

Fact Sheet: Racial Fairness in the Advisory Guidelines System

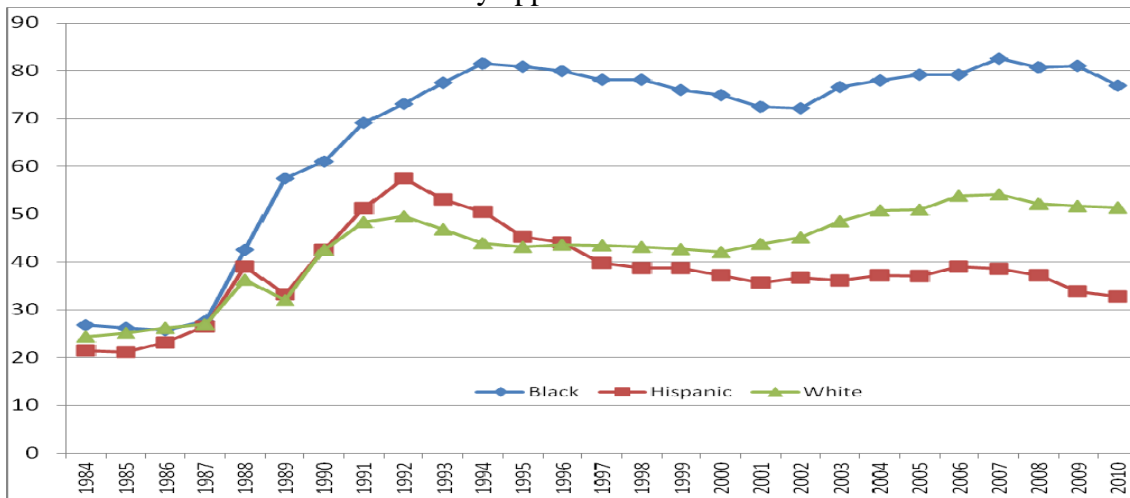
Introduction

In recent testimony before Congress, the Sentencing Commission called for legislation that would require that the guidelines and policy statements be given substantial weight at sentencing and on appeal.¹ In support of this request, the Commission reported that the difference in sentence length between Black and White males had steadily increased since *Booker*, based on a multivariate study comparing post-*Booker* sentencing to the period following the PROTECT Act.

Multivariate studies like the Commission's do *not* establish that judicial discretion results in racial disparity. Such studies do not include important legally relevant factors that would change the results if they were included. Small differences in methodology produce very different results. And even using the same methodology, race effects appear for some offense types but not others, and for some years and not others. For these reasons, the Commission has previously warned that such studies do not provide reliable evidence that race influences judicial sentencing decisions. But the Commission omitted these warnings in its recent testimony before Congress. The Commission has used three different models in performing multivariate analyses over the years, previously finding the greatest race effect during the mandatory guidelines era. The Commission's methodological choices for the most recent model produced a greater reported race effect than previous models. Different researchers using more widely accepted models have reached results in conflict with the Commission's. These issues are discussed below, but first we address proven causes of racial unfairness in the system, and how judges have reduced such unfairness after *Booker*.

1) Implementation of mandatory guidelines and mandatory minimums created racial unfairness that did not previously exist.

- Allegations of racial bias infecting judicial decisions were made before the sentencing guidelines were adopted, but were later proven unfounded. A comprehensive review sponsored by the Department of Justice's Bureau of Justice Statistics reported that "outcomes generally corresponded to differences in cases and offenders' characteristics that were commonly seen as legitimately considered. . . . Differences clearly thought to be unwarranted (*e.g.*, by the offender's race or ethnicity) were found to be uniformly small or statistically insignificant."²
- When the guidelines and mandatory minimums took effect in 1989, a gap in time served between Black and White offenders immediately appeared. *See Chart below.*³



- The gap was caused primarily by changes in the types of offenses and offenders prosecuted in federal court, *i.e.*, new and harsher mandatory sentencing rules that applied most frequently to Black offenders. The gap was found to be “the result of differing offense/offender characteristics that were formally and rigidly incorporated into Federal sentencing law and policy rather than the differences in the treatment that offenders of specific racial groups received at sentencing.”⁴
- Some of the new and harsher rules with an adverse impact on Black offenders were not necessary to achieve the purposes of sentencing. Sentencing policies implemented through statutes and guidelines are unfair when they lead to excessive punishment that does not advance a legitimate purpose of sentencing, no matter who they impact. Such policies result in unwarranted racial disparity when they adversely impact a particular racial group.⁵
- In 2004, the Commission found: “Today’s sentencing policies, crystallized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁶

2) Judges have used their increased discretion after *Booker* to reduce unwarranted racial disparity resulting from the adverse impact of unfair guidelines and laws, and from law enforcement and prosecutorial decisions.

- The gap in time served between Black and White offenders was greatest in 1994, at 37.7 months. In the advisory guidelines era, it has narrowed to 25.4 months as of 2010, the lowest since 1992.
- When judicial discretion was tightly constrained in a mandatory guidelines system, judges could not compensate for unfairness in the guidelines, statutes, or decisions of law enforcement agents or prosecutors.⁷ Judges have used their increased discretion after *Booker* to *reduce* unwarranted racial disparity caused by these sources.
- Many guidelines and mandatory minimums have a disproportionate impact on racial minorities without advancing a legitimate purpose of sentencing. For example, in 2010, 78.4% of drug trafficking offenders sentenced under the crack guidelines and 64.4% of offenders sentenced under the “career offender” guideline were African American. The Commission’s own research demonstrated that penalties under both these guidelines were excessive. In addition to its research on crack sentencing, the Commission found that the severe punishment recommended by the career offender guideline, as applied to those who qualify based on prior drug convictions (the vast majority of career offenders), vastly overstates the risk of recidivism of those offenders, has no general deterrent effect, and has a racially disparate impact.⁸
- After *Booker*, judges have been better able to compensate for unfair and unnecessarily harsh rules that create racial disparity. In fiscal year 2010, judges imposed below-guideline sentences in 26.5% of crack cases (a rate that would likely have been higher but for trumping mandatory minimums), and 79.8% of these offenders were African American. Only 4.5% of crack offenders received a downward departure in 2004 when the guidelines were mandatory. With an average reduction of 44 months, in 2010 alone, this 22% increase in below-guideline sentences spared nearly 1,000 predominantly African American defendants a total of 3,657 years of unnecessary incarceration. Similarly, in fiscal year 2010, judges imposed below-guideline sentences in 27.7% of career offender cases, and 66% of these offenders were African American. Only 7.2% of career offenders received a downward departure in 2004. With an average reduction of 75 months, in 2010 alone, this 20.5% increase in below-range sentences saved 475 predominantly African American offenders a total of nearly 3000 years of unnecessary incarceration.⁹

- Prosecutors and law enforcement agents control sentencing outcomes by manipulating the type or quantity of drugs, through charging and plea bargaining decisions, and through departures under their control.¹⁰ While data on the reasons for these decisions is lacking, data that are available reveal unexplained racial disparities in decisions to charge defendants under 18 U.S.C. § 924(c) rather than seek the 2-level enhancement under § 2D1.1(b)(1), the use of “stacked” § 924(c) sentences, and departures under USSG § 5K1.1 for substantial assistance.¹¹ Judges can now compensate for some of the unfairness caused by these decisions.¹²

3) **The Commission’s multivariate study does *not* establish that judicial discretion causes or results in racial disparity.**

- Multivariate regression studies of the type published by the Commission treat as “legally relevant” the guidelines, statutes, and decisions of law enforcement agents and prosecutors. This research focuses on judges not because judges are the primary source of disparity, but because judges’s decisions are made in open court and result in data on many (but far from all) “legally relevant” factors, while there is no similar data regarding decisions of law enforcement agents and prosecutors.¹³
- Multivariate studies measure differences among groups in average sentence lengths, or rates of imprisonment, after taking into account only those factors (1) for which data are available, and (2) that researchers choose to include in their statistical model. Applicable guidelines, mandatory minimums, and other available and chosen factors are statistically taken into account, and any remaining differences among groups are reported as race effects.
- Based on such a study, the Commission states that “Black male offenders received longer sentences than White offenders. The differences in sentence length have increased steadily since *Booker*.”¹⁴ Some assume that these reported differences must be “based on race” and reflect discrimination by judges. But this conclusion is unfounded.
- **Missing variables.** The Commission does not collect, and its datasets do not include, many relevant factors that legitimately and legally affect decisions as to sentence type or length, and that would change the results if they were included.¹⁵ Data are missing on the following:
 - Differences among groups in criminal history not taken into account by the guidelines, including degrees of violence in defendants’ criminal histories.
 - Differences in seriousness of the offense not taken into consideration by the guidelines, including violence committed as part of the present crime.
 - Differences in employment history, current employment, or employment prospects.
 - Any other mitigating or aggravating factors not incorporated into the guideline rules.
 - Any reason given for a departure or variance other than substantial assistance.¹⁶
- When a relevant factor is missing, and is correlated with race (*i.e.*, appears more frequently in some groups than others), the effect is falsely attributed to consideration of race. For example, for a variety of reasons, African Americans have more violence in their criminal histories.¹⁷ This criminal history legitimately influences sentencing decisions, but the effect is attributed to race rather than violence because violent criminal history is not included as a control variable in the analysis. Similarly, employment legitimately influences sentencing decisions, particularly whether to impose an alternative to imprisonment.¹⁸ If more White defendants are employed and judges take this into account in the type or length of sentence, the effect is falsely attributed to consideration of race rather than employment because employment is not a factor included in the analysis.

- **Excluded variables.** The Commission did not include in its “refined model” several factors it did include in its previous *Booker* and Fifteen Year Review models.¹⁹ The exclusion of these factors is contestable.²⁰ These factors influence sentencing decisions beyond their contribution to the guideline range, for example, in choosing the type of sentence, placement within the range, or extent of departure.²¹ Factors excluded from the “refined model” include criminal history, defendants’ classification as a “career offender” or “armed career criminal,” and defendants’ meeting the qualifications for the safety valve.²² These factors are associated with race, and excluding them therefore inflates the weight assigned by the model to race.²³
 - Sentencing decisions were most rigidly controlled by the rules and influenced by the least number of relevant considerations during the post-Protect Act period. Now that judges must consider all of the purposes and factors set forth in § 3553(a), relevant but missing or excluded factors are relied upon more frequently or given more weight. Such consideration is reported as an increased race effect by multivariate studies, though it reflects increased consideration of relevant factors that were previously restricted from consideration. It does not make sense to conclude from such a study that judges have exercised their discretion under § 3553(a) to discriminate against racial minorities after *Booker*, yet at the same time have used that discretion to reduce racial unfairness caused by the rules. *See* Point 2. Even when judges had unfettered discretion, differences in sentences attributable to race or ethnicity were uniformly small or insignificant. *See* Point 1.
 - **Warnings.** The Commission has previously warned that it “cannot overcome a lack of complete data on all legally relevant considerations,”²⁴ and that “[i]f it were possible to include these unmeasured factors in the models, the statistical significance and impact of these demographic variables would likely change.”²⁵ In March 2010, the Commission stated that data on relevant factors was missing from its refined model because it is not collected, or may have been erroneously omitted.²⁶ It acknowledged that “judges make decisions when sentencing offenders based on many legal and other legitimate considerations that are not or cannot be measured,” and that “[t]he omission of one or more important variables usually causes the value of the variables that are included in the model to be overstated.”²⁷ The Commission’s testimony before Congress did not contain these extensive warnings.
 - **Failure to differentiate among types of departure.** The Commission’s “*Booker* model” took somewhat more detailed account of different types of below range sentences, grouping them into government initiated, court initiated, and substantial assistance.²⁸ The “refined model,” however, groups all kinds of below range sentences except for “substantial assistance” together.²⁹ That is, court-initiated below range sentences, government-initiated “fast track” departures (which predominantly benefit non-Black offenders), and “other” government-initiated below range sentences were assigned the same weight. The extents of these different types of below-guideline sentences differ markedly, and the weights received by court and government initiated below range sentences in the *Booker* model often differed markedly,³⁰ so failing to differentiate them can affect the results.
- 4) **The Commission has not shown that the changes it reported were caused by increased judicial discretion.**
- Given the absence of data on important legally relevant factors, it is difficult to measure how much, if at all, judicial discretion contributes to *unwarranted* sentencing differences among groups. For a

variety of reasons, it is even more difficult to measure changes in this contribution across time, or to attribute any change to a legal decision such as *Booker*.

- Multivariate regression analyses assign a parameter, or weight, to each factor included in the study. These weights are meant to predict sentencing outcomes as accurately as possible given the available data, but they can fluctuate for a variety of reasons. Unreliability in the data and inter-correlations among the factors all affect these weights. Any claim that the weight assigned to race has changed across time must rule out other reasons for fluctuations, but the Commission did not establish the statistical significance of the changes it reported.
- **Fluctuations.** Under the Fifteen Year and *Booker* models, the Commission found that race effects appear only for drug offenses or non-drug offenses and only in some years and not others, and concluded that these fluctuations “are difficult to reconcile with theories of enduring stereotypes [or] overt discrimination” on the part of judges.³¹ Fluctuations continue, but the Commission’s “refined model” masks them by aggregating years and offense types, and wrongly implies that differences between time periods are caused by the legal changes used to define the periods.
- **Methodological Choices.** The results of multivariate studies differ depending on the methodological choices made by researchers. The Commission has previously warned,³² and reviews of research before the guidelines warned: “Any findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution.”³³
- The Commission’s own studies have reached conflicting conclusions, primarily due to changes in methodological choices.
 - The Fifteen Year Review model found a 20% difference in the odds of imprisonment and a 4.2% difference in sentence length between Black and White males in FY1998-2002 combined; differences in the odds of imprisonment and sentence length between all Black and White offenders in these combined years existed only in drug cases; and differences for all offenses combined in the odds of imprisonment, or sentence length, existed only in some years but not others.³⁴
 - The *Booker* model, adopted in 2006 and spanning FY1999-2009, found the greatest difference in sentence length between Black and White offenders when the guidelines were mandatory: 14.2% in 1999; 10.2% in 2000; 8.2% in 2001; none in 2002; none “pre-Protect” (10/1/02-4/30/03); none “post-Protect” (5/1/03-6/24/04); 7.4% “post-*Booker*” (1/12/05-12/10/07); and 10% “post-*Gall*” (12/11/07-9/30/09).³⁵
 - The *Booker* model examined differences by offense type “post-Protect” and “post-*Booker*” through 1/11/06, and found a difference in sentence length between Black and White offenders only in drug cases “post-Protect,” and only in non-drug cases “post-*Booker*.”³⁶
 - The Commission adopted a new model in 2010, beginning “post-Protect” Act. The “refined model” found a 5.5% difference in sentence length between Black and White males “post-Protect,” a 15.2% difference in the 2 years and 11 months “post-*Booker*,” and a 23.3% difference in the year and 9 months “post-*Gall*” through FY2009.³⁷
 - An update of the “refined model” found the “post-*Gall*” difference had decreased to 20% in the 2 years and 9 months “post-*Gall*” through FY2010.³⁸
 - The updated “refined model” added a 4 ½ year “post-*Koon*” period beginning October 1, 1999 (over 3 years after *Koon* was decided) and ending with the Protect Act.³⁹ The Commission

reports an 11.2% difference in sentence length between Black and White males for this period, suggesting that the difference “post-*Koon*” was less than “post-*Booker*” and “post-*Gall*.”⁴⁰ However, the 11.2% figure results from aggregating several years for which the *Booker* model reported a greater difference than post-*Booker* or post-*Gall* or no statistically significant difference. (Results of the two models cannot be directly compared because of the differences in methodologies.) The “post-*Koon*” period apparently does not include detention status data, while the other three periods do.⁴¹

5) Research conducted at Pennsylvania State University reached different conclusions using more widely accepted statistical models.

- Peer-reviewed research authored by academic criminologists at Pennsylvania State University, including a former Staff Director of the Commission, replicated the Commission’s refined model, tested different models, and reached different conclusions.⁴² This study used the Commission’s datasets, and therefore did not include data on relevant factors that are missing from those datasets.
- By conducting separate analyses of the decisions (1) whether to imprison and (2) how long to imprison, these researchers found that the Commission’s finding of increased sentence length disparity was explained by a greater difference in the likelihood of incarceration between Black and White males after *Gall* through FY2009.⁴³ This result is not surprising, since the in/out decision is sensitive to factors that are missing from the Commission’s datasets. *See* Point 6.
- The academic researchers also analyzed the sentence length decision over five periods -- pre-*Koon* (10/1/93-9/30/95); pre-Protect Act (10/1/01-4/30/03); post-Protect Act (5/1/03-6/24/04); post-*Booker* (1/05-11/07); post-*Gall* (12/07-9//09)⁴⁴ -- and found that sentence length differences between Black and White males were:
 - significantly less after *Booker* and *Gall* than before *Koon* when judicial discretion was more constrained than at any time other than post-Protect Act.⁴⁵
 - nearly identical pre-Protect Act, post-*Booker*, and post-*Gall*.⁴⁶
 - significantly less after *Booker* and *Gall* than pre-Protect Act when immigration cases were excluded.⁴⁷
- The academic researchers questioned several of the methodological choices made by the Commission,⁴⁸ and found that these choices affected the findings.
 - As noted above, they modeled the sentencing decision as two separate decisions, *i.e.*, whether to imprison, and if so for how long, but the Commission modeled it as a single decision of how long to imprison, counting probation as zero months. The Commission studied the decisions separately in the Fifteen Year Review.⁴⁹
 - The Commission included immigration offenses, but the academic researchers excluded them given that non-citizens are handled uniquely in many districts (*e.g.*, with “fast track” dispositions), and most non-citizens are subject to deportation, making probation impossible. The Commission excluded non-citizens from the Fifteen Year Review analysis for the same reasons.⁵⁰ The academic researchers found that immigration offenses accounted for 40% of the effect on sentence length for Black males.⁵¹
 - The Commission counted months of home or community detention the same as months of imprisonment.⁵²
 - The Commission’s “refined model,” unlike its Fifteen Year or *Booker* models, excluded criminal history as a control variable except for its influence on the guideline calculation. The

academic researchers found that criminal history has significant and substantial effects beyond the minimum guideline sentence.⁵³

- The academic researchers found greater disparity in government-sponsored departures than in judge-initiated departures.⁵⁴
 - Academic criminologists commenting on the two studies all agreed that, in light of the conflicting analyses of the Commission's data and the limitations of such studies, no change in federal sentencing policy is warranted.⁵⁵
- 6) Defendants of all groups are treated more fairly when judges discount excessively severe rules and take greater account of relevant differences among defendants.**
- Judges are now able to take account of characteristics that make some offenders suitable candidates for alternatives to imprisonment, or for shorter prison sentences. The Commission does not have data on the frequency with which most mitigating characteristics occur in the defendant population or in any demographic group within it.⁵⁶
 - African American offenders benefit from consideration of mitigating offender characteristics at a rate proportional to or greater than their representation in the defendant population.
 - For example, while 27.3% of non-immigration offenders in 2010 were African American, African Americans made up 35.7% of those who received a below-range sentence for education or vocational skills, 31.3% of those who received a below-range sentence based on the need for education, training or treatment, 25.7% of those who received a below-range sentence for previous employment record, 26.7% of those who received a below-range sentence for rehabilitation, and 33.6% of those who received a below-range sentence for lack of youthful guidance.⁵⁷
 - When a missing or excluded characteristic like continued employment or lack of violence in criminal history influences judges to impose an alternative to imprisonment, and is present more often among White than Black male offenders,⁵⁸ multivariate regression studies will report a race effect in the in/out decision. This is not discrimination or unfairness because these factors are legally relevant to the purposes of sentencing.

¹ Prepared Testimony of Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 1-2 (Oct. 12, 2011) (hereafter Commission Testimony).

² Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90*, at 25-26 (1993).

³ This chart first appeared in the Commission's Fifteen Year Review at p. 116, and has been expanded to more recent years. The source of the data is USSC, 1984-1990 AO FPSSIS Datafiles; 1991-2010 USSC Monitoring Datafiles. Time served is estimated from the sentence imposed. In the Monitoring Datafile TIMESERV assumes good time credits will be applied. Offenders receiving no term of imprisonment are excluded [SENTIMP=1, 2].

⁴ John Scalia Jr., *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison by, Drug Defendants Convicted in U.S. Courts*, 14 Federal Sentencing Reporter, 152, 157 (1991).

⁵ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 113-135 (2004) [Fifteen Year Review].

⁶ *Id.* at 135.

⁷ *Id.* at 92.

⁸ *Id.* at 133-34; USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 9 (May 2004) (inclusion of career criminals in category VI reduces the predictive validity of the guidelines).

⁹ USSC, 2004 and 2010 Monitoring Datasets.

¹⁰ Fifteen Year Review at 82-87.

¹¹ USSC, *Mandatory Minimum Penalties in the Criminal Justice System* 363-64 (use of § 924(c)s has adverse impact on African American offenders) (2011); *id.* at 159-60, 179, 214-15, 221, 291 (Black offenders receive substantial assistance motions less often than defendants of other races); Fifteen Year Review at 90, 91, 131 (among offenders who possess or use a gun during a drug trafficking crime, black offenders are more likely to be charged with § 924(c) rather than receive the shorter two-level gun adjustment under the guidelines); *id.* at 104-05 (decisions whether or not to file substantial assistance motions are a source of disparity and have a racial impact, but there is a lack of data regarding reasons for these decisions).

¹² *See, e.g., United States v. Briggs*, 397 Fed. App'x 329, 333 (9th Cir. 2010) (judge varied from 235 to 132 months where agents recruited defendant's older brother and him to rob a non-existent drug "stash house" with large non-existent drug quantities); USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbls.25, 25A, 25B (429 below guideline sentences for cooperation without a § 5K1.1 motion); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) (varying in part because government insisted on buying crack rather than powder consistent with defendant's prior sales); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. 2005) (varying in part because agent doubled the sentence through three subsequent purchases); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1260 (D. Utah 2004) (imposing sentence of one day on drug counts because of harshness of stacked § 924(c)s to punish defendant for going to trial), *aff'd*, 433 F.3d 738 (10th Cir. 2006); *United States v. Ballard*, 599 F. Supp. 2d 539 (S.D.N.Y. 2009) (same).

¹³ Fifteen Year Review at 135 ("[D]iscrimination by judges has been exaggerated by the existing research, while other stages of the criminal justice process have been relatively neglected, in part because of the paucity of data that can be used to investigate them.").

¹⁴ Commission Testimony at 54.

¹⁵ Fifteen Year Review at 119-120, 125, 131; USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 84, 105-06 (2006) [Booker Report]; USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis* at 4, 9-10 & nn.35-39, A-3 (2010) [2010 Demographic Differences Report].

¹⁶ 2010 Demographic Differences Report at 4, 9-10 & nn.35-39, A-3; Fifteen Year Review at 119, 125.

¹⁷ 2010 Demographic Differences Report at 9 n.37; Booker Report at 105 & n.317.

¹⁸ USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 16 (1996) ("offenders who were viably employed were 21 percent more likely to receive an alternative sentence than unemployed offenders").

¹⁹ USSC, 2010 Demographic Differences Report at 19-20; Booker Report at B-23 (criminal history points, career offender, armed career criminal, safety valve); Fifteen Year Review at D-12 (included low, medium or high criminal history category).

²⁰ The Commission states that it omitted these factors from the "refined model" because they are "highly correlated" with the presumptive sentence, *i.e.*, the variable that reflects the minimum sentence based on the guidelines and mandatory minimums. 2010 Demographic Differences Report at 19. But no inter-correlation matrix is included in the report. Researchers at Pennsylvania State University recently found that there was no collinearity problem with including criminal history, and the Commission reached the same conclusion in its Fifteen Year Review. Jeffery T. Ulmer, Michael T. Light,

& John H. Kramer, *Racial disparity in the wake of the Booker/Fanfan decision: An alternative analysis to the USSC's 2010 report*, 10 *Criminology & Pub. Pol'y* 1077, 1086 (2011); Fifteen Year Review at D-12.

²¹ Booker Report at B-23 – B-24 (these factors were included in addition to the presumptive sentence to “allow[] a measure of their weight in determining the sentence beyond the weight they are given in the guidelines”); USSC, 2010 Demographic Differences Report at 19-20, B5-B6 & n.81 (these factors contributed to sentence length above or below the amount they already contribute to the presumptive sentence through the guidelines and statutes but were excluded from the “refined model”); Fifteen Year Review at 108-09, 130 (criminal history strongly influences the decision whether to impose prison or probation).

²² 2010 Demographic Differences Report at 19-20.

²³ African Americans comprise 20.7% of the defendant population but 32.6% of defendants in the three highest criminal history categories, and 64.4% of defendants classified as career offenders. USSC 2010 Monitoring Dataset. Primarily because many African American drug offenders have more than one criminal history point, only 14.4% of African American offenders received safety valve relief, compared to 48.4% of Other Race offenders, 46.3% of Hispanic offenders, and 39.5% of White offenders. USSC, *Mandatory Minimum Penalties in the Criminal Justice System* at 354 (2011). “Black offenders constitute a majority of offenders who qualify for the Armed Career Criminal Act’s 15-year mandatory minimum penalty (63.7%) and of offenders who remain subject to its mandatory minimum penalty at sentencing (63.9%).” *Id.* at 363. *See also* Ulmer et al., *supra* note 20, at 1093 (“Black male disparity is more than 30% larger when a measure of criminal history is not included in the analysis.”).

²⁴ Fifteen Year Review at 120; *see also id.* at 125.

²⁵ Booker Report at 106; *see also id.* at 84.

²⁶ 2010 Demographic Differences Report at 9.

²⁷ *Id.* at 4, 9-10.

²⁸ Booker Report at B-23.

²⁹ 2010 Demographic Differences Report at A-2 – A-3.

³⁰ 2010 Sourcebook of Federal Sentencing Statistics, tbls. 30-31D; 2010 Demographic Differences Report, B7, B9.

³¹ Fifteen Year Review at 121-27; Booker Report at 108-09, B-31.

³² Fifteen Year Review at 118, 127; Booker Report at 108.

³³ McDonald & Carlson, *supra* note 2, at 106.

³⁴ Fifteen Year Review at 121, 122, 124, 126.

³⁵ 2010 Demographic Differences Report at 14-16; Booker Report at 109.

³⁶ Booker Report at 108, B-31.

³⁷ 2010 Demographic Differences Report at 22.

³⁸ Commission Testimony at 54.

³⁹ *Id.* at 53 n.164.

⁴⁰ *Id.* at 54 & Appendix E.

⁴¹ 2010 Demographic Differences Report at 2.

⁴² Jeffery T. Ulmer, Michael T. Light, & John H. Kramer, *Racial disparity in the wake of the Booker/Fanfan decision: An alternative analysis to the USSC's 2010 report*, 10 *Criminology & Pub. Pol'y* 1077 (2011) ["Penn State Study – Alternative Analysis"].

⁴³ *Id.* at 1094-96, 1100, 1105.

⁴⁴ *Id.* at 1088,1099.

⁴⁵ *Id.* at 1098-1100.

⁴⁶ *Id.* at 1094, 1096.

⁴⁷ *Id.* at 1106.

⁴⁸ *Id.* at 1081-87.

⁴⁹ Fifteen Year Review at 121-26, D-12.

⁵⁰ *Id.* at 120, D-12; *see also* USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 16 (1996) ("Non-citizens are less likely to receive an alternative than are U.S. citizens, reflecting perhaps the impending deportation of the defendant and the absence of a local residence suitable for home confinement.").

⁵¹ Penn State Study – Alternative Analysis, at 1098.

⁵² *Id.* at 1086, 1093-94.

⁵³ *Id.* at 1086, 1093.

⁵⁴ *Id.* at 1100-04.

⁵⁵ *See* Cassia Spohn, *Unwarranted disparity in the wake of the Booker/Fanfan decision: Implications for research and policy*, 10 *Criminology & Pub. Pol'y* 1119 (2011); Ryan W. Scott, *Race disparity under advisory guidelines: Dueling assessments and potential responses*, 10 *Criminology & Pub. Pol'y* 1129 (2011); Rodney Engen, *Racial disparity in the wake of the Booker/Fanfan: Making sense of "messy" results and other challenges for sentencing research*, 10 *Criminology & Pub. Pol'y* 1139 (2011); Celesta A. Albonetti, *Judicial discretion in federal sentencing: An intersection of policy priorities and law*, 10 *Criminology & Pub. Pol'y* 1151 (2011).

⁵⁶ Fifteen Year Review at 119.

⁵⁷ USSC, 2010 Monitoring Dataset. The proportional share for African Americans is even greater if immigration offenders are included, as immigration offenders frequently waive their right to present mitigating evidence under "fast track" agreements.

⁵⁸ USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 16-17 (1996) ("offenders who were viably employed were 21 percent more likely to receive an alternative sentence than unemployed offenders"); Fifteen Year Review at 108-09, 130 (criminal history, employment status, role in the offense, citizenship, and mode of conviction are given extra weight in the in/out decision and accounted for all racial differences in use of sentencing options).