No. 18-2168

In the United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PATRICK BEGAY

Defendant-Appellant.

Appeal from the United States District Court for the District of New Mexico
Honorable Judith C. Herrera, presiding

USDC NM No. 1:17-CR-01714-JCH

APPELLANT'S OPENING BRIEF

Oral Argument is Requested

(Attachments scanned PDF format)

Brian A. Pori
Attorney for Appellant
Assistant Federal Public Defender
111 Lomas NW, Suite 501
Albuquerque, NM 87102
505.346.2489
brian_pori@fd.org

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SUMMARY OF THE ARGUMENT

Federal law as it pertains to criminal convictions for Indian people is in need of a major overhaul. It is 2019, and yet, in many ways, this area of the law remains shamefully ignored.

As an immediate example, this brief employs the word "Indian" because, while problematic, it has remained the legal term used in the laws of the United States to refer to this country's indigenous population. Although the term dates back to the mistaken belief of early European explorers in North America who thought they had encountered people on the South Asian subcontinent, through case law, it has come to mean a person who is an enrolled member of a federally recognized tribe or whose relationship with a tribe is such that the federal government recognizes that person as an Indian. *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995); *see also F.T.C. v. Payday Financial, LLC*, 935 F.Supp.2d 926, 929 n.1 (D.S.D. 2013).

The case establishing this still-used legal test of what it means to be an "Indian"—*United States v. Rogers*, 45 U.S. 567—is undeniably racist. *Rogers* refers to this country's indigenous population as an "unfortunate race" that the white population "in the spirit of humanity and justice...[have] endeavored by every means in its power to enlighten their minds...and to

save them if possible from the consequences of their own vices." Since *Rogers*, the United States Supreme Court has done little to update the definition of "Indian"—including selecting a less-offensive term to describe the indigenous population—to account for more recent American dynamics, such as ever-increasing inter-marriage, social and geographic mobility, cross-cultural understanding and respect, and more assertive self-identity.

It is true that something awful happened in this case. Mr. Begay, a Diné, acknowledged he became intoxicated—the burden of his lifelong addiction to alcohol stemming from his troubled childhood—and assaulted his partner's mother's boyfriend with a bat and knife.[1] Doc. 52; ROA, Vol II, 12-15; ROA, Vol III, 85.[2] For those actions, he admitted guilt and accepted

[1] How and why alcohol abuse is so prevalent in Indian country is something that also warrants examination, especially since alcoholism often causes encounters with the criminal justice system. The fact that "Native Americans as a whole, and particularly those living in Indian country, endure higher rates of poverty, unemployment, low education, crime rates and alcoholism than the rest of the country" provides a necessary contextual backdrop for understanding crimes committed in Indian country. Timothy J. Driske, CORRECTING NATIVE AMERICAN SENTENCING DISPARITY POST-BOOKER, 91 Marq. L. Rev. 723, 740.

[2] "Doc." refers to the District Court Clerk's Record and is followed by the docket control number and, where necessary, a page number. Counsel is filing a contemporaneous motion to supplement the record to ensure the plea hearing is available on appeal.

responsibility, pleading as charged to the government's indictment without the benefit of a plea agreement. He acknowledged his alcoholism and the need for treatment to harness his addiction. ROA Vol. III, 85-86.

But this case is not about his guilt. It is about something much larger than that. It is about fairness and this Court's ability to take some responsibility too. Responsibility for this country's centuries-old dishonorable treatment of Native Americans.[3] This Court has the power—as courts have historically done in the struggle for equality—to begin to right

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[3] The idea of taking responsibility for the racism of our predecessors, while not a wholly novel concept, was inspired in part by a recent article by Kyle Korver, an NBA athlete and member of the Utah Jazz:

> And I guess I've come to realize that when we talk about solutions to systemic racism — police reform, workplace diversity, affirmative action, better access to healthcare, even reparations? It's not about guilt. It's not about pointing fingers, or passing blame.
>
> It's about responsibility. It's about understanding that when we've said the word "equality," for generations, what we've really meant is equality *for a certain group of people*. It's about understanding that when we've said the word "inequality," for generations, what we've really meant is *slavery*, and its aftermath — which is still being felt to this day. It's about understanding on a fundamental level that black people and white people, they still have it different in America. And that those differences come from an ugly history..... not some random divide.

Kyle Korver, *Privileged*, THE PLAYER'S TRIBUNE (Apr. 8, 2019), https://www.theplayerstribune.com/en-us/articles/kyle-korver-utah-jazz-nba (last visited Apr. 18, 2018); *see also* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform*," THE YALE

some wrongs. Talking about race can be uncomfortable and messy, it is rarely easy. But getting out of our own way and overcoming our temporary discomfort is essential if we seek positive social change.

Counsel of record is well-aware of the law. Federal courts have repeatedly held that federal-state sentencing disparities should not be considered. *See e.g. United States v. Wiseman*, 749 F.3d 1191 (10th Cir. 2014). However, he is also aware that these glaring disparities are unjust and can no longer be ignored. And he does not stand alone. From legal scholars who have studied Native Americans, to judges willing to address this disregarded population, to fellow practitioners who understand the ins-and-outs of the federal criminal *justice* system, it is obvious that Indian defendants suffer disproportionately harsher sentences than if they were non-Indian or if they had committed their crimes off the reservation. *See e.g.* Charles B Kornmann, INJUSTICES: APPLYING THE SENTENCING GUIDELINES AND OTHER FEDERAL MANDATES IN INDIAN

LAW JOURNAL FORUM 861 (March 28, 2019) ("Our criminal laws are based on some of the most arbitrary aspects of human existence, like power, racial bias, and economic self-interest—they reflect our demons, past and present.")

COUNTRY, 13 Fed. Sent'g Rep. 71, 71 (2000).[4] Accordingly, because New Mexico is one of the handful of jurisdictions where a sizeable Native American population exists, counsel maintains that it is his responsibility to do something.

In this appeal, Mr. Begay maintains his argument that the Courts are in the best position to eradicate sentencing disparities which 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. While ordinarily federal-state sentencing disparities are not considered by our courts, the federal government's unique relationship—and its centuries-long, troubled, racist history—with Native Americans necessitates a different approach.

[4] An excerpt from Judge Kornmann's article (and of significance: this was written 19 years ago, and the problem he speaks of persists):

> Ask virtually any United States District Judge presiding over cases from Indian Country whether the Federal Sentencing Guidelines are fair to Native Americans; ask virtually any appellate judge dealing with cases from Indian Country the same question, and I believe the answer would be largely the same: No. Too often we are required to impose sentences based on injustice rather than justice...

STATEMENT OF THE ISSUE

In consideration of the factors delineated in 18 U.S.C. § 3553(a), Mr. Begay, through counsel, urged the district court judge to vary from the calculated guideline range to account for the unwarranted sentencing disparity between the presentence report's advised sentencing range and the sentences of similar offenders in the state system. As part of this argument, he argued that the Sentencing Commission failed to act in its "characteristic institutional role" when creating its sentencing guidelines. ROA Vol. I, 35-41; ROA Vol. III, 54-57; *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). The district court believed this consideration was not one it was authorized to make. ROA Vol. III, 7.

In so ruling, did the district court commit error in failing to acknowledge it had authority to consider the unwarranted sentencing disparity between Mr. Begay's sentence in the federal court and similarly situated defendants in the local state system?

STATEMENT OF JURISDICTION

Appellant Patrick Begay appeals from a final judgment entered February 5, 2019, in the United States District Court, District of New Mexico,

the Honorable Judith C. Herrera presiding. Attachment A; ROA, Vol. I, 77-84.[5]

On June 28, 2017, Mr. Begay was charged in a three-count indictment with assault with two distinct dangerous weapons (Counts 1 and 2) that resulted in serious bodily injury (Count 3) in violation of 18 U.S.C. § 1153, § 113(a)(3) and § 113 (a)(6). ROA, Vol. I, 7-8. The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

On March 22, 2018, Mr. Begay pled guilty to each count of the indictment without the benefit of a plea agreement. Doc. 52, p. 15. Following a hearing, Mr. Begay was sentenced, and the final judgment entered February 5, 2019. Attachment A; ROA, Vol. I, 77-84. The notice of appeal was timely filed on February 7, 2019. ROA, Vol. I, 87. *Accord* Fed. R. App. 4(b)(2). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[5] In accordance with 10 Cir. R. 28.1, references to the three-volume record on appeal are to the record volume and page number, found at the bottom-right of the page in each of the first two volumes and at the top-right of the page in the third volume (e.g., ROA, Vol. I, 12).

STATEMENT OF THE CASE

By virtue of his status as an Indian, Mr. Begay is subject to the Major Crimes Act (hereinafter "the MCA"). In 1885, Congress enacted the MCA which conferred federal jurisdiction to prosecute enumerated offenses that are committed by an Indian "within the Indian country." 18 U.S.C. § 1153(a). In its current form, it applies to various classes of felonies, including the felony assault crimes to which Mr. Begay pled. When Congress decided to make the federal Sentencing Guidelines (hereinafter "the Guidelines") applicable to the Major Crimes Act, several experts warned of potential disparate sentencing issues: the fear was that Native American defendants would be treated more harshly by the federal sentencing system than if Indian defendants were prosecuted by their respective states for the same or similar offenses. *See* United States Sentencing Commission, Report of the Tribal Issues Advisory Group, 17 (May 16, 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf (hereinafter "TIAG Report"). As noted, the primary cause of the concerns is jurisdictional. Native Americans are disproportionately found in federal court as crimes committed by Native Americans on native lands fall under federal jurisdiction.

To address some of these concerns, in 2002, the United States Sentencing Commission (hereinafter "the Commission") created an *ad hoc* Advisory Group on Native American sentencing issues. *Id*. The 2002 Advisory Group was tasked with considering "any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans under the Major Crimes Act." *See* United States Sentencing Commission, Report of the Native American Advisory Group, 9 (Nov. 3, 2013) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf (hereinafter "NAAG Report"). When the NAAG Report issued, there was limited data available to develop comprehensive recommendations. Still, the three states studied—New Mexico included—yielded findings that given similar conduct, Native American aggravated assault defendants received longer sentences in federal courts. *Id*. at 14-19. In fact, New Mexico was highlighted for its significant disparity:

> When one considers the data from New Mexico, the disparity between state and federal sentences for assault is even more dramatic. The average sentence received by an Indian person convicted of assault in New Mexico state court is six months. The average for an Indian convicted of assault in federal court in New Mexico is 54 months. While the New Mexico statistics are based in part on low level offenses which would generally not be prosecuted in federal court, the difference in sentence length is so great even the

> elimination of these offenses does not negate the significance of the disparity. The six month versus 54 month difference covers a number of offense levels (15), and thus easily it meets the prima facie disparity test.

The NAAG Report "strongly recommended" the Commission reduce the base offense level for aggravated assault by two levels, which it called a "conservative approach," to eliminate the disparity between state and federal sentences. NAAG Report 34. The Commission responded by lowering the base offense level by only one. *See* U.S. Sentencing Guidelines Manual, Supplement to Appendix C, Amendment 663. Subsequent data collected by the Commission showed that, after the amendment, the overall average federal sentence for aggravated assault increased. *United States v. Joshua Begay*, No. CR 04-1979 MV, 2006 WL 8444146, at *6-7 (D.N.M. June 2, 2006) (unpublished). Part of the increase resulted from the Commission's decision to contemporaneously increase all of that guideline's corresponding Special Offense Characteristics for bodily injury. *Id.*; U.S. Sentencing Guidelines Manual §§ 2A2.2(b)(3)(A)-(E)gui.

By 2015, not much had changed. The Commission formed a new group—the "Tribal Issues Advisory Group" to again study sentencing disparities, which, according to those familiar with the criminal justice system, still existed. TIAG Report 3, 19. According to the report issued by the

group, data collection *remained* insufficiently comprehensive to tackle the problem. In fact, the 2016 Report's recommendations included suggestions to the Commission of *how* to collect the data that (1) Congress failed to collect when it decided to apply the sentencing guidelines to the Major Crimes Act and (2) the Commission itself failed to collect after the 2003 Report. Aside from the persistence of federal-state sentencing disparities, the 2016 Report indicated that "from fiscal year 2003 to fiscal year 2011, Native American defendants received higher sentences than all other races, with the exception of Black defendants." TIAG Report 23. It also confirmed the findings of the 2003 Report with regard to sentences for aggravated assault. *Id*. at 26.

Trial counsel alerted the district court to these problems, first in a sentencing memorandum and again at the sentencing hearing. ROA, Vol I, 24-62; ROA, Vol III, 54-63. A paralegal from the Public Defender's office well-versed in the sentencing disparities was prepared to provide testimony to highlight the problem with disparate sentencing in general and in this case in particular. ROA, Vol. III, 56-57. The paralegal prepared a report, based on comprehensive data, comparing the sentences in New Mexico's Second Judicial District in with federal sentences. *Id*. The government objected, informing the court that it could not consider the testimony pursuant to

Wiseman, 749 F.3d 1191 and *United States v. Beaver*, 749 F. App'x 742 (10th Cir. 2018) (unpublished). ROA, Vol. I, 63-69.

At the sentencing hearing, trial counsel also made another argument regarding disparate sentencing. *Id*. at 57, 62. He informed the court that he wished to put a witness on the stand to testify regarding another aggravated assault, similarly committed, as a stabbing. *Id*. That assault was perpetrated by the victim in this case against Mr. Begay's longtime partner, Adrianne Toledo. *Id*. The government did not prosecute that case. *Id*.

The district court, relying on *Beaver*, sentenced Mr. Begay to forty-six months incarceration, the low end of the presentence report's recommendation based on its Guideline calculation. ROA, Vol. I, 79; ROA, Vol. II, 25; ROA, Vol. III, 95; Attachment A. As part of its ruling, which included a refusal to permit the paralegal's testimony, the district court judge stated that "even if I wanted to [consider the federal-state sentencing disparities]—and I don't...I simply wouldn't have enough information anyway." *Id*. at 70-71; 89.

The district court also refused to consider the other disparity concerning the altercation between Roland Begay and Adrianne Toledo, similarly denying Ms. Toledo's testimony. *Id*. at 71. Despite denying trial counsel's desire to proffer evidence, the district court stated: "I have no

information at all on the facts of that case...or the circumstances of the event." *Id*.

The district court acknowledged that many defendants that come before her are Native Americans with long histories of alcohol addiction and, rather than accepting any responsibility for the role the U.S. government may have played in that long history, placed responsibility on Mr. Begay for "breaking the cycle." *Id*. at 89-91.

ARGUMENT

Issue: The district court's sentence was unreasonable.

In the wake of *United States v. Booker*, 543 U.S. 220 (2005), this Court reviews the sentencing decisions of district courts under a reasonableness standard. *See United States v. Kristl,* 437 F.3d 1050, 1053 (10th Cir. 2006) (per curiam). Reasonableness review comprises both "procedural and substantive components." *United States v. Atencio,* 476 F.3d 1099, 1102 (10th Cir. 2007).

When this Court reviews a sentence for procedural reasonableness, it analyzes whether the district court committed any error in calculating or explaining the sentence. *Id*. A district court's failure to consider the § 3553(a) sentencing factors constitutes procedural error. *United States v.*

Haley, 529 F.3d 1308, 1311 (10th Cir. 2008) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). The question of whether a district court complied with 18 U.S.C. § 3553(c) is reviewed de novo. *United States v. Delgado*, 357 F.3d 1061, 1071 (9th Cir. 2004); *see also United States v. Rose*, 185 F.3d 1108, 1112-1113 (10th Cir. 1999) (considering that issue de novo). De novo review applies whether or not the defendant objected to the sentencing court's failure to comply. *United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006) (the question is whether the district court fulfilled its duties under § 3553(c)(1) and not what the accused did); *United States v. Cunningham*, 429 F.3d 673, 679-680 (7th Cir. 2005) (an attorney in federal court "is not required to except to rulings by the trial judge."); Fed. R. Crim. P. 51(a) ("Exceptions to rulings or orders of the court are unnecessary."); *see also Rose*, 185 F.3d at 1112-1113 (reviewing de novo where apparently no objection was made).

"[S]ubstantive reasonableness review broadly looks to whether the district court abused its discretion . . . in light of the 'totality of the circumstances.'" *United States v. Sayad*, 589 F.3d 1110, 1116 (10th Cir. 2009) (quoting *Gall*, 552 U.S. at 51). This Court's review for substantive reasonableness "continues to have an important role to play and must not be regarded as a rubber stamp." *United States v. Pinson*, 542 F.3d 822, 836

(10th Cir. 2008). "The 'totality of the circumstances' substantive reasonableness calculus demands that [circuit courts] . . . ensure that the sentence caters to the individual circumstances of a defendant, yet retains a semblance of consistency with similarly situated defendants." *United States v. Evans*, 526 F.3d 155, 167 (4th Cir. 2008) (Gregory, J., concurring). Because the court did not consider the imbalance inherent in the Guidelines or the inequity of a punishment, it generated a sentence "'greater than necessary' to achieve [18 U.S.C.] § 3553(a)'s purposes . . . ." *Kimbrough*, 552 U.S. 85, 110.

A. This court possesses the power to remediate the discriminatory impact of the federal sentencing guidelines on Native Americans.

> ...Swift Hawk faces up to five years more time in prison and a much higher fine than a similarly situated Norwegian, or for that matter, another Native American [criminal defendant] in Sioux Falls. This is without taking into account the terrible harshness of the Federal Sentencing Guidelines in their treatment of Native Americans...I do not understand the logic of any of this. **It is, if nothing else, unfair and discriminatory. It is certainly not "equal justice under the law.**"

United States v. Swift Hawk, 125 F. Supp.2d 384, 384-85 (D.S.D. 2000) (emphasis added).

As acknowledged in the opening summary of the argument, current case law prohibits consideration of federal-state sentencing disparities.

Significantly, however, the cases cited at sentencing by the government and district court to preclude consideration of these disparities did not specifically consider them in the context of Indian law. The federal government has imposed a complicated maze of federal criminal jurisdiction on Native Americans. Driske, *supra* n.1, 91 Marq. L. Rev. 723, 728. As a result of these jurisdictional impositions, "Native Americans are subject to federal jurisdiction for many offenses that are almost exclusively within states' criminal jurisdiction, such as...assault." *Id*. at 724.

The Sentencing Commission has been aware since the promulgation of the Guidelines in the 1980s that this jurisdiction would create unfair federal-state sentencing disparities for Native Americans. *Id*. at 749-50, 752. Still, the Commission failed to take preventative measures to remedy the problem. *Id*. Given that the Commission has ignored the data generated by its own Advisory Groups and has dragged its feet on its responsibility to ensure fair sentencing practices, the Courts seem to be the only avenue remaining to remedy the disparities.[6]

[6] Congress has also not acted to eradicate the federal-state disparity in sentencing for Native Americans. *See United States v. Norquay*, 905 F.2d 1157, 1162 (8th Cir. 1990) (noting that after disparate treatment was upheld as not violative of equal protection by the Supreme Court in *United States v. Antelope*, 430 U.S. 641, 647-50 (1977), Congress did not show "any apparent concern.")

If history has taught us anything, it is that the Courts have found ways to eliminate inequality through the law. *See e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584; *Kimbrough*, 552 U.S. 85, 98 (recognizing that the "crack/powder sentencing differential" was associated with a "widely-held perception" that it "promote[d] unwarranted disparity based on race."); *Brown v. Board of Ed. of Topeka, Shawnee Cty. Kan.*, 347 U.S. 483 (1954).[7] Courts have always been at the forefront of social justice movements, acting as catalysts for change. This Court should do the same here to remedy the problems highlighted in this appeal.

1. The district court erred when it refused to consider federal-state sentencing disparities in the context of Native Americans convicted of aggravated assault.

In deciding not to consider Mr. Begay's arguments regarding sentencing disparities, the district court committed procedural error. The outcome of its procedural error was a substantively unwarranted and indefensible prison term. For the reasons that follow, Mr. Begay maintains on appeal that the factors delineated in 18 U.S.C. § 3553(a) permit a district

[7] While counsel recognizes that *Obergefell* and *Brown* presented equal protection claims, the issue raised in this case is tantamount to an equal protection violation as it raises similar concerns of injustice based on immutable characteristics.

court judge to vary from the calculated guideline range to account for the unwarranted sentencing disparity between the presentence report's Guidelines-based sentencing range and the sentences of similar offenders in the state system. This is specifically true in the context of Native American defendants facing assault convictions because the Guidelines for the crime were not created by the Sentencing Commission using empirical data or national experience. *Kimbrough*, 552 U.S. at 109-10.

a. Sentencing judges have authority to act on policy disagreements with the Guidelines.

By making the Guidelines advisory, *Booker* returned to judges their traditional authority to craft an individualized sentence for each unique defendant and criminal case. This authority includes permission to consider factors outside the Guidelines. Sentencing judges may impose sentences that vary from the applicable Guidelines range based on their disagreement with a particular policy reflected in the Guidelines. Under Supreme Court precedent, judges are invited to consider arguments that a guideline fails properly to reflect § 3553(a) considerations, reflects an unsound judgment, or that a different sentence is appropriate regardless. *United States v. Rita*, 551 U.S. 338, 387 (2007). Judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the

Guidelines," *Kimbrough*, 552 U.S. 85, 101-02 (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Rita*, 551 U.S. at 347.

Practitioners and judges may dissect a guideline to discover whether it was developed by the Commission in "the exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109-10. This role, drawn from the Sentencing Reform Act of 1984 (hereinafter "SRA"), has two basic components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of comments, data, and research. *Rita*, 551 U.S. at 349. "Notably, not all of the Guidelines are tied to this empirical evidence." *Gall* 552 U.S. at 46 n.2. When a guideline is not the product of "empirical data and national experience," it is not an abuse of discretion to conclude that it fails to achieve § 3553(a)'s purposes, "even in a mine-run case." *Kimbrough*, 552 U.S. at 109-10; *see also Pepper v. United States*, 562 U.S. 476, 502 (2011); (explaining "that a district court may *in appropriate cases* impose a non-Guidelines sentence based on a disagreement with the Commission's views," including views based on Congressional policy) (emphasis added); *United States v. Corner*, 598 F.3d 411, 415 (7th Cir. 2010) (en banc) (reaffirming well-settled law that "district

judges are at liberty to reject any Guideline on policy grounds—though they must act reasonably when using that power").

b. The Guidelines Ranges for Aggravated Assault Are Not Based on Empirical Data and National Experience.

A district court's authority to vary from the applicable Guidelines range due to a policy disagreement is at its greatest when the offense Guideline at issue is not the product of the Commission's empirical analysis and technical expertise. Congress established the Commission pursuant to the SRA to formulate and constantly refine national sentencing standards. *Kimbrough*, 552 U.S. at 108. In fulfilling this "important institutional role," the Commission draws on a "capacity courts lack to base its determinations on empirical data and national experience, guided by professional staff with appropriate expertise." *Id*. at 109 (citation and internal quotation marks omitted).

When an offense guideline is based on the Commission's analysis of empirical data and national experience, the advisory ranges it produces can fairly be said to "reflect a rough approximation of sentences that might achieve [the sentencing] objectives" of the SRA. *Id*. (quoting *Rita*. 551 U.S. at

350) (internal quotation marks omitted).[8] In that event, the Supreme Court has suggested that "closer review" of sentences outside the applicable range might be warranted. *Id.*; *see also United States v. Cavera*, 550 F.3d 180, 192 (2nd Cir. 2008) (en banc). But no such scrutiny is warranted where a variance is based on a policy disagreement with offense guidelines that are "not based on empirical data and national experience, and hence 'do not exemplify the Commission's exercise of its characteristic institutional role.'" *Kimbrough*, 552 U.S. at 109. In such cases, appellate courts should defer to a sentencing judge's reasonable policy disagreement with the Guidelines. *See, e.g.*, *United States v. VandeBrake*, 679 F.3d 1030, 1037-40 (8th Cir. 2012).

In 1986 when the Sentencing Commission supposedly employed an "empirical approach" based on data about sentencing practices to form its guidelines for aggravated assault, it failed to consider concerns expressed by experts in Indian law regarding the potential for disparities. According to the 2015 Advisory Group's research, "written submissions and public hearing testimony when the Commission was developing the Guidelines in the late 1980s" anticipated future problems of the kind presented in Mr. Begay's case.

[8] The basic sentencing objectives of the SRA are set forth in § 3553(a), which enumerates the factors a sentencing judge must consider when imposing punishment. The SRA further directs the Commission to establish Guidelines that carry out these same objectives. 28 U.S.C. § 991(b)(1)(A).

"Several experts, noting the unavailability of parole in the federal system and other comparative structure disparities in sentencing, urged the Commission to consider the special circumstances of Indian offenders and to be sensitive to the concerns of tribal governments." TIAG Report 17, n.16.

Again, in 1990, when Congress decided to make the Guidelines applicable to the MCA, the Sentencing Commission failed to adequately account for the disproportionate affect those guidelines would have on Native Americans. This is true despite admonishments and warnings from experts in the field. *See* Jon M. Sands, DEPARTURE REFORM AND INDIAN CRIMES: READING THE COMMISSION'S STAFF PAPER WITH "RESERVATIONS," 9 Fed. Sent. R. 144, 145 (1996); TIAG Report 17. While the Commission collected data to create its sentencing matrix based on some factors, it ignored the demographics of the people sentenced to evaluate for disproportionality.[9]

[9] This ignorance is likely because of the self-imposed color-blindness of the Commission. 28 U.S.C §994(d) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.") However, Native Americans are not considered a race, and even if they were, the Commission's refusal to consider race in this context would be unfair, given that the U.S. Government has subjected them to jurisdictional hopscotch due to their race. *See* TIAG Report 17 (citing *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974) to indicate that "it is the legal status of Indian people in treaties and federal law, and not their race or national origin, that separate them from the prohibitions of § 994(d).").

Gregory D. Smith, DISPARATE IMPACT OF THE FEDERAL SENTENCING GUIDELINES ON INDIANS IN INDIAN COUNTRY: WHY CONGRESS SHOULD RUN THE ERIE RAILROAD INTO THE MAJOR CRIMES ACT, 27 Hamline L. Rev. 483, 511.

It is evident that after codifying these disparities, the Commission realized its mistake—that it failed to formulate Guidelines based on empirical data and national experience. Indeed, the first ad hoc Advisory Group in 2002 was formulated to address the problem. NAAG Report i ("This Advisory Group was formed in response to concern raised that Native American defendants are treated more harshly by the federal sentencing system, than if they were prosecuted by their respective states."). Unfortunately, the limited remedial measures taken after that Advisory Group issued its report did little to improve the pervasive federal/state sentencing disparities. *See supra*, p.8 (noting that the Commission lowered the base level for assault by one level after the NAAG Report recommended a minimum of a two-level reduction to help remediate the disparities). In addition, the 2003 Advisory Group observed that it needed *more data* to develop more comprehensive findings and solutions. NAAG Report 12 ("Though there was a continuing concern on the part of the Ad Hoc Advisory Group, because of the limitations of the data set upon which it could base its analysis and from which it could draw conclusions, the Ad Hoc Advisory Group believes the conclusions contained

in this report are supported by the best available data.") Still, the limited data that *did* exist—including statistics from New Mexico—reflected disparate federal-state sentences and an overrepresentation of Native Americans convicted of assault compared with their makeup in the general population. NAAG Report 31-33; *see infra* p.22, Subsection C (providing the actual statistics gathered).

When the Commission launched a new Advisory Group *thirteen years later*, data collection had not improved. TIAG Report 20-21. Still, the 2015 Advisory Group confirmed the decades-old findings. Without significant new data—which the Commission had failed to collect in the thirteen-year gap—and with evidence that the national experts were ignored when formulating the Guidelines and again after the NAAG Report, it is impossible to conclude that the Commission acted in its characteristic institutional role in setting sentencing parameters for Native Americans convicted of assault.

c. The Guidelines Ranges for Aggravated Assault as Applied to Native Americans Have Never Been "Heartlands," and the Commission has Shirked its Responsibility to Make Meaningful Changes When Confronted with this Reality.

Presumably, by looking at federal-state disparities, the 2002 and 2015 Advisory Groups were trying to discover the "'heartland'—a set of typical cases embodying the conduct that each guideline describes." U.S. Sentencing

Guidelines Manual, § 1A4.B (1987). Because the majority of aggravated assault defendants in the federal system are Native Americans, their cases embody the "typical case." 2003 NAAG Report, 31 (noting that "[w]hile Indians represent less than 2% of the U.S. population, they represent about 34% of individuals in federal custody for assault." As the 2003 NAAG Report found, using data supplied by the Commission to the 2002 Advisory Group, "about 34% of those convicted of assault in the federal system are Indian, 27% are White, 20% are African American, 17% are Hispanic, and 2% are classified as other). *Id*. at n.58.[10]

After the 2003 NAAG Report, and certainly after the 2016 TIAG Report, the Commission was not supposed to sit by silently while both the data and experience indicated that its Guidelines ranges in aggravated assault cases as applied to Native Americans were consistently overly punitive. The SRA instructs the Commission to "establish sentencing policies and practices" that, inter alia, "reflect to the extent practicable, advancement

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[10] *See also* Driske, *supra*, 91 Marq. L. Rev. at 743 (using the Commission's own data to conclude: "In 2002, for example, Native Americans nationally comprised 3.6% of all federal criminal defendants but 36.9% of federal criminal defendants that were prosecuted for assault."); Smith, *supra*, 27 Hamline L. Rev. at 515 ("Assaults constitute the greatest portion of crimes prosecuted under the Major Crimes Act, and the ensuing federal jurisdiction results in Indians receiving the greatest percentage of federal assault convictions of any ethnic group.")

in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C); *see also* 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.") Thus, the Introduction to the first Guidelines Manual contains the assurance that "these initial guidelines are but the first step in an evolutionary process" and that "experience with these guidelines will lead to additional information and provide a firm empirical basis for revision." U.S. Sentencing Guidelines Manual, § 1A.1.3; 1A.1.5 (1987). The current Manual provides the same assurance. *See* U.S. Sentencing Guidelines Manual, § 1A.2 (2018) (promising continuing review and modifications by the Commission, based upon, "continuing research, experience and analysis.")

Unfortunately, the promise of evolution has been hollow. The Guidelines ranges for aggravated assault are not now, and have never been, the "heartlands" the Commission sought to establish. By refusing this reality, even in the face of its own Advisory Group's reports, the Commission has

violated its statutory duty to promulgate Guidelines reflecting experience and "advancement in knowledge of human behavior."

Despite repeated, decades-old criticisms from practitioners, judges, scholars and the Commission's own advisory groups, little has been done to address the federal-state sentencing disparity Native American defendants face when convicted for aggravated assault. As the Ad Hoc Advisory Group noted in 2003, more data needed to be collected to properly assess the disparities. Yet, in 2015, when the Commission formulated a new advisory group, accurate data collection was *still* outstanding. Because the courts witness the disparity first-hand, they are in the best position to take action without the need for voluminous amounts of data collection.

d. Examining how state courts sentence a similarly-situated non-Native defendant is part of ensuring federal sentencing courts promote uniformity and proportionality.

The Sentencing Reform Act instructed the Commission to establish Guidelines that would reconcile the multiple purposes of punishment while promoting the goals of uniformity and proportionality. 28 U.S.C. § 991(b)(1). The multiple purposes of punishment are reflected in § 3553(a), which sets forth the basic sentencing objectives of the SRA. Those purposes include just punishment, deterrence, incapacitation, and rehabilitation. § 3553(a); *see*

also U.S. Sentencing Guidelines Manual § 1A.1.2-1.3 (2018). Accordingly, as relevant here, sentencing courts must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6). They must also consider that the sentence imposed "promotes respect for the law." § 3553(a)(2)(A).

i. Precedent that precludes consideration of federal-state disparities in sentencing has not specifically considered the question of disproportionality of federal sentencing on Native Americans.

Appellate courts have thus far declined to grant departures solely on the basis of a disparity between state and federal sentences for the same offense. *See Wiseman*, 749 F.3d 1191; *United States v. Branson*, 463 F.3d 1110, 1112-13 (10th Cir. 2006) (listing other circuits similar holdings). The courts offer variegated reasoning, including that the Commission's goal of achieving uniformity in federal sentencing would be undermined if district courts were to consider a state sentence for comparable conduct. *Branson*, 463 F.3d at 1112-13. For example, part of the logic the *Wiseman* Court used to preclude review of federal-state disparities was that § 3553(a)(6) was only meant to apply to sentencing disparities "among and between federal

defendants sentenced under the federal sentencing guideline range." 749 F.3d 1191, 1196.

However, to conduct meaningful research, the 2002 and 2015 Advisory Groups *had* to look at state assault sentences because assaults for which Native Americans are prosecuted in federal court have no other federal equivalent, again, because of the unique standing of Native peoples subjecting them to federal jurisdiction. *Cf. Wiseman*, 749 F.3d at 1196 (in the context of disparate federal-state sentencing disparity *for drug crimes*, which can be committed by all races equally, arguing that §3553(a)(6) is "only intended to apply to sentencing disparity among and between similarly situated federal defendants").

In addition, as the 2003 NAAG Report highlighted, the fact that Native Americans are subjected to federal-state sentencing disparities in the context of aggravated assault is the product of "an accident of history and geography." NAAG Report 34. The Report noted:

> The assault statutes are among the earliest federal laws, and they were apparently intended to provide for law and order in areas not policed by various states. Generally, states oversee the administration of criminal law dealing with assault, and the sentences states hand down for assault are much less severe than federal assault sentences. For states analyzed by the Commission staff, federal assault sentences are, for the most part, higher than state sentences. The inclusion of Indian Country under federal assault jurisdiction, which has resulted in a disproportionate percentage of Indian offenders incarcerated for

> federal assault would appear to be an accident of history and geography.

NAAG Report 34.

Put another way, the sentencing disparities to which Native Americans are subject has resulted from an expired federal interest and cannot be considered without federal-state comparisons because it results from our unique jurisdictional arrangement with Native Americans. Conversely, *Wiseman* dealt with a defendant charged with a drug offense, an area that Congress has targeted with federal jurisdiction because drug crimes implicate an *ongoing* federal interest. Federal jurisdiction over drug crimes does not disproportionately affect Native Americans, or any one group of defendants, due to "an accident of history and geography." *See Joshua Begay*, 2006 WL 8444146, at n.9.

Moreover, ignoring the jurisdictional anomalies—a federal government *creation*—is a convenient sidestep around an important issue and works against § 3553(a)(2)(A)'s mandate that sentences foster respect for the law. *See United States v. Deegan*, 605 F.3d 625, 656-657 (8th Cir. 2010) (Bright, J. dissenting) (recognizing that the Majority's affirmed sentence "promotes disrespect for the law and the judicial system" because while "ordinarily state sentences are not germane to showing disparities in sentencing," an

exception should exist for "a woman living in North Dakota and generally subject to state and tribal laws, except as to some aspects of federal law because of her residency on an Indian reservation."); *see also Kimbrough*, 552 U.S. 85, 98 (noting that the Sentencing Commission recognized that the "sentencing differential" between crack and powder cocaine "fosters disrespect for and lack of confidence in the criminal justice system" because the disparities fell across racial lines).

B. In failing to consider sentencing disparities, the district court crafted a substantively unreasonable sentence.

After *Booker*, a single key provision of the Sentencing Reform Act dictates judicial action: The district court must, in every case, select a punishment that is "sufficient, but not greater than necessary" to accomplish the purposes of sentencing listed in § 3553(a). A sentencing judge should also "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall* 552 U.S. at 52, citing *Koon v. United States*, 518 U.S. 81, 98 (1996). Here, the court's sentence was unreasonable because it failed to recognize federal-state sentencing disparities warranted a place in its sentencing deliberation. It made a legal error in failing to understand important distinguishing features presented by

the case at hand involving unique historical and jurisdictional concerns that exist by virtue of Mr. Begay's Indian status. In refusing to learn more about the disparities and excluding the defense witness slated to provide more information about the disparities, the court could not properly apply the § 3553(a) factors. *See Munoz-Pacheco v. Holder*, 673 F.3d 741, 745 (7th Cir. 2012) ("Failure to exercise discretion is not exercising discretion; it is making a legal mistake.") The outcome of its procedural error was a substantively unwarranted and indefensible prison term of 46 months.

Excluding significant defense evidence of federal-state sentencing disparities rendered the court's sentence neither well-reasoned nor reasonable. *See United States v. McBride*, 633 F.3d 1229, 1232 (10th Cir. 2011) (for a sentence to be "reasoned" it must be procedurally reasonable). Reasonableness should imply a rational and meaningful consideration of the factors enumerated in § 3553(a). Specifically, the sentence imposed should be based on reasons that are logical and consistent with the factors set forth in that section. Only this type of analysis vindicates the need for every person to be considered "'as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify'" the conduct and the sentence which follows. *Gall*, 552 U.S. at 53 (quoting *Koon*, 518 U.S. at 113). Because the district court failed to do so here, Mr. Begay

represents another Native American convicted of aggravated assault who suffers a disproportionately high sentence due to an "accident of history and geography." Mr. Begay's sentence is simply unfair.

CONCLUSION

Mr. Begay asks this Court to set aside the district court's sentence. More specifically, he asks this Court to order the district court to develop a sentence addressing all the statutory sentencing factors to include the disparity between federal and state sentences because such a sentence would promote uniformity and proportionality and promote respect for the law.

REQUEST FOR ORAL ARGUMENT

Mr. Begay respectfully requests oral argument to more fully develop the issues raised and to offer this Court the opportunity to question counsel so as to clarify those issues and the accompanying facts.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489
brian_pori@fd.org

s/ Brian A. Pori
Attorney for Appellant

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I, Brian A. Pori, counsel for petitioner-appellant Patrick Begay, certify that this opening brief conforms to the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief uses a proportionally spaced 14- point type. Excluding table of contents, table of citations, request for oral argument and certificates of counsel, it contains 7,040 words. I relied on my word processor to obtain the count and it is Word Version 2016:

I certify that this certificate of compliance is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Brian A. Pori
Attorney for Appellant

CERTIFICATE OF PRIVACY REDACTIONS AND VIRUS SCANNING

I, Brian A. Pori, certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form is an exact copy of the written document filed with the Clerk and that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, i.e., Symantec AntiVirus Corporate Edition, Version 12.1, updated April 22, 2017, and according to the program, are free of viruses.

s/ Brian A. Pori
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Brian A. Pori, certify that seven copies of the foregoing was sent by Federal Express overnight to the Clerk of the Court of Appeals for the Tenth Circuit, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, and the foregoing was filed electronically with the court, and the electronic filing of the foregoing caused Assistant Attorney General Paige Messec to be served electronically on this 22nd day of April, 2019.

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489
brian_pori@fd.org

s/ Brian A. Pori
Attorney for Appellant