APPENDIX A

Decision of the Tenth Circuit

974 F.3d 1172
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Patrick Calvin BEGAY, Defendant - Appellant.

No. 19-2022
|
FILED September 11, 2020

Synopsis

Background: Defendant was convicted, on guilty plea entered in the United States District Court for the District of New Mexico, Judith C. Herrera, Senior District Judge, of two counts of assault with a dangerous weapon and one count of assault resulting in serious bodily injury, and he appealed from sentence imposed.

The Court of Appeals, Lucero, Circuit Judge, held that in imposing sentence, court could not consider disparities that allegedly existed between sentences imposed on Native Americans subject to prosecution in federal court for assaults committed on Indian land and sentences imposed on state court defendants convicted of like assaults.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

***1173 Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:17-CR-01714-JCH-1)** (D. N.M.)

Attorneys and Law Firms

Submitted on the briefs: *

Brian A. Pori, Assistant Federal Public Defender, Albuquerque, New Mexico, for Defendant-Appellant.

John C. Anderson, United States Attorney, Albuquerque, New Mexico, for Plaintiff-Appellee.

Before LUCERO, MURPHY, and EID, Circuit Judges.

Opinion

LUCERO, Circuit Judge.

This case involves disparities in the sentences received by Native Americans in federal court for aggravated assault as compared to state-court sentences for similar conduct. Although we are sympathetic to Begay's argument that but for an "an accident of history and geography," he would have received a lighter sentence, we conclude that our precedents foreclose the consideration of federal/state sentencing disparities under 18 U.S.C. § 3553(a)(6). Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, we affirm the judgment of the district court.

I

Begay assaulted a man in the Navajo Nation with a baseball bat and a knife. The crime thus occurred in Indian country, within the boundaries of the reservation. Both Begay and the victim are enrolled members of the Navajo Nation. Begay was indicted in federal court on two counts of assault with a dangerous weapon and one count of assault resulting in serious bodily injury. He pled guilty to these charges.

The Probation Office issued a Presentence Report ("PSR") calculating Begay's guidelines imprisonment range to be 46 to 57 months. By analogy to Kimbrough v. United States, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), Begay requested that the court vary from this range 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 requested to submit testimony regarding this asserted sentencing disparity. The government objected, arguing that under our precedents, if the district court "even considers this argument or this train of argument in any way whatsoever, any sentence rendered by the [c]ourt becomes invalid." The sentencing judge agreed, stating that she could not consider Begay's sentencing-disparity argument under our unpublished decision in United States v. Beaver, 749 F. App'x 742 (10th Cir. 2018) (unpublished), and moreover, she would not consider this argument because the evidence Begay offered to present lacked sufficient detail to make any comparison of his sentence to state-court sentences meaningful.

Begay was sentenced to 46 months' imprisonment. He appeals, challenging the reasonableness of his sentence.

II

We review a district court's sentencing decision for reasonableness. ***1174** "[R]easonableness review has two aspects: procedural and substantive." United States v. Cookson, 922 F.3d 1079, 1091 (10th Cir. 2019). "Review for procedural reasonableness focuses on whether the district court committed any error in calculating or explaining the sentence." United States v. Friedman, 554 F.3d 1301, 1307 (10th Cir. 2009). Substantive reasonableness addresses "whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." United States v. Verdin-Garcia, 516 F.3d 884, 895 (10th Cir. 2008) (quotation omitted). Section 3553(a) includes an "overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing" set forth in § 3553(a)(2). Kimbrough, 552 U.S. at 101, 128 S.Ct. 558 (quoting § 3553(a)). The statute enumerates several factors that the sentencing court "shall consider." § 3553(a). Of particular relevance to this appeal is § 3553(a)(6), under which a sentencing court considers "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

"We review sentences for reasonableness under a deferential abuse of discretion standard." United States v. Haley, 529 F.3d 1308, 1311 (10th Cir. 2008) (citation omitted). Under this standard, we will reverse a sentence if it is "arbitrary, capricious, whimsical, or manifestly unreasonable." United States v. Muñoz-Nava, 524 F.3d 1137, 1146 (10th Cir. 2008) (quotation omitted). "A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

A

Citing Kimbrough, Begay argues that sentencing courts are not prohibited from considering whether sentences imposed on Native Americans for aggravated assault

are unfairly harsh because Native Americans are disproportionately subject to federal jurisdiction. In Kimbrough, the Supreme Court upheld a district court's decision to impose a below-guidelines sentence on a defendant who pled guilty to charges relating to the possession and distribution of crack cocaine. 552 U.S. at 91-93, 128 S.Ct. 558. The Court began by explaining that the 100-to-1 disparity in crack and powder offenses—treating each gram of crack cocaine as equivalent to 100 grams of powder cocaine—originated in the Anti-Drug Abuse Act of 1986 ("ADAA") and was based on several false assumptions about the relative harmfulness of the two drugs. Id. at 95-97, 128 S.Ct. 558. It further explained that the Sentencing Commission, in adopting the ADAA's "weight-driven scheme" to set base offense levels for drug-trafficking, acted outside its "characteristic institutional role" to formulate sentencing standards based on "empirical data and national experience." Id. at 96, 109, 128 S.Ct. 558 (quotation omitted). The Court also noted that the Commission itself had determined that the disparity was "generally unwarranted" for several reasons, including that it disproportionately affected African Americans and thereby "foster[ed] disrespect for and lack of confidence in the criminal justice system." Id. at 97-98, 128 S.Ct. 558 (quotations and citations omitted). Consistent with these conclusions, the Commission attempted several times—in 1995, 1997, 2002, and 2007—to reduce the crack/powder disparity, with limited success. See id. at 99, 128 S.Ct. 558.

***1175** Against this background, the district court sentenced Kimbrough below the recommended guidelines range. The court reasoned that the crack/powder cocaine disparity in the Guidelines "drove the offense level to a point higher than is necessary to do justice in this case." Id. at 111, 128 S.Ct. 558 (alteration omitted). The Fourth Circuit reversed, holding that "a sentence outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." Id. at 93, 128 S.Ct. 558.

Reversing the Fourth Circuit, the Supreme Court began from the premise stated in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), that the Guidelines are no longer mandatory, and the district court is tasked with "impos[ing] a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing provided in § 3553(a). Hudson v. United States, 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (quotation omitted). The Court concluded that consistent with this directive, "the District Court properly homed in on the particular circumstances of Kimbrough's case and accorded weight to the Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a)." Id. at 111, 118 S.Ct. 488. Accordingly, the Court held that the district court did not

abuse its discretion in calculating Kimbrough's sentence, and the Fourth Circuit erred in concluding otherwise. Id.

Begay draws several comparisons between the crack/powder disparity addressed by the Court in Kimbrough and the disparity in aggravated-assault sentences imposed on Native Americans. Like the crack/powder disparity, the aggravated-assault disparity originates in a statute: the 1885 Major Crimes Act ("MCA"), 18 U.S.C. § 1153, which confers exclusive jurisdiction to the federal courts over certain offenses committed by "[a]ny Indian ... within the Indian country." As Begay contends, and the government does not dispute, the MCA disproportionately affects Native Americans.

Also like the crack/powder disparity, the aggravated-assault disparity is not the result of empirical data or national experience. Begay avers that the Sentencing Commission failed to collect adequate demographic data when it decided to apply the Guidelines to the MCA. As a result, the Commission did not consider the potentially disproportionate impact the Guidelines would have on Native Americans convicted of crimes enumerated in the statute. Acknowledging this problem, the Commission formed two advisory groups, the Native American Advisory Group ("NAAG") and the Tribal Issues Advisory Group ("TIAG"), to improve the application of the Guidelines to Native Americans under the MCA. The advisory groups confirmed the disparity between federal and state sentences imposed on Native Americans—particularly aggravated-assault sentences in New Mexico. See U.S. Sentencing Comm'n, Report of the Native American Advisory Group i (2003); U.S. Sentencing Comm'n, Report of the Tribal Issues Advisory Group 3, 19 (2016).

B

Before the district court, Begay argued these similarities with Kimbrough warranted consideration in the calculation of his sentence. Relying on our unpublished decision in Beaver, 749 F. App'x 742, the district court concluded that it could not consider disparities in aggravated-assault sentences imposed in federal court versus New Mexico state court. Beaver, of course, is not precedential, but it nonetheless purports to rely on two opinions, United States v. Branson, 463 F.3d 1110 (10th Cir. 2006), and ***1176** United States v. Wiseman, 749 F.3d 1191 (10th Cir. 2014), for its stated proposition. 749 F. App'x at 748. On appeal, Begay argues we should consider federal/state sentencing disparities that disproportionately affect Native Americans, drawing compelling parallels to the application of the crack/powder disparity on African Americans discussed in Kimbrough.

In Branson, we rejected the argument that a sentencing court must take account of federal/state sentencing disparities under § 3553(a)(6). 463 F.3d at 1112. That subsection provides that sentencing courts must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6). We explained in Branson that this directive "does not mean that a sentence calculated under the Guidelines is unreasonable simply because it is harsher than a state-court sentence would be for a comparable crime." 463 F.3d at 1112. Because state and federal courts exercise concurrent jurisdiction over several criminal offenses, differences in sentences imposed in state and federal courts are to be expected. See id. Thus, consistent with the rulings of our sibling circuits, we concluded that the purpose of § 3553(a)(6) is not to prevent disparities between state and federal sentences, but rather to prevent disparities in sentences among federal defendants. Id. at 1112-13 (collecting cases). Were the sentencing court to conform a federal sentence to a state sentence, it would undermine this goal. See id. at 1112. Accordingly, we held that "[t]he sentence imposed on Mr. Branson is not unreasonable simply because it is more severe than a state-court sentence would have been." Id. at 1113 (emphasis added).

Eight years later in Wiseman, we again rejected the argument that the district court procedurally erred by failing to consider, under § 3553(a)(6), whether the defendant would have received a different sentence in state court for similar conduct. 749 F.3d at 1194, 1196. Citing Branson, we affirmed "that § 3553(a)(6) is only intended to apply to sentencing disparity among and between similarly situated federal defendants." Id. at 1196 (citation omitted). We further concluded that under Kimbrough, a "judge's policy judgment that drug sentences in federal court are too long when compared to state court sentences" cannot be used as the basis for a downward variance under § 3553(a)(6). Id.

We are 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. Nevertheless, we acknowledge "[w]e cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." In re Smith, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam). Branson and Wiseman control, and they preclude consideration of Begay's sentencing-disparity arguments.

These precedents deal only with § 3553(a)(6). Begay's sentencing-disparity arguments may be relevant to other § 3553(a) factors. See Kimbrough, 552 U.S. at 110-11, 128 S.Ct. 558.[1] We agree with ***1177** the government, however, that Begay has failed to sufficiently develop his arguments with respect to any § 3553(a) factor other than § 3553(a)(6). In his opening brief on appeal, Begay cites the provision in § 3553(a)(2)(A) that requires a district court to consider "the need for the sentence imposed ... to promote respect for the law." But other than a citation to a dissenting opinion from one of our sibling circuits and a citation to Kimbrough, he does not further develop the argument that a district court may consider a federal/state sentencing disparity under § 3553(a)(2)(A). Accordingly, we consider Begay's sentencing-disparity arguments under only § 3553(a)(6).

So limited, Begay's arguments are foreclosed by Branson and Wiseman. Both cases squarely hold that a district court may not consider a federal/state sentencing disparity under § 3553(a)(6), reasoning that consideration of such a disparity would undermine the statute's goal of achieving uniformity in sentences among similarly situated federal defendants. Branson, 463 F.3d at 1112-13; Wiseman, 749 F.3d at 1196. Wiseman, moreover, holds that "the Kimbrough line of cases do not ... conflict with Branson" and do not contradict our interpretation of § 3553(a)(6). 749 F.3d at 1195. Instead, Kimbrough recognizes "that the guidelines are advisory and that district courts have the authority to deviate from guideline sentences based on policy considerations, including disagreements with the guidelines." Id. Begay attempts to distinguish Branson and Wiseman on the basis that they did not involve a Native American defendant. But 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).[2]

III

AFFIRMED.

All Citations

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Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

1 We note that in Kimbrough, the Court specifically upheld the district court's application of the § 3553(a) factors to the crack/powder sentencing disparity, including its allusion to the Sentencing Commission's reports on the 100-to-1 disparity under § 3553(a)(5), which requires consideration of policy statements issued by the Sentencing Commission. Id. at 110, 128 S.Ct. 558. The Court also approved the sentencing court's "fram[ing of] its final determination in line with § 3553(a)'s overarching instruction to impose a sentence sufficient, but not greater than necessary, to accomplish the sentencing goals advanced in § 3553(a)(2)." Id. at 111, 128 S.Ct. 558 (quotation omitted); see also Wiseman, 749 F.3d at 1196 (noting possibility that sentencing disparity could warrant downward variance under § 3553(a) factors other than § 3553(a)(6)).

2 Begay also argues that his sentence is substantively unreasonable because the district court "failed to recognize [that] federal/state sentencing disparities warranted a place in its sentencing deliberation." His argument for substantive unreasonableness is substantially identical to his arguments for procedural unreasonableness. Because he contends the district court failed to consider his sentencing-disparity arguments under the § 3553(a) sentencing factors, Begay's substantive-unreasonableness argument is properly addressed as a challenge to the procedural reasonableness of his sentence. See United States v. Sanchez-Leon, 764 F.3d 1248, 1268 n.15 (10th Cir. 2014) ("[P]rocedural error is the failure to consider all the relevant factors, whereas substantive error is when the district court imposes a sentence that does not fairly reflect those factors." (alterations and quotations omitted)). Accordingly, we reject his substantive-unreasonableness challenge.

Additionally, Begay argues in a footnote that "the issue raised in this case is tantamount to an equal protection violation as it raises ... concerns of injustice

based on immutable characteristics." He provides no further explanation in support of this assertion. Because this argument is insufficiently developed, we decline to consider it. See Bronson v. Swensen, 500 F.3d 1099, 1104 (10th Cir. 2007) (issues omitted from or inadequately presented in opening brief are waived).

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APPENDIX B

District Court's Oral Ruling Denying Arguments Regarding State/ Federal Sentencing Disparities

THE COURT: All right.

I am going to take just a couple of minutes, and I will return. Don't go too far away. It will just take me a short time.

(A recess was taken from 2:43 p.m. to 3:06 p.m.)

THE COURT: Please be seated.

All right. I have reviewed the Beaver case that was provided to the Court, and I have considered the arguments that you-all have made with respect to the defendant's objections.

As to the -- to the first objection as to whether or not the two-level enhancement applies for vulnerable victim, I'm going to overrule the objection.

I think that my review of the facts that have been presented are that the defendant was -- was a vulnerable victim. He was asleep at the time the victim -- did I say the defendant? -- the victim is a vulnerable victim because he was asleep at the time that the defendant hit him with the -- with the bat.

There was some attempt to undermine the victim's testimony, but I -- I think that it was not meaningfully disputed because the victim was able to clarify what he said to the FBI on the date of the

injury.

Now, the report that was provided to the Court does say words to the effect that when Patrick came into the room he had said something to Begay indicating Begay had messed up the family.

Begay, in this instance, meaning the victim.

But I think the rest of the paragraph is consistent with what the victim testified here.

The paragraph says that around 2:00 p.m. Patrick came into the room where Begay was sleeping and began beating him with a baseball bat.

And Begay recalled first getting hit across the thighs. Begay brought his arms up to defend his head and was hit in the arms and then hit in the head.

Begay remembered the bat Patrick used was pink.

Begay said that when Patrick came in the room he had said something to Begay indicating Begay had messed up the family.

And so I am satisfied that the victim, Roland Begay, was vulnerable at the time that he was hit with a bat. So I do -- I'm overruling that objection, so that the two-level enhancement is

applicable.

Then the second objection, the defendant objects to the conclusion in the presentence report that Roland Begay suffered permanent or life-threatening bodily injury, and that the injuries are more consistent with something less severe, which is serious bodily injury, and so disputes the enhancement that was applicable.

I think -- again, I'm going to overrule the objection. The enhancement is applicable to the facts in this case, which is the scars to the head and to the chest are permanent.

And secondly, that the victim, Roland Begay, has experienced headaches, has experienced them on an ongoing basis. And although he testified that they are less severe than they had been initially, he still does get them. And at this point he has no way of knowing whether they will ever completely go away.

The third objection deals with the disparate sentencing on two bases.

One is that the sentencing commission failed to take into account empirical evidence as -- for example, the argument that was made about sentences that are handed out in the Second Judicial

District Court which result in first-time aggravated assault sentences resulting in probation for two-thirds of sentences.

And my reading of the Beaver case says that the federal court should not rely on -- in that case -- sentences from the state -- New Mexico state system.

And I think it's clear that I cannot take into account what New Mexico sentencing would be in arriving at an appropriate sentence in this case, and so I will not rely on what sentences may or may not be in the state court in arriving at an appropriate sentence here.

And I'll go one step further and say that even if I wanted to -- and I don't -- I wouldn't be able to actually use the information that has been suggested because I really would have no basis for comparison anyway.

So two-thirds resulted in probation, one-third apparently does not. And I don't have anything to compare this individual defendant with as compared to the people who have been sentenced in the state system.

So I'm not taking into consideration that disparity, nor would I be able to, because I -- I

simply wouldn't have enough information to do so anyway.

And then the second reason for the objection for disparity is a similar set of circumstances as against Ms. Tom was not prosecuted.

So the defendant argues that that should be taken into consideration in arriving at a sentence here, or at least in establishing a disparate sentencing towards this defendant versus Mr. Roland Begay, who was not prosecuted for a stabbing of Ms. Tom.

Well, as to that, I can only say that I am not prepared to litigate what occurred between Mr. Roland Begay and Ms. Adrianne Tom. I have no information at all on the facts of that case. I have no -- or the circumstances of the event. I don't know that it's a case.

I have no factual basis to evaluate what the rationale is for whatever decisions were made about how to proceed or not proceed on that case.

So I've got -- I've got nothing to really solidly rely on to conclude that there is or is not a disparity.

So that's my long way of saying that particular objection is also overruled.

So having ruled on the objections let me ask you, Mr. Pori, if there are any other objections or changes that should be brought to the Court's attention?

MR. PORI: No, Your Honor. I would have argument on the Court's ruling, but there are no other objections to the presentence report, other than those that the Court's considered.

THE COURT: All right. So with that, the Court -- wait. Hold on one second.

I note that there was no plea agreement in this case, and the Court will adopt the factual findings that are contained in the presentence report and subject, of course, to the information that was presented here and the rulings the Court has made on the objections.

So the next issue, then, is arriving at an appropriate sentence.

And, Mr. Pori, I'll hear any comment you'd like to make.

MR. PORI: Your Honor, I think the Court finds itself in the same situation that the Court in Kimbrough found itself. When a federal court is called upon to sentence someone for possession of crack cocaine and the sentence is six times higher

than the sentence for powder cocaine, and the defendant says that's not fair.

The Court can consider that. We have a similar situation here.

Why is 56 months an appropriate sentence? Where can we -- from what resources can we discern that that -- other than it says it in a book, where can we find that that is an appropriate and a fair and judicious sentence?

I respectfully submit that it is not.

We already agreed that the commission did not rely on empirical evidence in setting these offense levels. And in fact what happened was, in response to the concerns of the Native American advisory group, they reduced the offense level but increased the enhancements.

So there was a concern, as reflected in the report -- and I urge the Court to consider it -- that these sentences were too high and the commission decided to reduce the offense level but, effectively, make them higher.

Where is the justice in that? Where is the fairness in that?

And the Court has said -- you know, I understand, Your Honor, whenever we talk about

similar offenses we can always draw distinctions. We can always say, Well, but, you know, how much information am I going to have to decide whether or not they're similar?

We're prepared to present the testimony of someone who was stabbed by Roland Begay in his home while they were drinking.

Roland Begay was stabbed in Mr. Begay's home while they were drinking.

One of those men has committed a stabbing and faces no punishment.

The Court doesn't know why, and I understand the Court's concern, How can I make this comparison?

The comparison is, for whatever reason, a person can stab someone in the Navajo Nation, stab them in their home, and escape all punishment whatsoever.

And another person can stab someone and faces 56 months.

Where is the justice? Where is the fairness?

Your Honor, I hate to be so vituperative -- my apologies to Mr. Baca -- but this is something that has really bothered me very deeply in the time

that I've been with the Federal Public Defenders.

It concerns me because it's bad enough that Native Americans have to drive three and a half hours to come to court.

It's bad enough that a mother who wants to attend her son's court proceedings has to make sure she has a car that's good enough to drive three and a half hours, she has enough money to put gas in that car, she has enough money or friends to stay.

The imposition of the Major Crime Act on native communities has always bothered me.

But nowhere does it bother me more than in the aggravated assault realm, because we have two commissions.

Dean Washburn, of the University of New Mexico, was on the second group, who has said 77 percent of the people sentenced for aggravated assault in the federal system are native.

And time and time and time again those sentences are, by any measure, too high.

And as the Court in the case we cited in Nebraska noted, if the only difference for these increased sentences is the fact that he's native, that's an attack on the constitutional democracy that we love so much, and it is not appropriate.

And I think every stakeholder, every person who participates in this system, has to pause and ask themselves: Is the Major Crime Act the functional equivalent of smallpox-infested blankets? Is the United States, in its shameful history to Native Americans, continuing to disparately and unnecessarily and without any justification continuing to adversely affect native people just by virtue of their status of being native?

I respectfully submit in this case that is the case, and it's not right.

And I am happy, and proud, even, to be able to stand here and challenge it. Because I think every one of us in this courtroom needs to ask ourselves: Where did this sentence come from, this 56 months? And is it fair?

And is it -- and how -- how can we -- how can we say it's fair when one stabbing results in no punishment whatsoever?

We don't know why it results in no punishment. But we know one person was stabbed and the person who stabbed her escaped any prosecution or punishment of any kind.

Her husband, on the other hand, the father of her four children, is now facing the prospect of

being removed from his family for up to five years based on an assault.

And, Your Honor, I don't want to -- by this advocacy, I don't want to suggest that this assault doesn't deserve to be punished. It does. That's not what I am saying.

Does it need to be punished as severely as the guideline would recommend?

Absolutely not. It would be unjust to do that. Truly, truly unjust.

And if we know that the commission didn't rely on any kind of empirical sentences in setting these guideline levels, then what are we talking about? What is a good sentence for aggravated assault?

Well, of course any sentence depends on the history and characteristics of the defendant and the facts and the circumstances of the crime. And this crime is troubling.

You know, whether he was asleep or laying down, he -- he was laying down.

And Mr. Begay, intoxicated as he was, confronted him.

Now, perhaps if Roland Begay had not followed Mr. Begay out to the porch; if, perhaps, he

would have stayed where he was while Mr. Patrick Begay was retreating, and picked up that cell phone and called the police, maybe we never would have had any of these injuries.

You know the point of presenting this evidence is to show that these injuries -- which again, we submit, are not permanent, because they are going away.

Are not life-threatening, because he was able to do all the tasks that he did before, with the exception of having headaches.

They are not disfigurement. He has a scar on his head that we couldn't see because it's covered by his hair. It's not like someone taking an eye out or losing a limb.

And yet it's punished just the same, just the same as taking an eye out or losing a limb.

And it's punished only because of the victim's conduct in going out -- and his words were consistent throughout -- to confront him.

Be that as it may, with all due respect to the Court and Mr. Spindle, a 56-month sentence is patently unjust, deeply unfair, and raises an unsettling prospect that is based on Mr. Begay's status as a Native American. Because if he were to

commit the same assault across the street, he would not be facing the same sentence.

Your Honor, let me take a different tact in this case.

The sentencing -- first of all 28 USC Section 994(j), that's the enabling legislation for the United States sentencing commission. 28 USC Section 994(j) says that the commission must remember that in a first offense, a true first offense, sending someone to prison for the crime is generally not appropriate unless the crime is truly serious.

And -- and we can always debate. Certainly someone who gets stabbed, that crime is serious in some people's mind.

But the commission has tried to finally implement the congressional directive inherent in the enabling legislation by coming up with an amendment, that's not yet in effect, that talks about sentencing first-time offenders.

Now, we can all discuss the obvious fact that anyone who was arrested in a Tribal Court is not technically a first-time offender. And yet we don't count tribal arrests and count tribal convictions because the -- the hallmarks of due process that we would insist on are not present there: the right to

appointed counsel, the right to an impartial decision-maker, the right to -- the penalty of constitutional rights are not always apparent in Tribal Courts, and that's why they don't count for any criminal history points.

But they shouldn't count for another reason. It's a revolving door.

Ramah police arrest people. They arrest them for these acts. They put them in jail. The most they can punish them is for a year.

And usually any arrests don't result in punishment. I think that's why Roland Begay had difficulty remembering all of his threatening arrests.

But they're different for another way, because of the notion of recidivism and rehabilitation.

When a person has gone to prison and has been punished and is then on probation and has the opportunity to improve their behavior, and then still commits a crime, that person is more blameworthy than someone who commits a first offense, who's never been in prison, who's never had the opportunity to get better, who's never been given the tools to rise up out of the world that he was arrested from.

And that's what Mr. Begay needs right now. He is a true first offender to you. He has never done any amount of prison time. This is the longest sentence he has ever served in his life. He's been in continuous custody since his arrest in this case.

And while in custody, he has not had the opportunity to receive any kind of help for what he needs help with the most.

I'm going to let Mr. Begay speak to you directly. But it's important to know that whatever I say about anyone else, I'm going to say this about Mr. Begay right now.

This man has a drinking problem, a profound drinking problem. It's already led him to lose his children. His children will return to him. He still hasn't overcome that drinking problem.

His wife has been stabbed because of that drinking problem.

He stabbed someone else because of that drinking problem.

His wife's husband -- his wife's father, excuse me, lost his life in a stabbing surrounding drinking.

The Court knows too well that alcohol is the ruination of the Navajo people and natives

throughout the United States, the ruination.

And when we talk about smallpox-infested blankets, alcohol has done far more damage than smallpox-infested blankets ever did. And the damage is done with the complicity of the people who drink alcohol, despite their alcohol problem.

And so Patrick Begay, standing next to me, has an opportunity to be a father to his four children or to let those children slide down into further poverty and degradation and humiliation while he drinks himself to death.

And I hope Mr. Begay will snap, will realize not just that he seriously injured someone, not just realize that he took himself out of the life of his family because of his drinking and the violent act that he committed while he was drunk, but that he'll do it again. It will happen again. And his children will not have a father and his wife will not have a husband and his whole family will be destroyed because of alcohol.

And I would ask the Court to give Mr. Begay the opportunity to meaningfully address that disease, the disease of alcoholism.

It will not, I respectfully submit, be meaningfully addressed by a commitment to the Bureau

of Prisons. The Bureau of Prisons would have a 500-hour residential drug abuse program that is very helpful. Unfortunately, people who commit violent crimes are not eligible for that program.

And even if a Court were to recommend that they participate in it, the internal politics of life in a prison prevent people with violent crimes from participating in the RDAP program for this reason.

Other inmates exert enormous pressure on any inmate who is going to take a spot in RDAP, who does not receive the one-year credit, not to take that spot.

Because in the colloquialism of the inmate, that inmate is blocking the door to another inmate who could get into that program, get the one-year credit, and get out sooner than the inmate who isn't receiving the credit.

So across the board, in my experience -- and I invite the Court to survey other criminal defense lawyers or defendants who have been to the Bureau of Prisons. If you're not going to get the one-year credit, you're not going to do RDAP. Not because you couldn't do it, but because there's so much pressure among other inmates to keep you out of that program that you will, to maintain your health

and safety, stay out of that program.

Mr. Begay needs help, and the Court has the opportunity to give him that help. That help will not be found in incapacitating him for years in the Bureau of Prisons.

It's our request that Mr. Begay be sentenced to a term of time served and that he receive a period of supervised release, in which he is required to enter an inpatient substance abuse program like the Four Winds Recovery Center and stay there for up to six months until he's discharged.

And when he's discharged, that's when Mr. Begay will have to start doing the real work. That's when he'll have to start being a husband to his wife and a father to his children, without alcohol.

And he and I have talked. It's not easy. It's not easy to give up drugs and alcohol. It's not easy at all. It doesn't matter how smart you are, how committed you are, how much you love your children, you fail again and again and again and again because the disease is so insidious.

As they say in Alcoholics Anonymous, it's cunning, baffling, and powerful.

If Mr. Begay fails there will be a

sanction. But if Mr. Begay fails, my hope for him is that he not take that failure and stop. He will only succeed in overcoming his alcoholism if he keeps trying until he succeeds, no matter the cost, no matter the disappointments, no matter the setback.

That is my prayer for Mr. Begay and his family, and I urge the Court to help that prayer come to fruition through a structured program of supervised release designed to address his alcoholism.

And I know Mr. Begay wanted to address the Court.

THE COURT: All right.

Mr. Begay?

THE DEFENDANT: Your Honor, my name is Patrick Begay, and I'm here before you today to admit to more than my guilt. I'm here to accept full responsibility for my actions.

To begin with, I want to apologize to the victim for my actions. And I also want to apologize to my family for putting them through all of this.

The time away has been hard on me and my family, especially harder on my -- on the mother of my children, Adrianne Toledo.

As I stand here before you today,

Your Honor, I ask for your help with my alcohol addiction. I ask this of you because I'm ready for change. I want my life back. I want to be a father, a partner, a brother, a son, again.

I don't want to be a burden on everyone around me. And I really don't want to be remembered as that one drunk guy.

I want to make everlasting memories with my family and provide a bright future for them.

As I stand here today, I ask of you, Your Honor, for a long-term treatment and your guidance to learn a trade.

If given the opportunity, I would really like to be admitted to a long-term treatment facility to get help for my addiction.

And that's it.

MR. PORI: Thank you.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Thank you, Mr. Begay.

Let me hear from the government.

Mr. Spindle?

MR. SPINDLE: Thank you, Your Honor.

Your Honor, the two main points the United States wants to emphasize are both under 2553, the first of which is the nature and circumstances of

this event.

The Court, in this situation, has actually had more information than normal, because we actually did have the victim testify here in court.

But what we have before us was a very cold and calculating attack. He was a sleeping man who was attacked with a baseball bat that could very well have killed him.

As the Court heard, there was a health fair in Ramah that week, and on that day specifically. And but for the proximity of these emergency services we could have a very different outcome. This could be a murder that the Court could be sentencing.

You heard the testimony from Roland that when he was in the helicopter flying to Albuquerque he started losing consciousness. He started fading into different colors, and it started sounding like he was underwater. He was seemingly pretty out of it.

There was a very good chance that this could have resulted very differently, all because the defendant was under the influence of alcohol and is incredibly violent when he is under the influence of alcohol.

The other thing I wanted to point out is

his history, which really provides upward pressure on the guidelines in this case. The United States would move for an upward departure for -- under representation.

As the Court sees from the PSR, he's been arrested 13 times since 2002. Six of those times were alcohol related and three of them were violent crimes related.

It's clear he's not getting the point. Hopefully, after a sentence in this matter, he will do everything that Mr. Pori is hoping for. The United States hopes that he can get his act together as well.

But it's been very clear that these little sentences in Tribal Court are not doing the job. He's not been deterred, he's not changing his behavior.

We believe that provides upward pressure on the guidelines, and we're asking for a penalty on the high end of the guidelines, which would be 57 months.

And the other thing that we would ask, and I think it's just the record was a little unclear, and it might be my misunderstanding, Your Honor.

But is the ruling from the Court that the Court is excluding Adrianne Toledo from testifying

because the proffer from defense was that the proposed testimony would be irrelevant for the purposes before the Court?

THE COURT: That was my conclusion as to both of the witnesses. I was not going to -- I heard the proffer that Mr. Pori made, but I determined that the additional testimony would not be helpful. So...

MR. SPINDLE: Thank you, Your Honor. That was clear.

I have no further argument.

THE COURT: Okay. All right.

Is there anything further, Mr. Pori?

MR. PORI: No, Your Honor. Thank you.

THE COURT: Well, I have just a few things that I want to say, Mr. Begay.

I can't tell you how many times I have had -- I can't tell you how many times I've had the very sad and unfortunate duty to sentence someone to significant time in custody because of some sort of violent conduct that occurred while the person was under the influence of alcohol.

I don't disagree with the -- with the notion that I see this very frequently in cases that come from the reservations or, you know, pueblos in New Mexico.

And I -- I just continue to -- I continue to wonder at what point do people get to the point where enough is enough.

I can't tell you how many times I have said to others who were standing there, much like you are now, that at some point those of you who are here in, you know, similar circumstances, I just hope that you take -- the day will come that you are released and are returned to your community. And I just hope you take to your community the message that this -- this cycle just needs to stop.

I mean, you're here. We've heard today from others who have had tragedy fall upon them on account of the effects of alcohol. And at some point this cycle has to stop.

And I just wonder what kind of life you want for your own children. Is this the kind of future you envision for your children, where some day they'll be standing in a federal courtroom being sentenced for some crime that occurred while they were intoxicated?

And at some point somebody needs to be a leader and really spread the message that not only is this an addiction that needs to be conquered, but if there was a meaningful way to get the young people in

your community to not even go down this path, I don't -- I just -- I just feel so sorry for, you know, you, your family, and others in your community, because I just -- this is just such an ongoing tragedy.

So I don't disagree that the disease of alcoholism is insidious. I have seen a lot of it. Just as Mr. Pori said a moment ago, it is insidious.

And while I hope, as he does, that you step up to the plate and decide what kind of life you want to live and what kind of husband and father you want to be, I -- I hope that you make the right decisions.

And I agree it's not going to be easy. But it's something that you have to want, and it's something that you have to live, and it's something that your kids deserve because they -- you know, what kind of life are they going to have if they were to decide that they want to follow in your footsteps?

And so -- so this is -- this is something that's bigger than you, bigger than this set of facts that brought us here today. But it's -- you know, it's -- I wish I could say that you were the last person that I'm going to see in court who committed an act that was violent because of alcohol.

I wish so much that you would be the last.

But I just believe that there will be others that follow you, and -- and this cycle just has to stop.

And I -- if I had the answer I would solve the problem. But it's -- you know, it's going to take some leadership by people like you who will go back to your community and teach a different way, encourage a value system that -- that places more emphasis on how to avoid this path or how to -- how to fight it and get -- you know, do what you can to lead to the cure, because this is something -- I agree with your attorney. Mr. Pori said that this is destroying not only your life but your -- your community. It just is.

So you know, Mr. Begay, I heard you say that you were accepting responsibility for this. And obviously you did, because you pled guilty.

And so I -- I don't -- I don't -- you know, I never enjoy sentencing anybody. I don't -- I don't find it to be particularly rewarding, but it is something that I'm required to do by law.

And so I'm looking at your sentencing range here. The guideline range is the low end of 46 months, a high end of 57 months.

You heard the prosecutor a moment ago argue for the high end, and I understand his rationale. I

mean, you do have a history of violence and a history involving alcohol. And although this is your first felony conviction in federal court, your -- your history shows that you have engaged in, you know, violent conduct before.

And the facts of this case, the -- again, I know you accepted responsibility. But I just have to emphasize that this is a serious case.

To attack someone with a baseball bat and hit them on -- all over the body, including the head, is -- is a very serious -- a very serious act that no doubt could have been much more serious than it was.

I mean, thankfully Roland Begay was not injured more seriously or killed.

But that's not to say that he wasn't injured and that this was not serious.

The -- and hitting him with a bat was not the whole story. Then he was also stabbed.

So all of this taken into consideration is certainly a series crime.

I understand some of the things that, you know, your attorney has pointed out. I'm not saying that life has been easy for you. But taking into consideration everything that occurred in this case, I do think that the guideline range is an appropriate

sentence in this case.

However, I have determined that a sentence of 46 months is the appropriate sentence in this case, as opposed to the 57 months that the government has requested.

I heard what you said, Mr. Pori, about the 500-hour drug and alcohol treatment program in the Bureau of Prisons.

And I heard what you said about the unlikely -- the fact that it is unlikely that the defendant would actually get placed in it. I heard that. But nevertheless, I'm going to recommend that.

So I will also be recommending other conditions that would require the defendant to obtain treatment and counseling.

So unless somebody has something else they'd like to say I will proceed, then, to pronounce sentence.

So the Court adopts the presentence report factual findings.

The Court has considered the sentencing guideline applications and the factors that are set forth at 18 United States Code Section 3553(a)(1) through (7).

The offense level is 23.

The criminal history category is I.

And the guideline imprisonment range is 46 to 57 months.

And the Court notes the defendant assaulted the victim with a bat before stabbing him with a knife.

So as to each of Counts 1, 2, and 3 of Indictment 1:17-CR-01714-001-JCH, the defendant, Patrick Calvin Begay, is committed to the custody of the Bureau of Prisons for a term of 46 months. Said terms will run concurrently.

The Court recommends the defendant participate in the Bureau of Prisons -- excuse me -- participate in the Bureau of Prisons 500-hour drug and alcohol treatment program.

The defendant is placed on supervised release for a term of two years as to each count. Said terms shall run concurrently.

The defendant must comply with the mandatory and standard conditions of supervision.

The following special conditions will also be imposed.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program.

The probation officer will supervise your participation in the program, which provider, location, modality, duration, intensity, et cetera, and you may be required to pay all or a portion of the cost of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress.

The probation officer may disclose the presentence report, any previous substance abuse evaluations and/or other pertinent treatment records to the treatment provider.

You must submit to substance abuse testing to determine if you have used a prohibited substance.

Testing may include urine testing, the wearing of a sweat patch, a remote alcohol testing system, an alcohol monitoring technology program, and/or any form of prohibited substance screening or testing.

You must not attempt to obstruct or tamper with the testing methods.

You may be required to pay all or a portion of the cost of the testing.

You must submit to a search of your person, property, residence, vehicle, papers, computers, as defined in 18 United States Code Section 1030(e)(1), other electronic communications or data storage devices or media or office under your control.

The probation officer may conduct a search under this condition only when reasonable suspicion exists in a reasonable manner and at a reasonable time for the purpose of detecting alcohol, marijuana, drug paraphernalia, or any other illegal contraband.

You must inform any residents or occupants that the premises may be subject to a search.

You must not use or possess alcohol.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances, for example, synthetic cannabinoids, synthetic cathinones, et cetera, that impair your physical or mental functioning, whether or not intended for human consumption.

You must not possess, sell, offer for sale, transport, cause to be transported, cause to effect interstate commerce, import, or export any drug paraphernalia, as defined in 21 United States Code Section 863(d).

And the conditions that I just reviewed are

all imposed due to the nature of the offense and to the defendant's history of marijuana and alcohol use.

You must participate in and successfully complete a community-based program which provides education and training in anger management.

And this condition is imposed based on the circumstances of the instant offense.

Additionally, the defendant's personal and family history may be a contributing factor to his aggression, so this condition will assist him with finding positive outlets.

You must participate in and successfully complete a community-based program which provides education and training in parenting.

And this condition is imposed to assist the defendant in reintegrating into the lives of his children upon his release from custody.

And this condition will also provide additional tools to help the defendant speak to his children in a productive manner.

You must reside in a residential reentry center for a term of up to six months.

You must follow the rules and regulations of the center.

And this condition is imposed to help the

defendant reintegrate back into society.

This condition will also assist the defendant in maintaining a schedule and routine prior to residing independently.

Pursuant to the Mandatory Restitution Act -- the Mandatory Victim Restitution Act, it is further ordered that the defendant will make restitution to the victim, John Doe, in the amount of $420.

Restitution shall be submitted to the Clerk of Court, Attention Intake, 333 Lomas Boulevard, Northwest, Suite 270, Albuquerque, New Mexico 87102, to then be forwarded to the victim.

The restitution will be paid in monthly payments of $50 or 10 percent of the defendant's monthly income, whichever is greater.

Based on the defendant's lack of financial resources, the Court will not impose a fine or a portion of a fine.

However, in accordance with US Sentencing Guideline Section 5(e)1.2(E), the Court has imposed as a special condition that the defendant reside at a residential reentry center.

So the Court concludes that the total combined sanction, without a fine or alternative

sanction other than residing at a residential reentry center, is sufficiently punitive.

The defendant shall pay a special assessment of $100 as to each count of conviction, for a total of $300, which is due immediately.

Lastly, pursuant to 18 United States Code Section 374(a), within 14 days of the entry of judgment you have the right to appeal the final sentence of this Court.

You have the right to apply for leave to appeal in forma pauperis if you are unable to pay the cost of an appeal.

So with that, let me ask counsel, is there any reason sentence should not be imposed as I have stated it?

MR. SPINDLE: Your Honor, because there's no appellate waiver here, we would ask the Court to inquire of defense counsel whether or not the adequacy of the Court's explanations for all the decisions here today were sufficient.

THE COURT: Let me begin with that, Mr. Pori.

MR. PORI: The explanation is adequate, Your Honor.

We do object that the sentence is both

procedurally and substantively unreasonable.

It's procedurally unreasonable under Section 3661, because the Court has limited the information that Mr. Begay has proffered to show the Court two issues.

One, that the commission did not act in its characteristic institutional role and ignored empirical evidence of a national consensus of sentences for aggravated assault and deliberately set those sentences higher for federal cases, with the result that the people who must bear the burden of that deliberate and ill-conceived choice are Native Americans.

We tried to offer the Court evidence that a first offense, a felony assault, is so far outside norms that it is unreasonable.

They're wrong in the abstract, but they are especially unjust and unreasonable when the only reason for these excessive and unreasonable sentences is the defendant's status as a Native American, and come to find out, the charging decisions of a prosecutor.

Your Honor, this case smacks of unfairness. We tried to offer you evidence that Adrianne Toledo was stabbed by Roland Begay, stabbed in his home

after they were drinking, went to the hospital, received treatment, was released, and no charges were filed.

Everything that Mr. Spindle said about Patrick Begay I could say about Roland Begay.

Roland Begay had eight arrests before the stabbing of Adrianne Toledo for threatening people, for aggravated assault, for battery.

It was wrong for Roland Toledo [sic] to attack Adrianne Toledo and stab her. It's a very serious offense which could have resulted in a much more serious crime.

And one is not even punished, and the other is punished for 46 months. It's like being struck by lightning.

It's arbitrary. It's unfair. And it is unjust.

We believe that the sentence is substantively unreasonable for this reason.

Mr. Begay has been in custody for ten months. By the Court's ruling, he has three more years in prison. What part of justice would be served by three more years that couldn't be served by two more years or one more year, or no more year?

What -- what is it about this offense that

requires three more years as opposed to, say, one more year?

We can't really say.

One man can stab a person and walk away free with no sanction whatsoever, and the other man could stab someone and he receives the highest sentence in the nation among these category of offenses primarily because he's a Native American.

And the sentence is imposed without considering the evidence that we do have of a stark sentencing disparity.

And credit to Mr. Spindle for taking the concern not to compare state sentences with federal sentences under the rubric of 3553(a)(6).

But to suggest that you can't compare them at all, we're just going to have to let that go. That's just the way it is, is to ignore the authority of Kimbrough, and we have something even worse than Kimbrough.

We don't have a six-to-one disparity, we have a 46-to-nothing disparity. 46 months for one man, no months for the other man.

And I'd respectfully submit the sentence is -- the offenses are similar, but we don't know, because we never got the opportunity to present the

evidence of a similar offense where one man receives no time while the other man receives 46 months.

I don't mean to attack the Court personally or professionally in this particular case. I think it's the nature of what we do.

But we cannot do this without a consideration that in doing so our sentences may be arbitrary, they may be unjust, and they may be unfair.

And I'd respectfully submit and object that that's what's happened here.

With that, the matter will be submitted.

THE COURT: All right. Well, for the reasons that have already been stated, the Court will sentence the defendant as stated.

I -- I don't feel that any additional explanation is necessary for the Court's rulings.

The Court did hear the proffer and the Court has stated adequately, in my view, the reasons for the Court's ruling.

So thank you all.

And the Court will be in recess.

MR. SPINDLE: Thank you, Your Honor.

MR. PORI: Thank you, Your Honor.

Oh, Your Honor, one other matter.

Adrianne Toledo is here. She's traveled from Ramah. I was wondering, if it's acceptable to the marshal, if Mr. Begay could have an opportunity to speak with her defined, of course, by the bar to the Court, but to speak with her before his return to custody, if that's acceptable to the Court and the marshals.

THE COURT: I will leave that to the marshals.

MR. PORI: Thank you, Your Honor.

(Proceedings concluded at 3:56 p.m.)

APPENDIX C

Text, 18 U.S.C. § 3553(a)

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018
Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

