No. 25-1039

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JASON ROBERT HOPSON AND
ROBERT MARCUS JOHNSTON,

Respondent.

RENEWED MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND CERTIFICATION OF COUNSEL

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Counsel for Respondent Robert Marcus Johnston

Respondent Robert Marcus Johnston ("Mr. Johnston") seeks leave to proceed *in forma pauperis* in the above-captioned matter pursuant to Rule 39.

The district court (the United States District Court for the Northern District of Oklahoma) found Mr. Johnston eligible for court-appointed counsel under the Criminal Justice Act, 18 U.S.C. 3006A; and the court of appeals (the United States Court of Appeals for the Tenth Circuit) appointed Mr. Bradley, counsel of record for this petition, as counsel for Mr. Johnston under that statute. Mr. Johnston has not sought leave to proceed *in forma pauperis* unsuccessfully in any other court.

Under Rule 39, an accompanying affidavit is not required in light of that appointment. A copy of the Tenth Circuit's appointment order is appended to this motion.

Dated: May 11, 2026

Respectfully submitted.

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Counsel for Respondent
Robert Marcus Johnston

FILED
United States Court of Appeals
Tenth Circuit

January 13, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

ROBERT MARCUS JOHNSTON,

Defendant - Appellee.

No. 25-5130
(D.C. No. 4:25-CR-00169-SEH-1)
(N.D. Okla.)

ORDER

Before **HOLMES**, Chief Circuit Judge.

This matter is before the court on the appellee's Motion to Withdraw and for the Appointment of Conflict-Free Counsel (the "Motion"). The Federal Public Defender for the District of Colorado (the "FPD"), which was previously appointed by this court, has identified a conflict and now moves to withdraw from further representation of Defendant-Appellee Robert Marcus Johnston. Upon consideration, the Motion is granted, as provided in this order.

With the FPD's withdrawal, the court finds that Mr. Johnston is eligible for, and the interests of justice require, the appointment of other counsel to assist with this appeal in accordance with 18 U.S.C. § 3006A. Therefore, attorney Keith Bradley is appointed as counsel for Mr. Johnston.

The court also directs as follows:

1. On or before January 27, 2026, the FPD shall transmit to Mr. Bradley copies of all documents in their possession pertinent to this appeal that are not available on PACER or CM/ECF, including all exhibits introduced at hearings and/or trial. Mr. Bradley's contact information is as follows: Keith Bradley, Squire Patton Boggs Colorado, 717 17th Street, Suite 1825, Denver, CO 80202; telephone: 303-830-1776; email: keith.bradley@squirepb.com.

2. Also by January 27, 2026, Mr. Bradley shall file and serve an entry of appearance in this case. *See* 10th Cir. R. 46.1.

3. Appellant United States filed its Motion for Summary Affirmance on January 9, 2026 [ECF 27]. The court now sets a deadline for the appellee to file a response to the United States' motion for February 3, 2026. Briefing on the merits in this appeal is tolled pending further order of this court. The February 9, 2026, due date for the United States' opening brief and appendix is vacated.

4. The clerk of this court shall transmit a copy of this order to the clerk of the district court. The FPD shall serve Mr. Johnston with a copy of this order.

Entered for the Court

Per Curiam

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
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January 13, 2026

Keith Bradley
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RE: 25-5130, United States v. Johnston
Dist/Ag docket: 4:25-CR-00169-SEH-1

Dear Counsel:

You have been appointed as counsel for appellee under the Criminal Justice Act, 18 U.S.C. 3006A. The order appointing you has been docketed in the above-referenced appeal.

All Tenth Circuit Appellate Criminal Justice Act ("CJA") vouchers must be prepared and submitted electronically via eVoucher. eVoucher is a nationally-supported, web-based solution for the preparation, submission, monitoring and approval of CJA vouchers. The Tenth Circuit's eVoucher database can be accessed by clicking here, or by pasting the following URL into your web browser:

https://evsdweb.ev.uscourts.gov/CJA_c10_prod/CJAeVoucher/

For eVoucher Technical Support please review the Court's eVoucher Resources Page (http://www.ca10.uscourts.gov/cja/evoucher), or contact the Clerk's Office at (303) 844-3157 or eVoucher@ca10.uscourts.gov.

For substantive questions regarding the content of a voucher, required documentation, and related issues please consult the Court's CJA Policies and Procedures Webpage (http://www.ca10.uscourts.gov/cja/tenth-circuit-and-national-cja-policies-and-procedures), or contact a CJA case analyst at (303) 844-5306 or CJA_Vouchers@ca10.uscourts.gov.

If an adverse decision is rendered you must advise your client of the right to seek review of this court's decision by petition for writ of certiorari. If the client requests, and you believe a petition for writ of certiorari to be legally sound, you must file one with the Clerk of the Supreme Court of the United States. *See* Criminal Justice Act Plan, 10th Cir. R., Addendum I. If you claim compensation on the CJA 20 voucher for services rendered

in petitioning for certiorari, you must attach a PDF copy of the petition in the "Documents" tab of your electronic voucher.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Steven Briden

CMW/mlb

No. 25-1039

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JASON ROBERT HOPSON AND
ROBERT MARCUS JOHNSTON,

Respondent.

BRIEF OF RESPONDENT ROBERT MARCUS JOHNSTON IN OPPOSITION

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Counsel for Respondent Robert Marcus Johnston

QUESTION PRESENTED

The Major Crimes Act gives district courts jurisdiction over a discrete set of serious crimes committed by Indians in Indian country. The enumerated offenses include "felony assault," but not simple assault. 18 U.S.C. § 1153(a). The question presented is whether a district court nonetheless has jurisdiction to convict an MCA defendant of simple assault merely because it is a lesser-included offense of felony assault.

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INTRODUCTION

The government is trying to cover its tracks. After failing to secure a conviction for felony assault and failing to properly prosecute misdemeanor assault, the government now asks this Court to step in.

For this and other reasons, this case is not an appropriate vehicle for resolving the government's question presented, nor does the issue presented rise to the level of importance warranting this Court's consideration. As explained in the Brief in Opposition of Respondent Mr. Hopson, the Tenth Circuit's decision that was the basis for affirming the dismissal of the misdemeanor assault charge against Respondent Robert Marcus Johnston ("Mr. Johnston") was sound, and the question presented here neither arises often nor is particularly important.

The government acknowledges in its Petition (as it did before the district court), that an avenue existed for it to properly secure Mr. Johnston's conviction for misdemeanor assault. Because Mr. Johnston was and is an Indian and the government contends that his alleged victim was not an Indian, the government could have brought charges against Mr. Johnston under the General Crimes Act, as the government has done in similar circumstances. It was the government's failure to do so here that caused the district court to vacate Mr. Johnston's conviction, not the issue raised by the question presented. And when the government had the opportunity to raise its new jurisdictional theory before the Tenth Circuit in this case, it did not.

The factual predicates further demonstrate the relative unimportance of the question presented. Its resolution will aid in only those few cases where the General

Crimes Act is not available (for instance, if both the defendant and the victim are Indians), and where the government fails to secure a conviction for the crime enumerated under the Major Crimes Act but obtains a guilty verdict for the lesser-included offense.

Even in those cases, the Court need not worry that the Indian defendant will go unpunished. Instead, tribal courts remain the appropriate forum for adjudicating crimes in Indian country, as demonstrated by ongoing proceedings prosecuting Mr. Johnston on charges arising from the very same conduct for which he was charged in federal court.

Mr. Johnston thus respectfully submits that the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

1. The General Crimes Act ("GCA"), 18 U.S.C. § 1152, extends the general criminal laws of federal enclave jurisdiction to "the Indian country," but expressly carves out "offenses committed by one Indian against the person or property of another Indian." 18 U.S.C. § 1152. In other words, the GCA makes it a federal crime for an Indian to violate the "general laws of the United States" against a non-Indian in Indian Country. But under long-standing federal policy, crimes "by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs." *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883). Consequently, "Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian." *United States v. Bryant*, 579 U.S. 140, 147 (2016).

2. Notwithstanding that exclusion, the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, "authorized federal jurisdiction over enumerated grave criminal offenses when the perpetrator is an Indian and the victim is 'another Indian or another person.'" *Bryant*, 579 U.S. at 147. "Any Indian who commits against the person or property" of another person one of the listed offenses "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." 18 U.S.C. § 1153(a). The MCA includes an assimilation provision: If one of the listed major crimes "is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States[, it] shall be defined and punished in accordance with the laws of the State in which such offense was committed." *Id.* § 1153(b). The MCA was a "direct response" to the *Crow Dog* case, cited above, in which the Court held a federal court "lacked jurisdiction to try an Indian for the murder of another Indian." *Keeble v. United States*, 412 U.S. 205, 209 (1973). "The prompt congressional response—conferring jurisdiction on the federal courts to punish certain offenses—reflected a view that tribal remedies were either nonexistent or incompatible with principles that Congress thought should be controlling." *Id.* at 210. The Secretary of the Interior had observed (as was quoted in the congressional debates) that "[m]inor offenses may be punished through the agency of the 'court of Indian offenses,' but it will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation." *Id.* at 211 (citation omitted).

3. Mr. Johnston's case arises from a domestic dispute within the Muscogee (Creek) Nation reservation. 1 *Johnston* ROA 37. Mr. Johnston, a member of the Choctaw Nation of Oklahoma, spent the night at his ex-girlfriend's house. 2 *Johnston* ROA 46, 84. The government states that the ex-girlfriend is not an Indian. Pet. 19. Mr. Johnston and his ex-girlfriend got into an argument and Mr. Johnston was alleged to have strangled the ex-girlfriend. 2 *Johnston* ROA 128. The government prosecuted Mr. Johnston for felony assault.

4. In particular, the indictment alleged a violation of section 113(a)(6). 1 *Johnston* ROA 11. Such an offense is among those explicitly enumerated in the MCA (again, section 1153). The indictment further invoked 18 U.S.C. §§ 1151, 1153, and 113(a)(8). 1 *Johnston* ROA 11. It did not cite section 1152, the GCA, and did not allege the status (Indian or non-Indian) of the alleged victim.

5. Mr. Johnston's case proceeded to trial. Mr. Johnston asked the district court to instruct the jury on the lesser-included offense of simple assault under section 113(a)(5), and the district court issued that instruction. 1 *Johnston* ROA 125-26; 2 *Johnston* ROA 271. The government did not oppose or contest that instruction. 2 *Johnston* ROA 271.

After the court instructed the jury, the government openly attempted to amend the indictment by asking the court to charge the jury with finding the victim was a non-Indian, which the government acknowledged was an element of the misdemeanor charge. The government apologized twice because it "did not notice this earlier."

2 *Johnston* ROA 277. The court responded, "I'm not going to go back and change that." *Id.* The government replied, "Okay. That's fine. I just wanted to bring it up." *Id.*

The jury acquitted Mr. Johnston of felony assault and found him guilty of simple assault. 1 *Johnston* ROA 135-36.

6. On the same day that the jury returned its verdict, the government filed a notice alerting the district court of the Tenth Circuit's decision in *United States v. Hopson,* 150 F.4th 1290 (10th Cir. 2025). 1 *Johnston* ROA 73. *Hopson* held that where a defendant is acquitted of the MCA charge that serves as the basis of the court's jurisdiction and is then convicted of only a lesser-included offense that is not listed in the MCA, the court lacks jurisdiction to convict for only the lesser-included offense. *See Hopson*, 150 F.4th at 1297 ("[W]hen an Indian defendant is lawfully prosecuted for an offense listed in the Act, and the district court properly instructs the jury on a lesser-included-offense not listed in the Act, does the court have subject matter jurisdiction to enter judgment of conviction on that unenumerated lesser-included offense? After carefully considering the briefing, the appellate record, and the applicable law, we answer no.").

7. Mr. Johnston accordingly moved to dismiss the conviction for the lesser-included offense of simple assault, 1 *Johnston* ROA 138, and the government did not oppose. The district court then vacated the verdict and conviction as to the lesser-included offense based on *Hopson*. 1 *Johnston* ROA 212.

8. The government appealed. 1 *Johnston* ROA 214. Rather than make any arguments about the district court decision vacating the conviction, or anything else

about the case (such as the court's refusal to charge the jury about the victim's status), the government moved for summary affirmance based on *Hopson*. The court of appeals granted that motion. Pet. App. 61a-63a.

9. The government filed a petition for a writ of certiorari seeking review of the summary affirmance that the government itself had sought. The government joined this case in its petition regarding *Hopson*.

10. Meanwhile, Mr. Johnston was indicted in the Muskogee (Creek) Nation District Court for the same charges he faced in federal court. *See* Case Status Report, https://records.creekdistrictcourt.com/fullcourtweb/mvc/courtCase/86004?r=_pJ; *see also Muskogee (Creek) Nation v. Johnston*, No. CF-2025-466, First Amended Criminal Complaint And Information (March 31, 2026) (attached hereto as Exhibit A).

REASONS FOR DENYING THE PETITION

Respondent Mr. Hopson's brief explains the soundness of the Tenth Circuit's decision, the relative unimportance of the question presented, and the lack of a genuine circuit split that requires resolution, as well as circumstances specific to Mr. Hopson's case. Rather than restate those items here, Mr. Johnston directs the Court to Mr. Hopson's brief for a full discussion of those issues and addresses herein only a few additional reasons for denial that are particularly germane to Mr. Johnston.

I. Mr. Johnston's Case Is Not a Good Vehicle to Address the Question the Government Raises.

This case is before the Court due to choices made by the government, not due to unsettled law that the Court needs to address. The government chose to proceed in this case under only the MCA, despite recognizing the availability of the GCA, and then failed to raise any issues whatsoever on appeal. The government's failure to secure a judgment against Mr. Johnston for simple assault was not due to the Tenth Circuit's ruling in *Hopson*, but was instead due to the government's own decisions and waivers.

A. The Government Could Have Charged Mr. Johnston under 18 U.S.C. § 1152 for the Lesser-Included Offense.

Given the government's assertion that the alleged victim is a non-Indian, Pet. 9, the government could have charged Mr. Johnston under the GCA, section 1152. Yet the indictment brought charges under only the MCA, section 1153. Following the presentation of evidence, Mr. Johnston requested that the jury be instructed on the "lesser-included of just a misdemeanor assault," which the government did not oppose. 2 *Johnston* ROA 262.

The district court then read the instructions to the jury. *Id.* 276. For the lesser-included offense, the jury was instructed that the government must prove each of three elements beyond a reasonable doubt: (1) "The defendant assaulted or attempted to assault M.V."; (2) "The defendant is an Indian"; and (3) "The offense occurred within Indian Country in the Northern District of Oklahoma." 1 *Johnston* ROA 125. The jury was not instructed that the alleged victim must be non-Indian. *Id.* The government did not object to this instruction.

After the instructions were given, however, the government requested a sidebar to inform the court that "it is an element of a misdemeanor that the victim will be a non-Indian because Indian against Indian offenses do not qualify under 1152." 2 *Johnston* ROA 277. Thus, the government recognized that the misdemeanor conviction could have proceeded under 18 U.S.C. § 1152. The district court declined to "go back and change that," to which the government responded, "Okay. That's fine. I just wanted to bring it up." *Id.*

The jury ultimately found Mr. Johnston guilty of only simple assault. The government never again mentioned its issue with the jury instruction—not to the district court and not to the Tenth Circuit.

If the government wished to convict Mr. Johnston of the lesser-included misdemeanor assault, it had an avenue to do so that is not addressed by the instant Petition. The government could have alleged a violation of 18 U.S.C. § 1152 in the indictment, presented evidence that the alleged victim was non-Indian, and properly (*i.e.* in a timely manner) requested a jury instruction that the victim was non-Indian.

The government represents to this Court that it has "[n]ever argued that the non-Indian status of Johnston's victim would alternatively support conviction under the General Crimes Act." Pet. 19. Actually, the government made exactly that argument to the district court: It asked the district court to charge the jury to find the victim was a non-Indian, precisely because that fact would enable the lesser-included offense to arise under 18 U.S.C. § 1152. 2 *Johnston* ROA 277. What the government never argued is the position that it takes now: that the lesser-included

offense could be convicted under § 1153. The government instead: (a) itself provided notice to the district court of the Tenth Circuit decision in *Hopson*, 1 *Johnston* ROA 73; (b) did not oppose Mr. Johnston's Motion to Dismiss the Indictment based on *Hopson*; and (c) sought summary affirmance on appeal, without suggesting to the Tenth Circuit that it wanted to preserve some objection for further review.

B. Because the Government Could Have Proceeded Under § 1152, the Issue Presented Is Not Important Enough to Warrant the Court's Review.

The applicability of the GCA separately undercuts the government's arguments regarding the importance of this dispute. The government emphasizes the "substantial interest in the proper allocation of authority to prosecute crimes by Indians in Indian country," which it claims is "at its peak with respect to the types of serious crimes covered by the Major Crimes Act." Pet. 18. That interest will not be addressed by granting the Petition. Of course, the government had full authority to prosecute the serious crimes covered by the MCA; it just turned out the jury did not accept the government's accusations. Had the government adequately proved Mr. Johnston committed one of the listed serious crimes, the jury would have found him guilty. The government's true complaint is that it was unable to secure a judgment for a lesser crime that Congress did not see fit to include in the MCA. But with respect to Mr. Johnston, the government here had an avenue to prosecute that crime and seal the "escape hatch" of which it complains. *Id.* Were the government truly concerned about prosecuting misdemeanor assault in Indian country, it should have pursued charges against Mr. Johnston under section 1152 in addition to section 1153. *See, e.g., United States v. King*, No. 25-5014, 2026 WL 1073744 (10th Cir. Apr.

21, 2026) (affirming propriety of bringing parallel charges under both section 1152 and section 1153); *United States v. Driver*, 945 F.2d 1410, 1414-15 (8th Cir. 1991) (same).

Indeed, it is the government that seeks to utilize an "escape hatch" here, by relying on section 1153 to obtain a conviction for a section 1152 crime. Doing so would create loopholes for prosecutors who fail to charge defendants under section 1152, or otherwise fail to prove a section 1152 crime. So long as those prosecutors charged the defendant with a crime under section 1153, regardless of the merits and ultimate acquittal of that charge, the government could, under its theory, nonetheless secure a conviction for a misdemeanor that would otherwise fail under section 1152, merely by virtue of having tried, and failed, to secure a more serious conviction.

That result would be particularly improper where, as here, the circumstance that might make Mr. Johnston's conduct eligible for section 1152 prosecution is distinctly different between sections 1152 and 1153, and Congress included that different text in section 1152 as a bulwark against incursions on tribal sovereignty. It requires a "clear expression of the intention of congress" to make such an incursion, *Ex parte Crow Dog*, 109 U.S. at 572, and what we have here is the opposite: a clear expression from Congress that such matters are left to the Tribes. To adopt the government's position would be tantamount to reading out of section 1152 the limitation that "[t]his section shall not extend to offenses committed by one Indian against the person or property of another Indian"—so long as the government at least pretended to attempt to convict under section 1153.

C. Granting the Petition Would Require the Court to Resolve Issues the Government Chose Not to Raise to the Tenth Circuit.

The government invited many of the purported errors in this case by choosing not to oppose Mr. Johnston's motion to dismiss and then requesting summary affirmance of the district court's judgment. The government could have aimed to distinguish *Hopson*, for instance, by noting that Mr. Johnston's misdemeanor charge could (given the government's assertion the victim is a non-Indian) have been brought pursuant to the GCA, which would then have afforded jurisdiction. *See* Pet. 19 ("Nor has the government ever argued that the non-Indian status of Johnston's victim would alternatively support conviction under the General Crimes Act.").

Or, it could have sought *en banc* consideration before the Tenth Circuit to address issues it did not raise in the *Hopson* case. The government told the *Hopson* panel that the prerequisites to the MCA restrict a district court's subject-matter jurisdiction. *See Hopson*, 150 F.4th at 1297, n.6 (noting that the government agrees that the issue relates to the court's subject matter jurisdiction). The government then attempted to change positions when petitioning for rehearing *en banc*. *See Hopson*, No. 23-5056, Gov't Pet. Reh'g En Banc, Doc. 89-1 at 11 n.1 (10th Cir. Sept. 12, 2025) ("Upon further consideration, this case does not implicate the federal court's jurisdiction over the case, . . . but rather the power of the federal government (vis-à-vis the tribe) to prosecute the defendant."). Mr. Hopson's October 24, 2025, response to the petition explained that the government had waived this issue by not raising it before the panel, *Hopson*, No. 23-5056, Resp. to Pet. Reh'g En Banc, Doc. 93 at 14 n.1, and on November 7, 2025, the Tenth Circuit denied rehearing.

Three months later, having received that warning from Mr. Hopson, the government repeated its error. The government had the chance to argue its "power to convict" theory to the Tenth Circuit in this case. It could have argued it first to the panel and then *en banc*, taking care not to waive the issue along the way. It chose not to, and instead, on January 9, 2026, moved for summary affirmance.

The government could have sought Tenth Circuit review of the vacatur of Mr. Johnston's misdemeanor conviction on other grounds as well. It could have urged reinstating Mr. Johnston's conviction because the GCA provides jurisdiction for misdemeanor crimes committed by Indians against non-Indians in Indian Country. Perhaps it chose not to do so because it failed to raise that argument in the trial court, failed to assert the GCA in the indictment, and proposed a jury charge about the alleged victim's non-Indian status only after the district court instructed the jury.

Put simply, the vacatur of Mr. Johnston's conviction was the result of the government's repeated forfeitures or waivers. It now aims to correct those missteps by shoe-horning Mr. Johnston's case into a dispute about jurisdiction to charge lesser-included offenses under the MCA. Had the government properly pursued the misdemeanor charge under the GCA, however, the question now before the Court would have no relevance to Mr. Johnston's conviction.

The government's decision not to pursue the appeal below, moreover, means that many of the issues presented by Mr. Johnston's case have not yet been briefed by Mr. Johnston or considered by the Tenth Circuit. Had the government sought to re-instate Mr. Johnston's conviction, Mr. Johnston could have presented alternative

grounds for affirmance, including each of the government's failures listed two paragraphs above. Each could have been offered as a separate ground for affirming the district court's judgment. Because the government sought summary affirmance, however, Mr. Johnston did not have the chance to brief these issues and the Tenth Circuit did not have the opportunity to address them. This court should not "be the pioneer court to decide the matter." *Smith v. Arizona*, 602 U.S. 779, 801 (2024).

II. The Government Overstates the Importance of the Question Presented Because Defendants, Like Mr. Johnston, May Still Be Tried in Tribal Courts.

According to the government, the question presented is "exceptionally important" because the Tenth Circuit adopted an "escape hatch" that will allow Indians to roam free after committing the "serious crimes covered by the Major Crimes Act—offenses like murder, kidnapping, maiming, felony assault, arson, burglary, and robbery." Pet. 18. That is wrong for a few different reasons, not least of which is that the alleged "escape hatch" exists only for those who are *acquitted* of those "serious crimes." Even under the Tenth Circuit's reading of the statute, there is no "escape hatch" for those who are *convicted*. And again, the GCA still provides an avenue for the government to charge Indians with crimes on the reservation that are not covered by the MCA, so long as the victim is not also an Indian.

Second, as noted in Mr. Hopson's brief, vacating a conviction for the less serious crime does not mean the perpetrator of that crime gets off scot-free. Rather, because the Double Jeopardy Clause does not bar a subsequent prosecution by a separate sovereign, *Denezpi v. United States*, 596 U.S. 591, 599 (2022), the Tribe with jurisdiction subsequently can prosecute the defendant for the same transgressions.

Here, the Tribe is doing exactly that. Mr. Johnston has been indicted and is being prosecuted in Muscogee (Creek) Nation District Court for the very same alleged conduct that was the subject of his federal criminal trial at issue in this case. *See* Amended Indictment, Exhibit A. Mr. Johnston faces two charges, each of which carries a maximum sentence of three years' imprisonment and a $15,000 fine. Mr. Johnston thus faces punishment well above the "imprisonment for not more than six months" for simple assault under the federal system. 18 U.S.C. § 113(a)(5).

In other words, not only is it inaccurate to imply that those who commit the most serious crimes are allowed to go free out of some "escape hatch," but it is also demonstrably incorrect that a defendant found guilty of a lesser-included crime that is then vacated will not be held to account. Instead, the MCA in those cases operates as intended, deferring to the Tribes to prosecute defendants in accordance with the Tribes' "inherent power to prescribe laws for their members and to punish infractions." *Denezpi*, 596 U.S. at 598. Indeed, "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country." Pub. L. No. 111-211, Title II, § 202(a)(2), 124 Stat. 2262 (2010).

III. The Government's Position Would Turn the Lesser-Included Offense Instruction on Its Head.

Further underscoring the soundness of the Tenth Circuit's decision and the relative unimportance of this dispute, it warrants emphasis that the lesser-included charges at issue were not brought by the government, but were requested by the defendants for their protection.

This Court has long recognized that where evidence as to one element of a greater crime is in dispute, the jury may be instructed, and may adjudicate guilt, of a "lesser-included offense." *See, e.g., Stevenson v. United States*, 162 U.S. 313, 323 (1896) ("the question as to the grade of the crime, whether murder or manslaughter, should have been submitted to the jury" where there was "any evidence fairly tending to bear upon the issue of manslaughter"). It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble*, 412 U.S. at 208.

Though the rule "originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged," it "has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Beck v. Alabama*, 447 U.S. 625, 633 (1980). It ensures that the jury "will accord the defendant the full benefit of the reasonable-doubt standard" where "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense." *Id.* at 634 (quoting *Keeble*, 412 U.S. at 212–13). Rather than force the jury to choose between acquittal and conviction in such cases where "the jury is likely to resolve its doubts in favor of conviction," the lesser-included offense instruction affords the jury a third option of convicting the defendant of a lesser offense that does not require proof of the disputed element. *Id.* It thereby

ensures that the jury will not err on the side of conviction, despite the prosecution's failure to prove one element beyond a reasonable doubt.

The lesser-included offense instruction operated as intended in Mr. Johnston's case. Finding that the prosecution failed to prove the strangulation element beyond a reasonable doubt, the jury convicted Mr. Johnston of only simple assault, a misdemeanor. *See* 1 *Johnston* ROA 136-37. The issue for the government, of course, is that simple assault is not a crime under the Major Crimes Act, the only jurisdictional basis asserted in the indictment. The government seeks to take advantage of its series of failures by nonetheless urging conviction of the lesser-included offense. That would turn the lesser-included offense protection on its head. It would no longer function to ensure the jury properly applies the beyond-a-reasonable-doubt standard for each element, but would instead function for the prosecution to secure an otherwise invalid conviction.

That Mr. Johnston could not actually be convicted of the lesser-included offense makes no difference to this analysis. The jury's role is solely to find facts and draw the ultimate conclusion of guilt or innocence. *See United States v. Gaudin*, 515 U.S. 506, 514 (1995). Because the jury has no "sentencing function," it is instructed to "reach its verdict without regard to what sentence might be imposed." *Rogers v. United State*s, 422 U.S. 35, 40 (1975). The jury in this case was specifically instructed not to "discuss or consider the possible punishment in any way while deciding your verdict." 1 *Johnston* ROA 31.

That "juries are not to consider the consequences of their verdict is a reflection of the basic division of labor in our legal system between judge and jury." *Shannon v. United States*, 512 U.S. 573, 579 (1994). Whereas juries consider the facts to adjudicate guilt or innocence, the judge, "by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict." *Id.* "Information regarding the consequences of a verdict is therefore irrelevant to the jury's task." *Id.* The lesser-included offense served its purpose in this sense as well, preventing any concerns about punishment or lack thereof from "diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty." *Beck*, 447 U.S. at 643.

The jury here determined that the only crime the prosecution could prove beyond a reasonable doubt was misdemeanor simple assault. That the district court lacked jurisdiction to convict and punish Mr. Johnston for that offense was not somehow "tricking" the jury—it should have been, and was, irrelevant to the jury.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 11, 2026

EXHIBIT A

IN THE DISTRICT COURT OF THE MUSCOGEE (CREEK) NATION
OKMULGEE DISTRICT

DISTRICT COURT
FILED
2026 MAR 31 - A 10:42
MUSCOGEE (CREEK) NATION
CYNTHIA FREEMAN
COURT CLERK

MUSCOGEE (CREEK) NATION,
Plaintiff,

vs.

JOHNSTON: Robert Marcus
CHOCTAW MALE
DOB: 01/24/2006
LKA: 2125 E Skelly Dr Apt 247
Tulsa, OK 74105
Defendant.

Case No.: CF-2025-466

FIRST AMENDED CRIMINAL COMPLAINT AND INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE MUSCOGEE (CREEK) NATION comes now Melissa Roth, the duly qualified Prosecutor, within and for the Muscogee (Creek) Nation, and upon their oath of office gives the District Court of the Muscogee (Creek) Nation, to know and be informed and complain that defendant **Robert Marcus Johnston**, an Indian person, did, within the jurisdiction of the Muscogee (Creek) Nation, on or about the 7th day of April, 2025, anterior to the presentment hereof, commit the following crime(s) in the manner and form as follows:

COUNT ONE: DOMESTIC ABUSE BY STRANGULATION (MCNCA Title 14, § 2-303(G)) That said Defendant within the Muscogee (Creek) Nation on the day and year aforesaid did unlawfully commit an assault and battery with the intent to cause great bodily harm by strangulation or attempted strangulation against D.B., a person with whom the Defendant was in a previous domestic relationship.

This crime is a felony punishable by imprisonment for not less than one (1) year nor more than three (3) years and/or a fine of not more than fifteen thousand dollars ($15,000.00).

COUNT TWO: DOMESTIC ABUSE SECOND OFFENSE (MCNCA Title 14, § 2-303(C)) That said Defendant within the Muscogee (Creek) Nation on the day and year aforesaid did unlawfully apply force D.B., a person with whom the Defendant was in a previous domestic relationship with, after the defendant had a prior conviction for domestic abuse from the Muscogee (Creek) Nation District Court in Case No. CM-2024-1156.

This crime is a felony punishable by imprisonment for up to three (3) years and/or a fine of not more than fifteen thousand dollars ($15,000.00).

Contrary to the form of the laws in such case made and against the peace and dignity of the Nation.

Melissa Roth, Prosecutor
Muscogee (Creek) Nation
Office of the Attorney General
P.O. Box 580
Okmulgee, OK 74447
(918) 295-9720

NAMES OF WITNESSES FOR THE PROSECUTION:

1. Off. Matthew Lovelace, SPD
2. Denika Marialea Burdick, Child Victim
3. Choctaw Nation of Oklahoma Tribal Membership Department, Agency Witness
4. Lori Gonzalez, Expert Witness
5. Muscogee (Creek) Nation Realty and Trust Services, Agency Witness
6. Leah Oliver, Expert Witness
7. Deborah Lea White, Witness
8. Misty Williford, Victim Representative
9. Audra Rees, FBI
10. Off. Cade Sweet, SPD