IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**No. CR 1:19-03796-001 WJ**
	§	
GREGORY JOJOLA,	§	
	§	
Defendant.	§	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DOWNWARD VARIANCE

COMES NOW, Defendant, Gregory Jojola, by and through his attorneys of record, Assistant Federal Defenders, Devon M. Fooks and Daniel B. Snyder and hereby files this memorandum in support of downward variance.

INTRODUCTION

The Major Crimes Act, which is based on a racial classification, is linked to penalty provisions that create disparate sentencing for Native American defendants, particularly for the crime of aggravated assault. The Major Crimes Act is the law that confers federal-court jurisdiction over Mr. Jojola's case, because he is "Indian" and the charged offenses occurred in "Indian country." 18 U.S.C. § 1153(a). "Indian" is a questionable racial classification under the law. And because of this law, Mr. Jojola is being treated significantly more harshly than he would be if he were a non-Indian convicted of the same offenses in New Mexico. The sentencing disparities are caused by the MCA's racial classification—which is of questionable constitutionality itself—and render the sentencing guideline for aggravated assault (U.S.S.G. § 2A2.2) unconstitutional as applied. *See e.g., Arlington Heights v.*

Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (a facially neutral law that contains a discriminatory purpose that disparately impacts a disfavored group is not constitutional).

Recently, in *United States v. Begay*, the Tenth Circuit confronted whether the federal jurisdiction imposed on Native Americans creates unique federal/state sentencing disparities warranting a downward variance under 18 U.S.C. § 3553(a)(6). 974 F.3d 1172 (10th Cir. 2020). While the Tenth Circuit precluded relief under Subsection (a)(6), it noted that Mr. Begay's arguments "may be relevant to other § 3553(a) factors" and left open the question of whether the disparities ran afoul of the equal protection clause. *Id.* at 1176 and n. 1 & 2. *See also United States v. Wiseman*, 749 F.3d 1191, 1196 (10th Cir. 2014) (noting possibility that sentencing disparity could warrant downward variance under § 3553(a) factors other than Subsection (a)(6)); *United States v. Clark*, 434 F.3d 684 (4th Cir. 2006) (noting that "the consideration of state sentencing practices is not necessarily impermissible per se.") Of course, it is a longstanding principle that sentencing courts may consider a variety of information at sentencing. *See e.g. Pepper v. United States,* 562 U.S. at 480 ("This Court has long recognized that sentencing judges 'exercise a wide discretion' in the types of evidence they may consider when imposing sentence and that '[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.") (quoting *Williams* v. *New York*, 337 U. S. 241, 246-247 (1949)); *see also* 18 U.S.C. § 3661 ("[n]o limitation shall be placed on the information" a sentencing court may consider "concerning the [defendant's] background, character, and conduct") and § 3553(a) (setting forth certain factors that sentencing courts must consider, including "the history and characteristics of the defendant.").

Here, Mr. Jojola argues that a sentence that does not account for the disproportionately higher sentences faced by Indian defendants in the federal system offends constitutional equal protection

guarantees. And additionally (or alternatively), such disparate sentences offend principles of fair sentencing enshrined in § 3553(a). Under such circumstances, a variance is appropriate.

ARGUMENT

The Major Crimes Act's racial classification, which exposes Native Americans to the much harsher outcomes of the federal justice system, should be considered as a mitigating circumstance at sentencing.

A. The Major Crimes Act

The Major Crimes Act was enacted in 1885, at the dawn of the allotment era, the period in which government policy sought to detribalize Indian people by converting reservation land to fee land. *See generally* Philip P. Frickey, Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf, 38 Tulsa L. Rev. 5, 7 (2002) (explaining allotment process and how it led to loss of seventy percent of Indian land); 2 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 609-757 (1984) (describing culmination of "drive to acculturate and assimilate" Indians at end of nineteenth century as "an ethnocentrism of frightening intensity [setting] a pattern that was not easily eradicated"); Addie C. Rolnick, The Promise of *Mancari*: Indian political rights as racial remedy, 86 N.Y.U L. Rev. 958, 980 n 96 (2011).

The Act subjects "Indians" to federal prosecution for a host of listed felonies. *See* 18 U.S.C. § 1153(a). But the Major Crimes Act itself does not define Indian. Instead, courts rely on a definition that dates back to an 1846 decision by the Supreme Court, *United States v. Rogers*, 45 U.S. 567 (1846), which held that a white man living among Indians and recognized as Indian by the Cherokee was not "Indian" within the meaning of a statute excluding Indians from criminal jurisdiction, because the law "does not speak of members of a tribe, but of the race generally, of the family of Indians." *Id.* at 573.[1]

[1] *Rogers* is also explicitly racist in its references to country's indigenous population, referring to Indians 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." While

The test developed in *Rogers* explains that, to be Indian, a person must (1) have some degree of Indian blood, and (2) be recognized within his community or by the federal government as an Indian. *See* Weston Meyring, "'I'm an Indian outlaw, Half Cherokee and Choctaw': Criminal Jurisdiction and the Question of Indian Status," 67 Mont. L. Rev. 177, 196 (2006). The definition of Indian rests, in other words, on a racial blood-quantum test, rather than a political affiliation test. *See also United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir. 1977) (calling this the "racial identification" element of the Major Crimes Act). Enrollment in a tribe is neither necessary nor sufficient for purposes of the Act. *Id.*

Despite the distant and racist origins of the *Rogers* formulation, it persists in contemporary doctrine. *See, e.g., United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) (explaining that, in determining Indian status for Major Crimes Act cases, "[c]ourts have generally followed the test first discussed in *United States v. Rogers*"). When a defendant is prosecuted under the Major Crimes Act (or the related Indian Country Crimes Act, 18 U.S.C. § 1152), prosecutors and defense attorneys occasionally battle over whether the defendant (or victim) has the requisite degree of "Indian blood." Appellate courts have varied in their conclusions about how *much* Indian blood will suffice, ranging from "some" to a "significant" to a "substantial" degree of it. *See* Meyring, 67 Mont. L. Rev. at 190-93 (canvassing cases concerning degree-of-blood requirement).

Yet the Supreme Court has not acknowledged what the lower courts are doing, which is applying a law with a racial classification at its heart that cannot withstand constitutional scrutiny.

B. Equal Protection

The Fifth Amendment of the Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This equal protection

upsetting, this description is useful because it illuminates a cultural sentiment held towards Indians at the time.

component of the Fifth Amendment Due Process clause commands that similarly situated people must be treated alike. Boiled down, this constitutional rule simply means that when one group of people violates the same type of laws as other people similar to them, they should be punished in the same manner.

A law may violate equal protection in different ways:

First, it can discriminate on its face. In *United States v. Antelope*, 430 U.S. 641 (1977), the Supreme Court called "Indian" a political, not a racial, designation, turning away a facial equal protection challenge brought against the Major Crimes Act. The equal protection claim in *Antelope,* brought by two Indian defendants, highlighted the difference in proof required to convict for felony-murder under the state and federal statutes. The Idaho state statute at issue required proof of additional elements—premeditation and deliberation—that were unnecessary for conviction under the federal statute. Because the Major Crimes Act subjected the Indian defendants to federal law, they were exposed to a lesser burden of proof on the mens rea elements.

Although no circuit court (including the Tenth) had so held, the Supreme Court determined that there were no impermissible racial classifications in the Major Crimes Act.[2] It relied on its precedent in *Morton v. Mancari*, a civil case that permitted race-based hiring preferences for Indians. 417 U.S. 535, 553 n.24 (1974). In *Mancari*, the preferences did not disadvantage Indians, so a political rather than racial classification made sense. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. In the Court's view, the preference was "reasonably related to further to

[2] In fact, circuit courts, including the Tenth Circuit, found that the racial classifications for Indian in the Major Crimes Act were precarious and unlawful. *See, e.g., United States v. Boone*, 347 F.Supp. 1031, 1034 (10th Cir. 1972) (finding racial classification not reasonably related to any proper governmental objective and thus unconstitutional); *United States v. Cleveland*, 503 F.2d 1067, 1072 (9th Cir. 1974) (finding that the sentencing disparities between Indian and non-Indian defendants are based on unconstitutional racial classifications); *United States v. Tyndall*, 400 F.Supp. 949 (D. Neb. 1975) (the court noting its "serious reservations as to whether the Major Crimes Act can withstand" constitutional challenges because punishments were uneven across federal/state lines purely on account of the defendant's race).[2]

cause of Indian self-government and to make the [federal Bureau of Indian Affairs] more responsive to the needs of its constituent groups." *Id.* at 554.

By contrast, the decision in *Antelope* works in a manner that is unfavorable to Indians. The reasoning provided in *Antelope* is scant. It never mentions the "unique obligation" owed to the Indians and provides no reasoning about how the federalization which occurs through the Major Crimes Act furthers the cause of Indian self-government. As Justice Thomas recently noted in his *United States v. Bryant* concurrence, there has never existed a legitimate basis for Congress to "punish assaults that tribal members commit against each other on Indian land." 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) (also noting that the Court manufactured an extraconstitutional reason to justify the Major Crimes Act). Indeed, the foundational assumption supporting Congress's supposed "plenary power" over Indians is that they are the "remnants" of a particular "race." *See id.*, 136 S. Ct. at 1967-68 (2016) (plenary power is based on the paternalistic theory that Congress must assume all-encompassing control over the 'remnants of a race' for its own good") (*quoting United States v. Kagama*, 118 U.S. 375, 384 (1886)).

Mr. Jojola does not accept *Antelope*. As is clear from post-*Antelope* appellate rulings and scholarly commentary, Mr. Jojola is subject to federal law—and, more specifically, a significant federal sentencing range—for one over-arching reason: because of his race. Under New Mexico law, he would have faced significantly less time for the same acts.[28] Since the 1970s when the thrust of equal protection challenges were made, it has become clear that the division that the Supreme Court was attempting to create—between political status on the one hand and racial status on the other—is unworkable in both theory and practice.[3]

[3] There is reason to believe that the Supreme Court may be open to revisiting its holding in *Antelope*, and may soon have the opportunity to cast doubt on the continued vitality of *Antelope*. *See Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000) (Court struck down a statute that created a voting qualification that, it said, used native Hawai'ian ancestry as "a proxy for race."); *Brackeen v. Barnhard*, *rehearing en banc granted, app. pending*, 942 F.3d 287 (5th Cir 2019) (evaluating the racial classification in the Indian Child Welfare Act).

Antelope did not address the racist foundations of the Major Crimes Act and predated the sentencing provisions subsequently enacted by the Sentencing Guidelines. These racist underpinnings make the Act susceptible to other types of equal protection challenges.

There are two other ways in which a law (or a Sentencing Guideline) can violate equal protection. They contain related analyses and are relevant to Mr. Jojola's sentencing argument. These analyses were absent in the *Antelope* decision, which focused exclusively on a facial challenge to the Major Crimes Act. Assuming that Mr. Jojola is precluded from a facial challenge because of precedent, the following challenge may be considered by this court in considering an appropriate sentence for Mr. Jojola. First, an enacted law can be facially neutral but, when applied, be discriminatory. Or, a legislature can enact a facially neutral law with a discriminatory purpose, which disparately impacts a disfavored group.

A statute, otherwise neutral on its face, must not be applied so as to invidiously discriminate on the basis of race. *See Yick Wo v. Hopkins,* 118 U.S. 356 (1886) (holding that racially selective enforcement of a facially neutral law is presumptively unconstitutional). The Federal Sentencing Guidelines, therefore, may not be applied to federal prisoners "with a mind so unequal and oppressive as to amount to a practical denial by the State of equal protection." *Id.* at 375. However, in *Washington v. Davis,* 426 U.S. 229, 242 (1976), the Supreme Court stated that "[d]isproportionate impact ... is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule ... that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." Rather, the Supreme Court requires that a challenger to official government action provide evidence that "an invidious discriminatory purpose" motivated the alleged racial discrimination. *Id.; see also Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 256 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *United States v. Easter*, 981 F.2d 1549, 1559 (1oth

Cir. 1992) (extending "discriminatory purpose" requirement to Sentencing Commission when mounting an attack to criminal penalties).

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*. 429 U.S. at 266. Factors that tend to establish intentional discrimination include: (1) the disparate impact of an otherwise neutral classification; (2) the historical background of the decision; (3) the political climate leading to the challenged decision; and (4) the departure from normal procedures. *See id.*, 429 U.S. at 266-268. In the present case, an examination of these factors establishes that Major Crimes Act and the aggravated assault guideline have not only resulted in severely disproportionate prosecution rates among Indian and other populations, but that this was a foreseeable effect of the legislation and sentencing guidelines.

1. Historical background of the decision & political climate.

The history of oppression and colonization of Indians is as old and as complex as this country. As such, tying the Major Crimes Act to one isolated historical moment is impossible. In the 1870s and 1880s, Anglo settlers were rapidly encroaching on Indian lands and their push for economic superiority through land acquisition "coincided with a developing moral imperative to 'civilize' and 'assimilate' the Indians." Kevin K. Washburn, Federal Criminal Law and Tribal Self-Determination, 84 N.C.L. Rev. 779, 797 (Mar. 2006). Initially, there was only a federal interest in addressing crimes between Indians and non-Indians to maintain some order during the tensions caused by late nineteenth-century land grabs. *Id.* 797-798. The era of treaty-making with the tribes devolved into pure legislative action, effectively cutting Indians out of the process. Indian dependence on the federal government began to grow. The Secretary of Interior, who managed agents from a newly-established Indian Department, became increasingly "frustrated by the lack of negative coercive power, such as the power to prosecute or imprison tribal dissidents." *Id.* 798. He explained in his Annual Report: "[i]t

is impossible to properly govern a barbarous people like our wilder Indians without being able to inflict some punishment for wrong-doing that shall be a real punishment to the offender." *Id.* Here began the push to "assert authority to prosecute offenses between Indians, at least in serious cases." *Id.*

Indian agents were initially unsuccessful at lobbying Congress, but an opportunity for prosecutorial authority presented in 1881 when Crow Dog, a Sioux Indian, killed Spotted Tail, a Sioux Chief, with the Brule Sioux reservation. *Id.* at 800. Crow Dog did not deny the killing, and the case was adjudicated by his tribe. *Id.* at 801. But the traditional tribal remedy—restitution—was anathema to the federal Indian agents because it didn't align with the moral underpinnings of the federal criminal justice system. *Id.* So they indicted him. *Id.*

The theme of the government's case at the ensuing trial smacked of colonial motives. *Id.* Crow Dog was cast as an Indian adverse to the federal government's interests, while Spotted Tail was a "friendly" Indian who had been appointed a tribal chief by the United States Army. *Id.* Crow Dog was found guilty and sentenced to hang. *Id.*

Crow Dog petitioned the Supreme Court for a writ of habeas corpus, arguing that the federal court had no jurisdiction to try cases where the offense had already been tried by the tribal council. *Id.* at 802. The Court found unanimously for Crow Dog and he was released. *Ex parte Crow Dog*, 109 U.S. 566 (1883).

The Supreme Court's ruling prompted legislative action. Washburn, 84 N.C.L. Rev. at 803. The Secretary of Interior touted the *Crow Dog* holding and used misleading, ignorant and racist scare tactics to lobby for a bill that Congress soon enacted—the Major Crimes Act. *Id.* The MCA "was enacted as a rider on the annual appropriations legislation for the Department of the Interior, so direct legislative history is thin." *Id.* at 804. But as Washburn notes, "three motives" for the law's enactment

can be derived from the surrounding historical context. *Id.* The three motives are (1) a general enlargement of federal power over the tribes, (2) assimilation and (3) public safety in Indian country.

The constitutionality of the Major Crimes Act was almost immediately challenged in *Kagama,* which marked the beginning of the "plenary power" legal doctrine—vesting the federal government with expansive, unlimited authority to regulate tribes—that has been used in Indian case law to limit tribal sovereignty. 118 U.S. at 131. As noted above, page 8 *supra*, Justice Thomas recently questioned *Kagama* and invited the Court to reexamine its holding which lacked a basis in the constitution. 136 S. Ct. 1954, 1968.[4] *Kagama* was followed by *Antelope*, which cited *Kagama* for the proposition that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country."

The Sentencing Guidelines, in turn, were promulgated almost exactly a century after the Major Crimes Act. 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.[5] 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 problems with disparate sentencing. "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.

[4] Justice Thomas' conclusion that the holding in *Kagama* lacks a constitutional foundation is one shared by many scholars and suggests that even if evaluated under a lesser-standard than strict scrutiny, there is no rational basis for Congressional control over crimes committed in Indian country.

[5] For more about the "empirical approach" to formulating guidelines, *see infra* pp. 27-30.

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.[6] 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.

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, 2003) (hereinafter "NAAG Report").[7] 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

[6] 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, as noted 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 *Mancari*, 417 U.S. at 54-55 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).").

[7] Available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf

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).

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. According to the report issued by the group, (TIAG Report) data collection *remained* insufficiently comprehensive to tackle the problem. United States Sentencing Commission, Report of the Tribal Issues Advisory Group, 3, 19 (May 16, 2016).[8] In fact, the 2016 Report's recommendations included suggestions to the Commission of *how* to collect the data that (1)

[8] Available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf

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.

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. Thus, the sentencing disparities to which Native Americans are subject has resulted from an expired federal interest.

2. Departure from normal procedures & disparate impact.

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.[9]

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 reflected that Indian defendants were overrepresented and disparately sentenced in aggravated assault cases. The SRA instructs the Commission to "establish sentencing policies and practices" that, inter alia, "reflect to the extent practicable, advancement 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

[9] *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.")

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 immediate action in sentencing.

In sum, applying the *Arlington Heights* factors shows that racism was, at a minimum, a "motivating factor" in the passage of the Major Crimes Act. Not only did this racism underlie the original version of the Major Crimes Act, the law has disparately impacted Indian defendants in the century since through the use of the Sentencing Guidelines. This disparity is particularly acute in the context of aggravated assault crimes through the application of U.S.S.G § 2A2.2.

3. The discriminatory purpose and intent behind the Major Crimes Act renders the aggravated assault guideline unconstitutional as applied.

In April 2020, the Supreme Court relied on historical evidence of a state legislature's racial motives to strike down a criminal law enacted a century earlier. *See Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Although the law was later reenacted with no evidence of animus, the Court refused to ignore the "racially discriminatory *reasons* that [the state] adopted [its] peculiar rules in the first place." *Id.* at 1401 (emphasis in original). Even the justices' "shared respect for rational and civil discourse" could not "supply an excuse for leaving an uncomfortable past unexamined." *Id.* at 1401 n.44.

Like the law in *Ramos*, the Major Crimes Act and the aggravated assault guideline inextricably linked to it has an "uncomfortable past" that must be examined. *Id.* A law or guideline which burdens Native

Americans disproportionately and whose influence has been traced to racial considerations, warrants the most rigorous scrutiny. Such a law can survive only if the classification which is suspect is narrowly tailored to further a compelling governmental interest. *McDaniel v. Paty,* 435 U.S. 618, 628, 98 S.Ct. 1322, 1328, 55 L.Ed.2d 593 (1978). Consistent with the history of criminalizing behavior among minority groups in this country, at the very least, the assault guideline in its application has created a "de facto suspect classification" to which strict scrutiny must apply. Under this standard, the assault guideline is defective.

Because the statute (the MCA) is race-based, the accompanying guidelines are necessarily race-based and violate equal protection. The facts and historical evidence presented here show that the sentencing scheme for aggravated assaults as applied to Indian defendants originated from a discriminatory purpose and still has a disparate impact. Accordingly, the aggravated assault guideline is presumptively unconstitutional under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The burden thus shifts to the government to show that the Major Crimes Act is legitimate in the absence of any discriminatory purpose. If the government cannot make this showing, the guideline to which it is linked (U.S.S.G § 2A2.2) is constitutionally suspect and this court may fashion a sentence for Mr. Jojola that accounts for the significant disparity that exists between a federal sentence and New Mexico state sentence.

C. 18 U.S.C. § 3553 considerations

As an alternative, because the Sentencing Commission failed to act in its "characteristic institutional role" when creating its sentencing guideline for aggravated assault, this Court can depart or vary downwards.

Mr. Jojola should not be subject to a higher sentence than a non-Indian offender who commits assault in New Mexico purely on account of his race. 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 COUNTRY, 13 Fed. Sent'g Rep. 71, 71 (2000) [10]; *see also United States v. Swift Hawk*, 125 F. Supp.2d 384, 384-85 (D.S.D. 2000) (noting that the disparity in state/federal sentencing is illogical, "unfair," "discriminatory" and "not equal justice under law.") Accordingly, because New Mexico is one of the handful of jurisdictions where a sizeable Native American population exists, this Court has a unique opportunity to remediate these disparities.

The overall spirit of 18 U.S.C. § 3553 allows for wide latitude in fashioning an appropriate sentence. The court should use this latitude to bring Mr. Jojola's sentence in line with comparable state sentences. First, a court may depart from the applicable guideline range if it finds an aggravating or mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that … should result in a sentence different from that described." 18 U.S.C. § 3553(b). As discussed in Chapter 1, Part A of the Guidelines Manual: The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where circumstances significantly differ from the norm, the court may consider whether a departure is warranted. *See* U.S.S.G § 5K2.0(a)(2)(B).[11]

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[10] 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…

[11] U.S.S.G § 5K2.0(a)(2)(B) provides**:** Unidentified Circumstances.--A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that

As discussed above, 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. This court should not continue to ignore the jurisdictional anomalies—a federal government creation—to which Indians are subject. To conduct meaningful research, the 2002 and 2015 Advisory Groups looked 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. Their findings of significant disparities between state sentences and federal sentences should not be ignored by this Court.

While departures are rarely granted (and it is unclear what precisely is required from the elusive "exceptional case"), this court may still grant relief through their sentence-altering counterpart—variances. The ability to vary preserves district courts' ultimate ability to impose, regardless of what the guideline range is found to be, a sentence that it views is "sufficient, but not greater than necessary" to serve the goals of sentencing. Mr. Jojola submits that the factors delineated in 18 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 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.

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nevertheless is relevant to determining the appropriate sentence.

See also Jon M. Sands, DEPARTURE REFORM AND INDIAN CRIMES: READING THE COMMISSION'S STAFF PAPER WITH "RESERVATIONS," 9 Fed. Sent. R. 144 (1996) (suggesting that the Commission develop specific departures or separate guidelines that consider the unique sentencing issues presented by Native American history and culture).

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* 562 U.S. at 502 (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").

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).[12] 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. This the situation here. As explained, the Commission did not consider empirical data reflecting the overrepresentation of Indian defendants convicted of aggravated assault crimes. *See supra*, p. 16.

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

[12] 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).

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).

In light of the extensive history of the MCA and aggravated assault guideline provided in this memorandum and to avoid an unreasonable sentence in Mr. Jojola's case, this Court should consider several of § 3553(a)'s purposes which are implicated here.[13] To start, Mr. Jojola's "history and characteristics" would certainly include his status as an Indian. This status unfairly subjects him to the harsher sentences of the federal criminal justice system.

In addition, 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. § 3553(a)(2)(A) allows for this.

[13] In *Begay*, this Court evaluated sentencing disparity claims for procedural error, ignoring Mr. Begay's substantive reasonableness challenge. *See* 974 F.3d 1172, n. 2.

Moreover, as other cases have acknowledged, sentencing disparities that create disparate treatment for a particular group of citizens fail to foster respect for the law. *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). The severe sentencing disparity faced by Indian defendants by virtue of their subjection to federal jurisdiction does not 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.").

CONCLUSION

The aggravated assault guideline is problematic as applied to Indian defendants. Not only is it tied to the Major Crimes Act which contains a questionably constitutional racial classification, the Sentencing Commission was aware at the time of the guideline's promulgation that this tie would have a disparate impact on Indian defendants. In ignoring the data and testimony presented to it, and its continuing blind-eye towards its own advisory groups' reports, the Commission has shirked its duty to craft a fair and equitable guideline. Mr. Jojola asks this court to craft a sentence addressing all the statutory sentencing factors to include the disparity between federal and state sentences for aggravated assault because such a sentence would promote uniformity and proportionality and would promote respect for the law.

WHEREFORE, Mr. Jojola requests that this court sentence Mr. Jojola to a term of imprisonment of 24 months and to a term of supervised release as deemed appropriate by the court.

Respectfully submitted,

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