No._____

In the
SUPREME COURT OF THE UNITED STATES

PATRICK BEGAY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari

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Question Presented

In carrying out the mandate of 18 U.S.C. § 3553(a) to impose a sentence that is "sufficient but not greater than necessary on a defendant," may a district court consider reports generated by the United States Sentencing Commission's own advisory groups that concluded that the Guidelines for aggravated assault create sentencing inequities for Native American defendants?

Related Proceedings

- *United States v. Begay*, No. 17-cr-01714-JCH, U.S. District Court for the District of New Mexico. Judgment entered February 5, 2019.

- *United States v. Begay*, No. 19-2022, U.S. Court of Appeals for the Tenth Circuit. Opinion filed September 11, 2020.

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The Tenth Circuit's decision in *United States v. Patrick Begay*, Case No. 19-2022, affirming the district court's sentence was published and is reported at 974 F.3d 1172 (10th Cir. 2020). Appendix A. At Mr. Begay's sentencing hearing, the district court orally rejected his argument that his sentence was unreasonable because it failed to consider that similarly situated state defendants receive substantially shorter sentences. Appendix B.

Basis of Jurisdiction

On September 11, 2020, the Tenth Circuit affirmed the district court's decision to deny Mr. Begay's challenge to the sentence imposed in his case. Appendix A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Order of March 19, 2020, this petition is timely if filed on or before February 8, 2021.

Constitutional and Statutory Provisions Involved

1. The Major Crimes Act, 18 U.S.C. § 1153 (2013):

   (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

   (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive juris-diction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

2. 18 U.S.C. § 3242 (2018):

   All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

3. 18 U.S.C. § 3553(a):

   The text of this statute is reproduced as Appendix C.

Statement of the Case

1. By virtue of his status as an Indian, Petitioner Patrick Begay is subject to the Major Crimes Act (hereinafter "the MCA"). In 1885, Congress enacted the MCA, which conferred federal jurisdiction to prosecute enumerated offenses that are committed by an Indian "within the Indian country." 18 U.S.C. § 1153(a). In its current form, it applies to various classes of felonies, including the two felony assault crimes to which Mr. Begay pled. When Congress decided to make the Federal Sentencing Guidelines (hereinafter "the Guidelines") applicable to the Major Crimes Act, several experts warned of potential disparate sentencing issues: the fear was that Native American defendants would be treated more harshly by the federal sentencing system than if Indian defendants were prosecuted by their respective states for the same or similar offenses. *See* United States Sentencing Commission, Report of the Tribal Issues Advisory Group, 17 (May 16, 2016) (hereinafter "TIAG Report").[1] The primary cause of the concerns is jurisdictional. Native Americans are disproportionately found in federal court as crimes committed by Native Americans on native lands fall under federal jurisdiction.

To address some of these concerns, in 2003, the United States Sentencing Commission (hereinafter "the Commission") created an *ad hoc*

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

Advisory Group on Native American sentencing issues. *Id*. The 2003 Advisory Group was tasked with considering "any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans under the Major Crimes Act." *See* United States Sentencing Commission, Report of the Native American Advisory Group, 9 (Nov. 3, 2013) (hereinafter "NAAG Report").[2] When the NAAG Report issued, there was limited data available to develop comprehensive recommendations. Still, the three states studied—New Mexico included—yielded findings that given similar conduct, Native American aggravated assault defendants received longer sentences in federal courts. *Id*. at 14-19. In fact, New Mexico was highlighted for its significant disparity:

> When one considers the data from New Mexico, the disparity between state and federal sentences for assault is even more dramatic. The average sentence received by an Indian person convicted of assault in New Mexico state court is six months. The average for an Indian convicted of assault in federal court in New Mexico is 54 months. While the New Mexico statistics are based in part on low level offenses which would generally not be prosecuted in federal court, the difference in sentence length is so great even the elimination of these offenses does not negate the significance of the disparity. The six month versus 54 month difference covers a number of offense levels (15), and thus easily it meets the prima facie disparity test.

The NAAG Report "strongly recommended" the Commission reduce the base offense level for aggravated assault by two levels, which it called a "conservative approach," to eliminate the disparity between state and federal

[2] 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

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 contemporaneous decision to 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. TIAG Report 3, 19. According to the report issued by the group, data collection *remained* insufficiently comprehensive to tackle the problem. In fact, the 2016 Report's recommendations included suggestions to the Commission of *how* to collect the data that (1) Congress failed to collect when it decided to apply the sentencing guidelines to the Major Crimes Act and (2) the Commission itself failed to collect after the 2003 Report. Aside from the persistence of federal-state sentencing disparities, the 2016 Report

indicated that "from fiscal year 2003 to fiscal year 2011, Native American defendants received higher sentences than all other races, with the exception of Black defendants." TIAG Report 23. It also confirmed the findings of the 2003 Report with regard to sentences for aggravated assault. *Id.* at 26.

2. In Mr. Begay's case, the Probation Office issued a Presentence Report ("PSR") calculating his Guidelines imprisonment range to be 46 to 57 months. By analogy to this Court's decision in *Kimbrough v. United States*, 552 U.S. 85 (2007) and citing various 18 U.S.C. § 3553(a) factors that the court was required to consider in arriving at the appropriate sentence, Mr. Begay requested a downward variance because significantly higher penalties are imposed on Native Americans convicted of assault in New Mexico federal court than in New Mexico state court. Defense counsel urged the court to consider the reports generated by the Commission's own advisory groups that studied the federal/state sentencing disparities and concluded that the Guidelines for aggravated assault led to sentencing inequities for Native American defendants.

Counsel had also collected additional sentencing data from the New Mexico state court system confirming the advisory groups' findings—that aggravated assault sentences in the state system were significantly lower than their federal counterparts. The government objected, arguing that Tenth Circuit precedent precluded such considerations under § 3553(a)(6). *See*

United States v. Wiseman, 749 F.3d 1191 (10th Cir. 2014); *United States v. Branson*, 463 F.3d 1110 (10th Cir. 2006). The sentencing judge agreed, stating that she could not consider Mr. Begay's sentencing-disparity argument because of that precedent. *Wiseman* and *Branson* instruct a district court to ignore federal/state sentencing disparities in favor of creating consistency for federal defendants who are sentenced in different jurisdictions. The court sentenced Mr. Begay to 46 months' imprisonment. He appealed to the Tenth Circuit, challenging the reasonableness of his sentence.

3. The Tenth Circuit affirmed Mr. Begay's sentence in a published decision. *United States v. Begay*, 974 F.3d 1172 (10th Cir. 2020). It twice extended its "sympathies" that Native Americans are subjected to higher sentences by virtue of a jurisdictional anomaly that does not apply to other federal defendants. Still, focusing exclusively on § 3553(a)(6), the Court felt precedent precluded consideration of federal/state disparities, despite Mr. Begay's larger argument: that the sentencing discretion afforded to district courts through this Court's precedents (in *United States v. Booker,* 543 U.S. 220 (2005) and *Kimbrough*, for example) made the existence of federal/state disparities relevant to other § 3553(a) factors and sentencing overall.

Reasons for Granting the Writ

A. Introduction.

The federal government has imposed a complicated maze of federal criminal jurisdiction on Native Americans.[3] As a result of these jurisdictional impositions, "Native Americans are subject to federal jurisdiction for many offenses that are almost exclusively within states' criminal jurisdiction, such as…assault." Driske, 92 Marq. L. Rev. at 724.

The majority of aggravated assault defendants in the federal system are Native Americans and their cases embody the "typical case." NAAG Report, 31. "While Indians represent less than 2% of the U.S. population, they represent about 34% of individuals in federal custody for assault." *Id*. As the NAAG Report found, using data supplied by the Commission to the 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.[4]

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[3] Timothy J. Driske, CORRECTING NATIVE AMERICAN SENTENCING DISPARITY POST-BOOKER, 91 Marq. L. Rev. 723, 728.

[4] *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.")

The Sentencing Commission has been aware since the promulgation of the Guidelines in the 1980s that the federal jurisdiction imposed on Native Americans by the MCA would create unfair federal/state sentencing disparities for Native Americans. *Id.* at 749-50, 752. Still, the Commission failed to take preventative measures to remedy the problem. *Id.* The Commission has ignored the data generated by its own advisory groups and has dragged its feet on its responsibility to ensure fair sentencing practices, resulting in thousands of additional years of lives spent in prison, and incalculable losses to affected defendants and their families.

Aside from the sheer number of cases affected by the existing sentencing disparity, which alone warrants review, granting certiorari is important because the ruling of the Tenth Circuit conflicts with the overall purpose of § 3553(a) and this Court's decisions in *Booker* and *Kimbrough*. *See* S.Ct. R. (a), (c). How the sentencing factors in § 3553(a) interact with the MCA and Indian law are areas uniquely well-suited for this court, because they involve federal law affecting thousands of cases each year.

B. The impact of *Booker*, *Kimbrough* and 18 U.S.C. §3553 on sentencing procedure.

In *Booker*, the Supreme Court held that the mandatory application of the Sentencing Guidelines was incompatible with the Sixth Amendment. 543 at 226-27 (2005). In 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 this Court's precedent, judges are invited to consider arguments that a guideline fails properly to reflect § 3553(a) considerations, reflects an unsound judgment, or that a different sentence is appropriate regardless. *United States v. Rita*, 551 U.S. 338, 387 (2007). Judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," *Kimbrough*, 552 U.S. 85, 101-02 (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Rita*, 551 U.S. at 347.

Practitioners and judges may dissect a guideline to discover whether it was developed by the Commission in "the exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109-10. This role, drawn from the Sentencing Reform Act of 1984 (hereinafter "SRA"), has two basic components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of comments, data, and research. *Rita*, 551 U.S. at 349. "Notably, not all of the Guidelines are tied to this empirical evidence." *Gall* 552 U.S. at 46 n.2. When a guideline is not the

product of "empirical data and national experience," it is not an abuse of discretion to conclude that it fails to achieve § 3553(a)'s purposes, "even in a mine-run case." *Kimbrough*, 552 U.S. at 109-10; *see also Pepper v. United States*, 562 U.S. 476, 502 (2011); (explaining "that a district court may *in appropriate cases* impose a non-Guidelines sentence based on a disagreement with the Commission's views," including views based on Congressional policy) (emphasis added); *United States v. Corner*, 598 F.3d 411, 415 (7th Cir. 2010) (en banc) (reaffirming well-settled law that "district judges are at liberty to reject any Guideline on policy grounds—though they must act reasonably when using that power").

C. The Tenth Circuit's decision not to consider the data generated by the Sentencing Commission's own advisory groups conflicts with precedent and 18 U.S.C. §3553(a) that permit consideration of a wide array of information when imposing a sentence.

This Court should grant certiorari to evaluate the manner in which a sentencing court may consider the Native American sentencing disparities highlighted by the United States Sentencing Commission's own advisory groups in 2003 and 2015. Those advisory groups each concluded that the guidelines ranges for aggravated assault are not based on empirical data and national experience.

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. *Kimbrough*, 552 U.S. at 108 (quoting *Rita,* 551 U.S. at 350) (internal quotation marks omitted).[5] In that event, this Court has suggested that "closer review" of sentences outside the applicable range might be warranted. *Id.*; *see also United States v. Cavera*, 550 F.3d 180, 192 (2nd Cir. 2008) (en banc). But no such scrutiny is warranted where a variance is based on a policy disagreement with offense guidelines that are "not based on empirical data and national experience, and hence 'do not exemplify the Commission's exercise of its characteristic institutional role.'" *Kimbrough*, 552 U.S. at 109. In such cases, appellate courts can defer to a sentencing judge's reasonable policy disagreement with the Guidelines. *See, e.g.*, *United States v. VandeBrake*, 679 F.3d 1030, 1037-40 (8th Cir. 2012).

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

[5] 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).

1980s" anticipated future problems of the kind presented in Mr. Begay's case. "Several experts, noting the unavailability of parole in the federal system and other comparative structure disparities in sentencing, urged the Commission to consider the special circumstances of Indian offenders and to be sensitive to the concerns of tribal governments." TIAG Report 17, n.16.

Again, in 1990, when Congress decided to make the Guidelines applicable to the MCA, the Sentencing Commission failed to adequately account for the disproportionate affect those guidelines would have on Native Americans. This is true despite admonishments and warnings from experts in the field. *See* Jon M. Sands, DEPARTURE REFORM AND INDIAN CRIMES: READING THE COMMISSION'S STAFF PAPER WITH "RESERVATIONS," 9 Fed. Sent. R. 144, 145 (1996); TIAG Report 17. While the Commission collected data to create its sentencing matrix based on some factors, it ignored the demographics of the people sentenced to evaluate for disproportionality.[6] Gregory D. Smith,

[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, Native Americans are not considered a race, and even if they were, the Commission's refusal to consider race in this context would be unfair, given that the U.S. Government has subjected them to jurisdictional hopscotch due to their race. *See* TIAG Report 17 (citing *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974) to indicate that "it is the legal status of Indian people in treaties and federal law, and not their race or national origin, that separate them from the prohibitions of § 994(d).").

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

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

New Mexico—reflected disparate federal-state sentences and an overrepresentation of Native Americans convicted of assault compared with their makeup in the general population. NAAG Report 31-33; *see infra* p.22, Subsection C (providing the actual statistics gathered).

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

To add insult to injury, in affirming the district court's decision to exclude the well-documented federal/state sentencing disparities, the Tenth Circuit focused exclusively on § 3553(a)(6), determining that the disparities faced by Native American defendants solely on account of the MCA's racial classification is foreclosed by precedent. This self-imposed limitation ignores that the overall spirit and purpose of § 3553(a) and this Court's precedent encourages a broad scope of information at sentencing. *See e.g. Pepper*, 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.").

To conduct meaningful research, the 2003 and 2015 Advisory Groups *had* to look at state assault sentences because assaults for which Native Americans are prosecuted in federal court have no other federal equivalent, again, because of the unique standing of Native peoples subjecting them to federal jurisdiction. *Cf. Wiseman*, 749 F.3d at 1196 (in the context of disparate federal-state sentencing *for drug crimes*, which can be committed by all races equally, arguing that §3553(a)(6) is "only intended to apply to sentencing disparity among and between similarly situated federal defendants").

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

> The assault statutes are among the earliest federal laws, and they were apparently intended to provide for law and order in areas not policed by

> various states. Generally, states oversee the administration of criminal law dealing with assault, and the sentences states hand down for assault are much less severe than federal assault sentences. For states analyzed by the Commission staff, federal assault sentences are, for the most part, higher than state sentences. The inclusion of Indian Country under federal assault jurisdiction, which has resulted in a disproportionate percentage of Indian offenders incarcerated for federal assault would appear to be an accident of history and geography.

NAAG Report 34.

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

Moreover, ignoring the jurisdictional anomalies—a federal government *creation*—is a convenient sidestep around an important issue and works against § 3553(a)(2)(A)'s mandate that sentences foster respect for the law. *See United States v. Deegan*, 605 F.3d 625, 656-657 (8th Cir. 2010) (Bright, J. dissenting) (recognizing that the majority's affirmed sentence "promotes disrespect for the law and the judicial system" because while "ordinarily state

sentences are not germane to showing disparities in sentencing," an exception should exist for "a woman living in North Dakota and generally subject to state and tribal laws, except as to some aspects of federal law because of her residency on an Indian reservation."); *see also Kimbrough*, 552 U.S. 85, 98 (noting that the Sentencing Commission recognized that the "sentencing differential" between crack and powder cocaine "fosters disrespect for and lack of confidence in the criminal justice system" because the disparities fell across racial lines).

The Tenth Circuit largely ignored the prefatory language found in §3553(a), which highlights that a district court must, in every case, select a punishment that is "sufficient, but not greater than necessary" to accomplish the purposes of sentencing listed in § 3553(a)(2). This language sets the framework for all of the factors listed in §3553(a). Instead, the Tenth Circuit placed too much emphasis on §3553(a)(6)—the need to avoid "unwanted sentencing disparities"—to the exclusion of the remaining factors. There is nothing in the plain language of §3553(a) that indicates any one of these factors in general, or (a)(6) in particular, should be given any more weight than any other factor.

Congress, in promulgating §3553(a), did not elevate the disparity factor above the others, instead leaving the weighting of listed factors to the judge determining an individualized sentence. The Tenth Circuit's conclusion that

Subsection (a)(6) does not allow for consideration of federal-state disparities should not have foreclosed the district court from considering how inequities in sentencing exist specifically for Native American defendants because the Commission has repeatedly failed to account for their overrepresentation in federal court.

Booker specifically disavowed the notion that imparting district court judges with discretion would create "excessive sentencing disparities." 543 U.S. at 263 (quoting Scalia's dissent, 543 U.S. at 312, 313). The *Booker* opinion had faith in the fluid nature of the Commission, stating

> The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process.

543 U.S. 220, 263. At sentencing, Mr. Begay merely pointed out that the Commission had failed in this regard and that the court was empowered with considerable discretion to alleviate sentencing inequities faced by Native American defendants. The Tenth Circuit erred when it limited that discretion.

This Court should grant certiorari because the Tenth Circuit's approach is inconsistent with the usual practice of giving judges broad latitude in the information that they may consider at sentencing, and because it erroneously elevated the importance of §3553(a)(6) over other §3553(a) considerations in a manner that conflicts with both §3553(a) itself and with this Court's precedent in *Booker* and *Kimbrough*.

Conclusion

For the reasons given above, Petitioner Patrick Begay requests this Court to grant this petition for certiorari.

Respectfully submitted,

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DATED: February 8, 2021

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Certificate of Service

I, Margaret Katze, hereby certify that on February 8, 2021, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

DATED: February 8, 2021

s/ Margaret Katze

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