No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street, N.W.
Washington, D.C. 20005
(202) 466-7767

CARTER G. PHILLIPS
VIRGINIA A. SEITZ*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
vseitz@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

December 8, 2015

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY	1
REASONS FOR GRANTING THE PETITION	4
I. THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY IS UNIQUELY IMPORTANT TO INDIAN DEFENDANTS AND COMMUNITIES	4
II. DISCRIMINATION AGAINST NATIVE AMERICANS REMAINS A SERIOUS PROBLEM, PARTICULARLY IN STATES WHICH INCLUDE RESERVATIONS	7
III. JURY VENIRES FOR FEDERAL CRIMES ARISING IN INDIAN COUNTRY GENERALLY DO NOT INCLUDE MEMBERS OF THE DEFENDANTS' INDIAN COUNTRY COMMUNITY	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Glasser v. United States, 315 U.S. 60 (1942), *superseded on other grounds by rule*, Fed. R. Evid. 104(a), *as recognized in Bourjaily v. United States*, 483 U.S. 171 (1987) 11
Smith v. Texas, 311 U.S. 128 (1940)..... 11
Strauder v. W. Virginia, 100 U.S. 308 (1879) 12
Taylor v. Louisiana, 419 U.S. 522 (1975) 11
United States v. Antelope, 430 U.S. 641 (1977) 4
United States v. Benally, 546 F.3d 1230 (10th Cir. 2008) 2, 6, 11
United States v. Kagama, 118 U.S. 375 (1886) 4, 7
United States v. Lara, 541 U.S. 193 (2004) .. 1
United States v. Rogers, 45 U.S. 567 (1846) 4

STATUTES

Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253..... 7
Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended 18 U.S.C. § 1162(a)) 4
18 U.S.C. § 1151 4
18 U.S.C. § 1153 ..... 4, 12

SCHOLARLY AUTHORITIES

Kevin K. Washburn, *American Indians, Crime and the Law*, 104 Mich. L. Rev. 709 (2005-2006)..... 3, 7, 12, 13

TABLE OF AUTHORITIES – continued

OTHER AUTHORITIES Page

J. Bell, *Mass Incarceration: A Destroyer of People of Color and Their Communities*, Huffington Post (May 17, 2010, updated May 25, 2011), http://www.huffingtonpost.com/jamaal-bell/mass-incarcerations-a-dest_b_578854.html 8

S. Buchanan, S. Poverty Law Ctr., *Violence Against American Indians is a Pervasive Problem* (Jan. 16, 2007), http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/winter/indian-blood 8

L. Millet, *Native Lives Matter, Too*, N.Y. Times, Oct. 13, 2015 8

New Mexican Advisory Comm., U.S. Sentencing Comm'n, *The Farmington Report: Civil Rights for Native Americans 30 Years Later* (Nov. 2005) 9

S. Perry, Office of Justice Programs, U.S. Dep't of Justice, *American Indians and Crime: A BJS Statistical Profile, 1992-2002* (Dec. 2004), http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf .. 6, 8

S.E. Ruckman, *FBI Hate Crime Report Shows Indians Remain Most Often Assaulted*, Native Times.com, http://nativetimes.com/index.php?option=com_content&task+view&id=516&Itemid=1 (last viewed Dec. 4, 2015)..... 7

S.D. Equal Justice Comm'n, *Final Report and Recommendations* (2006), http://ujs.sd.gov/uploads/docs/Equal_Justice_Commission_Report.pdf 9, 10

TABLE OF AUTHORITIES – continued

Page

U.S. Comm'n on Civil Rights, *Commission Briefing: Discrimination Against Native Americans in Border Towns* (Mar. 22, 2011), http://www.usccr.gov/pubs/Border Towns_03-22-11.pdf..... 10

U.S. Sentencing Comm'n, *Report of the Native American Advisory Group* (Nov. 4, 2003).....5, 6, 9

INTEREST OF *AMICUS CURIAE*

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI and its member tribes are dedicated to protecting the rights and improving the welfare of American Indians and tribes.[1] NCAI regularly files *amicus* briefs in this Court on issues of importance to tribes and their members, including on issues of criminal law enforcement that affect Indians. See, *e.g.*, *United States v. Lara*, 541 U.S. 193 (2004).

NCAI's substantial interest in this case arises from its long term commitment to ensuring the fair and constitutional application of criminal laws to Native Americans subject to the criminal justice system. The rule of constitutional law announced by the Colorado Supreme Court – that the Constitution allows "no impeachment" rules to bar juror testimony about racially biased statements during deliberations that tie race to guilt – undermines the goal of equal justice for all, including Native Americans.

INTRODUCTION AND SUMMARY

Petitioner Pena-Rodriguez has demonstrated that the constitutional issue presented here is the subject of a clear, acknowledged conflict among the circuit

---

[1] No counsel for any party to these proceedings authored this brief in whole or in part. No person or entity other than NCAI made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have received timely notice of the intent to file this brief and have consented to its filing, and the letters of consent have been filed with the Clerk.

courts of appeals and the highest courts of a number of states, and that this Court should resolve the conflict to avoid a fundamental unfairness in the administration of criminal justice – specifically, the racial bias of jurors, openly expressed in deliberations to support a guilty vote and urge others to vote for a guilty verdict. This corruption of jury deliberations rightly concerns persons of all races. NCAI files this *amicus* brief to explain the historic and geographical reasons that the Sixth Amendment right to an impartial jury and jury deliberations free of discriminatory arguments directed at guilt are of critical importance to Native Americans.

First, the Major Crimes Act gives federal courts jurisdiction over violent crimes involving Indian defendants that occur in Indian country. As a result, Indians are substantially overrepresented among federal criminal defendants accused of and tried for violent crimes in federal courts. Discrimination against Native American defendants, accordingly, is particularly likely to taint the administration of criminal justice in federal courts.

Second, as detailed *infra*, there is substantial discrimination against Native Americans, particularly in states including Indian reservations and communities bordering reservations. This usually latent discrimination comes to the surface in jury deliberations, as exemplified in *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), in which the jury foreman told other jurors deliberating on an assault charge against a Native American defendant that he lived near a reservation and that "'[w]hen Indians get alcohol, they all get drunk' and when they get drunk, they get violent." *Id.* at 1231 (alteration in original).

Finally, an individual juror's discrimination is likely to remain unexpressed when a jury is diverse, but jury venires are particularly unlikely to include Native Americans. The federal districts in which reservations are located are massive, and long distances often separate Indian country and the seats of federal district courts. This fact, in combination with the relative poverty of Indian country residents, means that Indian defendants are rarely tried by juries that include their peers, fellow residents of Indian country. Instead, the jury venires for federal district courts in Indian country states are overwhelmingly composed of state residents who lack any connection with Indian country or that community. See generally Kevin K. Washburn, *American Indians, Crime and the Law*, 104 Mich. L. Rev. 709 (2005-2006).

NCAI recognizes that this Court's principal consideration in granting a petition for certiorari is the existence of a conflict among the lower courts on an important question of federal law, all criteria that are satisfied here. NCAI writes to highlight the particular importance of the issue to Native American criminal defendants who are disproportionately disadvantaged and suffer intentional discrimination in jury deliberations in criminal cases in federal court. These circumstances have given rise to widespread Native American wariness about the criminal justice system. And where a jury verdict stands after a trial court concludes that jurors made statements during deliberations that directly relate to the criminal defendant's guilt or innocence and constitute intentional race discrimination, that mistrust may evolve into a conclusion of illegitimacy.

REASONS FOR GRANTING THE PETITION

NCAI will not rehash the arguments for conflict among the courts, the importance of the issue and the error of the lower court's ruling which have already been made in the petition. It files this *amicus* brief to set out the reasons that the issue presented is so significant to Native Americans.

I. THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY IS UNIQUELY IMPORTANT TO INDIAN DEFENDANTS AND COMMUNITIES.

This Court has upheld the federal government's authority to assert jurisdiction over criminal offenses in Indian country since it resolved *United States v. Rogers*, 45 U.S. 567 (1846), and *United States v. Kagama*, 118 U.S. 375 (1886). See also *United States v. Antelope*, 430 U.S. 641, 648 (1977) ("Congress had undoubted constitutional power to prescribe a criminal code applicable in Indian country").

Today, as a result, federal law grants federal courts jurisdiction when Native Americans commit the crimes set forth in the Major Crimes Act of 1885 in "Indian country." See 18 U.S.C. § 1153.[2] "Indian country," in turn, is defined as all land within the boundaries of an Indian reservation including dependent communities and Indian allotments as provided in 18 U.S.C. § 1151.

---

[2] The United States transferred criminal jurisdiction over reservations to some states in what is known as Public Law 280, Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588, 588-89 (codified as amended 18 U.S.C. § 1162(a)). Some of those states have retroceded jurisdiction to the tribes. Under current law, states cannot assume such jurisdiction without tribal consent.

Thus, "Federal criminal jurisdiction is an important fact of life for Indian people on Indian reservations in a way different than for other Americans." U.S. Sentencing Comm'n, *Report of the Native American Advisory Group* 1 (Nov. 4, 2003) ("*Advisory Group Report*"). For most Americans, any prosecution of a routine felony offense would be conducted by the laws and authorities of their state of residence. Federal authorities would prosecute only when the crime relates to a federal interest or to national or international concerns (*i.e.*, international drug trade or terrorism). Significantly, before the passage of the Major Crimes Act, tribal governments handled such crimes as tribal offenses, and the United States only rarely prosecuted Indian country crimes. *Id.*

The Major Crimes Act thus represented a fundamental change in the jurisdictional allocation, federalizing first six and now more than 20 felonies in Indian country, including manslaughter and aggravated assaults. (Most misdemeanors are still prosecuted by tribal governments in tribal courts.) The federal government has displaced the tribes as the chief source of law enforcement in cases involving serious crimes in Indian country. In thus "singling out particular communities defined by tribal membership and geography and by displacing tribal governments that handle many of the other important governmental responsibilities in these communities, the United States has undertaken a substantial responsibility for public safety and criminal justice in Indian communities." *Id.* at 3.

The effect of federal jurisdiction over Indian country on the makeup of the federal courts' docket of cases involving violent crimes is breathtaking. The *Advisory Group Report* observed:

> While Indian offenses amount to less than five percent of the overall federal caseload, they constitute a significant portion of violent crimes in federal court. Over eighty percent of manslaughter cases and over sixty percent of sexual abuse cases arise from Indian jurisdiction. Nearly half of all the murders and assaults arise from Indian jurisdiction.

Id. at 1-2 (citing U.S. Sentencing Comm'n, *2001 Sourcebook of Federal Sentencing Statistics*; U.S. Sentencing Comm'n, *Manslaughter Working Group Report to the Commission* (1997)). See also S. Perry, Office of Justice Programs, U.S. Dep't of Justice, *American Indians and Crimes: A BJS Statistical Profile 1992-2002* (Dec. 2004), http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.

The vast overrepresentation of Native Americans among federal offenders charged with the most serious violent crimes heightens the importance of the constitutional question presented to Native Americans who are tried for violent crimes in federal courts. Indeed, addressing juror prejudice is particularly critical in cases involving violent crimes. Such crimes carry the longest sentences and are the most likely to elicit strong emotional reactions from jurors that may be tied to stereotypes rather than direct evidence of guilt. See, *e.g.*, *Benally*, 546 F.3d at 1231-32 (juror stating that "'[w]hen Indians get alcohol, they all get drunk' and when they get drunk, they get violent," while second juror described a desire to "send a message back to the reservation") (alteration in original).

The Constitution leaves no room for discrimination in federal juries trying Indian defendants for violation of the felonies covered by the Major Crimes Act.

II. DISCRIMINATION AGAINST NATIVE AMERICANS REMAINS A SERIOUS PROBLEM, PARTICULARLY IN STATES WHICH INCLUDE RESERVATIONS.

This Court once said that Indians "owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies." *Kagama*, 118 U.S. at 384. Plainly, this description of the State-Indian relationship and local hostility is too extreme today. Indians are now citizens, see Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253. And, in the modern era, there has been substantial state and tribal cooperation on law enforcement issues and significant improvement in race relations in states encompassing Indian country. Nonetheless, discrimination against Native Americans remains a serious issue, particularly in areas bordering reservations.

As one scholar summarized, "[r]acism and bias remain strong, particularly in states where Indians compete with non-Indians for limited resources." K. Washburn, *supra*, at 764 & n.271 (citing Bryan H. Widenthal, *Fighting the* Lone Wolf *Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 Tulsa L. Rev. 113, 145 (2001); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 521 n.88 (1976)). In this regard – and suggestive of the depth of this racial issue – FBI statistics reveal that Native Americans are among the most predominant victims of hate crimes. See S.E. Ruckman*, FBI Hate Crime Report Shows Indians Remain Most Often Assaulted*, Native Times.com, http://nativetimes.com/index.php?option=com_content&task+view&id=516&Itemid

=1 (last viewed Dec. 4, 2015). "[W]hile American Indians and Alaska Natives comprise only 1% of the U.S. population, they represent 2% of victims of racially motivated hate crimes." S. Buchanan, S. Poverty Law Ctr., *Violence Against American Indians is a Pervasive Problem* (Jan. 16, 2007), http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/winter/indian-blood. Native Americans experience violence "at a rate . . . more than twice the rate for the Nation." See Perry, *supra*, cover. A Department of Justice study, *American Indians and Crime*, found "a disturbing picture of the victimization of American Indians and Alaska Natives." *Id.* at iii.

In addition, Native Americans receive disproportionate sentences of imprisonment:

> [t]he incarceration rate of Native Americans is 38% higher than the national rate. The U.S. Commission on Civil Rights attributes this higher rate to differential treatment by the criminal justice system, lack of access to adequate counsel and racial profiling. . . . Law enforcement agents arrest American Indians and Alaskan Natives at twice the rate of the greater U.S. population for violent and property crimes. On average, American Indians receive longer sentences than non-Indians for crimes.

J. Bell, *Mass Incarceration: A Destroyer of People of Color and Their Communities*, Huffington Post (May 17, 2010, updated May 25, 2011), http://www.huffingtonpost.com/jamaal-bell/mass-incarcerations-a-dest_b_578854.html (referring, *e.g.*, to *Advisory Group Report* at iii-iv). See also L. Millet, *Native Lives Matter, Too*, N.Y. Times, Oct. 13, 2015 ("American Indians are more likely than any other

racial group to be killed by the police, according to the Center on Juvenile and Criminal Justice").

State and federal civil rights organizations have also focused on discrimination against Native Americans. It was the post-hearing recommendations of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights that led to the creation of the Ad Hoc Native American Advisory Group, and its 2003 Report on disparities in federal sentencing of Native Americans under the Major Crimes Act. See *Advisory Group Report* at 3. In 2005, the New Mexico Advisory Committee to the Commission issued *The Farmington Report: Civil Rights for Native Americans 30 Years Later* (Nov. 2005). This Report addressed relations between the Navajos and local residents of the Farmington, New Mexico area thirty years after "the brutal murder of three Navajo youths and numerous complaints from Navajo leaders concerning unequal protection and enforcement of the laws." *Id.* at ii. The Report concluded that while there have been significant improvements, "[p]roblems . . . persist" with respect to "equal protection and enforcement of laws for Native Americans." *Id.*

In 2006, the South Dakota Equal Justice Commission issued its *Final Report and Recommendations* to the South Dakota Supreme Court ("*South Dakota Report*"), http://ujs.sd.gov/uploads/docs/Equal_Justice_Commission_Report.pdf, on perceptions of unfairness to Native Americans*, inter alia*, in the State's judicial system, including in criminal cases and in the jury system. Testimony before that Commission focused on disparities across the spectrum in criminal proceedings, including stops, arrests, legal representation and sentencing and strongly recommended investigation and action. See *South Dakota Report* at

1 (Native Americans perceive that the South Dakota "judicial system shows favoritism to non-minorities"); *id.* at 8 (finding that "[m]inority people have a general distrust of the criminal justice system and exclusion from being seated on juries fosters that distrust").

Finally, in 2007, the United States Commission on Civil Rights held hearings on the significant discrimination against Native Americans in regions of the country including Indian reservations. See, *e.g.*, U.S. Comm'n on Civil Rights, *Commission Briefing: Discrimination Against Native Americans in Border Towns* (Mar. 22, 2011), http://www.usccr.gov/pubs/BorderTowns_03-22-11.pdf. These hearings provide detailed testimony about the kinds of discrimination Native Americans face in such regions. See *id.* at 4-24 (summarizing testimony); *id.* at 25-45 (written statements).

In short, Native Americans have a demonstrated need for federal protection, including constitutional protection, from discrimination in the criminal justice system. The legitimacy of that system with respect to the Native American defendants and communities it governs will turn on its perceived equality of treatment and impartiality. Most Americans would agree with this Court's view that the Constitution forbids race discrimination to infect adjudication. But if a jury's guilty verdict against a Native American infected by express bias stands, Native Americans understandably will view the process as tainted.

In this case, jurors made discriminatory statements reflecting racial stereotypes that supported a conviction for sexual crimes, such as "I think he did it because he's Mexican and Mexican men take whatever they want." Pet. App. 4a-5a. This case

thus resembles the *Benally* case which involved analogous stereotyping of Native Americans. See *Benally*, 546 F.3d at 1231 (jury foreperson states that "'[w]hen Indians get alcohol, they all get drunk,' and when they get drunk, they get violent") (alteration in original). Yet in both cases, the courts decided that the Constitution's guarantee of an impartial jury had been fulfilled.

It is critically, and constitutionally, important that administration of criminal justice be free from discrimination against persons of all races, including Native Americans and other minorities. This Court should grant review to examine the Colorado court's view of the Sixth Amendment and ensure that it is consistent with this constitutional goal.

III. JURY VENIRES FOR FEDERAL CRIMES ARISING IN INDIAN COUNTRY GENERALLY DO NOT INCLUDE MEMBERS OF THE DEFENDANTS' INDIAN COUNTRY COMMUNITY.

The Sixth Amendment is framed as a guarantee of certain rights to criminal defendants, but this Court has made clear that it also serves the important interest of community participation in our criminal justice system. Thus, juries are "instruments of public justice" and must be "truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). Our system "'presupposes a jury drawn from a pool broadly representative of the community.'" *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975). See also *Glasser v. United States*, 315 U.S. 60, 85 (1942) (a representative jury is fundamental to the "basic concepts of a democratic society and a representative government").

As a practical matter, the residents of Indian country generally are not well represented in the jury venires or juries deciding Indian country cases. See generally K. Washburn, *supra* at 747-50. Indians constitute only a small percentage of any given state's population even in states with substantial Indian populations. *Id.* at 747 n.188. Jury venires are drawn from state voter registration rolls. While Indian voter participation in state elections is increasing, Indians, who are "among the poorest Americans," *id.* at 747 & n.189, and often focused on tribal rather than state government, are somewhat less likely than other state citizens to be registered to vote. *Id.* at 747-48 & nn.190-93.

Finally, and critically, most federal districts including Indian reservations are physically large – meaning that the courts are located in cities or towns hundreds of miles from Indian country. *Id.* at 748-50 & nn.194-95. The relatively impoverished residents of Indian country generally lack the resources to be jurors in courts hundreds of miles away.

Native American defendants are thus unlikely to have jury venires, let alone juries, that include any residents of Indian country. Instead, the jury venires are composed of state citizens. These individuals, like residents of Indian country, are U.S. citizens, but their legal status differs from that of Native Americans in significant ways. Cf. *Strauder v. W. Virginia*, 100 U.S. 308 (1879) ("the very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of . . . persons having the same legal status in society as that which he holds").

Thus, an Indian who commits a crime in Indian country is very likely to be subject to a different legal regime than any member of his or her jury. See 18

U.S.C. § 1153. The crimes covered by the Major Crimes Act are quite serious, but they are "of a local nature with significant local effects and few effects beyond that locality." K. Washburn, *supra* at 762. Nonetheless, an Indian committing such a crime is subject to federal law and federal punishment, while a state citizen committing the same crime in a community governed by state law would face state and local criminal regimes.

NCAI is not alleging that jury pools in such regions are generally unconstitutionally constituted. NCAI's point is simply that, as a practical matter of geography, economics and local government affiliation, Indian defendants often are not tried by a jury of their peers or even a jury with members from their distinctive Indian country community. In most cases, jurors will not openly announce their biases at voir dire or in deliberations, even though unstated biases will affect deliberations and the administration of justice. But, significantly, the absence of Indian country denizens from a jury makes overt bias more likely and its discovery less likely. This situation presents a serious challenge to our criminal justice system. Where juror misrepresentations are made in voir dire and where jurors make openly biased statements during deliberations that are directly related to guilt, the defendant has not received a fair trial from an impartial jury and is entitled to a new trial untainted by racial bias.

CONCLUSION

For these reasons and those stated in the petition, the petition should be granted.

Respectfully submitted,

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street, N.W.
Washington, D.C. 20005
(202) 466-7767

CARTER G. PHILLIPS
VIRGINIA A. SEITZ*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
vseitz@sidley.com

Counsel for Amicus Curiae

December 8, 2015

* Counsel of Record