No. 20A161

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OKLAHOMA, APPLICANT

v.

SHAUN MICHAEL BOSSE

(CAPITAL CASE)

ON APPLICATION TO STAY MANDATE
OF THE OKLAHOMA COURT OF CRIMINAL APPEALS
PENDING REVIEW ON CERTIORARI

MOTION OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE RESPECTING THE APPLICATION FOR A STAY

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

JEAN E. WILLIAMS
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ERICA L. ROSS
Assistant to the Solicitor General

JAMES A. MAYSONETT
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The Acting Solicitor General, on behalf of the United States, respectfully moves to file this brief as amicus curiae regarding the State of Oklahoma's application to stay the mandate of the Oklahoma Court of Criminal Appeals (OCCA). This case raises the question whether Oklahoma has jurisdiction, concurrent with the United States, to prosecute crimes committed by non-Indians against Indians within Indian country. The allocation of criminal jurisdiction in Indian country here affects the responsibilities and interests of three sovereigns: the State, which has filed the application; the Chickasaw Nation, which has moved to file an

amicus brief in this case; and the United States. The United States thus has a substantial interest in the resolution of this case, and we respectfully submit that a brief expressing the views of the United States on the question of criminal jurisdiction would be of material assistance to the Court.

STATEMENT

1. Federal law defines "Indian country" to include, inter alia, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." 18 U.S.C. 1151(a). Unless Congress has determined otherwise, the federal government generally exercises criminal jurisdiction over crimes committed by or against Indians in Indian country. See 18 U.S.C. 1152. Offenses by one Indian against another Indian "typically are subject to the jurisdiction of the concerned Indian Tribe," Negonsott v. Samuels, 507 U.S. 99, 102 (1993); see 18 U.S.C. 1152, except that the Indian Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (18 U.S.C. 1153) (Major Crimes Act), grants the federal government jurisdiction over certain serious offenses when an Indian is the perpetrator, even if the victim is an Indian. State jurisdiction generally covers crimes within Indian country that are committed by non-Indians if they (1) are committed against other non-Indians or (2) are victimless. See Duro v. Reina, 495 U.S. 676, 680 n.1 (1990); Solem v. Bartlett, 465 U.S. 463, 465 n.2, 467 n.8 (1984).

2. This case concerns a crime committed by a non-Indian against Indians in Oklahoma. In 2012, respondent was convicted in state court of the 2010 murders of Katrina Griffin and her children, who were members of the Chickasaw Nation. Bosse v. State, 360 P.3d 1203, 1211-1214 (Okla. Crim. App. 2015), vacated, 137 S. Ct. 1 (2016) (per curiam); Appl. App. 1, at 16, 23.[1] At that time, respondent did not argue that his crimes were committed on an Indian reservation or that the State lacked jurisdiction. See generally Bosse, 360 P.3d at 1214-1235 (discussing fifteen propositions of error raised on direct appeal); see also Bosse v. State, 400 P.3d 834 (Okla. Crim. App. 2017) (opinion on remand from this Court's decision granting, vacating, and remanding for further consideration in light of Payne v. Tennessee, 501 U.S. 808 (1991)), cert. denied, 138 S. Ct. 1264 (2017).

In 2019, respondent filed a successive post-conviction application in state court, contending that his offense against Indian victims occurred within the boundaries of an Indian reservation, and thus that the state courts lacked jurisdiction over his crimes. Appl. App. 1, at 1-2. After this Court issued its decision in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), which held that Congress never disestablished the Muscogee (Creek) Nation's reservation in eastern Oklahoma, id. at 2468, respondent

[1] "Appl." refers to the application for a stay. "Appl. App. 1" refers to Appendix 1 to the application, which is the decision of the OCCA.

relied on McGirt to seek relief, see Appl. App. 1, at 2. Respondent contended that the Chickasaw Nation's reservation likewise had never been disestablished, and that as a result, only the federal government, and not the State, had jurisdiction over his on-reservation crimes against Indians. See Appl. App. 1, at 3-4.

After remanding to the state district court for an evidentiary hearing, the OCCA agreed with respondent that the State lacked jurisdiction over his crimes, on the ground that they occurred within the boundaries of the Chickasaw Nation's reservation, which had not been disestablished. Appl. App. 1, at 10. The OCCA rejected the State's arguments that respondent's claim was procedurally barred. Id. at 16-17; see generally id. at 16-19. And the OCCA rejected the contention that the State had jurisdiction, concurrent with the federal government's jurisdiction under 18 U.S.C. 1152, over on-reservation crimes by non-Indians against Indians. Appl. App. 1, at 19-23. Relying on this Court's prior decisions, the text of Section 1152, and other statutes specifically granting States criminal jurisdiction over crimes committed by non-Indians against Indians, the OCCA determined that "[a]bsent any law, compact or treaty" altering the default rules, "federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law." Appl. App. 1, at 23. Because no such law, compact, or treaty

applied, the OCCA held that "[t]he State of Oklahoma does not have concurrent jurisdiction to prosecute" respondent. Ibid.

3. The State sought a stay of the mandate from the OCCA, supported in part by the Chickasaw Nation. See Appl. 4-5. The OCCA ultimately stayed the mandate for 45 days from April 15, 2021. Id. at 5. The State now seeks a further stay from this Court pending its filing, and this Court's consideration of, a timely petition for a writ of certiorari. Id. at 5-6.

ARGUMENT

A Circuit Justice or this Court will grant a stay pending the filing and disposition of a petition for a writ of certiorari if the applicant "show[s] (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). "In close cases, the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." Ibid.

The State of Oklahoma contends (Appl. 7-23) that the Court is likely to grant certiorari and reverse on two questions: (1) whether the OCCA properly rejected the State's contention that respondent's claim based on McGirt v. Oklahoma, 140 S. Ct. 2452

(2020), was procedurally barred; and (2) whether States have jurisdiction, concurrent with the United States, to prosecute non-Indians for crimes against Indians committed in Indian country. The United States addresses the second question, agreeing with respondent that the State does not have jurisdiction over respondent's offenses against Indians. The United States therefore respectfully submits that the Court is unlikely to grant certiorari and reverse on the second question presented.

In response to this Court's invitation to file a brief expressing the views of the United States on this same question of criminal jurisdiction in Arizona v. Flint, 492 U.S. 911 (1989), the Solicitor General stated that "[i]f the Court were writing on a clean slate, it might conclude that federal jurisdiction under Section 1152 is not exclusive and that [a State] therefore has jurisdiction over offenses committed by non-Indians against Indians in Indian country." U.S. Br. at 3, Flint, supra (No. 88-603) (Flint Br.); see p. 26 & n.9, infra. The Solicitor General explained, however, that "[t]he Court * * * [wa]s not writing on a clean slate," and that the text and history of Section 1152, as well as additional congressional enactments and the practice of all three Branches of the federal government, supported the view that States lack jurisdiction over such crimes. Ibid. In addition, the Solicitor General observed, several of the States' highest courts had held that the federal government has exclusive

jurisdiction over crimes committed by non-Indians against Indians in Indian country. Ibid.

Although this Court's decision in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), increases the practical consequences of that jurisdictional determination, no basis exists to reverse the long-held understanding of the division of federal, state, and tribal jurisdiction in Indian country, which generally governs throughout the Nation.[2] To the contrary, on a number of occasions over many decades, this Court has reaffirmed the established rule that a State does not have jurisdiction over offenses by non-Indians against Indians in Indian country. It is thus unlikely that this Court would grant certiorari and reverse on this issue.

1. Section 1152 of Title 18 provides that "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. 1152. The second paragraph of Section 1152 explicitly excepts from its coverage offenses committed by one Indian against the person or property of another Indian. Those offenses are left exclusively to tribal jurisdiction, except for

[2] The United States took the position in its amicus brief in McGirt (at 38) that if the Court held that the territory in question constituted a reservation over which the federal government had jurisdiction, the federal jurisdiction over crimes by non-Indians against Indians would be exclusive.

"major crimes" by Indians that are subject to federal jurisdiction under 18 U.S.C. 1153.

In United States v. McBratney, 104 U.S. 621 (1882), this Court held that crimes committed by non-Indians against other non-Indians were implicitly excluded from federal jurisdiction. McBratney, 104 U.S. at 623-624. The Court acknowledged that such crimes were subject to federal jurisdiction prior to statehood, but it held that the Act admitting Colorado to the Union implicitly repealed any prior statute insofar as it applied to offenses by non-Indians against non-Indians and vested such jurisdiction in the State. Ibid.; see New York ex rel. Ray v. Martin, 326 U.S. 496, 500 & n.5 (1946). The Court emphasized, however, that McBratney presented no question "as to the punishment of crimes committed by or against Indians." 104 U.S. at 624; accord Draper v. United States, 164 U.S. 240, 247 (1896); see United States v. Wheeler, 435 U.S. 313, 325 n.21 (1978); United States v. Antelope, 430 U.S. 641, 643 n.2 (1977).

As a result of the second paragraph of Section 1152 and this Court's decision in McBratney, Section 1152 applies only to crimes committed either by or against Indians. In Donnelly v. United States, 228 U.S. 243 (1913), the Court rejected an attempt to narrow the scope of Section 1152 still further to exclude crimes by non-Indians against Indians. The defendant argued that under McBratney's rationale, California's admission to the Union

conferred on the State the "undivided authority to punish crimes committed upon * * * an Indian reservation, excepting crimes committed by the Indians." Id. at 271. The Court in Donnelly described McBratney as holding, in effect, that the "admission of States qualified the former Federal jurisdiction over Indian country included therein by withholding from the United States and conferring upon the State the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary." Ibid. The Court thus viewed the McBratney principle as having two aspects: the withdrawal of federal jurisdiction and the conferral of jurisdiction on the State over crimes by non-Indians against non-Indians. The Court determined, however, that "offenses committed by or against Indians are not within the principle of * * * McBratney." Ibid. The Court observed that "[t]his was in effect held as to crimes committed by the Indians" in United States v. Kagama, 118 U.S. 375, 383-384 (1886), which sustained federal jurisdiction under the Major Crimes Act over crimes by Indians in Indian country on the ground that the Indians are wards of the Nation and in need of its protection. Donnelly, 228 U.S. at 271 (emphasis omitted). The Court concluded that "[t]his same reason applies -- perhaps a fortiori -- with respect to crimes committed by [non-Indians] against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of

segregating them from the whites and others not of Indian blood." Id. at 272.[3]

2. Under Donnelly, the United States has jurisdiction under Section 1152 to prosecute respondent for the conduct at issue here. The question, then, is whether Oklahoma had concurrent jurisdiction to prosecute him as well.

As the OCCA observed (Appl. App. 1, at 21), it is settled that federal jurisdiction under Section 1153 over crimes committed by Indians is exclusive. United States v. John, 437 U.S. 634, 651 (1978); Seymour v. Superintendent, 368 U.S. 351, 359 (1962); Williams v. Lee, 358 U.S. 217, 220 n.5 (1959). This rule is said to protect Indian defendants from the possibility of prejudice in state courts, and thus is an expression of the federal duty to protect the Indians. See, e.g., Kagama, 118 U.S. at 383-384.

Oklahoma contends (Appl. 18-23) that in the converse situation, involving crimes committed by non-Indians against Indians, a different rule should govern, permitting the State to exercise concurrent jurisdiction. The text and history of Section 1152 do not support that argument, and Oklahoma cites no decision of this Court, or any other court, adopting it. To the contrary, the rationale of Donnelly is inconsistent with that argument

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[3] Federal convictions of non-Indians for crimes against Indians in Indian country were subsequently sustained in United States v. Pelican, 232 U.S. 442 (1914); United States v. Ramsey, 271 U.S. 467 (1926); United States v. Chavez, 290 U.S. 357 (1933); and Williams v. United States, 327 U.S. 711 (1946).

because the State here points to no law that withdraws federal jurisdiction and confers it on the State. Moreover, this Court has long regarded federal jurisdiction over crimes by non-Indians against Indians within Indian country as exclusive, and state courts and lower federal courts have consistently reached the same conclusion. It is therefore unlikely that this Court would grant a petition for a writ of certiorari and reverse the OCCA's decision.

a. Section 1152 applies to Indian country the laws of the United States that apply to crimes committed within the "sole and exclusive jurisdiction of the United States." 18 U.S.C. 1152. The quoted phrase suggests that Congress contemplated a parallel between Indian country and the federal enclaves over which Congress may "exercise exclusive Legislation," U.S. Const. Art. I, § 8, Cl. 17, and other areas over which the United States has exclusive jurisdiction. Because state criminal laws are inapplicable in such areas, the text of Section 1152 indicates that Congress intended those laws to be generally inapplicable in Indian country as well.

That inference is reinforced by Section 1152's history. Section 1152 was enacted in 1834 as Section 25 of the Intercourse Act (Indian Tribes), ch. 161, 4 Stat. 733. See Martin, 326 U.S. at 500 n.6. At that time, this Court's then-recent decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), "reflected the

view that Indian Tribes were wholly distinct nations within whose boundaries 'the laws of [a State] can have no force.'" New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983) (quoting Worcester, 31 U.S. (6 Pet.) at 561) (brackets in original). As a result, the Congress that enacted what is now Section 1152 no doubt assumed that it occupied the entire field of criminal law enforcement in Indian country (except for that undertaken by the Tribes), and that the States therefore did not have concurrent jurisdiction over reservations within their borders.

Although this Court subsequently held in McBratney that a State has jurisdiction over crimes committed by non-Indians against non-Indians, McBratney does not support Oklahoma's argument here. The basis of the holding in McBratney was not that the predecessor to Section 1152 remained applicable and that the State nonetheless had concurrent jurisdiction over those crimes. Rather, the Court held that the Act admitting Colorado to the Union implicitly repealed any federal statute that would have applied to crimes involving only non-Indians, and that the State acquired jurisdiction as a result of that repeal. McBratney, 104 U.S. at 623-624. That reasoning supports the conclusion that where, as here, Section 1152 has not been repealed, federal jurisdiction remains exclusive of state jurisdiction. See Donnelly, 228 U.S. at 271-272.

The reasoning of McBratney is consistent with principles that historically have governed jurisdiction in Indian country. The Framers of the Constitution intended that relations between Indians and non-Indians would be regulated by the United States, to the exclusion of the States, and Congress has consistently acted on that premise. See, e.g., County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234-235 & n.4 (1985). The first Congress enacted the Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790), which established that the federal government, rather than the States, would exercise basic police and regulatory powers over interactions between Indians and non-Indians. See Cohen's Handbook of Federal Indian Law § 1.03[2], at 35-38 (Nell Jessup Newton et al. eds. 2012) (Cohen). The original Indian Trade and Intercourse Act provided for the punishment of non-Indians who committed crimes against Indians, ch. 33, §§ 5 and 6, 1 Stat. 138, consistent with the United States' obligations under certain treaties and in an effort to "prevent abuses of the Indians and conflicts between Indians and whites." Cohen § 1.03[2] at 36. Subsequent Congresses reasonably could conclude that because offenses committed by non-Indians against other non-Indians in Indian country do not directly involve relations with the Indians, jurisdiction could be transferred to the States without undermining this principle of exclusive federal control. By contrast, criminal offenses by or against Indians directly

implicate relations between Indians and non-Indians, which traditionally have been the subject of federal, not state, concern.[4]

b. Consistent with the text and history of Section 1152, this Court has stated on multiple occasions, albeit in dicta, that in the absence of authorization by Congress, the States do not have jurisdiction over offenses committed by non-Indians against Indians in Indian country.

In the first of those cases, Williams v. United States, 327 U.S. 711 (1946), a non-Indian man was charged with having sexual intercourse with an underage Indian girl on a reservation. Although no jurisdictional claim was raised, the Court, in describing the statutory regime under which the non-Indian was prosecuted, stated:

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[4] Oklahoma observes (Appl. 19) that in In re Wilson, 140 U.S. 575 (1891), the Court stated that the words "'sole and exclusive'" in the predecessor to Section 1152 "do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it." Id. at 578. The Court made that statement in discussing the second paragraph of the provision, which then (as now) provided that federal jurisdiction does not extend "to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. 1152; see Rev. Stat. § 2145; Wilson, 140 U.S. at 578. Neither Wilson's statement, nor Donnelly's quotation of it, see 228 U.S. at 268, suggests that States may exercise criminal jurisdiction over offenses committed by non-Indians against Indians in Indian country.

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on [the] reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.

Id. at 714 (emphasis added; footnote omitted).

In Williams v. Lee, supra, the Court held that an Arizona court did not have jurisdiction over a civil suit brought by a non-Indian against an Indian arising out of a transaction occurring on the Navajo Reservation, because the exercise of state jurisdiction would undermine the authority of the tribal courts. After discussing jurisdictional principles governing Indian reservations generally, and observing that "state courts have been allowed to try non-Indians who committed crimes against each other on a reservation," the Court stated that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." Lee, 358 U.S. at 220; see generally id. at 218-221. As a result, the Court observed, "non-Indians committing crimes against Indians are now generally tried in federal courts." Id. at 220 n.5.

The Court described the governing jurisdictional principles in similar terms in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) (Yakima Indian Nation), in which it upheld the manner in which Washington assumed jurisdiction over Indians and Indian territory pursuant to the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Public Law 280). The

Court observed that before the State assumed jurisdiction, its law reached into Indian reservations only if it did not infringe on tribal self-government. "As a practical matter," the Court explained, this "meant that criminal offenses by or against Indians [had] been subject only to federal or tribal laws * * * except where Congress * * * 'expressly provided that State laws shall apply.'" Yakima Indian Nation, 439 U.S. at 470-471 (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-171 (1973)); see also, e.g., Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1985) ("Within Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians, see New York ex rel. Ray v. Martin, 326 U.S. 496 (1946), and victimless crimes by non-Indians."); Solem, 465 U.S. at 467 n.8 (Lands with reservation status "fall within the exclusive criminal jurisdiction of federal and tribal courts under 18 U.S.C. §§ 1152, 1153."); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204-205 (1978).

In the past two decades, this Court has continued to describe the allocation of jurisdiction in Indian country in similar terms. In Nevada v. Hicks, 533 U.S. 353 (2001), the Court described "Sections 1152 and 1153 of Title 18" as "giv[ing] United States and tribal criminal law generally exclusive application" over "crimes committed in Indian country." Id. at 365 (emphasis omitted). And in United States v. Bryant, 136 S. Ct. 1954 (2016), the Court observed that "[m]ost States lack jurisdiction over

crimes committed in Indian country against Indian victims," identifying as the exception States granted criminal jurisdiction by Public Law 280. Id. at 1960. Most recently, in McGirt, this Court stated that while the Major Crimes Act "applies only to certain crimes committed in Indian country by Indian defendants," Section 1152 "provides that federal law applies to a broader range of crimes by or against Indians in Indian country." 140 S. Ct. at 2479. The Court implied that such jurisdiction was exclusive, explaining that "States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. See McBratney, 104 U.S.[] at 624." Ibid. (emphasis added).

The statements in those decisions were dicta, insofar as the Court did not have before it a non-Indian defendant who was charged or convicted in state court. But those repeated statements of the governing rule cannot be dismissed as mere casual asides. In Williams v. United States and Williams v. Lee, they were part of a thorough and considered review of jurisdictional principles in Indian country. See Williams, 327 U.S. at 714-715 n.10; Lee, 358 U.S. at 219-222. In Yakima Indian Nation, the Court's observation set the stage for a discussion of Public Law 280, which authorized the States to assume jurisdiction over offenses "by or against Indians" in Indian country -- an enactment that alone indicates that the States do not have such jurisdiction in the

absence of express authorization by Congress. See pp. 19-21, infra. And in Solem, the Court's statements of the rule of exclusive federal jurisdiction over crimes by or against Indians explained the consequences of a holding that a tract of land has reservation status -- the very issue in this case.

So too in this Court's more recent decisions, the discussion of jurisdiction over crimes against Indians in Indian country has reflected careful consideration. In Hicks, the Court's discussion of state jurisdiction provided the backdrop for its holding that while "[t]he States' inherent jurisdiction on reservations can of course be stripped by Congress" -- as it had been under Sections 1152 and 1153 -- Congress had not proscribed the particular action at issue (state officers' entering a reservation "to investigate or prosecute violations of state law occurring off reservation"). 533 U.S. at 365-366. In Bryant, the Court described the "complex patchwork of federal, state, and tribal law governing Indian country," which "made it difficult to stem the tide of domestic violence experienced by Native American women" and thus formed the impetus for enactment of the statute at issue. 136 S. Ct. at 1959-1960 (citation and internal quotation marks omitted). And in McGirt, the Court addressed the scope of state jurisdiction in considering Oklahoma's and the United States' contention that recognizing a present-day Creek reservation would "unsettle an untold number of convictions and frustrate the State's ability to

prosecute crimes in the future." 140 S. Ct. at 2479. Those contentions were featured prominently in the briefing and at argument, see, e.g., U.S. Br. 37-39; Tr. 54-55, 64, and the Court's opinion gave them significant attention, 140 S. Ct. at 2479-2480.[5]

c. Public Law 280 and a number of State-specific statutes provide additional support for the conclusion that, in the absence of affirmative authorization by Congress, States lack jurisdiction over offenses committed by non-Indians against Indians within Indian country.

Section 2 of Public Law 280 enacted 18 U.S.C. 1162, which is entitled "State jurisdiction over offenses committed by or against Indians in the Indian country." Subsection (a) of Section 1162 now provides that the listed States (which do not include Oklahoma) "shall have jurisdiction over offenses committed by or against Indians" in particular areas "to the same extent that such State * * * has jurisdiction over offenses committed elsewhere within the State * * * , and the criminal laws of such State * * *

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[5] Oklahoma observes (Appl. 21) that in County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992), the Court recognized "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." Id. at 257-258. In support of that statement, the Court cited Martin, supra -- which held that, under McBratney, New York had "jurisdiction to punish a murder of one non-Indian committed by another non-Indian" on a reservation. Martin, 326 U.S. at 498. County of Yakima's reference to "criminal * * * jurisdiction," 502 U.S. at 257, thus does not address jurisdiction over crimes committed by non-Indians against Indian victims.

shall have the same force and effect within such Indian country as they have elsewhere within the State." 18 U.S.C. 1162(a) (emphasis added). The title and text of Section 1162(a) indicate that it establishes the sole and complete basis for regulation of state "jurisdiction over offenses committed by or against Indians in the Indian country" in the listed States. Ibid.; see Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 884 (1986). In addition, if the States already had jurisdiction over crimes by non-Indians against Indians notwithstanding Section 1152's vesting of such jurisdiction in the United States, as Oklahoma contends, then Section 1162(a)'s conferral of jurisdiction on the listed States over offenses "against Indians" would be superfluous: that phrase is not necessary to confer jurisdiction over offenses committed against Indians by other Indians, which are covered by the reference to offenses committed "by * * * Indians." 18 U.S.C. 1162(a).[6]

[6] Oklahoma observes (Appl. 21, 23 n.13) that this Court has held that state courts may exercise jurisdiction over civil claims by Indians against non-Indians arising in Indian country regardless of a State's assumption of jurisdiction under Public Law 280, which provides for the assumption of jurisdiction "over civil causes of actions between Indians or to which Indians are parties." 25 U.S.C. 1322 (emphasis added); see Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 148-149 (1984). As respondent explains (Br. 17 n.5), however, the underscored language provides jurisdiction over suits by non-Indians against Indians. Although it could have been drafted more narrowly, the phrase is not superfluous.

The conclusion that the States listed in Section 1162(a) did not already have jurisdiction over offenses by non-Indians "against Indians" is reinforced by Section 6 of Public Law 280, which authorized non-listed States to amend their constitutions or statutes to remove any legal impediments to the "assumption" of jurisdiction that Section 1162(a) conferred on listed States -- i.e., offenses "by or against Indians" in Indian country. 67 Stat. 590. It is likewise supported by Section 7 of Public Law 280, which granted the consent of the United States to any State "not having jurisdiction" to "assume" jurisdiction by legislative action. Ibid.; see Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 401(a), 403(b), 82 Stat. 78, 79 (25 U.S.C. 1321(a), 1323(b)) (repealing Section 7 and providing instead that States "not having jurisdiction" over offenses committed "by or against Indians" may "assume" such jurisdiction only with the consent of the Tribe concerned). In addition, Congress's enactment of other statutes, prior to the enactment of Public Law 280, that provided specific States with jurisdiction "over offenses committed by or against Indians," starting with a special statute applicable to Kansas, Act of June 8, 1940, ch. 276, 54 Stat. 249 (18 U.S.C. 3243) (Kansas Act), further confirms that States do not otherwise have jurisdiction over crimes by non-Indians against Indian victims.

See p. 22, infra (discussing laws conferring jurisdiction on New York and Iowa).[7]

It is also significant that Congress's enactment of the statutory provisions just discussed alternated with this Court's repeated statements that the States lack jurisdiction over offenses "by or against Indians" in the absence of express congressional authorization. Thus: (1) Congress enacted the Kansas Act in 1940, conferring jurisdiction on Kansas on the understanding that the State was otherwise without jurisdiction over such offenses; (2) this Court expressed the same view in Williams v. United States, supra, in 1946; (3) Congress then acted on that premise when it passed special statutes providing certain criminal jurisdiction for New York and Iowa in 1948, see Act of July 2, 1948, ch. 809, 62 Stat. 1224 (25 U.S.C. 232) (New York); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa), repealed, Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395; and Public Law 280 in 1953; (4) this Court reiterated the rule of Williams v. United States in Williams v. Lee in 1959; (5) Congress amended Public Law 280 in 1968; and (6) this Court again reiterated that view in Yakima Indian Nation in 1979, and on several occasions

[7] As the United States explained in Flint, the legislative history of those provisions manifests Congress's understanding that absent affirmative authorization by Congress, States generally lack criminal jurisdiction over offenses committed by non-Indians against Indians within Indian country. See Flint Br. at 15-17.

thereafter, see pp. 15-19, supra. In light of this pattern of congressional action and this Court's reiterations of the jurisdictional rule, the Court is unlikely to grant certiorari and reverse the decision below on the question of criminal jurisdiction.

d. That is particularly true because the conclusion that the OCCA reached in this case is consistent with the holdings of other state and federal courts. The courts of South Dakota, Arizona, North Dakota, and Montana have held that those States are without jurisdiction over offenses committed by non-Indians against Indians in Indian country. See State v. Larson, 455 N.W.2d 600 (S.D. 1990); State v. Flint, 756 P.2d 324 (Ariz. App. 1988), cert. denied, 492 U.S. 911 (1989); State v. Greenwalt, 663 P.2d 1178 (Mont. 1983); State v. Kuntz, 66 N.W.2d 531 (N.D. 1954); see also State v. Youpee, 61 P.2d 832, 835 (Mont. 1936) (dictum). A number of other state courts have expressed the same view in dicta. See, e.g., State v. Stanton, 933 N.W.2d 244, 249 (Iowa 2019); State v. Reber, 171 P.3d 406, 407-408 (Utah 2007); State v. Sebastian, 701 A.2d 13, 22 & n.21 (Conn. 1997), cert. denied, 522 U.S. 1077 (1998); State v. Warner, 379 P.2d 66, 68-69 (N.M. 1963); State v. Jackson, 16 N.W.2d 752, 754 (Minn. 1944). And multiple federal courts have reached the same conclusion. See, e.g., United States v. Langford, 641 F.3d 1195, 1199 (10th Cir. 2011); United States v. Bruce, 394 F.3d 1215, 1221 (9th Cir. 2005); see also Cohen

§ 9.03[1], at 763 (stating that "if federal jurisdiction exists under one or both of [Section 1152 or 1153], the states lack concurrent criminal jurisdiction to prosecute the same conduct").[8]

3. In light of this long line of consistent authority and congressional enactments, the State's contrary arguments provide an insufficient basis for granting certiorari and altering the allocation of jurisdiction in Indian country, which would overturn the established practice throughout the United States.

The State suggests that the "strong presumption against preemption of state law" favors finding concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. Appl. 20 (citing Wyeth v. Levine, 555 U.S. 555, 565 (2009)). As this Court has explained, however, in light of "the history of tribal sovereignty" and the federal government's plenary authority over Indian affairs, "questions of pre-emption in this area are not resolved by reference to standards of pre-

[8] In State v. McAlhaney, 17 S.E.2d 352 (1941), the Supreme Court of North Carolina held that the State had jurisdiction over an offense by a non-Indian against an Indian on the Eastern Cherokee Reservation. That decision predates much of this Court's relevant jurisprudence and most of the congressional enactments conferring jurisdiction over such crimes on particular States, and it has since been called into question, albeit in a different context. See State v. Nobles, 818 S.E.2d 129, 135 & n.2 (N.C. Ct. App. 2018) (rejecting argument, based on McAlhaney, that "North Carolina at least has concurrent criminal jurisdiction" over crimes committed within Indian country "without regard to whether the defendant is an Indian or non-Indian," and holding that federal jurisdiction under the Major Crimes Act is exclusive).

emption that have developed in other areas of law." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989); see, e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-334 (1983). Rather, in deciding whether state law may be applied to the on-reservation conduct of non-Indians in matters affecting Indians, this Court, in the absence of a governing Act of Congress, undertakes a "'particularized examination of the relevant state, federal, and tribal interests.'" Cotton Petroleum, 490 U.S. at 176 (quoting Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 838 (1982)).

Here, that more context-specific interest balancing is not implicated, because Congress has passed statutes specifically addressing the subject of jurisdiction over offenses committed by non-Indians against Indians in Indian country. The relevant question is whether those statutes permit Oklahoma to exercise jurisdiction over such offenses. Cf. Kennerly v. District Court, 400 U.S. 423, 424 n.1, 427 (1971) (per curiam) (noting the "detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country"). As already discussed, the text, background, and consistent interpretation of Section 1152, as well as Congress's other enactments in this area, indicate that Oklahoma

lacks jurisdiction over crimes committed by non-Indians against Indians.[9]

Although this Court's decision in McGirt greatly increased the practical consequences of the question presented in Oklahoma, that change does not warrant this Court's reconsideration of state criminal jurisdiction in Indian country throughout the Nation under Section 1152. That is particularly so because Congress is considering a bill that would permit the Chickasaw and Cherokee Nations to enter into compacts with the State regarding the exercise of concurrent criminal jurisdiction "by or against Indians within [their] reservation[s]." H.R. 3091 § (6)(b)(1),

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[9] The United States explained in its amicus brief in Flint that a strong policy argument could be made in more modern times -- putting to one side the origins and history of Indian law and criminal jurisdiction in Indian country in particular -- that concurrent state jurisdiction over crimes committed by non-Indians against Indians would be consistent with state, federal, and tribal interests. See Flint Br. at 15-17. Largely for that reason, the Office of Legal Counsel concluded in 1979 that, although the question was "exceedingly difficult," a "substantial case" could be made that the States should not be deprived of jurisdiction over offenses committed by non-Indians against Indians. Memorandum Opinion for the Deputy Attorney General, 3 Op. O.L.C. 111, 117, 120; see Reply Br. 12-13. The United States Attorneys' Manual took a similar position. U.S. Dep't of Justice, United States Attorneys' Manual § 9-20.215 (1985). As the government explained in Flint, however, the government subsequently came to a different view upon a thorough reexamination of the issue in light of the statutory text, history, and case law discussed above. The current Justice Manual thus explains that absent a contrary Act of Congress, federal jurisdiction over crimes committed by non-Indians against Indians in Indian country is exclusive. See U.S. Dep't of Justice, Criminal Resource Manual 685 (updated Jan. 23, 2020). The United States adheres to that view here.

117th Cong., 1st Sess. (2021); see id. § 3(7). Although the United States has not taken a position on that particular bill at this time, this type of targeted action by Congress would be one means to address practical difficulties resulting from exclusive federal jurisdiction over crimes by non-Indian defendants against Indian victims in Oklahoma, without altering the well-established jurisdictional regime throughout the entire country. See McGirt, 140 S. Ct. at 2481-2482. For all of these reasons, it is unlikely that this Court would grant certiorari and reverse the ruling below that the State lacked criminal jurisdiction in this case.

4. Oklahoma argues that there is a likelihood of irreparable injury if this Court does not further stay the OCCA's mandate. As Oklahoma observes (Appl. 23), the federal government has filed charges against respondent based on the murders at issue in this case. D. Ct. Doc. 1 at 1, United States v. Bosse, No. 21-203 (W.D. Okla.) (Mar. 30, 2021) (Criminal Complaint). Thus, if the mandate is not stayed and respondent is released from state custody, the United States will obtain custody of and prosecute him.

Oklahoma suggests that such a "transfer of custody will trigger the Interstate Agreement on Detainers' so-called anti-shuttling provision, thereby preventing the federal government from returning Respondent to state custody without risking dismissal of its case with prejudice." Appl. 23-24 (emphasis

omitted). The United States respectfully disagrees. As an initial matter, the Interstate Agreement on Detainers' anti-shuttling provision applies only to "prisoner[s]" who are "serving a term of imprisonment." 18 U.S.C. App. 2, § 4(a) and (e). Because the federal government would obtain custody of respondent after his release from state custody, respondent would no longer be a "prisoner" "serving a term of imprisonment" imposed by the State, and the anti-shuttling provision would not be implicated.

In addition, even if the anti-shuttling provision applied, it would not have the effect Oklahoma asserts. Oklahoma suggests (Appl. 23-24) that the federal government might not return respondent to Oklahoma, because doing so would "risk dismissal of [the federal government's] case with prejudice." But under Tenth Circuit case law, the anti-shuttling provision would be violated -- and the federal charges subject to dismissal -- only if the federal government returned respondent to state custody before his federal trial was completed. See United States v. Coffman, 905 F.2d 330, 331-333 (1990). If this Court were to deny a stay but later grant a petition for a writ of certiorari and reverse the decision below, the federal government could simply await the completion of a federal trial (or, if appropriate, dismiss the federal charges) before returning respondent to state custody. Thus, insofar as the State rests its claim of irreparable injury

on the Interstate Agreement on Detainers, the United States disagrees with that argument.

Finally, Oklahoma suggests (Appl. 24-25) that absent a stay from this Court, other state convictions may be vacated (including in cases in which the federal statute of limitations has expired) while new crimes go unprosecuted. A stay of the mandate in this case would not necessarily foreclose the OCCA from holding that the State lacked authority to try other non-Indian defendants for crimes against Indians in Indian country and subsequently issuing its mandate to provide for the release of the defendants involved. And while there is no doubt that the burden on federal law-enforcement resources in Oklahoma has increased greatly following this Court's decision in McGirt and the OCCA's decisions applying it to other Tribes, the government remains committed to prosecuting crimes that fall within its jurisdiction under 18 U.S.C. 1152.

CONCLUSION

For the foregoing reasons, the Court should conclude that there is not a significant likelihood that the Court would grant certiorari and reverse the holding below that the State was without jurisdiction over respondent's offenses against Indians.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

JEAN E. WILLIAMS
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ERICA L. ROSS
Assistant to the Solicitor General

JAMES A. MAYSONETT
Attorney

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