UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 19-2022

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

PATRICK BEGAY,

Defendant/Appellant.

Appeal from the United States District Court
For the District of New Mexico
District Court No. 17-CR-1714
Hon. Judith C. Herrera, United States District Judge

APPELLEE'S ANSWER BRIEF – NO ATTACHMENTS

ORAL ARGUMENT IS NOT REQUESTED

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There are no prior or related appeals.

ISSUES PRESENTED FOR REVIEW

Following an incident in which he beat his victim with an aluminum baseball bat and stabbed him with a knife, Defendant Patrick Begay, an enrolled member of the Navajo Nation, was charged by indictment with three counts of assault. Begay pled guilty to all counts of the indictment. At sentencing, Begay asked the district court to impose a sentence below the 46 to 57 months suggested by the Sentencing Guidelines because, *inter alia*, the sentences imposed by New Mexico state courts for similar conduct are generally lower than those recommended by the federal Sentencing Guidelines, resulting in unwarranted sentencing disparities between similar offenders. The district court rejected this argument, concluding that in fashioning an appropriate sentence it was not permitted to consider disparities between federal and state sentencing schemes.

This appeal presents three issues:

I. Whether the district court committed procedural error when it concluded that, in fashioning an appropriate sentence, it was not permitted to consider sentences typically imposed in state courts for similar offenses.

II. Whether the within-guideline sentence was substantively unreasonable by virtue of the district court's refusal to consider sentences typically imposed in state courts for similar offenses.

III. Whether the prohibition on consideration of federal/state sentencing disparities violates Begay's right to equal protection of the laws as guaranteed by the Fifth Amendment.

STATEMENT OF THE CASE AND THE FACTS

I. Factual Background

The afternoon of May 12, 2017, found Begay and John Doe drinking vodka and beer at the home of Doe's girlfriend in Ramah, New Mexico. 2R.4-5.[1] At some point, an argument arose between the two men, and Doe retreated to the bedroom to "sleep off the alcohol." 2R.5.[2] Shortly thereafter, Begay entered the bedroom and began to strike the sleeping Doe with an aluminum baseball bat. *Id.*; 3R.8. Begay initially struck Doe on the thighs, and then proceeded to strike him on his arms and then on his head. 2R.5; 3R.12.

After administering this beating, Begay left the residence and stood on the porch. 2R.5. Doe then followed Begay onto the porch intending to confront him. *Id.* When Doe arrived on the porch, Begay stabbed him in the chest with a knife, and then fled the area. *Id.*; 3R.13. Officers from the Ramah Navajo Police Department soon arrived at the residence, where they found Doe on the porch bleeding from his head and chest. 2R.5. Doe was flown to University of New Mexico Hospital where he underwent emergency surgery

[1] Both Begay and Doe are enrolled members of the Navajo Nation and the residence is located within the exterior boundaries of the Navajo Nation. 2R.4.

[2] Citations to the record are provided in the following format [Vol.]R.[Page].

to drain blood between his skull and his scalp. 2R.5, 19. Doe's injuries included bruising to his brain and a laceration to his head requiring 16 staples to close. 2R.6, 19.

II. Procedural History

On June 28, 2017, a federal grand jury in the District of New Mexico returned a three-count indictment charging Begay with two counts of assault with a dangerous weapon, in violation of 18 U.S.C. §§ 1153 and 113(a)(3), and one count of assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1153 and 113(a)(6). 1R.7-8. On March 22, 2018, Begay entered a plea of guilty to all counts of the indictment without a plea agreement. 1R.16-17.

On April 25, 2018, the Probation Office issued a Presentence Report ("PSR"). The PSR recommended sentencing enhancements based on Begay's use of a dangerous weapon, the fact that Doe sustained permanent bodily injury, and the fact that Doe was a vulnerable victim. 2R.7. Ultimately, the PSR determined Begay's advisory guideline imprisonment range to be 46 to 57 months. 2R.16.

In his sentencing memorandum, Begay asked the district court to impose a sentence below that suggested by the Sentencing Guidelines on the basis that "sentences for Native American offenders convicted of aggravated assault in federal courts are disproportionate to the sentences imposed on

similarly situated state offenders." 1R.27. Specifically, Begay argued that a guideline sentence "would create an unwarranted sentencing disparity between his case and cases of similarly situated, non-Native defendants sentenced within the last three years for similar crimes in the Second Judicial District Court for the State of New Mexico." 1R.37. In support of this argument, Begay submitted documentary evidence, and offered to present testimony, to establish the disparate sentences imposed by the New Mexico state court system for similar conduct. 1R.53-56; 3R.55-57.

At a sentencing hearing on February 5, 2019, the district court declined to vary downward based on alleged disparities between state and federal sentences. The district court stated that it was prohibited from considering any such disparity. "[I]t's clear that I cannot take into account what New Mexico sentencing would be in arriving at an appropriate sentence in this case, and so I will not rely on what sentences may or may not be in the state court in arriving at an appropriate sentence here." 3R.70. The district court proceeded to impose a sentence of 46-months' imprisonment. 1R.77. This sentence represented the low-end of the advisory guideline range.

The district court entered judgment reflecting this sentence the same day. *Id.* On February 7, 2019, Begay timely filed a notice of appeal in the district court. 1R.87. This appeal followed.

SUMMARY OF THE ARGUMENT

Begay argues that the sentencing factors set forth at 18 U.S.C. § 3553(a) permit a district court to consider the fact that, had he been charged in state court, he would likely have received a lesser sentence than that suggested by the Sentencing Guidelines. But precedent from this Court is to the contrary. "[A] district court's authority to consider sentencing disparities [does] not extend to disparities between the applicable federal sentence and the likely sentence a defendant would have received had he been charged in state court." *United States v. Beaver*, 749 F. App'x 742, 748 (10th Cir. 2018) (citing *United States v. Wiseman*, 749 F.3d 1191, 1196 (10th Cir. 2014)).

Begay cannot escape this precedent by relying on the district court's prerogative to impose a variant sentence based on a policy disagreement with the applicable sentencing guideline. The prohibition on considering federal/state sentencing disparities is not a product of the Sentencing Guidelines but rather a statutory prohibition rooted in § 3553(a)(6). In determining a sentence, a district court may not defy its legislative mandate by considering a factor prohibited by statute.

Begay does not identify any subsections of § 3553(a), other than (a)(6), that would allow a district court to consider federal/state sentencing disparities. But to the extent Begay is understood to argue that provisions

other than § 3553(a)(6) permit such consideration, this argument must fail. Section 3553(a)(6) is the exclusive source of a district court's power to consider sentencing disparities, and it would violate established canons of statutory construction to allow consideration of such disparities under a more general provision of § 3553(a).

Finally, the fact that a district court is prohibited from considering federal/state sentencing disparities does not give rise to an equal protection claim based on an impermissible racial classification. The Supreme Court has long held that any disparate treatment of Native Americans compared to non-Natives is not based on race, but on the recognition of Native Americans as members of quasi-sovereign political entities. *See United States v. Antelope*, 430 U.S. 641, 646-47 (1977).

The United States does not advance these arguments with the intention of ignoring or downplaying the undeniable historical record of mistreatment and injustice suffered by Native Americans. And it may well be that the policy issues Begay raises in his brief deserve further congressional consideration. But the precedent from this Court is clear. If these questions are to be addressed, the authority to do so lies not with this Court but with Congress.

ARGUMENT

I. The District Court Did Not Commit Procedural Error by Refusing to Consider Disparities Between Federal and State Sentencing Schemes.

Begay argues that the district court committed procedural error when it concluded that it was prohibited from considering the disparity between the sentence recommended by the United States Sentencing Guidelines and the likely sentence that he would have received had he been sentenced for the same conduct in New Mexico state court. The district court's conclusion on this point, however, is consistent with precedent from this Court and does not represent procedural error.

A. Standard of Review

This Court reviews for reasonableness sentences imposed by the district court. "[R]easonableness review has two aspects: procedural and substantive." *United States v. Cookson*, 922 F.3d 1079, 1091 (10th Cir. 2019). "Review for procedural reasonableness focuses on whether the district court committed any error in calculating or explaining the sentence." *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009). When reviewing a sentence for procedural reasonableness, this Court reviews the district court's legal conclusions de novo and its factual findings for clear error. *United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012).

This Court reviews the substantive reasonableness of a sentence under an abuse of discretion standard. *United States v. Steele*, 603 F.3d 803, 809 (10th Cir. 2010). "The substantive component relates to the length of the sentence: In evaluating the substantive reasonableness of a sentence, we ask whether the length of the sentence is reasonable considering the statutory factors delineated in 18 U.S.C. § 3553(a)." *United States v. A.B.*, 529 F.3d 1275 (10th Cir. 2008). On appellate review, a sentence within the correctly calculated guideline range is entitled to a presumption of reasonableness. *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1215 (10th Cir. 2008).

B. The District Court Did Not Commit Procedural Error by Refusing to Consider the Sentence Begay Would Have Received in State Court for Similar Conduct.

1. *As Begay acknowledges, this Court's precedent prohibits consideration of federal/state sentencing disparities.*

As noted above, Begay challenges the procedural reasonableness of the 46-month sentence imposed by the district court. His main argument is that the district court committed procedural error when it determined that it was not permitted to consider federal-state sentencing disparities in fashioning an appropriate sentence.[3] According to Begay, "the factors delineated at 18

[3] Begay's brief also raises the district court's refusal to entertain evidence of an incident in which the victim of Begay's assault himself stabbed Begay's girlfriend. Op. Br. at 12. Though that assault resulted in no criminal charges, Begay sought to use it in support of his argument on unwarranted sentencing disparities. 3R.57. While Begay fails to develop a legal argument based on the

U.S.C. § 3553(a) permit a district court judge to vary from the calculated guideline range to account for the unwarranted sentencing disparity between the [PSR]'s Guidelines-based sentencing range and the sentences of similar offenders in the state system." Op. Br. at 17-18.

Begay does not identify which subsection(s) of § 3553(a) supposedly permit a district court to account for the disparity between federal and state sentencing schemes.[4] But the source of a district court's authority to consider

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exclusion of this evidence, any such argument would be without merit. Section 3553(a)(6) permits the district court to consider unwarranted sentencing disparities only "among *defendants . . . who have been found guilty of similar conduct*." 18 U.S.C. § 3553(a)(6) (emphasis added). That provision does not permit comparison with the conduct of uncharged individuals. *See United States v. Lacson*, 177 F. App'x 751, 751 (9th Cir. 2006) ("[A]ny consideration of the disparity in punishment between Lacson and other uncharged individuals does not properly fall under one of the factors listed in § 3553(a).").

[4] Begay's lack of specificity on this point may be intended to allow him the latitude to argue, at a later time, that provisions other than § 3553(a)(6) permit a district court to consider such disparities, especially in cases involving Native American defendants. But Begay has not identified any other § 3553(a) factor that would grant such authority to the district court. Nor has he developed any argument as to why such factor permits consideration of federal/state sentencing disparities. As such, he should not be permitted to advance such argument at a later stage in the proceedings. *See United States v. De Vaughn*, 694 F.3d 1141, 1154–55 (10th Cir. 2012) ("It is well-settled that arguments inadequately briefed in the opening brief are waived.").

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sentencing disparities is § 3553(a)(6). That subsection provides that in fashioning an appropriate sentence, a district court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). And as Begay candidly and correctly acknowledges, "current case law prohibits consideration of federal-state sentencing disparities." Op. Br. at 15; *see id*. at 4 ("Federal courts have repeatedly held that federal-state sentencing disparities should not be considered.").

In *United States v. Branson*, 463 F.3d 1110 (10th Cir. 2006), defendant raised the same sentencing argument that Begay offers here, namely, "that he would have received a significantly lower sentence had he been prosecuted in state court." *Branson*, 463 F.3d at 1112. Branson further argued that the directive contained in § 3553(a)(6) to "avoid unwarranted sentence disparities" permitted the district court to consider the likely sentence imposed by a state court for similar conduct. *Id.*

This Court rejected the defendant's challenge. "The sentence imposed on Mr. Branson is not unreasonable simply because it is more severe than a state-court sentence would have been." *Id.* at 1113. The Court explained that consideration of federal/state sentencing disparities is at odds with the policy underlying § 3553(a)(6). "Adjusting federal sentences to conform to those imposed by the states where the offenses occurred would not serve the

purposes of § 3553(a)(6), but, rather, would create disparities within the federal system, which is what § 3553(a)(6) is designed to discourage." *Id*.

This Court reaffirmed that holding in *United States v. Wiseman*, 749 F.3d 1191 (10th Cir. 2014). In *Wiseman*, defendant was charged with drug offenses and argued for a downward variance based on the lower sentence she would have received had she been charged in state court. On appeal, defendant argued that "the district court committed procedural error because it did not acknowledge it has authority to consider the disparity between sentences imposed in state court when compared to sentences imposed in federal court for similarly situated offenders." *Wiseman*, 749 F.3d at 1193-94. This Court again explained that "§ 3553(a)(6) cannot be used to support a downward variance based on the judge's policy judgment that drug sentences are too long when compared to state court sentences." *Id*. at 1196.

More recently, in *United States v. Beaver*, 749 F. App'x 742 (10th Cir. 2018), this Court remanded a case for resentencing because the district court impermissibly accounted for such disparity in fashioning its sentence. There, the Native American defendant pled guilty to involuntary manslaughter after he killed two people while driving drunk. *Beaver*, 749 F. App'x at 744-45.[5] In

[5] Begay argues that "the cases cited by the government and district court at sentencing did not specifically consider [the Sentencing Guidelines] in the context of Indian law." Op. Br. at 16. Yet *Beaver* involved a Native American defendant, who, represented by the same counsel as Begay, successfully

response to Beaver's argument that he would be facing less time had he been prosecuted in state court, the government replied that federal guidelines were actually more lenient than the state statutory scheme for that type of crime. *Id*. at 745. Imposing an upward variance, the district court relied, in part, on the fact that "the guideline range provides for a sentence significantly lower than Mr. Beaver could have received in State Court." *Id*. at 748. On appeal, this Court held such consideration to constitute plain error requiring remand. Citing its holdings in *Branson* and *Wiseman*, this Court explained that "a district court's authority to consider sentencing disparities [does] not extend to disparities between the applicable federal sentence and the likely sentence a defendant would have received had he been charged in state court." *Id*.

2. *No other § 3553(a) factors permit consideration of federal/state sentencing disparities.*

To the extent Begay may be understood to argue that the district court has authority to consider federal/state sentencing disparities under provisions of § 3553 other than (a)(6), that argument likewise fails. This Court has made clear that consideration of state sentencing outcomes "would

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urged this Court to prohibit consideration of federal/state sentencing disparities where it could hurt a Native American defendant. It is, therefore, incorrect for Begay to suggest that this issue has not been considered in the context of Indian law.

create disparities within the federal system, which is what § 3553(a)(6) was designed to prevent." *Branson*, 463 F.3d at 1112. Allowing a district court to consider state sentencing outcomes under a subsection of § 3553(a) other than (a)(6) would undermine this policy prescription.

Moreover, interpreting other subsections of § 3553(a) to permit consideration of federal/state sentencing disparities would run contrary to the "general/specific canon" of statutory construction. *See United States v. Porter*, 745 F.3d 1035, 1049 (10th Cir. 2014). This canon "works to ensure that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Id.* (internal quotation marks and citation omitted).

Here, the more specific subsection with regard to disparities is § 3553(a)(6), which speaks directly to a district court's authority to consider unwarranted sentencing disparities. All other subsections of § 3553(a) on which Begay may rely, to include "promot[ing] respect for the law" and "provid[ing] just punishment" are more general. 18 U.S.C. § 3553(a)(2). Allowing consideration of disparities under these more general provisions would thwart the policy goals of § 3553(a)(6). Indeed, the limitations imposed by § 3553(a)(6) would be meaningless if they could be circumvented simply by referencing another subsection of § 3553(a). Application of the general/specific canon, therefore, compels the conclusion that these general

provisions must yield to the more specific provision—§ 3553(a)(6). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

3. *Because the prohibition on consideration of federal/state sentencing disparites is grounded in statute, Begay's argument that the district court has authority to reject a sentencing guideline on policy grounds must fail.*

Despite the clear authority outlined above, Begay argues that because the district court may vary from the applicable guideline range based on a policy disagreement with the Sentencing Guidelines, it necessarily has authority to consider federal/state sentencing disparities. *See* Op. Br. at 18. Begay then devotes a substantial portion of his opening brief to criticizing the rationale underlying the applicable sentencing guideline based on its supposed lack of an empirical foundation and its disparate impact on Native American defendants. *See id*. at 20-31.

Begay is certainly correct that a district court may impose a variant sentence based on a policy disagreement with the relevant sentencing guideline. The prime example of this is *Kimbrough v. United States*, 552 U.S. 85 (2007). In *Kimbrough*, the Supreme Court held that a district court was

within its rights to vary based on a policy disagreement with the Sentencing Guidelines' adoption of a 100:1 crack to powder ratio in cases involving cocaine. *Kimbrough*, 552 U.S. at 91.

But this Court has never permitted a district court to rely on its disagreement with congressional policy in imposing sentence. *See United States v. Walker*, 844 F.3d 1253, 1257-58 (10th Cir. 2017) (where district court questioned the value of general deterrence, "Federal law required the court to put its skepticism aside."). Indeed, it has expressly rejected the argument that a district court's prerogative to vary based on a policy disagreement with the Sentencing Guidelines affords it license to consider federal/state sentencing disparities. In *Wiseman*, defendant argued that because "district courts can vary based on policy disagreements with the guidelines" by extension they must be "empowered to consider how the calculated [g]uideline sentence promotes an unwarranted disparity between similar defendants . . . whether in the federal or state system." *Wiseman*, 749 F.3d at 1195 (alteration in original). This Court disagreed, holding that the district court's ability to vary based on a policy disagreement with the Sentencing Guidelines does not alter the statutory prohibition against consideration of federal/state sentencing disparities imposed by § 3553(a)(6). *Id.* ("The *Kimbrough* line of cases do not, however, conflict with *Branson* as

they do not provide a different statutory interpretation of § 3553(a)(6) or otherwise counsel a different result.").

This reasoning finds support in Supreme Court precedent. In *Spears v. United States*, 555 U.S. 261 (2009), the Court explained that the "correct interpretation" of *Kimbrough* is that a district court may vary "based solely on its view" that the Guidelines' crack-cocaine ratio "creates an unwarranted disparity *within the meaning of § 3553(a) . . .*" *Spears*, 555 U.S. at 263-64 (emphasis added) (*quoting United States v. Spears*, 533 F.3d 715, 719 (8th Cir. 2008) (Colloton, J., dissenting)). By adding the qualifying phrase "within the meaning of § 3553(a)," *Spears* sends a clear message that a district court's ability to vary based on a policy disagreement with the Sentencing Guidelines is circumscribed by statute, and the only type of unwarranted disparity that a district court may consider is one falling within the purview of § 3553(a). *Branson* and *Wiseman* make pellucid that this category does not include disparities between federal and state sentencing schemes. *Branson*, 463 F.3d at 1112; *Wiseman*, 749 F.3d at 1196 ("§ 3553(a)(6) cannot be used to support a downward variance based on the judge's policy judgment that drug sentences are too long when compared to state court sentences.").

Likewise, in *Pepper v. United States*, 562 U.S. 476 (2011), the Supreme Court first took care to establish that congressional policy did not prohibit consideration of a particular factor (postsentencing conduct) before holding

that a district court may take such conduct into account despite a contrary Guidelines policy. *Id*. at 499-500. It then reiterated that a variance is permissible if the district court disagrees with the way that the Sentencing Commission has attempted to *implement* congressional policy. *Id*. at 501. Contrary to Begay's contention, Op. Br. at 19, *Pepper* does not suggest that a district court may impose sentence in disagreement with congressional policy.

Moreover, this Court has made clear that it would constitute procedural error for a district court to consider a factor beyond those enumerated in § 3553(a). *United States v. Smart*, 518 F.3d 800, 803-04 (10th Cir. 2008) ("[I]f a district court bases a sentence on a factor not within the categories set forth in § 3553(a), this would indeed be one form of procedural error. Section 3553(a) mandates consideration of its enumerated factors, and implicitly forbids consideration of factors outside its scope."). Thus, a district court may only consider sentencing disparities to the extent permitted by § 3553(a)(6), and that provision does not authorize consideration of differences in federal and state sentencing schemes. Begay cannot escape this reality by framing his argument as one centered on the policy or development of the Sentencing Guidelines, rather than on § 3553(a).

Finally, even if Begay were correct that the district court had the freedom to consider federal/state sentence disparities in his case, the district court would not have been required to adopt his policy position. "Logically,

because a district court may base a variance on a policy disagreement with a particular Guideline, the district court is also free to agree with the policy reflected in that Guideline." *United States v. Lopez-Macias*, 661 F.3d 485, 493 (10th Cir. 2011). Here, the district court made clear that it had no inclination to take state disparities into account. "[E]ven if I wanted to — *and I don't* — I wouldn't be able to actually use the information that has been suggested because I really would have no basis for comparison anyway,"[6] the court said. 3R.70 (emphasis added). The court did not lament that its hands were tied; it stated without reservation that it did not wish to consider the disparities argument. Begay's case on appeal therefore fails for the additional reason that he cannot establish any harm from the district court's alleged misunderstanding of its discretion, discretion that the court would not have exercised in his favor.

II. The Within-Guideline Sentence Imposed by the District Court Is Substantively Reasonable.

Begay argues that his 46-month sentence was substantively unreasonable because the district court failed to consider federal/state sentencing disparities in arriving at that sentence. *See* Op. Br. at 31 ("Here,

[6] The district court here was not suggesting, contrary to Begay's implication, that no information was available about federal/state disparities. It was explaining that even considering that information, it would have no way to compare the facts of Begay's assault against those who received state sentences. 3R.70.

the court's sentence was unreasonable because it failed to recognize federal-state disparities warranted a place in its sentencing deliberation."). As discussed above, Begay argues that § 3553(a) permits a district court to consider such disparities. *Id*. at 32 ("Reasonableness should imply a rational and meaningful consideration of the factors enumerated in § 3553(a).")

Because Begay's argument rests exclusively on the premise that the district court failed to consider the full range of § 3553(a) factors, however, this argument is properly viewed through the lens of procedural, rather than substantive reasonableness. *See United States v. Sanchez-Leon*, 764 F.3d 1248, 1268, n.15 (10th Cir. 2014); *United States v. Cookson*, 922 F.3d 1079, 1091 (10th Cir. 2019) (holding that a district court's failure to consider the § 3553(a) factors constitutes procedural error). This procedural reasonableness argument fails because under established precedent from this Court, a district court is not permitted to consider federal/state sentencing disparities in fashioning an appropriate sentence. Begay offers no other argument as to why his sentence should be deemed substantively unreasonable.

III. The Prohibition on Considering Federal/State Sentencing Disparities Does Not Give Rise to an Equal Protection Claim.

Although relegated to a footnote, Begay also suggests that the district court's inability to consider federal/state sentencing disparities "is

tantamount to an equal protection violation, as it raises . . . concerns of injustice based on immutable characteristics." Op. Br. at 17, n.7. Begay frames his argument along racial lines, suggesting that impermissible disparities "exist between Native Americans and their non-Native counterparts who are subject to lesser sentences simply by virtue of being subject to state rather than federal jurisdiction." *Id.* at 5.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend XIV. Although by its terms the equal protection clause applies only to the states, the Supreme Court has held that the due process clause of the Fifth Amendment incorporates a guarantee of equal protection applicable to the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Under the Fifth Amendment's guarantee of equal protection, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny" and will pass constitutional muster "only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

To the extent Begay is advancing an equal protection argument, however, such argument is squarely foreclosed by the Supreme Court's decision in *United States v. Antelope*, 430 U.S. 641 (1977). In *Antelope*,

defendants raised precisely the equal protection argument alluded to in Begay's brief. They argued that "their felony-murder convictions were unlawful as products of invidious racial discrimination" because "a non-Indian charged with precisely the same offense . . . would have been subject to prosecution only under Idaho law, which . . . does not contain a felony-murder provision." *Antelope*, 430 U.S. at 643.

The Supreme Court rejected this argument, explaining that subjecting Native Americans to federal, rather than state criminal laws does not reflect a race-based classification, but a political one. "[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as a separate people with their own political institutions." *Id.* at 647 (internal quotation marks and citation omitted); *see also United States v. Jim*, 786 F.3d 802, 805, n.2 (10th Cir. 2015) (rejecting equal protection claim based on *Antelope*); *United States v. Prentiss*, 273 F.3d 1277, 1281 (10th Cir. 2001) (holding that *Antelope* stands for the proposition that "federal regulation of Indian affairs is not based on an unlawful racial classification.").[7] In light of *Antelope*, any race-based equal protection argument necessarily fails.

[7] *Antelope* also serves to reject an equal protection-based claim relating exclusively to federal/state sentencing disparities. *See Antelope*, 430 U.S. at 648-49 ("Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country[.] [I]t is of no consequence that the federal

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

For the foregoing reasons, the district court did not commit procedural error in sentencing Begay, and the within-guideline sentence it imposed was substantively reasonable. This Court should, therefore, affirm the 46-month sentence imposed by the district court.

Because the arguments presented in this appeal are the subject of established precedent, oral argument would not assist this Court in developing the applicable law. For this reason, oral argument is not requested.

Respectfully submitted,

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scheme differs from a state criminal code otherwise applicable within the boundaries of the State of Idaho.") (citation omitted).

TYPE-VOLUME CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 4,913 words. I relied on my word processor to obtain the count. My word processing software is Word 2016.

s/ John C. Anderson
John C. Anderson
United States Attorney

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on July 18, 2019, and that the original and six photocopies of the foregoing brief will be sent by Federal Express to the United States Court of Appeals for the Tenth Circuit, Office of the Clerk, located at the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, 80257, within two business days of the electronic filing.

I ALSO CERTIFY that Brian A. Pori, attorney for Defendant-Appellant Patrick Begay, is a registered CM/ECF user, and that service will be accomplished by the appellate CM/ECF system.

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