**No. 19-2022**

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

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# APPELLANT'S REPLY BRIEF

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**Oral Argument is Requested**

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## Introduction

It has been over sixteen years since the United States Sentencing Commission first assembled an Advisory Group to compile data that confirmed allegations from courts, practitioners, and scholars regarding sentencing inequities faced by Native Americans in the federal criminal justice system. Little has changed despite a 2016 Report recognizing that those inequities still exist. The findings contained in the Advisory Groups' reports provide district courts with policy justifications for variant sentencing. Yet the government never mentions either report in its Answer Brief. Instead, while acknowledging its historical mistreatment of Native Americans, the government suggests there is nothing this Court can do to remedy the problem. The government's contention the Court's hands are bound is wrong.

## Argument

### Reply Issue A: A district court is empowered to reject the Guidelines' treatment of certain offenses.

The government agrees that *Kimbrough v. United States,* 552 U.S 85 (2007), permits judges to vary from the Guidelines based on policy

disagreements. AB 14.[1] However, it contends that "this Court has never permitted a district court to rely on its disagreement with congressional policy in imposing [a] sentence." AB 15. But Mr. Begay is not encouraging a deviation based on congressional policy. Instead, he challenges the policy decisions behind the *Guidelines* and reminded the district court that it was permitted to consider such argument before arriving at a sentence. The argument remains unchanged: the Sentencing Commission failed to act in its "characteristic institutional role" when creating its sentencing guidelines for assaultive crimes. The presence of empirical data collected by the Advisory Groups may absolutely be considered by judges in conducting their 18 U.S.C. § 3553(a) analyses. *United States v. Mondragon-Santiago*, 564 F.3d 357, 366 (5th Cir. 2009) ("We read *Kimbrough* to allow district courts, in their discretion, to consider the policy decisions behind the Guidelines, including the presence or absence of empirical data, as part of their § 3553(a) analyses."). Here, the district court completely foreclosed Mr. Begay's

[1] 1 Citations to "AB" refer to the government's Answer Brief. Similarly, citations to Mr. Begay's Opening Brief are abbreviated "OB." Both documents are consecutively paginated and page numbers follow the respective abbreviations. As in the Opening Brief, references to the three-volume record on appeal are to the record volume and page number found at the bottom-right of the page (e.g., ROA, Vol. 1, 12).

argument based on his policy disagreements with the Guidelines, even though it was a proper basis for sentencing outside the Guidelines. Because *Kimbrough* made clear that the district court's decision not to consider policy disagreements with the Guidelines is legally erroneous, the resulting sentence imposed under this legally erroneous view is, by definition, an abuse of discretion, *see Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.") (citation omitted), and hence unreasonable.

As noted in the Opening Brief, no Court appears to have specifically considered federal-state sentencing disparities in the context of Indian law. OB 28. While the government contends that *United States v. Beaver*, 749 F. App'x 742 (10th Cir. 2018) (unpublished) involved a Native American defendant, the issue of sentencing disparities faced by Native Americans was not specifically considered by either the district court or this Court on appeal.[2] *See* AB, FN 5. *Beaver* is also not a published case. However, it is

[2] It is true that undersigned counsel represented Mr. Beaver and *attempted* to raise a similar argument regarding disparate sentencing. However, the district court did not rule on his argument and instead made reference to available state sentences to support an *upward* variance. *Beaver*, 749 F. App'x 742, 745 (10th Cir. 2018).

noteworthy that the *same* district court judge that presided over Mr. Beaver's sentencing previously expressed concerns about the disparate federal-state sentencing related to Native American defendants in *United States v. Joshua Begay*, No. CR 04-1979 MV, 2006 WL 8444146 (D.N.M. June 2, 2006), a case cited in Mr. Begay's Opening Brief. As the district court in *Joshua Begay* recognized, a defendant's status as a Native American *should* be considered because "as a result of federal jurisdiction over cases arising in Indian country, the impact of the federal criminal justice system on Native Americans is significantly different from its impact on most other Americans." 2006 WL 8444146, at *6. This unique characteristic that weighs against Native Americans in sentencing—i.e., their subjection to federal jurisdiction based solely on their Native status—is what distinguishes *Wiseman*. *United States v. Wiseman*, 749 F.3d 1191 (2014).

Moreover, the reports of the Advisory Groups generated empirical data by engaging in federal-state comparisons so the district court did not have to. Stated differently, even if the district court believed it was precluded from considering federal-state sentencing disparities at Mr. Begay's sentencing, it could have reviewed the reports of the Advisory Groups cited by defense counsel. ROA, Vol I, 24-62; ROA, Vol III, 54-63. Those reports undertook

federal-state comparisons to address concerns regarding the disparate effect of the Guidelines on Native Americans populations. The Advisory Groups made findings that reinforced Mr. Begay's argument that the Commission neglected to act in its characteristic institutional role by failing to meaningfully correct the disparities based on the empirical data generated by those reports.

In addition, the prohibition on considering federal-state sentencing disparities should not bar other sentencing considerations contained in § 3553(a) that can provide a district court grounds for imposing a variant sentence to remedy the inequities faced by Native American defendants. As the court in *Joshua Begay* noted:

> In considering the federal-state sentencing disparity in the case of this Native American defendant sentenced for aggravated assault in the district of New Mexico, I follow the lead of the Sentencing Commission, which, by implementing Amendment 663, recognized that this disparity issue bears on the rectitude of a sentence. **This sentencing disparity issue is implicated by several of the sentencing directives set forth at § 3553(a), namely the requirement that a sentence reflects the seriousness of the offense, promotes respect for the law, and provides just punishment for the offense.** Different jurisdictions and sovereignties may properly punish the same offenses differently. Nonetheless, in the case of routine felonies for which Native Americans are sentenced in federal court due to an accident of history and

> geography, when considering what punishment reflects the seriousness of the offense, promotes respect for the law, provides for just punishment, and avoids unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, it is reasonable to consider what this defendant, who resides in New Mexico, would have faced in New Mexico state court.

2006 WL 8444146, at *7 (emphasis added). When Native Americans are overrepresented in federal court for assaultive crimes, the remedy cannot lie in comparing their sentences to other federal defendants. The solution rests in questioning why they are overrepresented in the first place and fashioning a sentence to remedy *that* problem. Because the district court in this case failed to acknowledge that it had a right to do so, reversal is warranted.

**Reply Issue B: Neither the Underlying Goals of Sentencing, Nor the Plain Language of Any Statute, Prohibit a District Court's Consideration of State Sentencing Practices.**

Despite the protestations of the government, no relevant sentencing statute or any act of Congress prohibits a federal sentencing court from being informed by, and considering, state sentencing practices in sentencing a federal defendant. AB 8-12; 16 (arguing that court neither required nor permitted to consider potential federal/state sentencing disparities). The prohibition is entirely a matter of judicial fiat. Instead, it is clear that

Congress has entrusted the Sentencing Commission to craft punishment in an equitable manner. For example, 28 U.S.C. § 991 establishes the United States Sentencing Commission with its stated purposes:

> (b) The purposes of the United States Sentencing Commission are to--
>
> (1) establish sentencing policies and practices for the Federal criminal justice system that-
>
> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) provide certainty and fairness in meeting the purposes of sentencing, **avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices**; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
>
> (2) Develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. 28 U.S.C. § 991 (emphasis added).

(emphasis added). *See also*, 28 U.S.C. § 994 (f) ("The Commission, in

promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.") It has also instructed the Commission to "review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of [28 U.S.C. § 994]. 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." 28 U.S.C. § 994(o).

Nowhere in the statement of purpose, or in any other statute, does Congress limit a federal court's sentencing consideration to only "disparities amongst federal defendants." To the contrary, Congress plainly sought to ensure fairness and avoid unwarranted disparities among all criminal defendants, in general, with similar records who have been convicted of like crimes. Indeed, the statutes quoted above evince an intent to provide for a flexibility in the federal sentencing process that seeks to include considerations not accounted for at the time the guidelines were developed. These types of considerations must include meaningful attention to reports

from the tribal Advisory Groups assembled by the Commission itself. After all, as the Supreme Court recognized, "Congress established the Commission to formulate and constantly refine national sentencing standards....Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by professional staff with appropriate expertise." *Kimbrough,* 522 U.S. 85, 109-110.

Also, as explained by the United States Supreme Court, Congress's basic goal in passing the Federal Sentencing Act was to move sentences in the direction of increased uniformity—a uniformity that does not consist simply of similar sentences for those convicted of violations of the same statute, but uniformity between sentences and real conduct. *See United States v. Booker*, 543 U.S. 220, 253 (2005). Mr. Begay asked nothing more of the court: he asked it to promote "uniformity" and "fairness" between sentences and real conduct (*i.e.* assaultive conduct). Further, 18 U.S.C. § 3551 sets forth the "authorized sentences" of federal defendants:

> (a) In general.-Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute,. . ., shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

18 U.S.C. § 3551.

Thereafter, § 3553(a) sets forth the requisite factors to be considered in imposing a sentence. *See* 18 U.S.C. § 3553(a). Again, nowhere in any of these legislative enactments does Congress *prohibit* sentencing courts from considering state sentences in consideration of these requisite sentencing factors. Indeed, the plain language of these statutes (undertaken through a statutory construction analysis), simply does not prohibit the consideration. *See Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir. 2006) (noting that where statutory language is plain, the sole function of the court is to enforce it according to its ordinary, everyday terms).

Moreover, any concern that sentencing would be different amongst federal defendants if their federal sentences are compared to state sentences is a hollow one. *See Wiseman*, 749 F.3d at 1194, *citing United States v. Branson*, 463 F.3d 1110-1112-13 (10th Cir. 2006) ("Adjusting federal sentences to conform to those imposed by the states where the offense occurred would not serve the purposes of § 3553(a)(6), but, rather, would create disparities within the federal system[.]"). But allowing such comparisons would not gut the district court's responsibility to consider other federal sentences, the other 3553(a) factors, mandatory sentencing

parameters, and the applicable federal guideline sentence. In *Kimbrough*, the government made a similar fatalistic argument: if district courts were permitted "to vary from the Guidelines based on their disagreement with the crack/powder disparity, defendants with identical real conduct [would] receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing." *Kimbrough*, 552 U.S. at 107, 128. The Supreme Court dismissed this concern because:

> it is unquestioned that uniformity remains an important goal of sentencing. As we explained in *Booker*, however, advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to "avoid excessive sentencing disparities." 543 U.S., at 264, 125 S.Ct. 738. These measures will not eliminate variations between district courts, but our opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted. See *id.*, at 263, 125 S.Ct. 738 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure [through mandatory Guidelines]."). And as to crack cocaine sentences in particular, we note a congressional control on disparities: possible variations among district courts are constrained by the mandatory minimums Congress prescribed in the 1986 Act.

*Id*. at 107-08. Similarly, examining state sentences in certain contexts case will not dismantle federal sentencing. Instead, it will remediate unjust inequities that exist and promote respect for the law. *United States v. Brennan*, 468 F.

Supp. 2d 400, 407 (E.D.N.Y. 2007) ("From the point of view of the impact of sentencing on specific and general deterrence and on reducing recidivism rates, state vertical coordination is more important than national-horizontal uniformity. The public and criminals generally consider the local federal and state courts as part of a single protective institution. Too great a disparity between state and federal prosecution and sentencing decisions will be seen by the public as creating unjustified disparities. Section 3553 (a)(6) should be construed as covering disparities in state—federal as well as federal-federal comparative sentencing.")

## Conclusion

For the foregoing reasons and those stated in the Opening Brief, this Court should find that the district court erred in refusing to consider defense counsel's sentencing argument regarding sentencing inequities faced by Native American defendants. Remand for resentencing is appropriate.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(g)

I, Brian Pori, counsel for defendant-appellant Patrick Begay, certify that this brief conforms to the type-volume limitations of Federal Rule of Appellate Procedure 32(g). The brief uses a proportionally spaced 14-point type. Excluding the table of contents, table of citations, request for oral argument and certificates of counsel, it contains 2,477 words. I relied on my word processor, Word Version 2016, to obtain the count.

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 Pori*
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## CERTIFICATE OF PRIVACY REDACTIONS AND VIRUS SCANNING

I, Brian 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 14.2 updated August 8, 2019, and according to the program, are free of viruses.

*s/ Brian Pori*
Attorney for Appellant

## CERTIFICATE OF SERVICE

I, Brian 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 United States Attorney John C. Anderson to be served electronically on this 8th day of August, 2019.

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