No. 18-9526

IN THE

Supreme Court of the United States

JIMCY MCGIRT,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 counting affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that Indian defendants are consistently afforded a federal forum when they are tried for crimes that are subject to exclusive federal jurisdiction.

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1. No counsel for any party authored this brief either in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. This brief is filed pursuant to the blanket consent of the petitioner and respondent filed on January 17, 2020, and January 21, 2020, respectively.

SUMMARY OF ARGUMENT

Contrary to respondent's argument opposing certiorari, this Court has jurisdiction to review the state-court decision in this case. Oklahoma law is clear that the subject-matter jurisdiction of a criminal court can be challenged at any time. Yet here the state court of last resort held that petitioner's jurisdictional challenge to his conviction, brought for the first time in postconviction proceedings, was procedurally barred because he did not raise it on direct appeal. Applying the procedural bar in this manner was not a firmly established and regularly followed aspect of Oklahoma law, and frustrated petitioner's exercise of his right to be tried in a federal forum.

This Court should reverse the decision of the court below and direct the Oklahoma state courts to dismiss petitioner's criminal case. This Court has consistently held that Congress has plenary and exclusive power to legislate on behalf of Indian tribes. As relevant here, Congress enacted the Major Crimes Act, 18 U.S.C. § 1153, to provide for exclusive federal jurisdiction over certain enumerated felonies, including the crimes of which petitioner stands convicted, committed by Indians in Indian country. When Congress has ceded this jurisdiction to particular states, it has always done so explicitly, simultaneously withdrawing federal jurisdiction under § 1153. But Congress has never explicitly allowed Oklahoma to exercise criminal jurisdiction over the sorts of crimes described in § 1153. This Court should reaffirm the plenary and exclusive authority of Congress to dictate the bounds of criminal jurisdiction in Indian country.

ARGUMENT

1. State-court rulings rejecting claims of federal jurisdiction on procedural grounds are never adequate bases in state law to avoid the merits of those claims, and so this Court always has jurisdiction to review those rulings under 28 U.S.C. § 1257.

This Court has jurisdiction under 28 U.S.C. § 1257 to review final judgments issued by state courts of last resort where the judgment implicates an issue of federal law. But this Court has long held that where a state-court ruling rests on adequate and independent grounds in state law, it lacks jurisdiction to review that ruling under § 1257. *See Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)). Here, petitioner contends that the Oklahoma state courts lacked jurisdiction to try him, an Indian, for an alleged sexual assault that occurred in Indian country, and so exclusive jurisdiction to try him rested in the federal courts under 18 U.S.C. §§ 1151 and 1153. The Oklahoma Court of Criminal Appeals held that that contention was procedurally barred in this postconviction proceeding.

In opposing certiorari, respondent contended that the state court's ruling was independent of federal law. (BIO at 10) Whether or not that contention is correct, the state court's procedural ruling is not an adequate basis in state law for refusing to reach the merits of the question of exclusive federal subject-matter jurisdiction. In Oklahoma, "issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal." *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim.

App. 2010) (quoting *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997)). Framing this exception in such categorical terms leaves little room to doubt that it is a firmly established and regularly followed component of Oklahoma procedural law. *See generally Beard v. Kindler*, 558 U.S. 53, 60 (2009) ("We have framed the adequacy inquiry by asking whether the state rule in question was firmly established and regularly followed.") (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). The Tenth Circuit Court of Appeals has recognized as much. *See Murphy v. Royal*, 875 F.3d 896, 907 n.5 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018).

Oklahoma's categorical rule embodies the fundamental principle that "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Yet the decision below ignores this principle. Instead, it doubly faults petitioner—both for not bringing the claim in his direct appeal, and also for not waiting for this Court to decide *Murphy* before bringing the claim in postconviction proceedings. By blaming petitioner for bringing the claim simultaneously too *late* and too *early*, the decision below departs from the firmly established rule that subject-matter jurisdiction may be challenged at any time. *See Wackerly*, 237 P.3d at 797–800 (reviewing, for the first time in a subsequent postconviction proceeding, the merits of a challenge to subject-matter jurisdiction of a state court to try a prisoner for a crime that occurred on land owned by the Army Corps of Engineers). It also frustrates petitioner's exercise of his right to be tried in federal court for a crime listed in 18 U.S.C. § 1153. *See Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir. 2001) (citing *Staub v. City of Baxley*, 355 U.S. 313, 325 (1958)).

This Court's jurisdiction under § 1257 turns on whether the state court's procedural ruling is both independent of federal law *and* adequate to support the judgment. *See Florida v. Powell*, 559 U.S. 50, 59 (2010) (emphasizing that a state court's decision must rest on "separate, adequate, and independent state grounds" in order for this Court to lack jurisdiction) (quoting *Long*, 463 U.S. at 1041). Even if applying a state-law procedural bar for failing to raise a claim on direct appeal might generally be independent of federal law, *cf. Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam), such a procedural bar cannot be adequate when applied in a manner contrary to well-established Oklahom law to avoid reaching the merits of a particular claim of exclusive federal subject-matter jurisdiction. This Court should reject respondent's argument against exercising jurisdiction under § 1257.

2. The fact that the State of Oklahoma has asserted jurisdiction over the Muscogee Creek reservation for more than a century cannot supplant the jurisdictional balance that Congress has created and maintained for many decades.

This Court has said that the "elaborate history" between another of the Five Civilized Tribes and the United States, along with a period of time during which state jurisdiction over the tribe and its lands has gone "unchallenged," are insufficient to "destroy[] the federal power to deal with them." *United States v. John*, 437 U.S. 634, 652–53 (1978). The parties both to this case and the related *Murphy* case, as well as the Tenth Circuit in *Murphy*, will thoroughly canvass the history of the Muscogee Creek reservation in Oklahoma. But even if that analysis suggests that the territory within that reservation

may be subject to state *civil* jurisdiction, in cases involving an Indian criminal defendant it still remains under the exclusive *criminal* jurisdiction of either the tribe under 25 U.S.C. § 1302 or of the United States under 18 U.S.C. § 1153. *Cf. John*, 437 U.S. at 649, 654; *see also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160–61 (1980) (explaining that the Major Crimes Act "provides for federal-court jurisdiction over crimes committed by Indians on another Tribe's reservation" and does not "pre-empt Washington's power to impose taxes on Indians not members of the Tribe"). Preserving this jurisdictional arrangement ensures consistent federal treatment of all Indians throughout the United States, regardless of which tribe they belong to, according to the jurisdictional framework that Congress has established.

The Constitution "grants Congress broad general powers to legislate in respect to Indian tribes, powers that [this Court has] consistently described as plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). This plenary and exclusive authority allows Congress to "enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *Id.* at 202. In enacting such legislation, Congress acts to "modify the degree of autonomy enjoyed by a dependent sovereign that is not a state." *Id.* at 203. The extent of criminal jurisdiction that tribes retain vis-à-vis the federal government flows from the "traditional understanding of the tribes' status as domestic dependent nations." *Id.* at 204 (citing *Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1, 17 (1831)).

"'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and

legislation passed by Congress." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). As relevant here, Congress has said that federal courts shall have exclusive jurisdiction to prosecute Indians accused of felony sex crimes committed in Indian country. *See* 18 U.S.C. § 1153(a); *John*, 437 U.S. at 651. Over 130 years ago this Court recognized that Congress had the authority to take away from the Indian tribes the power to prosecute "murder and other grave crimes" committed by Indians in Indian country. *United States v. Kagama*, 116 U.S. 375, 383, 384–85 (1886). And 43 years ago this Court reiterated that this authority was "undoubted," adding that the Major Crimes Act ensures the evenhanded application of federal law to all of Indian country. *United States v. Antelope*, 430 U.S. 641, 648–49 (1977). Four years ago this Court said, "In the Major Crimes Act, Congress authorized federal jurisdiction over enumerated grave criminal offenses when the perpetrator is an Indian and the victim is another Indian or other person." *United States v. Bryant*, 136 S. Ct. 1954, 1961 (2016). The continued vitality of the Major Crimes Act thus confirms Congress's continuing desire for serious crimes committed by Indians to be prosecuted in federal court.

To be sure, Congress has allowed some states to exercise criminal jurisdiction over Indian country. In the 1940s, Congress expressly conferred authority on the States of Kansas, North Dakota, and Iowa to exercise criminal jurisdiction in Indian country. *See Negonsott v. Samuels*, 507 U.S. 99, 103–04 (1993). And under what is known as Public Law 280, enacted in 1953, Congress "effected an immediate cession of criminal and civil jurisdiction over Indian country" in five states "with an express exception for the reservations of three

tribes." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471–72 (1979). (Alaska was added in 1958. *See id.* at 474 n.10.) When it afforded these Public Law 280 states criminal jurisdiction over Indian country, Congress simultaneously withdrew federal jurisdiction under the Major Crimes Act. *See* 18 U.S.C. § 1162(c). "To the remaining states it gave an option to assume jurisdiction over criminal offenses and civil causes of action in Indian country without consulting with or securing the consent of the tribes that would be affected." *Id.* at 472–74. For those states whose "constitutions or statutes contained organic law disclaimers of jurisdiction over Indian country," Congress allowed those states to "amend 'where necessary' their state constitutions or existing statutes to remove any legal impediment to the assumption of jurisdiction." *Id.* at 474. Ultimately, however, Congress terminated this option for states to assume criminal jurisdiction over Indian country in 1968 when it passed the Indian Civil Rights Act. *See* 25 U.S.C. § 1321(a); *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 557 (1983); *United States v. Hoodie*, 588 F.2d 292, 294–95 (9th Cir. 1978).

Even so, all of these actions fall within Congress's "plenary and exclusive power over Indian affairs" to "expressly provide[] that State laws shall apply." *Yakima Indian Nation*, 439 U.S. at 470–71 (quoting *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170–71 (1973)). This Court has characterized Public Law 280 as an "exception" to the rule that federal jurisdiction prevails over Indians who commit crimes in Indian country. *Nevada v. Hicks*, 533 U.S. 353, 365 (2001). Oklahoma is not one of the states to which Congress ceded criminal jurisdiction in Public Law 280. *See* 18 U.S.C. § 1162(a). Absent Congressional

legislation that explicitly confers jurisdiction on Oklahoma over the Muscogee Creek reservation, *cf. Negonsott*, 507 U.S. at 104 (stating that the Kansas Act "explicitly conferred jurisdiction on Kansas over all offenses involving Indians on Indian reservations"), Oklahoma simply does not have jurisdiction. And in the absence of clear statutory text indicating that Congress has given Oklahoma such jurisdiction, the long-standing exercise of jurisdiction over the Muscogee Creek reservation by that state cannot override the primacy of federal jurisdiction over major crimes committed by Indians on that reservation. *Cf. Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584, 604–05 (1977) ("The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrate the parties' *understanding of the Act*, but has created justifiable expectations which should not be upset by so strained a *reading of the Acts of Congress* as petitioner urges.") (emphasis added). This Court should expressly hold that federal jurisdiction prevails there, and then instruct the Oklahoma state courts to reverse petitioner's conviction and dismiss his case for lack of jurisdiction.

CONCLUSION

Amicus respectfully urges the Court to reverse the decision of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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