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.	§	

DEFENDANT'S REPLY RE SENTENCING MEMORANDUM

COMES NOW, Defendant, Gregory Jojola, by and through his attorneys of record, Assistant Federal Defenders, Devon M. Fooks and Daniel Snyder, and hereby submits this reply in support of Defendant's Sentencing Memorandum.

INTRODUCTION

The government argues in its reply that this court is foreclosed from considering sentencing disparities as a result of the 10th Circuit's ruling in *United States v. Begay*, 974 F.3d 1172 (10th Cir. 2020). The government's argument must fail because it ignores the plain language of *Begay*. Furthermore, a sentence at or above the guideline range does nothing to protect the public from further crimes on behalf of Mr. Jojola, nor does it necessarily act as a greater deterrent.

ARGUMENT

A. *Antelope* doesn't squarely foreclose Mr. Jojola's equal protection arguments as the government contends.

In its response to Mr. Jojola's request for a sentence reduction, the government neither disputes nor addresses that discrimination was a "motivating factor" in Congress's enactment of the Major Crimes Act (MCA). *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). The government ignores the detailed history of the MCA and entirely disregards the careful academic analysis of the MCA's racist origins and impact.

Instead, the government contends that *United States v. Antelope,* 430 U.S. 641 (1977), squarely forecloses Mr. Jojola's equal protection argument. Doc. 92 at 3. But *Antelope* is not a shield—the equal protection argument advanced by Mr. Jojola was brought under a different theory than the arguments advanced in *Antelope* (or *Jim* or *Prentiss*[1]). Significantly, it contests the constitutionality of the disparate impact of a Sentencing Guideline as applied as opposed to the constitutionality of the MCA.

The bottom line is that the crime of aggravated assault and its corresponding guideline have continued to "bear more heavily[]" on this country's indigenous populations. *Arlington Heights,* at 429 U.S. at 266.

[1] *United States v. Jim*, 786 F.3d 802, 805, n.2 (10th Cir. 2015); *United States v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001)

Given the overwhelmingly lopsided statistics collected by the Sentencing Commission's own tribal advisory groups in 2003 and 2016,[2] that can hardly be disputed. *United States v. Begay*, 974 F.3d 1172, 1175 (noting that the government does not dispute that "the MCA disproportionately affects Native Americans.") This evidence is all that is required to meet the disparate impact test.

While the government may seek to ignore it, the disturbing reality is that, in the process of colonizing this country, Congress enacted a federal criminal law that disproportionately impacts Indian defendants. The Sentencing Commission in turn, while fully apprised about the potential for disparate impact on indigenous populations, did not account for the overrepresentation of Indian defendants in the aggravated assault guideline. The intended effects of that law have reverberated across generations, tracing a straight line from 1885 to today. For the reasons stated in the opening motion and here, the Court should find that the aggravated assault guideline violates equal protection under *Arlington Heights*.

[2] The advisory groups, which convened in issued two reports
United States Sentencing Commission, Report of the Native American Advisory Group (Nov. 3, 2003) (NAAG Report), 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

United States Sentencing Commission, Report of the Tribal Issues Advisory Group (May 16, 2016) (TIAG Report), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf

B. The government ignores the Tenth Circuit's clear directive in *Begay* that avenues for relief exist outside of Section 3553(a)(6).

Contrary to the government's insistence otherwise, this Court is not cabined from considering sentencing disparities outside of Section 3553(a)(6). *Begay*, 974 F.3d at 1176; Doc. 81 at 2 (citing *Wiseman* and *Clark*). The Tenth Circuit indicated flexibility twice in *Begay*: (1) "Begay's sentencing-disparity arguments may be relevant to other § 3553(a) factors" and; (2) "the disproportionate effect of a sentencing disparity on Native Americans, though perhaps relevant to other § 3553(a) factors, does not permit us to review federal/state disparities under § 3553(a)(6)." *Begay*, 974 F.3d at 1176 (emphasis added).

The Tenth Circuit in *Begay* acknowledged that the advisory groups "confirmed the disparity between federal and state sentences imposed on Native Americans—particularly aggravated-assault sentences in New Mexico." *Begay* 974 F.3d at 1175. Yet the government repeatedly faults Mr. Jojola for failing to prove that defendants convicted of aggravated assault in state court routinely receive lower sentences than in federal court. Despite *Begay*'s clear acknowledgment that disparities exist, the government believes that the data from the 2003 Sentencing Commission's Native American Advisory Group Report (NAAG Report) is too dated to be considered. However, the 2016 Report of the Tribal Issues Advisory Group (TIAG Report) confirmed the findings of shorter state sentences. *See* TIAG Report at 18, n. 19.

The government misses the point. The disparities exist. How they can be used as sentence mitigation is the remaining question. Mr. Begay *tried* to proffer such evidence, however the district court refused to consider it, because case law on § 3553(a)(6) precludes such comparisons. The Tenth Circuit agreed. To avoid the same fate, Mr. Jojola focuses instead on the fact that the aggravated assault Guideline lacks an empirical basis, particularly with regard to Native defendants who remain overrepresented in the federal system and specifically with regards to aggravated assault crimes. Again, the Tenth Circuit did not dispute this: "[a]lso like the crack/powder disparity, the aggravated-assault disparity is not the result of empirical data or national expertise." *Begay* 974 F.3d at 1175. Precluding consideration of the disparities based on this acknowledged lack of empirical data would impermissibly strip district courts of their discretion to consider a wide-range of sentencing factors and to disagree with Guidelines based on policy reasons. Because district courts may vary from Guidelines ranges based on policy considerations—including disagreements with the Guidelines—Mr. Jojola asks this court to consider the data generated by the Commission's own advisory groups to find that the Guideline sentence itself fails to properly reflect § 3553(a) considerations. *Rita v. United States*, 551 U.S. 338, 351 (2007).

Contrary to this Court's longstanding precedent, the government ignores the "parsimony principle"[3] of sentencing, elevating § 3553(a)(6) over all else. *See United*

[3] The parsimony principle instructs "district courts to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing." *Kimbrough v. United States,* 128 S.Ct. 558, 570

States v. Lopez-Macias, 661 F.3d 485, 492 (10th Cir. 2011) ("a district court is not limited to consideration of [§ 3553(a)(6)], but instead should consider the totality of the sentencing statute." (citing *Kimbrough)).* The government entirely ignores Mr. Jojola's request for a departure based on U.S.S.G. § 5K2.0(a)(2). That departure provision is linked to 18 U.S.C. § 3553(a)(4) and 18 U.S.C. § 3553(b)(1). The government likewise ignores Mr. Jojola's citation to 18 U.S.C. § 3661 that allows courts to receive a wide variety of information to fashion a sentence. And, it only cursorily deals with Mr. Jojola's argument based on § 3553(a)(2), which it deems less important than § 3553(a)(6). *A sentencing judge does not have to follow the government's lead here and is entitled to conduct the "more holistic inquiry" presented by Mr. Jojola. United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008).

As the Tenth Circuit has already acknowledged, the Sentencing Commission knows and has known about the unique position of Native Americans in the federal system since the creation of the Guidelines. Aside from the fact that Native defendants have been contesting disparities between federal and state systems since before the Sentencing Reform Act that birthed the Guidelines—for example in *Antelope*—numerous experts in the criminal justice field warned the Commission that the inevitability of the disparities to Native populations were real and unjust. NAAG Report at 9. Then, the Commission acted to remediate the problem by establishing the advisory

(2007).

groups in 2003 and 2016. To conduct meaningful research, these advisory groups *did* compare state assault sentences with federal ones because a *raison d'etre* for the advisory groups was to investigate "whether there are disparities in the application of the federal sentencing guidelines to American Indian defendants, and, if so, how to address them." TIAG Report at 3; see also NAAG Report at iii ("Perhaps more than any of the other offenses included within the [MCA], it was the sentences for aggravated assault that gave rise to the perception of unfairness in the treatment of Native Americans under the federal sentencing guidelines, which led to the formation of this Advisory Group."). Assaults for which Native Americans are prosecuted in federal court have no other federal equivalent because of the government's imposition of federal jurisdiction on Native Americans.

C. Need for the sentence imposed to deter future conduct.

Other than concluding what is already understood post-*Begay*—that relief is not available under Section 3553(a)(6)—the government also pivots to other Section 3553(a) factors it thinks weigh in its favor. The government emphasizes how the nature of the offense and need for deterrence compels its desired sentence. As support, it cites the high rate of domestic violence in Native communities. Doc. 92 at 9. No one disputes domestic violence is serious and that it is a problem, particularly for Native populations. However, the government's analysis of the problem is superficial and fails to examine *why* that rate is so high. It is convenient that after centuries of stripping Native peoples of their lands and subjecting them to varying types of forced assimilation, the

government now seeks to use against them statistics borne from unrest that those programs created. For the past 500 years, the government has engaged in behaviors resulting in the purposeful and systematic destruction of the Native people, including the one contested here (subjection to the Major Crimes Act). *See generally*, Maria Yellow Horse Brave Heart, Ph.D. Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations, Journal of Psychoactive Drugs, Vol. 43 (4) (Dec. 2011). In particular, the government has been engaged in the systematic destruction of the Native American family unit, starting with boarding schools seeking to assimilate Native youth, and up to and including subjection to federal criminal sentencing that continues to separate parents from children, further traumatizing new generations. *See* N. Cole, *Trauma and the American Indian, Mental Health Care for Urban Indians: Clinical Insights from Native Practitioners* (2006). There is little societal emphasis on rebuilding and strengthening. Instead, the emphasis is on punishing and removing. While courts tend to focus on an individual's bad behavior, doing so neglects relevant historical context.[4] The deterrence to such crimes will not be attained by imposing a harsh sentence on Mr. Jojola.

[4] The Eighth Circuit is perhaps one exception—it has upheld a downward departure in an assault case based on the high rate of unemployment, alcohol abuse and socio-economic deprivations on the Indian Reservation. *See United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990) and *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993)

Moreover, the empirical evidence is unanimous that there is no relationship between sentence length and general or specific deterrence, regardless of the type of crime. *See* Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999) (concluding that "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance," and that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects"); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28- 29 (2006) ("[I]ncreases in severity of punishments do not yield significant (if any) marginal deterrent effects. . . . Three National Academy of Science panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence."); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995) (finding no difference in deterrence for white collar offenders between probation and imprisonment); Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, 48 Criminology 357 (2010) (study of over a thousand offenders whose sentences varied substantially in prison time and probation found that such variations "have no detectable effect on rates of re-arrest," and that "[t]hose assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame").

D. Need for the sentence imposed to protect the public.

The Sentencing Commission has found that "[t]here is no correlation between recidivism and guidelines' offense level. . . . While surprising at first glance, this finding should be expected. The guidelines' offense level is not intended or designed to predict recidivism." U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 15 (2004) ["U.S. Sent'g Comm'n, *Measuring Recidivism*"]. *See also* Part IV.A.3, *infra*. And according to "the best available evidence, . . . prisons do not reduce recidivism more than noncustodial sanctions." Francis T. Cullen *et al., Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S-51S (2011).

CONCLUSION

In sum, this Court is not constrained in sentencing as the government suggests. As Judge McCay noted recently in concurrence in *United States v. Wireman*, 849 F.3d 956, 966-969 (10th Cir. 2017), policy challenges to a Guideline are a special type of challenge that require a sentencing court to scrutinize the Guideline in its entirety:

> The Guidelines anchor a sentencing: the district court sets the Guidelines range—the starting point—at the outset, and then the parties argue whether the facts and circumstances of the case call for a different endpoint. By contrast, challenging the Guidelines themselves is more like rejecting the starting point. If the applicable Guidelines do not reflect a sound judgment, it stands to reason that they should not anchor the sentencing. And because the anchoring effect of the Guidelines is so strong (as it was intended to be), a winning policy argument would have an outsized effect on the sentencing proceedings.

Id. at 967.

If adopted, the government's position would jettison a district court's sentencing discretion and its right to disagree with the Guidelines. And there would be no path to relief, despite the room *Begay* left for such relief. As noted, the aggravated assault guideline developed without consideration of its disparate effect on Native American communities. As such, the Commission did not carry out its Guidelines-writing task in accordance with § 3553(a)'s sentencing objectives and this Court may mitigate Mr. Jojola's sentence accordingly.

Respectfully submitted,

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