IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Cr. No. 19-3796 WJ
	)	
vs.	)	
	)	
GREGORY JOJOLA,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO THE DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DOWNWARD VARIANCE

Following an incident in which he strangled his domestic partner, Defendant Gregory Jojola, an enrolled member of the Pueblo of Isleta, was charged by indictment with three counts of assault [Doc. 2]. Jojola pled guilty to all counts of the indictment [Doc. 64]. Now, at sentencing, Jojola is asking this Court to impose a sentence significantly below the 46 to 57 months suggested by the Sentencing Guidelines [Doc. 81 at 22]. Jojola contends that a variance of his sentence in this matter is appropriate where there is an alleged sentencing disparity between New Mexico state and federal sentences for aggravated assault [*id.* at 1-2]. Mr. Jojola first argues that if this Court does not take into consideration this alleged disparity when fashioning his sentence, it will violate his right to equal protection as guaranteed by the Fifth Amendment [*id.* at 3-16]. Alternatively, Mr. Jojola argues that this Court can take the alleged disparity into account when considering the sentencing factors of 18 U.S.C. § 3553(a) [*id.* at 16 - 22]. The United States respectfully disagrees.

The fact that a district court is prohibited from considering federal/state sentencing disparities does not give rise to an equal protection claim based on an impermissible racial

classification. The Supreme Court has long held that any disparate treatment of Native Americans compared to non-Natives is not based on race, but on the recognition of Native Americans as members of quasi-sovereign political entities. *See United States v. Antelope*, 430 U.S. 641, 646-47 (1977).

In addition, while the Tenth Circuit has suggested that sentencing disparities may be relevant to factors under 18 U.S.C. § 3553(a) other than 18 U.S.C. § 3553(a)(6), Jojola fails to present specific evidence documenting a sentencing disparity or explain in any detail how any discrepancy should be considered under all of the § 3553(a) factors in the context of his case. Finally, it is the United States' position that Section 3553(a)(6) is the exclusive source of a district court's power to consider sentencing disparities, and it would violate established canons of statutory construction to allow consideration of such disparities under a more general provision of § 3553(a).

As articulated in *United States v. Begay*, 974 F.3d 1172, 1176 (10th Cir. 2020), *cert. denied*, No. 20-7138, 2021 WL 1073737 (U.S. Mar. 22, 2021), the United States does not advance these arguments with the intention of ignoring or downplaying the undeniable historical record of mistreatment and injustice suffered by Native Americans. Appellee's Answer Brief in *United States v. Begay*, 2019 WL 3285585 at *6 (10th Cir. 2019). And it may well be that the policy issues Jojola raises in his memorandum deserve further congressional consideration. *Id.* However, in this case, Jojola has not sufficiently briefed these issues for the Court and, therefore, the requested relief should be denied.

ARGUMENT

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

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

Jojola's equal protection arguments are squarely foreclosed by the Supreme Court's decision in *Antelope*, 430 U.S. 641. In *Antelope*, defendants argued that "their felony-murder convictions were unlawful as products of invidious racial discrimination" because "a non-Indian charged with precisely the same offense . . . would have been subject to prosecution only under Idaho law, which . . . does not contain a felony-murder provision." *Id.* at 644.

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

protection claim based on *Antelope*); *United States v. Prentiss*, 273 F.3d 1277, 1281 (10th Cir. 2001) (holding that *Antelope* stands for the proposition that "federal regulation of Indian affairs is not based on an unlawful racial classification."). Considering *Antelope*, any race-based equal protection argument necessarily fails.

II. This Court Should Not Consider Any Sentence Disparity As Jojola Has Failed To Sufficiently Develop This Argument.

To summarize, Mr. Jojola argues that in light of the Tenth Circuit's recent decision in *Begay*, 974 F.3d at 1176, this Court should reduce his sentence due to alleged disparities between New Mexico state and federal sentences for aggravated assault [Doc. 81 at 22]. Mr. Jojola contends that in light of these disparities this Court should consider several of 18 U.S.C. § "3553(a)'s purposes" which he believes are implicated [Doc. 81 at 21].

In *Begay*, the defendant contended that the district court should consider whether aggravated assault sentences imposed on Native Americans are unfairly harsh because Native Americans are disproportionately subject to federal jurisdiction. *Begay*, 974 F.3d at 1173.

The United States took the position that a district court is prohibited from considering federal/state sentencing disparities. *Id.* The government relied on three Tenth Circuit cases that held that § 3553(a)(6), which directs the district court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," concerns only federal, not state, sentencing disparities. *See United States v. Wiseman*, 749 F.3d 1191 (10th Cir. 2014); *United States v. Branson*, 463 F.3d 1110 (10th Cir. 2006); *United States v. Beaver*, 749 F. App'x 742, 749 (10th Cir. 2018) (unpublished). The United States argued that the district court lacks authority to consider sentencing disparities under the provisions of § 3553(a) other than (a)(6) because it would create disparities within the federal system. Appellee's Answer Brief in *Begay*, 2019 WL 3285585, at *6 (10th Cir. 2019).

Further, allowing the district court to do under other subsections of § 3553(a) what it could not do under subsection (a)(6) would be contrary to the "general/specific canon" of statutory construction, which precludes a more specific provision from being nullified by a more general one. *Id.* Finally, the government contended that because the § 3553(a) factors are statutory, the district court was not free to vary based on its disagreement with congressional policy, unlike the disagreement with Sentencing Guidelines' policy that the Supreme Court found permissible in *Kimbrough v. United States*, 552 U.S. 85 (2007). *Id.* at 14-18.

The Tenth Circuit affirmed. While "sympathetic to Begay's concern that Native Americans receive harsher sentences for aggravated assault than other groups for no reason other than Native Americans are disproportionately subject to federal criminal jurisdiction," the Court concluded that its precedent foreclosed consideration of federal/state sentencing disparities under § 3553(a)(6), the only argument developed by Begay. *Begay*, 974 F.3d at 1176. In so doing, the Court noted that "sentencing-disparity arguments may be relevant to other § 3553(a) factors." *Id.*; *see also Wiseman*, 749 F.3d at 1196 ("Perhaps other § 3553(a) factors could support a downward variance here, but § 3553(a)(6) clearly cannot."). The Court, however, declined to consider any argument based on any of the other § 3553(a) factors because it was not sufficiently presented.

In this case Mr. Jojola has also not sufficiently developed this argument. Mr. Jojola has failed to present this Court with the evidence and analysis necessary to support his requested relief.

Mr. Jojola has provided no timely evidence establishing a specific federal and state sentencing disparity for aggravated assault that this Court could consider in the context of this case. Jojola relies on the 2003 U.S.S.C. Native American Advisory Group report, which found

that the average sentence for a Native American convicted of assault in New Mexico state court is six months, while the average sentence of a Native American convicted of assault in federal court in New Mexico is 54 months. *See* Report of the Native American Advisory Group (NAAG) (November 2003), at 33, *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. The NAAG report also noted that the New Mexico state court data included low level offenses that generally would not be prosecuted in federal court. *Id.* Whatever the significance of the data at the time, it is now almost two decades old and its reliability questionable in light of the U.S.S.C. Tribal Issues Advisory Group's 2016 finding of insufficient data to meaningfully compare state and federal sentences, and specifically noted the absence of any centralized data from New Mexico. *See* Report of the U.S.S.C. Tribal Issues Advisory Group (TIAG) (May 16, 2016), at 24-27, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf. With the limited data available, the TIAG found instances of federal sentences being both higher and lower than state sentences. *Id.* at 26. Moreover, any sentencing disparities that may exist are not uniform among the states. *See* NAAG report at 34 ("[T]here was some concern that the sentences in New Mexico were not representative of those in other states.").

Therefore, Jojola's contention that the nature and extent of any disparity between state and federal sentences in the District of New Mexico is "obvious" is insufficient. This is especially concerning where Mr. Jojola had every opportunity to explain how, in his case, he would be subjected to a lesser sentence under New Mexico state criminal law and how this Court could avoid, rather than produce, sentencing disparities among federal defendants under 18

U.S.C. § 3553(a)(6). Instead, his offer of support was a single, unsworn, conclusory statement that, "[u]nder New Mexico law, he would have faced significantly less time for the same acts[28] [sic]." [Doc. 85 at 6]. *See United States v. Clark*, 434 F.3d 684, 688 n.2 (4th Cir. 2006) (unreasonable for district court to consider federal and state sentencing disparities where the only proffer of a disparity was federal probation officer's unsworn statement that an unidentified local probation officer, cognizant of only the 'general facts,' believed that the defendant would actually receive a lesser sentence under state guidelines). This statement does not explain why 24 months' of imprisonment is an appropriate sentence, and Mr. Jojola has done nothing to explain to this Court how it can reconcile any disparities with 18 U.S.C. § 3553(a)(6).

Unfortunately, significant questions about the extent and nature of any sentencing disparity between state of New Mexico sentences for aggravated assault and federal sentences in the District of New Mexico persist. Undue emphasis on any alleged federal/state sentencing disparities in a particular state may result in a different type of disparity among Native American federal defendants based, for example, on whether the offense was committed on the Arizona or New Mexico side of the Navajo Nation. Whatever consideration may be given to federal/state sentencing disparities under the other § 3553(a) factors, subsection (a)(6) requires a district court to consider the need to avoid precisely this type of sentencing disparity among similarly situated Native American federal defendants. The issue is not that no information about disparities is available. Instead, it is that Mr. Jojola has offered no argument or analysis as to how he, in the context of his case, is entitled to the relief requested and how this can be achieved without running afoul of 18 U.S.C. § 3553(a)(6). Given these circumstances this Court should deny Mr. Jojola's request for a downward variance.

Further, although Jojola urges significant reduction of his sentence considering alleged

disparities, he fails to specifically and practically apply this disparity to all of the § 3553(a) factors, and instead asks this Court "to craft a sentence addressing all the statutory sentencing factors." [Doc. 81 at 22]. Jojola presents conclusory statements in lieu of analysis to argue why, considering the particular facts of his case and all the § 3553(a) factors, any sentencing disparity warrants a downward variance from his guideline range. This is significant given that these factors, when applied to his case, support a variance in the opposite direction.

For example, the need "to reflect the seriousness of the offense" weighs against any downward variance in this case. 18 U.S.C. § 3553(a)(2(A). The defendant, on multiple occasions, strangled his intimate partner to the point that she believed she was going to die. Ten percent of violent deaths in the United States are attributable to strangulation, and in the majority of these cases victims were women. *See* Gael B. Strack, J.D., George E. McClane, M.D., Dean Hawley, M.D., "A Review of 300 Attempted Strangulation Cases, Part I: Criminal Legal Issues", *The Journal of Emergency Medicine*, Vol. 21, No. 3, pp. 303-309 (2001). In addition, non-fatal strangulation is an important risk factor for homicide in a domestic violence relationship. Victims of non-fatal strangulation are 700 percent more likely to become a victim of domestic homicide. *See* Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women. *The Journal of Emergency Medicine*, 2009, 35.4. An abuser's willingness to strangle his partner correlates to other dangers as well. In a study of 133 homicides secondary to asphyxia in the Bexar County Medical Examiner's Office from 1985–1998, sexual assault was the motive in 66 percent of female victims of ligature strangulation and in 52 percent of those subject to manual strangulation. *See* Di Maio VJ: Homicidal asphyxia. *Amer. J. Forens. Med. Pathol.* 21(1):1-4, March 2000. These statistics are, unfortunately, not all that shocking to the domestic violence community, which for years has used a history of strangulation as a predictor of lethality.

Moreover, the defendant's sentence could be varied upward "to afford adequate deterrence to criminal conduct" given the pressing concern of domestic violence in Indian Country. 18 U.S.C. § 3553(a)(2)(B). It is important to note that the Native American community of Isleta, where the defendant lives and where these crimes occurred, is a small close-knit community of approximately 4,000. Many individuals in this community, like the school bus driver who called law enforcement and children who were on the school bus were either drawn into the aftermath of the defendant's crime or have heard of the injuries suffered by the victim in this matter. If this Court were to impose a sentence of 24 months, as the defendant requests, it would do virtually nothing to serve general deterrence and a reaffirmation of societal norms. This would be especially troubling where it is now common knowledge that American Indian and Alaska Native communities suffer alarming rates of domestic violence. *See United States v. Bryant*, —— U.S. ——, 136 S.Ct. 1954, 1959 (2016).

Recent studies suggest that Native American women experience certain violent crimes at two and a half times the national average. *Id.* (citing Dept. of Justice, Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, Ending Violence So Children Can Thrive 38 (Nov. 2014)). For example, 84% of American Indian and Alaska Native women have experienced violence in their lifetime, and over half of those experiencing such violence have done so at the hand of an intimate partner. *Dr. Andre v. Rosay, Violence Against American Indian and Alaska Native Women and Men, Nat'l Inst. Just. J.,* June 2016.

"[C]ompared to all other groups in the United States," Native American women "experience the highest rates of domestic violence." 151 Cong. Rec. 9061 (2005) (remarks of Sen. McCain). According to the Centers for Disease Control and Prevention, as many as 46% of

American Indian and Alaska Native women have been victims of physical violence by an intimate partner. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, M. Black et al., National Intimate Partner and Sexual Violence Survey 2010 Summary Report 40 (2011) (Table 4.3), online at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_report2010-a.pdf (all Internet materials as last visited June 23, 2021). In response to this epidemic of domestic violence, Congress created a federal felony offense of domestic assault in Indian country by a habitual offender "[t]o rachet up the punishment for serial offenders." *Bryant*, 136 S. Ct. at 1961. Mr. Jojola's argument that his sentence for an act of domestic violence should instead be decreased because he is Native American runs counter to congressional efforts to protect Native American communities by deterring this type of criminal conduct.

Mr. Jojola does suggest that this Court should consider his "history and characteristics" which includes "his status as an Indian" that "unfairly subjects him to the harsher sentences of the federal criminal justice system." [Doc. 81 at 21]. This is the extent of Jojola's analysis on this point. While Jojola does cite to a lengthy quote in *United States v. Begay*, No. CR 04-1979 MV, 2006 WL 8444146, at *7 (D.N.M. June 2, 2006), the opinion constitutes a memorandum order and is not precedent. Further, *Begay* is readily distinguishable from the current case in that the judge in *Begay* was notified of an apparent sentencing disparity between the state and federal sentences in the context of that defendant's case.

Nevertheless, it is the Government's position that the defendant's history and characteristics indicate a sentence at the high end of the applicable sentencing range is appropriate. In addition to the lethality associated with the mechanism of assault in this matter, the defendant has a documented history of assaulting the same victim. This is a characteristic

that often leads to a fatal attack. As the United States Supreme Court has noted, domestic abusers exhibit high rates of recidivism, and their violence "often escalates in severity over time." *United States v. Castleman,* 572 U.S. 157, 160(2014). Nationwide, over 75% of female victims of intimate partner violence have been previously victimized by the same offender, *See* Dept. of Justice, Bureau of Justice Statistics, S. Catalano, Intimate Partner Violence 1993–2010, p. 4 (rev. 2015) (Figure 4), online at http://www.bjs.gov/content/pub/pdf/ipv9310.pdf, often multiple times, *See* Dept. of Justice, National Institute of Justice, P. Tjaden & N. Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence, p. iv (2000), online at https://www.ncjrs.gov/pdffiles1/nij/181867.pdf ("[W]omen who were physically assaulted by an intimate partner averaged 6.9 physical assaults by the same partner."). Incidents of repeating, escalating abuse more than occasionally culminate in a fatal attack. See VAWA Reauthorization Act, § 901, 119 Stat. 3077–3078 ("[D]uring the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances.").

Only one month prior to the incident that brings the defendant before this Court did the defendant assault the same victim in this matter. On July 5, 2019, the Isleta Police Department was dispatched to the couple's shared residence for a 911 hang-up. The couple's ten-year-old son called 911 because he "got scared." The ten-year-old had witnessed the defendant punch his mother and tackle her twice. The ten-year-old appeared to have been crying. The ten-year-old stated that when he tried to intervene the defendant pushed him on top of the victim. A younger sibling stated that he, too, observed his mother get hit.

Finally, whatever the merits of an individualized consideration of federal/state sentencing disparities in a particular case, Jojola essentially requests a categorical downward variance in

Major Crimes Act cases where the defendant is Native American, which cannot be reconciled with § 3553(a)(6).

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

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

Here, the more specific subsection with regard to disparities is § 3553(a)(6), which speaks directly to a district court's authority to consider unwarranted sentencing disparities. All other subsections of § 3553(a) on which Jojola may rely, to include "promot[ing] respect for the law" and "provid[ing] just punishment," are more general. 18 U.S.C. § 3553(a)(2). Allowing consideration of disparities under these more general provisions would thwart the policy goals of § 3553(a)(6). Indeed, the limitations imposed by § 3553(a)(6) would be meaningless if they could be circumvented simply by referencing another subsection of § 3553(a). Application of the general/specific canon, therefore, compels the conclusion that these general provisions must yield to the more specific provision—§ 3553(a)(6). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is

construed as an exception to the general one.").

It is important to also note that, where Congress intended for the court to consider state sentencing ranges, it made its intent clear. Unlike federally defined offenses such as Mr. Jojola's, Congress directed that Native Americans be punished for assimilative state crimes "in accordance with the laws of the State." 18 U.S.C. § 1153(b). For these offenses, a defendant's sentence must fall within the minimum and maximum punishments authorized under state law. *See United States v. Martinez*, No. 20-2126, 2021 WL 2409396, at *2 (10th Cir. June 14, 2021). Had Congress wished to direct the court to consider state sentencing ranges for Native American defendants convicted of federally defined offenses, it knew how to do so. Instead, § 3553(a)(6) reflects concern only for federal sentencing disparities

Further, Jojola argues that because the district court may vary from the applicable guideline range based on a policy disagreement with the Sentencing Guidelines, it necessarily has authority to consider federal/state sentencing disparities [Doc. 81 at 16-21].

Jojola is correct that a district court may impose a variant sentence based on a policy disagreement with the relevant sentencing guideline. The prime example of this is *Kimbrough*, 552 U.S. 85. In *Kimbrough*, the Supreme Court held that a district court was within its rights to vary based on a policy disagreement with the Sentencing Guidelines' adoption of a 100:1 crack to powder ratio in cases involving cocaine. *Id*. at 91.

But a district court cannot rely on its disagreement with congressional policy in imposing sentence. *See United States v. Walker*, 844 F.3d 1253, 1257-58 (10th Cir. 2017) (where district court questioned the value of general deterrence, "Federal law required the court to put its skepticism aside."). Indeed, the Tenth Circuit Court of Appeals has expressly rejected the argument that a district court's prerogative to vary based on a policy disagreement with the

Sentencing Guidelines affords it license to consider federal/state sentencing disparities. In *Wiseman*, the defendant argued that because "district courts can vary based on policy disagreements with the guidelines" by extension they must be "empowered to consider how the calculated [g]uideline sentence promotes an unwarranted disparity between similar defendants . . . whether in the federal or state system." *Wiseman*, 749 F.3d at 1195 (alteration in original). The Tenth Circuit disagreed, holding that the district court's ability to vary based on a policy disagreement with the Sentencing Guidelines does not alter the statutory prohibition against consideration of federal/state sentencing disparities imposed by § 3553(a)(6). *Id.* ("The *Kimbrough* line of cases do not, however, conflict with *Branson* as they do not provide a different statutory interpretation of § 3553(a)(6) or otherwise counsel a different result.").

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

court sentences.").

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

Finally, even if Jojola were correct that this Court has the freedom to consider federal/state sentence disparities in his case, this Court is not required to adopt his policy position. "Logically, because a district court may base a variance on a policy disagreement with a particular Guideline, the district court is also free to agree with the policy reflected in that Guideline." *United States v. Lopez-Macias*, 661 F.3d 485, 493 (10th Cir. 2011). This Court does not have to consider the disparity argument.

CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court deny the requested relief in the defendant's memorandum.

Respectfully submitted,
FRED J. FEDERICI
Acting United States Attorney

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Thomas J. Aliberti
Assistant United States Attorney
P. O. Box 607
Albuquerque, NM 87103
(505) 224-1495
thomas.aliberti@usdoj.gov

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will cause a copy of this filing to be sent to counsel for Defendant.

/s/
THOMAS J. ALIBERTI
Assistant United States Attorney