

NOTE

JUDICIAL DISCRETION ACROSS JURISDICTIONS: MCGIRT'S EFFECTS ON INDIAN OFFENDERS IN OKLAHOMA

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“The Indian has been relegated a rather unique place in American jurisprudential thought. . . . The peculiar legal status of the Indian manifests itself in the modern context as a jurisdictional dilemma.”

—S. Lee Martin, *Indian Rights and the Constitutional Implications of the Major Crimes Act*¹

INTRODUCTION

At the heart of Federal Indian Law is the unique status of Native Americans. As citizens of both the United States and their respective tribal nations, Native Americans are subjected to a complicated and distinctive criminal jurisdiction scheme.²

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¹ 52 NOTRE DAME L. REV. 109, 109 (1976).

² For further discussions of Native Americans’ unique status in criminal law, see Jeffrey T. Ulmer & Mindy S. Bradley, *Punishment in Indian Country: Ironies of Federal Punishment of Native Americans*, 35 JUST. Q. 751, 751–55 (2018) (discussing how the status of Native Americans as citizens of the United States and tribal nations exposes them to each sovereign’s criminal jurisdiction if prosecuted for a crime); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 403–06 (2004) (critiquing the role of tribal courts

For over two hundred years, Congress, empowered by the Constitution to regulate Indian affairs, and federal courts, through common law rules, divested tribes of aspects of sovereignty. In 1883, the Supreme Court left the door open for Congress to restrict tribal courts' criminal prosecutions of Native American defendants after ruling in *Ex Parte Crow Dog* that no federal law permitted federal courts to prosecute Native Americans who commit crimes in tribal communities.³ Today, the federal courts exercise significant criminal jurisdiction over Native Americans.⁴

However, Congressional limits to criminal jurisdiction did not stop with tribes. States found themselves divested of criminal jurisdiction over crimes committed by Native Americans and non-Native Americans in Indian Country as well. Contrary to most states, though, Oklahoma continued to exercise criminal jurisdiction over crimes committed by Native American offenders within tribal communities.⁵ Instead, Oklahoma derived its authority from several assumptions, including that the Muscogee Creek Nation reservation was never established by Congress or, alternatively, that Oklahoma gained criminal jurisdiction through its Enabling Act.⁶

Oklahoma's exercise of criminal jurisdiction over crimes committed on tribal reservations remained unchecked until 2020. In *McGirt v. Oklahoma*, the Supreme Court held that the Muscogee Creek Nation's reservation had in fact never been disestablished and remains in existence today.⁷ In doing so, the Court restored criminal prosecution authority to tribal and federal courts. *McGirt* received praise throughout the United States from tribal nations and federal Indian Law practitioners for Justice Gorsuch's strong affirmation of the Muscogee Creek's sovereignty over its reservation and the honoring of treaties made between the United States and the Muscogee Creek Nation.⁸ Similarly situated tribes in Eastern Oklahoma

in the federal criminal justice scheme and its effects on Native American offenders); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504-05 (1976) (explaining the complexities of each sovereign's criminal jurisdiction over Native Americans).

³ 109 U.S. 556, 572 (1883).

⁴ Washburn, *supra* note 2, at 405.

⁵ See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020).

⁶ *Id.* at 2474-77.

⁷ *Id.*

⁸ Lawrence Roberts, *Supreme Court Decision in McGirt v. Oklahoma Affirms Tribal Sovereignty, Upholds Treaty Rights*, AM. INDIAN POL'Y INST., [https://aipi.asu.edu/blog/2020/07/supreme-court-decision-mcgirt-v-oklahoma-affirms-tribal-sovereignty-upholds-treaty#:~:text=Oklahoma%20Affirms%](https://aipi.asu.edu/blog/2020/07/supreme-court-decision-mcgirt-v-oklahoma-affirms-tribal-sovereignty-upholds-treaty#:~:text=Oklahoma%20Affirms%20)

including the Cherokee, Choctaw, and Chickasaw have already joined the Muscogee Creek Nation in asserting the changes that *McGirt* brings.

In the wake of this change, legal and political discussion has centered around practical matters: Does the Tribe have adequate resources for managing criminal jurisdiction within its reservation?⁹ Will the increase in cases overload the federal court system?¹⁰ The question of how the change in prosecutorial authority will affect Native American criminal defendants has yet to be asked, though. This Note assesses the effects of *McGirt* on the sentencing of Native Americans who commit crimes on a reservation in Oklahoma. Oklahoma state court judges exercise discretion in areas of sentencing different from federal court judges. Existing empirical studies suggest that federal sentencing produces harsher, lengthier sentences than state courts.¹¹ By comparing Oklahoma and federal court sentencing data, this study attempts to answer whether *McGirt's* celebration of tribal sovereignty is simultaneously a devastating blow to Native American criminal defendants committing crimes on tribal reservations in Oklahoma.

I

CRIMINAL JURISDICTION IN INDIAN COUNTRY

After *Ex Parte Crow Dog*, Congress designated federal courts with exclusive jurisdiction over all interracial crimes (Native American victim and non-Native American perpetrator, and vice-versa) occurring within Indian Country through the

20Tribal%20Sovereignty%2C%20Upholds%20Treaty%20Rights,-Posted%20by&text=written%20by%20affiliate%20scholar%20Lawrence%20Roberts.&text=the%20Court%2C%20by%20a%205,have%20criminal%20jurisdiction%20over%20McGirt [https://perma.cc/4RQ5-UWKP] (last visited Mar. 4, 2021).

⁹ The Muscogee Creek Nation has one district court, located in Okmulgee, Oklahoma. See *Judicial, MUSCOGEE NATION*, <https://www.muscogeenation.com/government/judicial/> [https://perma.cc/CW7X-UULF]

¹⁰ Curtis Killman, *McGirt-Related Murder Cases Increase Tulsa Federal Court's Caseload*, TULSA WORLD (Aug. 7, 2020), https://tulsa-world.com/news/local/crime-and-courts/mcgirt-related-murder-cases-increase-tulsa-federal-courts-caseload/article_987fd7b3-dace-523f-96ea-a8f3f8a4a029.html [https://perma.cc/7M55-TNZ8].

¹¹ Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 CALIF. L. REV. 1409, 1416–17 (2011). The findings of this study produce conclusions inconsistent with Tredeau's statement on the severity of federal sentencing of Native Americans. Tredeau's research used data prior to 2002 and may reflect a different understanding of federal sentencing of Native Americans than during this study's time period from 2002 to 2019. It could also be the case that the state data used by Tredeau accounted for South Dakota which may be more lenient in areas of criminal punishment than Oklahoma.

General Crimes Act.¹² Indian Country includes “all land within the limits of any Indian reservation under the jurisdiction of the United States Government.”¹³ Later, with the Major Crimes Act, Congress limited federal jurisdiction to seven enumerated major crimes committed by Native Americans within Indian Country.¹⁴ Today, three different sovereigns may exercise criminal jurisdiction in Indian Country, depending on the identity of the perpetrator and the victim.

Tribes may prosecute crimes that occur within Indian Country so long as the crimes are committed by a Native American against another Native American.¹⁵ Tribal courts are limited to imposing up to one-year sentences, or three-year sentences if the court provides counsel to an indigent defendant.¹⁶ Federal courts exercise exclusive jurisdiction in Indian Country over the thirteen enumerated Major Crimes that are committed by Native Americans.¹⁷ Any major crime committed by a Native American against a non-Native American victim may only be prosecuted by the federal government. In addition, only the federal government may prosecute major crimes committed by Native Americans against Native American victims.¹⁸ However, the federal government has limited jurisdiction over crimes committed in Indian Country by non-Native American perpetrators against non-Native American victims.¹⁹

¹² 18 U.S.C. § 1152.

¹³ 18 U.S.C. § 1151.

¹⁴ 18 U.S.C. § 1153 (providing for exclusive federal jurisdiction over the prosecution of serious crimes such as burglary, arson, robbery, rape, kidnapping, manslaughter, and murder if committed by an Indian in Indian Country).

¹⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (denying tribal jurisdiction over prosecuting non-Indians who commit crimes within Indian Country).

¹⁶ Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. § 1302(a)(7)).

¹⁷ 18 U.S.C. § 1153 (“Any Indian who commits against . . . another Indian . . . any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to . . . law and penalties . . . within the exclusive jurisdiction of the United States.”).

¹⁸ *Id.*

¹⁹ *United States v. McBratney*, 104 U.S. 621, 624 (1881) (holding that states possess the authority to prosecute all crimes committed by non-Indians and against non-Indian victims in Indian Country); *see also* *Draper v. United States*, 164 U.S. 240, 247 (1896) (affirming that states possess exclusive jurisdiction over crimes committed by a non-Indian against a non-Indian victim occurring within an Indian reservation).

States exercise jurisdiction over most crimes involving non-Native American perpetrators and non-Native American victims in Indian Country.²⁰ Public Law 280, a federal law, extends authority to some states to prosecute Indian Country crimes committed by or against Native Americans.²¹ In these states, both tribal and federal courts lack authority to prosecute crimes committed in Indian Country.²²

In both the General Crimes Act and the Major Crimes Act, Congress failed to define “Indian” for the purposes of criminal jurisdiction.²³ While most Native Americans may be identified through federal tribal enrollment, not all tribes in the United States are federally recognized. This Note includes all individuals that self-identify as Native American and those federally enrolled in a tribal nation.²⁴

II

CRIMINAL PROSECUTION IN FEDERAL COURTS

The adoption of the U.S. Sentencing Guidelines in 1987 drew significant criticism for limiting judicial discretion in criminal sentencing.²⁵ The Guidelines offered uniform, predictable sentences but exacerbated existing disparities in the federal system.²⁶ In 2005, the U.S. Supreme Court decided *United States v. Booker*, which struck down the mandatory use of the Guidelines.²⁷ Still today, the Guidelines influence federal judges’ sentencing decisions.²⁸

Pre-*Booker*, federal judges calculated the sentencing range and then considered seven factors related to an individual and

²⁰ *Id.*

²¹ Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162). This was amended in 1970 to include Alaska. Act of November 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358.

²² 18 U.S.C. § 1162. Mandatory Public Law 280 states include: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.*

²³ Clinton, *supra* note 2, at 513.

²⁴ U.S. SENT’G COMM’N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 39 (revised 2020).

²⁵ For criticism of the sentencing guidelines, see MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973) (“[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”).

²⁶ See Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 U. CHI. J. LEGAL STUD. 75, 75 (2015) (finding that the Guidelines create greater racial disparities that disadvantage black defendants).

²⁷ 543 U.S. 220, 222 (2005).

²⁸ Tredeau, *supra* note 11, at 1415–16.

the offense committed under 18 U.S.C. § 3553(a).²⁹ Post-*Booker*, judges exercise discretion in weighing the appropriate factors, making an upward or downward departure from the range, and identifying the mitigating or aggravating reasons for such a departure.³⁰ Such judicial discretion is not always present in sentencing, and the overwhelming use of plea agreements in criminal sentencing removes significant decision making from the judge.³¹

The literature suggests that the Federal Sentencing Guidelines' influence survived *Booker* and continues to produce racial disparities. However, even recently appointed judges who do not consider the Guidelines render decisions exhibiting vast sentencing disparities.³² Although race represents a popular area of study in sentencing disparity, Native Americans have often been excluded from this area of research.³³ The limited existing studies suggest that federal sentencing exposes Native Americans to harsher sentences, often resulting in lengthier sentences for Native Americans than non-Natives.³⁴

III

CRIMINAL PROSECUTION IN OKLAHOMA STATE COURTS

Sentencing in Oklahoma state courts takes place in the absence of any guidelines. Crimes, elements of crimes, and lengths of sentences are prescribed in state statutes.³⁵ In recent years, the state legislature has added mandatory minimum requirements to some crimes, and more are added each year.³⁶ As a result, the sentencing scheme provides judges with considerable discretion in criminal sentencing. However, in Oklahoma, judges exercise greater discretion in

²⁹ 18 U.S.C. § 3553(a) (One of the seven factors is "the nature and circumstances of the offense and the history and characteristics of the defendant.").

³⁰ For examples of reasons that a judge may use for departure, see *supra* note 24, at A-11 to A-17.

³¹ Today, between ninety to ninety-five percent of all federal criminal cases are resolved through plea agreements. U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011).

³² Yang, *supra* note 26, at 75.

³³ Travis W. Franklin, *Sentencing Native Americans in US Federal Courts: An Examination of Disparity*, 30 JUST. Q. 310, 311 (2013).

³⁴ See Tredeau, *supra* note 11; Franklin, *supra* note 33.

³⁵ See, e.g., OKLA. STAT. tit. 21, § 21-701.7 (2014) (defining the elements of murder).

³⁶ For example, an individual who pleads guilty to second degree murder must be punished by imprisonment for no less than ten years. See OKLA. STAT. tit. 21, § 21-701.9 (2014).

bench trials than jury trials. This is because Oklahoma affords great deference to jury decisions.³⁷

When a jury reaches a unanimous verdict, the judge may not deviate from the sentence length, but can determine in what manner the sentence must be served.³⁸ Here, judicial discretion may take one of two forms: the imposition of a deferred³⁹ or suspended⁴⁰ sentence. For example, if a jury returns a verdict of two years imprisonment, the judge may require the offender to serve a two-year deferred sentence in the form of probation. If the offender abides by the terms of probation for two years without any missteps, the judge will vacate the sentence and the conviction will be dismissed or expunged from the offender's criminal record.⁴¹ Alternatively, a judge may decide that a suspended sentence is better suited. Similar to a deferred sentence, the offender may be placed on probation or subject to other conditions such as completing only a portion of the imposed sentence as determined by the judge after sentencing.⁴² If an offender completes a suspended sentence, the conviction remains on the individual's criminal record.⁴³

Although judicial discretion is permissible in several areas of sentencing in Oklahoma, extrajudicial influences, such as electoral politics or psychological phenomena, may also effect a judge's discretion. For example, all Oklahoma state court judges are elected to serve four-year terms.⁴⁴ Short term periods and highly localized politics may influence the way that judges form sentencing decisions.⁴⁵ Additionally, because

³⁷ See, e.g., OKLA. STAT. tit. 22, § 22-16 (2014) (requiring, with few exceptions, a conviction by jury or an accepted guilty plea).

³⁸ See *id.* However, if a jury cannot reach a unanimous decision, the judge may impose a sentence at his discretion.

³⁹ OKLA. STAT. tit. 22, § 22-991(c) (2014) (authorizing a judge to defer sentencing and impose probation under terms designated by the court).

⁴⁰ OKLA. STAT. tit. 22, § 22-991(a) (2014) (authorizing a judge to suspend the imposition of a sentence in whole or in part, with or without probation). The terms of the suspended sentence are up to the judge's discretion. See *id.* A suspended sentence with probation requires supervision by the Department of Corrections for a period specified by court's judgement. See *id.*

⁴¹ *Frequently Asked Questions*, OKLA. DEP'T OF CORR., <https://oklahoma.gov/doc/offender-info/frequently-asked-questions1.html> [<https://perma.cc/T7UE-CD8U>] (last visited Feb. 23, 2022).

⁴² See OKLA. STAT. tit. 22, § 22-991(a) (2014).

⁴³ *Id.*

⁴⁴ Lesli E. McCollum, *The Oklahoma Judiciary*, in *THE ALMANAC OF OKLAHOMA POLITICS* 15, 19 (1998).

⁴⁵ See *id.*

ninety to ninety-five percent⁴⁶ of all criminal cases are resolved through plea bargain agreements, the agreements themselves might expose judges to anchoring effects.⁴⁷ Although these extrajudicial factors likely have important effects on judicial discretion in Oklahoma state courts, they are excluded from the scope of this Note.

IV METHODOLOGY

This project relies on a comparison between state and federal data. Initially, the source for the state data was the Oklahoma Department of Corrections' (ODOC) website.⁴⁸ However, the lack of a variable indicating whether a sentence had been deferred or suspended became apparent after running some comparisons with ODOC's individual offender records. Given that this is an area of judicial discretion, the original dataset was substituted for an alternative dataset from the Center for Investigative Reporting (CIR).⁴⁹ This dataset was provided to CIR by ODOC and includes the missing information, making it better suited for the purpose of this study. In turn, the federal dataset used in this study is from the U.S. Sentencing Commission, which makes available individual records for every fiscal year beginning in 2002.⁵⁰ Given that this study evaluates the change of jurisdiction as related to the crimes enumerated in the Major Crimes Act,⁵¹ the analysis was restricted to individuals convicted of major crimes. After reviewing crimes listed within each dataset, an identifier for all major crimes was created. The following subsections describe the relevant variables that were either included in the original datasets or generated for the purposes

⁴⁶ Anna Rouw, *Plea Deals Have Unbalanced Oklahoma's Justice System*, OKLA. POL'Y INST., <https://okpolicy.org/plea-deals-have-unbalanced-oklahomas-justice-system/> [<https://perma.cc/Y89Z-7WSS>] (last updated May 2, 2019).

⁴⁷ See JAGRITI SINGH, JUDICIAL DISCRETION IN PLEA BARGAINING: AN INDIAN PERSPECTIVE 2 (2010). An "anchoring effect" is a tendency for individuals to rely on the first piece of information they receive in decision making. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974) (explaining anchoring effects in decision making).

⁴⁸ ODOC Public Inmate Data, OKLA. DEPT OF CORR., <https://doc.ok.gov/odoc-public-inmate-data> [<https://perma.cc/76G8-6VP4>] (last updated Oct. 14, 2022).

⁴⁹ *Before You Dive into Oklahoma's Prison Data, Read Reveal's Tips*, REVEAL (Sept. 20, 2017), <https://revealnews.org/article/before-you-dive-into-oklahomas-prison-data-read-reveals-tips/> [<https://perma.cc/EW3B-4UN9>].

⁵⁰ *Commission Datafiles*, U.S. SENT'G COMM'N, <https://www.ussc.gov/research/datafiles/commission-datafiles> [<https://perma.cc/9RJN-H472>] (last visited Nov. 11, 2020).

⁵¹ See Tredeau, *supra* note 11.

of this study from the underlying data. As it will become clear, the federal courts dataset included many more variables than the Oklahoma courts dataset. This constituted a substantial limitation towards carrying out direct comparisons of the results of this study. Regardless, the focus of the analysis was always on the variables related to or potentially affecting judicial discretion.

A. Oklahoma Courts Dataset

At the conception of this study, only cross-racial comparisons in terms of sentence length for major crimes seemed attainable from the dataset. It became evident, however, that variables included in the dataset made it possible to run regressions that included the sentence length and the decision of whether to defer or suspend the sentence as dependent variables.

Apart from generating dummy variables⁵² corresponding to the Black, Hispanic, or Native⁵³ status of convicted individuals, control variables were created to better isolate the effect of race. The analysis includes a dummy variable for sex which takes the value of “zero” if the offender is male and of “one” if female. Although the age of the individuals was not available as a variable in the raw data, the subtraction of the individuals’ date of births from the start date of their respective sentences provided a variable approximating the age at sentencing. While this age variable was not included in the regressions, it served as a basis for two dummy variables indicating “very young” or “very old” individuals.⁵⁴

Additionally, the raw data lacked a variable for whether an individual had a criminal history at the time of sentencing. Mapping case ID numbers to the offender’s Department of

⁵² A dummy variable is a dichotomic variable that takes either the value of one or zero. These variables allow researchers to include in their analysis the data’s categorical characteristics, such as being male, or being of a certain race or ethnicity. When several dummy variables are included, values of zero for all of those variables indicate that the data point belongs to the baseline category. For example, if for a certain offender the dummy variables corresponding to Black, Hispanic, and Native status are zero, the individual is white. *See Dummy Variables in Regression*, STAT TREK, <https://stattrek.com/multiple-regression/dummy-variables.aspx> [<https://perma.cc/6CZE-W2KR>] (last visited Mar. 29, 2022).

⁵³ Data for Asian offenders was excluded from this study due to limited sample size constraints.

⁵⁴ To determine extreme age points, this study refers to the U.S. Sentencing Commission’s Codebook. U.S. SENT’G COMM’N, *supra* note 24, at 9 (“very young” includes twenty years old or below and “very old” includes sixty years old or above).

Corrections (DOC) number allowed the creation of a dummy variable that takes the value of “one” for each instance of conviction if there exists a previous sentence associated with the same DOC number. Some randomly selected instances of these ID and DOC numbers were cross-checked using ODOC’s public offender lookup⁵⁵ to confirm consistency.

Because the gravity of a crime is likely to affect judicial sentencing decisions, the study includes a variable reflecting the seriousness of the offense. The seven identified major crimes were arranged in an increasing order of seriousness in the following way: (1) burglary; (2) arson; (3) robbery; (4) rape; (5) kidnapping; (6) manslaughter; and (7) murder.⁵⁶ Additionally, the study includes gravity variables for each major crime to be used in crime-specific regressions. For example, the gravity variable for arson takes the value of “one” for arson in the fourth degree and the value of “four” for arson in the first degree with each intermediate offense increasing the value of the variable at a rate of one. This concludes the discussion of control and explanatory variables included in the regressions discussed below.

The first set of regressions includes as the dependent variable the length of the sentence imposed on an offender expressed in years. The initial exercise consisted of a pooled regression for all major crimes and included the race and control variables described above as independent variables. However, because there might be crime-specific and unobservable effects that affect the length of the sentence, an ordinary least squares (OLS) regression was inappropriate. Instead, the OLS model was replaced with a panel regression which includes fixed effects as a way to control for these unobservables.⁵⁷ After the initial panel regression, separate OLS regressions were ran for each major crime, which included the crime specific gravity variables as controls.

The second set of regressions includes as the dependent variable a dummy variable that takes the value of “one” if the

⁵⁵ OK Offender Basic Search, OKLA. DEP’T OF CORR., <https://okoffender.doc.ok.gov/> [<https://perma.cc/F282-L5CL>] (last visited Nov. 11, 2020).

⁵⁶ The ascending order of gravity for crimes is based on the U.S.S.C.’s ascending order in the Variable Codebook. See U.S. SENT’G COMM’N, *supra* note 24, at A-6.

⁵⁷ For a brief description of panel regressions and their uses, see Mahbubul Alam, *Panel Data Regression: A Powerful Time Series Modeling Technique*, TOWARDS DATA SCI. (Feb. 26, 2020), <https://towardsdatascience.com/panel-data-regression-a-powerful-time-series-modeling-technique-7509ce043fa8> [<https://perma.cc/86A8-D47C>].

court suspended or deferred the offender's sentence and the value of "zero" in the alternative. While this set of regressions focuses on whether an offender's sentence was suspended, the underlying assumption is that, because the likelihood that a sentence is deferred is lesser than that of a suspended sentence, any offender's sentence that was deferred would have been suspended.

Unlike the case of the length of the sentence regressions, these analyses involve a dependent variable that only takes the values of "zero" and "one" and independent variables not only taking the values of "zero" and "one" but also values within some continuum. As a result of this "mismatch," the OLS model is no longer useful to estimate correlations or causations. However, the probit model allows us to overcome this problem.⁵⁸

Here, the coefficients from the regressions show how the probability of having the sentence suspended changes as a result of increments in the value of each independent variable. The drawback of this model is that it does not allow for fixed effects⁵⁹ in the case of a regression that pools all major crimes. As a way to counteract this problem, the gravity variable was included as a control. As with the sentence length regressions, crime-specific probit regressions were ran and the corresponding gravity variables were included as controls.

Lastly, a third set of regressions analogous to those in the second set were ran. However, the dependent variable took the value of "one" if the offender's sentence was deferred and the value of "zero" in the alternative.

B. Federal Courts Dataset

In the federal courts dataset, an individual's presentencing status takes one of three forms: (1) released upon payment of bail, (2) released upon own recognizance, or (3) remained in custody. Two dummy variables were coded to be used as dependent variables in the presentencing status sets of regressions. The first dummy variable (bail) takes the value of "zero" if the individual was not released during the presentencing phase and the value of "one" if the individual was released on bail or his/her own recognizance. The second

⁵⁸ For an explanation of the probit model, see Karen Grace-Martin, *The Difference Between Logistic and Probit Regression*, THE ANALYSIS FACTOR, <https://www.theanalysisfactor.com/the-difference-between-logistic-and-probit-regression/> [<https://perma.cc/5YGN-828C>] (last visited Nov. 28, 2020).

⁵⁹ See Alam, *supra* note 57 and accompanying text.

dummy variable (released on own recognizance) takes the value of “zero” if the individual was not released or was released upon payment of bond and the value “one” if the individual was released on their own recognizance. Additionally, the study includes sets of regressions that use the length of the imposed sentence and the position of the imposed sentence within the statutory sentencing range, respectively, as dependent variables.

As was the case for the state data regressions, dummy variables were created for the offender’s race. The federal data included both gender and age variables, so the corresponding female and young/old dummy variables were created to be included as controls. In addition, a criminal history dummy variable was selected as a control. A variable indicating the statutory maximum was included as a way to control for the seriousness of the offense.

Originally, the idea was to focus on the presentencing decision made by the judge, and the federal data included a series of variables stating the reasons given by the court as the justification for imposing a sentence outside of the guideline range for the offense.⁶⁰ Assuming that either the same judge presided over presentence release and sentencing of the defendant or that reasons provided by a sentencing judge for sentence departures would have also been observed by the presentencing judge, the departure reasons could be used to create further dummy control variables related to the presentencing decision.⁶¹ Given that the analysis was later expanded to include the length of the sentence and the sentence position within the statutory range, the regressions related to these dependent variables retained these controls, as a matter of consistency.

As with the state sentence length regressions, the first set of federal data regressions includes as the dependent variable the length of the sentence imposed on an offender. In this case, however, the list of control variables was more extensive.

⁶⁰ These reasons are aggravating and mitigating circumstances a federal judge may list for an upward or downward departure from the statutory range included in the U.S.S.C. Variable Codebook. See U.S. SENT’G COMM’N, *supra* note 24, at A-11 to A-16.

⁶¹ Variables included in this study are substance abuse; community ties; history of mental illness; employment history; family responsibilities; intellectual disabilities; impact of sentencing on employment; educational attainment; and criminal history.

Again, a panel regression was ran first and individual major crime OLS regressions followed.⁶²

The second and third sets of regressions include probit specifications with explained variables that reflect whether the offender was released either on bail or their own recognizance, respectively. Just like with the state data, the independent variables included were a set of controls and the race specific dummy variables.

The final set of federal data regressions includes as the dependent variable a variable that takes integer values going from one to five, reflecting where within the statutory range a case was sentenced.⁶³ These regressions involve a similar “mismatch” between the dependent and independent variables in the suspended/deferred sentence state data regressions, but because the independent variable takes more than two values, the probit model is no longer appropriate. The logit model is similar to the probit, but it allows for a dependent categorical variable that takes more than two different values.⁶⁴ Additionally, in this case, the order of the different values the dependent variable may take is relevant. Therefore, the regression used a particular application of this model called the ordered logit.⁶⁵ Under this model, the coefficients reflect the change in the probability of an upward shift in the scale of categories that the dependent variable takes, as a result of a change in each independent variable. The control and race variables are the same as those in the other sets of federal data regressions.

V

RESULTS

Although the Oklahoma and federal criminal sentencing schemes operate differently in areas of judicial discretion, the results from the empirical exercises provide some insight into whether Native American offenders will be treated more harshly by federal judges as a result of the change in jurisdiction established in *McGirt*. Given the focus of the study, the only

⁶² Instead of individual gravity variables, the statutory maximum was used for both the individual and pooled major crimes.

⁶³ The values of the statutory range in ascending order are as follows: (1) guideline minimum; (2) lower half of the range; (3) midpoint of the range; (4) upper half of the range; and (5) guideline maximum.

⁶⁴ See Grace-Martin, *supra* note 58.

⁶⁵ Stephanie Glen, *Ordered Logistic Regression; Ordinal/Ordered Logit*, STATISTICS HOW TO, <https://www.statisticshowto.com/ordered-logistic-regression/> [<https://perma.cc/MG5F-FADJ>] (last visited Mar. 29, 2022).

coefficients that will be discussed in depth are those associated with race. Only when the coefficient corresponding to one of the control variables is significantly at odds with consistent findings in the literature⁶⁶ will these coefficients be highlighted.⁶⁷ This is the case because those results could be an indication that there are relevant omitted variables or some other type of misspecification, which would make the conclusions derived from the regressions less reliable.

Given that the literature indicates that females tend to receive lower sentences than males, a negative sign on the coefficient on the gender dummy variable was expected.⁶⁸ Additionally, the literature suggests that an individual with a considerable criminal history will receive a lengthier sentence.⁶⁹ Therefore, the coefficient on the criminal history variable was expected to be positive. Additionally, because other studies have found that offenders falling on either the younger or older side of the age range tend to receive more lenient sentences, this coefficient was expected to be negative.⁷⁰

Additionally, existing research serves as a benchmark for expected signs on the “race coefficients” that are the primary focus of this study. Research supports the expectation that Black offenders receive harsher, less lenient sentences.⁷¹ For Hispanic offenders, research supports the expectation that Hispanics will receive lengthier sentences than white offenders, but more lenient sentences than their Black counterparts.⁷² Less research exists on Native American offenders in state courts, but it is expected that, like Hispanic offenders, Natives will receive harsher sentences than white offenders, but more lenient sentences than Black offenders.⁷³ It is important to

⁶⁶ See sources cited *infra* note 68; Tredeau, *supra* note 11; Franklin, *supra* note 33.

⁶⁷ The findings are described for the sentence length (and position within the sentence range) regressions, and the opposite sign is expected for the deferred/suspended sentence and release on bail/own recognizance regressions.

⁶⁸ See David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 296 (2001); Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 L. & CONTEMP. PROBS. 75, 76 (2013).

⁶⁹ John H. Kramer & Jeffrey T. Ulmer, *Sentencing Disparity and Departures from Guidelines*, 13 JUST. Q. 81, 90 (1996).

⁷⁰ Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 JUST. Q. 1, 4–5 (2010).

⁷¹ See Mustard, *supra* note 68, at 285; Yang, *supra* note 26, at 75.

⁷² See Mustard, *supra* note 68, at 285.

⁷³ See Franklin, *supra* note 33.

highlight that the coefficient associated with the Native American variable is the main interest of this study's analysis.

A. Oklahoma Courts Results

Table 1 displays the results of the sentence length regressions for the state data. The regression for all major crimes (Column 1) shows that all independent variables are statistically significant at least at the ten percent level. While Black offenders tend to receive longer sentences than white offenders (the baseline racial category),⁷⁴ Native Americans and Hispanics receive shorter sentences for major crimes. Additionally, the sign of all the coefficients associated to the control variables display the expected signs, except for criminal history. Criminal history has an unexpected, negative effect on sentence length, which could be explained as the result of pooling prior misdemeanors and felonies when creating the control variable. While these results seem promising, they might be driven by the effects corresponding to one or more individual major crimes.

As a general matter, the significance of the coefficients should decrease with the seriousness of the crime analyzed because the statutory minimum increases as the gravity of the offense becomes greater. While this is generally the case, the regressions corresponding to rape (Column 5) and murder (Column 8) are the exceptions. Furthermore, the fact that an offender is Native American has either a neutral or slightly negative effect on the length of the sentence for all crimes but rape. Generally, the coefficient for Black offenders tends to be greater in magnitude for all crimes when significant. However, in the rape regression, the coefficient for Native Americans is almost as large as that for Black offenders. This is particularly surprising because the share of Native Americans convicted for each major crime is somewhat uniform.⁷⁵

⁷⁴ See *Dummy Variables in Regression*, *supra* note 52.

⁷⁵ See Table A-1 in the Appendix.

Table 1: Sentence Length Regressions

VARIABLES	(1) Maj. Crimes	(2) Burglary	(3) Arson	(4) Robbery	(5) Rape	(6) Kidnapping	(7) Manslaughter	(8) Murder
Native	-3.505* (1.970)	-1.042* (0.575)	0.753 (3.208)	-4.348 (5.127)	20.23*** (7.408)	-13.85 (11.61)	-2.262 (9.432)	-32.81 (32.84)
Black	4.878*** (1.370)	0.457 (0.428)	4.871* (2.941)	3.357 (2.623)	23.05*** (5.701)	-3.086 (8.090)	1.181 (7.998)	-9.477 (20.98)
Hispanic	-8.391*** (2.712)	-1.109 (0.865)	20.74*** (5.566)	-8.089 (5.859)	-24.68*** (8.642)	-17.92 (13.38)	-5.264 (13.43)	-76.16* (42.86)
Young	-13.84*** (1.436)	-2.947*** (0.417)	-5.550** (2.827)	-19.22*** (2.974)	-30.34*** (6.895)	-12.98 (10.65)	-9.615 (9.942)	-111.2*** (26.22)
Old	-25.86*** (6.974)	10.02** (3.969)	-3.477 (9.479)	166.5*** (19.43)	-5.656 (13.79)	72.70** (36.89)	18.30 (20.76)	-288.0*** (58.25)
Female	-26.09*** (2.213)	-2.474*** (0.701)	-6.129*** (3.023)	-24.32*** (4.278)	-22.44 (13.78)	-32.99** (13.23)	-19.39*** (8.353)	-117.9*** (29.21)
Criminal History	-3.988*** (1.197)	2.304*** (0.359)	1.133 (2.141)	15.00*** (2.620)	-19.63*** (4.559)	11.64* (7.062)	0.829 (6.874)	-139.8*** (20.58)
Gravity (Burglary)		7.349*** (0.518)						
Gravity (Arson)			3.857*** (1.068)					
Gravity (Robbery)				14.26*** (1.850)				
Gravity (Rape)					60.73*** (4.958)			
Gravity (Kidnapping)						-26.99** (12.66)		
Gravity (Manslaughter)							3.414 (5.255)	
Gravity (Murder)								1.386*** (18.97)
Constant	64.05*** (1.043)	-1.466** (0.664)	-1.720 (3.714)	-2.052 (5.374)	-40.48*** (9.353)	91.83*** (25.23)	33.22** (14.95)	-1,001*** (34.69)
Observations	163,157	96,300	4,961	29,914	17,278	4,243	5,057	5,404
R-squared	0.002	0.004	0.007	0.009	0.013	0.005	0.002	0.510

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Table 2 displays the results for the suspended sentence regressions. Again, for the regression that includes all major crimes (Column 1), the coefficients of all control variables are significant and display the expected sign.⁷⁶ In general, the coefficients for the variables included in all individual major crime regressions (Columns 2–8) show a more consistent decrease in significance as the gravity of the crime increases, as compared to the sentence length regressions. This might be the case because suspended sentences are more favorable to an offender than incarceration. Therefore, a judge will account for controls in a more consistent manner when using discretion to suspend a sentence while still taking the gravity of the crime into consideration. Here, the sign of the coefficient associated with criminal history does not generally match the sign suggested by the literature.⁷⁷ The same is the case for the individual crime gravity variables for burglary, robbery and manslaughter.

Native American offenders have a greater probability of receiving a suspended sentence than white offenders. However, this is not the case for crimes more serious than arson (Columns 4–8). Additionally, such probability is greater for Hispanic offenders and lesser for Black offenders, even for more serious crimes.

⁷⁶ In this case, the dependent variable is the probability of having the sentence suspended. Therefore, the expected signs are the opposite from those corresponding to the prior set of regressions.

⁷⁷ See Trudeau, *supra* note 11; sources cited *supra* note 68.

Table 2: Suspended Sentence Regressions

VARIABLES	(1) Maj. Crimes	(2) Burglary	(3) Arson	(4) Robbery	(5) Rape	(6) Kidnapping	(7) Manslaughter	(8) Murder
Native	0.0938*** (0.0142)	0.0674*** (0.0181)	0.131* (0.0687)	0.198*** (0.0406)	0.0112 (0.0413)	0.106 (0.0828)	0.0339 (0.0732)	0.136 (0.119)
Black	-0.134*** (0.01000)	-0.0656*** (0.0136)	0.0280 (0.0651)	-0.0968*** (0.0226)	-0.193*** (0.0332)	-0.124** (0.0597)	-0.363*** (0.0689)	-0.172* (0.0918)
Hispanic	0.171*** (0.0192)	0.205*** (0.0261)	0.125 (0.115)	0.223*** (0.0465)	-0.0268 (0.0504)	0.232** (0.0926)	0.179* (0.104)	-0.255 (0.223)
Young	0.174*** (0.0108)	0.173*** (0.0136)	0.139** (0.0641)	0.253*** (0.0258)	0.438*** (0.0395)	-0.107 (0.0822)	0.150* (0.0841)	0.0823 (0.119)
Old	0.0864* (0.0517)	0.199* (0.117)	0.225 (0.198)	-0.859*** (0.250)	0.0717 (0.0792)	0.415 (0.322)	0.0547 (0.167)	0.0211 (0.239)
Female	0.391*** (0.0155)	0.464*** (0.0210)	0.272*** (0.0664)	0.473*** (0.0338)	0.251*** (0.0776)	0.326*** (0.0924)	0.229*** (0.0675)	0.259** (0.105)
Gravity	-0.0931*** (0.00269)							
Criminal History	-0.0507*** (0.00888)	-0.201*** (0.0115)	-0.273*** (0.0470)	0.275*** (0.0223)	0.190*** (0.0257)	-0.0425 (0.0518)	0.409*** (0.0521)	0.505*** (0.0810)
Gravity (Burglary)		0.206*** (0.0160)						
Gravity (Arson)			-0.111*** (0.0232)					
Gravity (Robbery)				0.0929*** (0.0146)				
Gravity (Rape)					-0.322*** (0.0278)			
Gravity (Kidnapping)						0.134 (0.0943)		
Gravity (Manslaughter)							0.184*** (0.0457)	
Gravity (Murder)								-0.668*** (0.0790)
Constant	-0.587*** (0.0102)	-0.858*** (0.0210)	0.00900 (0.0798)	-1.490*** (0.0444)	-0.278*** (0.0524)	-1.039*** (0.188)	-1.581*** (0.132)	-1.095*** (0.133)
Observations	113,794	64,339	3,339	21,954	12,591	3,197	3,490	4,884

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 3 displays the results for the deferred sentence regressions. For the regression that includes all major crimes (Column 1), all coefficients except for the old dummy are statistically significant, and display the expected sign. Importantly, in this set of regressions, criminal history always appears as decreasing the probability of receiving a deferred sentence. Given that a deferred sentence is the most favorable outcome for a convicted offender, perhaps the distinction between felonies and misdemeanors is no longer relevant and the effect of prior offenses is better captured. Similar to the results for the suspended sentence regressions, the significance of the controls is somewhat decreasing as the gravity of the crime increases, when looking at the individual crime regressions (Columns 2-7). Given that a deferred sentence for an individual convicted of murder is highly unlikely, the observations included in the Murder regression (Column 8) are significantly smaller in number than for the other crimes. Additionally, because the intersection of receiving a deferred sentence and a positive value in those controls defined as dummy variables is even more unlikely, all variables except for the constant were omitted by the program.

Although with some inconsistencies, the race variables cease to be significant at a level of seriousness above Burglary (Column 2). This result is consistent with what was hypothesized for the case of suspended sentences: the highly favorable nature of a deferred sentence as compared to a suspended sentence makes it that judges stop taking into consideration “mitigating factors” at a lower gravity level (burglary instead of arson). For burglary, the probability of receiving a deferred sentence increases for Native Americans, even if this increase is smaller than that for Hispanic offenders. Noticeably, the coefficient corresponding to the Native American dummy variable reappears as slightly significant for Rape (Column 5), and still with a positive sign.

Table 3: Deferred Sentence Regressions

VARIABLES	(1) Maj. Crimes	(2) Burglary	(3) Arson	(4) Robbery	(5) Rape	(6) Kidnapping	(7) Manslaughter	(8) Murder
Native	0.0809*** (0.0254)	0.0780*** (0.0287)	0.0257 (0.1116)	0.00210 (0.0988)	0.263* (0.153)	0.175 (0.164)	0.125 (0.163)	
Black	-0.0806*** (0.0190)	0.00440 (0.0220)	-0.0886 (0.120)	-0.131** (0.0544)	-0.0374 (0.149)	-0.188 (0.139)	-0.691*** (0.256)	
Hispanic	0.0955*** (0.0341)	0.188*** (0.0387)	-0.0473 (0.196)	-0.121 (0.116)	-0.256 (0.283)	-0.343 (0.246)	-0.137 (0.288)	
Young	0.589*** (0.0162)	0.618*** (0.0183)	0.723*** (0.0845)	0.532*** (0.0530)	0.606*** (0.114)	0.215 (0.138)	0.582*** (0.158)	
Old	-0.189 (0.184)	0.0800 (0.233)	-0.409 (0.450)					
Female	0.410*** (0.0258)	0.446*** (0.0302)	0.0248 (0.119)	0.460*** (0.0686)	-0.279 (0.362)	0.186 (0.179)	0.323** (0.154)	
Gravity	-0.295*** (0.00780)							
Criminal History	-0.713*** (0.0177)	-0.745*** (0.0193)	-0.653*** (0.0857)	-0.586*** (0.0683)	-0.744*** (0.183)	-0.911*** (0.153)	-0.366** (0.165)	
Gravity (Burglary)		-0.155*** (0.0281)						
Gravity (Arson)			-0.221*** (0.0397)					
Gravity (Robbery)				-0.0499 (0.0348)				
Gravity (Rape)					-0.797*** (0.118)			
Gravity (Kidnapping)						0.145 (0.203)		
Gravity (Manslaughter)							-0.0788 (0.0996)	
Gravity (Murder)								-2.157*** (0.279)
Constant	-1.203*** (0.0179)	-1.343*** (0.0349)	-0.882*** (0.125)	-2.136*** (0.100)	-1.435*** (0.181)	-2.054*** (0.403)	-2.071*** (0.279)	
Observations	113,794	64,339	3,339	21,857	12,269	3,170	3,409	129

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

B. Federal Courts Results

This subsection proceeds to describe the results for the regressions that use the federal courts data as an input. Importantly, while after *McGirt*, major crimes will be prosecuted at district courts within the Tenth Circuit, and the judicial decision-making process corresponding to that subdivision should more closely reflect the expected outcome for those cases, because of sample size constraints, the results presented and discussed *infra* include cases decided in all federal circuits. However, the results for the Tenth Circuit sample are included in the Appendix.

Table 4 displays the results for the federal sentence length regressions. In the regression for all major crimes (Column 1), the coefficient for almost all variables appears significant and with the expected sign. For all major crimes, the length of the sentence is shorter as compared to the baseline category (white) for Natives, and unlike in the regressions for the state data, this effect is greater for Native American offenders than for Hispanic offenders. Contrastingly, Black offenders tend to receive longer sentences.

Table 4: Sentence Length Regressions

VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Maj. Crimes	Burglary	Arson	Robbery	Rape	Kidnapping	Manslaughter	Murder
Native	-15.72*** (1.660)	-0.293 (1.798)	-49.86*** (8.424)	-10.10*** (3.735)	-17.66*** (3.049)	-13.77 (18.24)	8.665* (5.161)	-25.42** (10.05)
Black	10.71*** (1.106)	-3.596 (2.460)	9.519 (7.564)	12.06*** (1.053)	2.689 (3.724)	44.24*** (1.81)	33.73*** (1.86)	-17.22 (10.89)
Hispanic	-3.499** (1.774)	4.651 (3.809)	-5.674 (10.56)	-2.833 (1.950)	-5.938 (4.666)	5.385 (10.47)	26.33*** (9.153)	-3.927 (11.47)
Female	-30.99*** (1.728)	-4.152 (2.932)	-6.418 (9.325)	-29.65*** (1.822)	-42.58*** (5.880)	-40.17*** (14.18)	-15.51*** (3.568)	-27.18*** (9.924)
Young	-21.93*** (2.008)	-3.303 (2.071)	-17.70* (9.361)	-25.95*** (2.229)	-23.69*** (5.773)	-14.45 (18.64)	5.960 (4.612)	-36.57*** (12.46)
Old	5.735** (2.917)	-0.607 (10.27)	9.513 (15.69)	-0.769 (3.575)	11.23** (5.681)	2.228 (44.25)	-2.881 (22.50)	-15.06 (20.25)
Substance Abuse	-10.14*** (3.502)	-7.742 (5.463)	-23.10 (30.10)	-9.993*** (3.468)	-10.60 (10.44)	1.328 (52.27)	12.15** (11.17)	-8.992 (35.05)
Community Ties	-3.091 (9.907)		-22.41 (82.23)	-18.86 (12.33)	1.862 (20.64)		-12.53 (19.52)	64.46 (59.49)
Mental Illness	-17.83*** (3.285)	2.055 (10.28)	10.22 (26.06)	-16.38*** (3.142)	-32.01*** (10.56)	92.66** (43.75)	-21.60 (15.40)	-11.79 (27.64)
Employment Hist.	-13.65** (5.583)	-6.862 (7.632)	-7.019 (34.75)	-21.98*** (6.360)	-0.547 (12.68)	-51.94 (75.88)	-25.91 (15.82)	-22.14 (61.21)
Family Ties/Responsibility	-23.45*** (3.999)	-2.972 (7.438)	-43.31 (29.27)	-23.80*** (4.522)	-11.45 (9.527)	-59.47* (32.59)	-22.17** (10.17)	-60.43** (26.79)
Intellectual Disability	-29.42*** (5.088)	-11.20 (12.36)	-13.70 (38.88)	-22.80*** (4.887)	-37.67*** (16.43)	-120.9 (76.19)	-22.54 (29.98)	-41.65 (34.25)
Employment Impact	-23.10 (52.95)			-49.36 (62.53)	-10.28 (95.54)			
Educational Attainment	-0.0247 (0.366)	0.621 (0.812)	0.603 (1.899)	-2.077*** (0.420)	2.246*** (0.843)	2.833 (2.937)	-0.493 (1.294)	1.813 (2.554)
Criminal History	21.80*** (1.503)	9.723*** (3.313)	8.544 (7.131)	27.26*** (1.945)	22.37*** (3.154)	33.95*** (8.836)	2.370 (4.281)	12.83 (8.953)
Statutory Maximum	0.0101*** (0.000157)	0.00202 (0.00124)	0.00336*** (0.000549)	0.0140*** (0.000353)	0.0101*** (0.000251)	0.00990*** (0.00138)	0.0237*** (0.00134)	0.0134*** (0.000879)
Constant	58.58*** (2.364)	12.19*** (4.785)	69.04*** (11.50)	60.81*** (2.815)	41.64*** (5.680)	41.45*** (20.82)	43.54*** (8.195)	106.2*** (15.64)
Observations	26,182	518	901	15,957	6,273	693	869	971
R-squared	0.179	0.054	0.087	0.155	0.242	0.137	0.300	0.265

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Regarding the individual regressions for the major crimes (Columns 2–8), Native American offenders seem to receive shorter sentences across crimes, although with some exceptions. However, the fact that there are more inconsistencies when it comes to the significance of the coefficients for the Black and Hispanic dummies makes it unwise to derive generalized conclusions.

Table 5: Statutory Range Point Regressions

VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Maj. Crimes	Burglary	Arson	Robbery	Rape	Kidnapping	Manslaughter	Murder
Native	0.570*** (0.0446)	0.315 (0.207)	-0.0831 (0.270)	0.147 (0.133)	0.188** (0.0752)	-1.027** (0.468)	-0.411 (0.292)	0.161 (0.267)
Black	0.0592* (0.0334)	0.158 (0.254)	0.0773 (0.312)	0.181*** (0.0381)	-0.334*** (0.0997)	-0.261 (0.317)	-0.102 (0.503)	-0.0437 (0.315)
Hispanic	0.0678 (0.0561)	0.671 (0.458)	-0.0701 (0.486)	0.0741 (0.486)	0.102 (0.115)	-0.568* (0.298)	0.678 (0.574)	-0.748** (0.328)
Female	-0.430*** (0.0629)	-1.046*** (0.365)	0.185 (0.374)	-0.559*** (0.0815)	-0.322 (0.203)	-0.772* (0.461)	-0.140 (0.189)	0.0601 (0.261)
Young	-0.240*** (0.0660)	0.0170 (0.237)	-0.348*** (0.0891)	-0.348*** (0.0891)	0.147 (0.162)	0.312 (0.394)	0.155 (0.275)	-0.0534 (0.311)
Old	-0.103 (0.0940)	0.457 (1.577)	-0.729 (0.547)	-0.182 (0.135)	-0.0479 (0.144)	0.391 (0.954)	0.230 (0.688)	0.0117 (0.824)
Substance Abuse	0.102 (0.513)	-12.45 (444.3)	-12.45 (444.3)	0.534 (0.622)	0.450 (1.440)	0.450 (1.440)	-12.75 (387.7)	-0.663 (1.465)
Community Ties	0.163 (1.790)				0.155 (1.442)			
Mental Illness	-0.781 (0.911)			-0.879 (1.194)				
Employment Hist.	0.368 (1.068)			0.128 (1.157)				
Family Ties/Responsibility	-0.889 (0.721)			-0.933 (1.250)	-13.31 (454.7)		-0.914 (1.485)	-0.502 (1.482)
Intellectual Disability	0.968 (1.700)			1.027 (1.868)				
Educational Attainment	0.00349 (0.0115)	0.0544 (0.0875)	-0.140* (0.0726)	-0.00296 (0.0153)	-0.0105 (0.0213)	0.0831 (0.0945)	-0.0157 (0.0670)	-0.0182 (0.0755)
Criminal History	0.359*** (0.0515)	1.227*** (0.415)	0.441 (0.293)	0.613*** (0.0848)	0.313*** (0.0810)	0.252 (0.314)	0.242 (0.267)	-0.00513 (0.254)
Statutory Maximum	9.11e-07 (3.85e-06)	0.000101 (0.000162)	1.62e-05 (1.43e-05)	-3.42e-06 (8.19e-06)	-1.72e-05*** (6.35e-06)	-2.50e-05 (3.61e-05)	9.85e-05 (0.000131)	7.43e-05** (2.48e-05)
Constant cut1	0.270*** (0.0776)	1.143** (0.548)	-0.269 (0.439)	0.574*** (0.113)	-0.162 (0.144)	-0.0794 (0.613)	-1.052** (0.439)	-0.316 (0.439)
Constant cut2	0.968*** (0.0779)	1.658*** (0.550)	0.347 (0.439)	1.286*** (0.113)	0.550*** (0.144)	0.852 (0.615)	-0.584 (0.471)	0.677 (0.440)
Constant cut3	1.375*** (0.0783)	2.300*** (0.440)	0.660 (0.440)	1.702*** (0.113)	0.966*** (0.145)	1.001 (0.616)	-0.0955 (0.470)	0.884** (0.440)
Constant cut4	1.989*** (0.0792)	2.686*** (0.559)	1.324*** (0.445)	2.380*** (0.115)	1.491*** (0.146)	1.740*** (0.625)	0.306 (0.470)	1.696*** (0.444)
Observations	16,650	445	354	10,909	3,630	281	573	458

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

In turn, the results shown in Table 5 for the statutory range point regressions show even less telling results. In the regression for all major crimes (Column 1), there are hardly any statistically significant coefficients for the control variables. Moreover, only the Black and Native American dummies appear as significant when looking at the offender's race effect. While an initial impulse would be to conclude that there might be some systemic bias against Black and Native American offenders, the individual crime regressions (Columns 2–8) rebut this conclusion. Both for Native American and Black offenders, the coefficient is only significant for two of the individual crime regressions, albeit with a different sign. In turn, the coefficient for the Hispanic offender dummy is hardly ever significant.

Table 6 displays the results for the probability of being released on bail before trial. Given that the controls were selected based on the typical reasons upon which the judges base their presentencing decision, it is unsurprising that more control variables show as more statistically significant in the regression for all major crimes (Column 1). However, this is not the case for all individual crime regressions (Columns 2–8). Additionally, the regression for all major crimes returned significant coefficients for all races. However, the individual crime regressions seem to indicate, if anything, that being Native American decreases the probability of being released on bail.

Table 6: Bail Regressions

VARIABLES	(1) Maj. Crimes	(2) Burglary	(3) Arson	(4) Robbery	(5) Rape	(6) Kidnapping	(7) Manslaughter	(8) Murder
Native	0.239*** (0.0283)	-0.339** (0.136)	-0.114 (0.158)	-0.0382 (0.0952)	0.108** (0.0446)	0.0651 (0.301)	-0.566*** (0.148)	-0.330* (0.198)
Black	-0.0592*** (0.0222)	-0.0612 (0.167)	-0.00316 (0.120)	0.0734*** (0.0278)	0.00363 (0.0534)	-0.607*** (0.263)	-0.380 (0.184)	-0.363** (0.148)
Hispanic	-0.0692*** (0.0353)	-0.776** (0.314)	-0.0233 (0.173)	0.0455 (0.0493)	-0.0665 (0.0652)	-0.489** (0.201)	-0.637** (0.290)	-0.0965 (0.174)
Female	0.673*** (0.0275)	0.563*** (0.179)	0.407*** (0.141)	0.838*** (0.0357)	0.620*** (0.0669)	0.745*** (0.191)	0.212* (0.111)	0.380** (0.160)
Young	0.156*** (0.0387)	0.0888 (0.152)	-0.00764 (0.168)	0.290*** (0.0513)	-0.0753 (0.0930)	-0.235 (0.474)	-0.141 (0.153)	-0.113 (0.332)
Old	0.266*** (0.0495)	-0.287 (0.770)	0.219 (0.228)	0.252*** (0.0802)	0.203*** (0.0732)	-0.294 (0.595)	0.906*** (0.315)	0.343 (0.264)
Substance Abuse	-0.236*** (0.0573)	-0.00402 (0.340)	0.254 (0.369)	-0.237*** (0.0730)	-0.223* (0.130)		-0.141 (0.298)	-0.515 (0.560)
Community Ties	0.230** (0.107)	1.199 (0.829)	-0.532 (0.787)	0.377*** (0.151)	0.232 (0.183)		0.497 (0.557)	-0.518 (0.673)
Mental Illness	0.0841 (0.0669)	0.784 (0.674)	-0.200 (0.471)	0.117 (0.0794)	0.279* (0.158)		0.345 (0.469)	
Employment Hist.	0.461*** (0.0693)	0.744 (0.524)	1.279*** (0.447)	0.587*** (0.0954)	0.183 (0.123)	-0.180 (0.774)	0.626 (0.383)	0.0575 (0.618)
Family Ties/Responsibility	0.470*** (0.0537)	0.404 (0.460)	0.218 (0.352)	0.634*** (0.0722)	0.262** (0.103)	0.831** (0.378)	0.281 (0.269)	0.774*** (0.277)
Intellectual Disability	0.0299 (0.0908)	0.933 (0.650)	0.627 (0.524)	0.0387 (0.113)	-0.0854 (0.209)	0.916 (0.700)	0.338 (0.526)	-0.0651 (0.604)
Employment Impact	0.811** (0.361)			0.969** (0.483)	1.011 (0.637)			
Educational Attainment	0.0985*** (0.00683)	0.154*** (0.0532)	0.0922*** (0.0301)	0.0897*** (0.0103)	0.0836*** (0.0115)	0.0899 (0.0548)	0.102*** (0.0383)	0.0156 (0.0405)
Criminal History	-0.709*** (0.0251)	-0.867*** (0.204)	-0.606*** (0.111)	-0.788*** (0.0391)	-0.555*** (0.0414)	-0.423** (0.181)	-0.589*** (0.130)	-0.594*** (0.140)
Statutory Maximum	-5.97e-05*** (2.67e-06)	-0.000701 (0.000439)	-5.06e-05*** (1.88e-05)	-8.12e-05*** (7.33e-06)	-6.10e-05*** (3.73e-06)	-4.73e-05** (2.03e-05)	-9.08e-05** (4.16e-05)	-4.43e-05*** (1.38e-05)
Constant	-0.989*** (0.0433)	-0.302 (0.306)	-0.493*** (0.180)	-1.093*** (0.0643)	-0.800*** (0.0768)	-1.238*** (0.355)	-0.110 (0.243)	-1.083*** (0.245)
Observations	34,075	654	1,063	19,864	8,628	943	998	1,884

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 7 displays the results for the probability of an individual being released on their own recognizance before trial. As with the bail regressions, more control variables appear significant in the regression for all major crimes (Column 1) but not consistently with respect to the individual major crime regressions (Columns 2–8). As for the effect of the offender’s race, Native Americans have a higher chance of being released on their own recognizance as compared to white offenders for some crimes. The opposite is the case for Black offenders. Still, inconsistencies in the signs and significance of the coefficients make it sensible not to excessively rely on this result.

Table 7: Released on Own Recognizance Regressions

VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Maj. Crimes	Burglary	Arson	Robbery	Rape	Kidnapping	Manlaughter	Murder
Native	0.578*** (0.0377)	-0.0570 (0.179)	0.335 (0.207)	0.181 (0.130)	0.450*** (0.0619)		-0.151 (0.171)	1.221*** (0.458)
Black	-0.116*** (0.0363)	-0.474* (0.259)	0.264 (0.165)	-0.0554 (0.0459)	-0.00478 (0.0859)	-0.0133 (0.460)	-0.0352 (0.298)	
Hispanic	-0.108* (0.0582)	-0.465 (0.416)	-0.315 (0.318)	-0.0869 (0.0838)	-0.0595 (0.104)	-0.261 (0.502)	-0.467 (0.362)	0.934*** (0.443)
Female	0.437*** (0.0393)	0.617*** (0.207)	0.273 (0.190)	0.576*** (0.0532)	0.295*** (0.100)	0.817* (0.417)	0.212* (0.124)	-0.301 (0.434)
Young	-0.0806 (0.0619)	-0.476* (0.254)	0.198 (0.221)	0.114 (0.0864)	-0.412*** (0.156)		-0.267 (0.183)	-0.113 (0.495)
Old	0.291*** (0.0688)	0.330 (0.477)	-0.491 (0.120)	0.248** (0.0965)	0.310*** (0.0965)		0.679** (0.314)	0.372 (0.616)
Substance Abuse	-0.151* (0.0869)	0.0877 (0.426)	-0.0464 (0.552)	-0.0509 (0.113)	-0.142 (0.185)		-0.177 (0.358)	
Community Ties	0.295** (0.139)		0.334 (0.810)	0.430** (0.204)	0.175 (0.229)		0.594 (0.585)	
Mental Illness	0.118 (0.0959)			0.117 (0.119)	0.405** (0.197)		0.465 (0.518)	
Employment Hist.	0.356*** (0.0963)	0.294 (0.616)	0.772* (0.466)	0.313** (0.144)	0.302* (0.158)		0.250 (0.452)	
Family Ties/Responsibility	0.271*** (0.0776)	-0.255 (0.643)	0.123 (0.444)	0.289*** (0.111)	0.330** (0.132)		0.139 (0.301)	
Intellectual Disability	0.112 (0.127)	1.131 (0.800)	0.667 (0.577)	0.173 (0.162)	-0.360 (0.350)		0.128 (0.606)	1.012* (0.610)
Employment Impact	0.550 (0.426)			0.515 (0.605)	0.726 (0.657)			
Educational Attainment	0.0491*** (0.0104)	0.203*** (0.0669)	0.0537 (0.0441)	0.0502*** (0.0166)	0.0251 (0.0171)	0.190 (0.126)	0.00713 (0.0432)	0.0859 (0.0832)
Criminal History	-0.475*** (0.0364)	-0.717*** (0.251)	-0.533*** (0.148)	-0.496*** (0.0585)	-0.344*** (0.0602)	-0.0385 (0.484)	-0.618*** (0.139)	-0.463 (0.287)
Statutory Maximum	-5.85e-05*** (4.50e-06)	-0.00132* (0.000739)	-2.53e-05 (2.63e-05)	-0.000102** (2.05e-05)	* -5.49e-05*** (5.71e-06)		-4.72e-05 (4.40e-05)	-8.75e-05*** (2.95e-05)
Constant	-1.716*** (0.0651)	-1.250*** (0.382)	-1.440*** (0.255)	-1.854*** (0.101)	-1.546*** (0.113)	-3.401*** (0.793)	-0.493* (0.273)	-2.674*** (0.589)
Observations	34,075	647	1,053	19,864	8,628	711	998	1,302

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

CONCLUSION

As a direct consequence of *McGirt v. Oklahoma*, major crimes committed by Native Americans within the Muscogee Creek reservation will no longer be prosecuted by the state.⁷⁸ Instead, the federal courts now exercise exclusive jurisdiction over these crimes.⁷⁹ While this is a clear victory in terms of tribal sovereignty, it is not clear whether Native American defendants in Oklahoma will benefit in terms of the severity and fairness of their received sentences. This study's aim was to empirically test whether, as a result of systemic racial bias in judicial decision-making, which system may be preferable for Native American offenders. However, given structural limitations in the datasets and differences across the state and federal systems, some of the empirical exercises could only be carried out for one or the other sovereign.

The results exclusive to the federal courts regressions are related to the presentencing status decision made by the court, and the point within the statutory sentence range where the offender's sentence falls. While the results for the regressions that pool together all major crimes suggest that Native Americans have both a greater probability of obtaining a more favorable presentencing status and a greater likelihood of receiving a sentence farther up the statutory range, the individual crime regressions indicate that there is not ample support for either of those conclusions.

The results exclusive to the state courts regressions are related to the probability that a court imposes a deferred or suspended sentence. Here, there is some slight evidence that the race of Native American offenders increases the probability of receiving a deferred or suspended sentence, but only up to a certain point in the gravity scale for major crimes.

The only regression sets that are somewhat comparable between the two datasets are the sentence length regressions. For the state courts data, the regression that pools all major crimes seems to indicate that Native American offenders received shorter sentences, but the individual crime regressions cut against this conclusion. Contrastingly, the similar result for the pooled regression using the federal courts data is somewhat confirmed by the corresponding individual crime regressions.

⁷⁸ 140 S. Ct. 2452, 2459 (2020).

⁷⁹ *Id.*

Table 8: Median Sentence Length

	White		Native American		Black		Hispanic	
	State	Federal	State	Federal	State	Federal	State	Federal
Burglary	5.0	1.8	4.0	1.8	5.0	1.8	4.5	1.7
Arson	5.0	5.0	5.0	3.0	5.0	5.0	5.0	5.0
Robbery	9.0	5.3	8.0	4.2	10.0	6.4	9.0	5.0
Rape	10.0	10.0	10.0	5.3	10.0	10.0	10.0	8.2
Kidnapping	10.0	15.0	8.0	11.3	10.0	15.8	7.0	12.5
Manslaughter	8.0	3.1	8.0	3.3	10.0	5.1	9.0	3.1
Murder	Life	10.9	Life	18.0	Life	21.8	Life	24.6

The results from these exercises do not allow this study to conclude that one or the other system is more racially biased against Native Americans. However, an examination of the median length of the sentence by race and major crime, as shown in Table 8, allows one to conclude that major crimes are often punished more harshly under the state system, likely as a result of how Oklahoma and federal courts regard major crimes. Hence, even if not the result of judicial discretion, there is some evidence that *McGirt* will not only benefit tribes but also Native American defendants in terms of receiving relatively more favorable sentences.

APPENDIX

Table A-1: Major Crimes by Race

	White		Native American		Black		Hispanic	
	State	Federal	State	Federal	State	Federal	State	Federal
Burglary	65403	227	10190	354	21438	116	4182	41
Arson	3573	671	637	138	776	178	188	76
Robbery	12706	8466	2090	397	15129	9303	1541	1671
Rape	11657	3776	1805	2524	3638	1547	1284	805
Kidnapping	2436	221	489	57	1347	267	334	389
Manslaughter	3124	89	699	885	1104	40	311	34
Murder	3276	428	542	531	1932	537	299	400

Table A-2: 10th Circuit Sentence Length Regressions

VARIABLES	(1) Maj. Crimes	(2) Burglary	(3) Arson	(4) Robbery	(5) Rape	(6) Kidnapping	(7) Manslaughter	(8) Murder
Native	-22.10*** (4.365)	4.487 (5.352)	-59.38*** (19.81)	-9.562 (7.778)	-18.83*** (7.459)	-41.33 (73.28)	26.44* (14.40)	-98.60* (53.92)
Black	11.06*** (4.279)	29.72*** (9.071)	-19.50 (35.78)	9.043** (3.834)	-0.768 (13.05)	140.7* (72.90)	83.95*** (22.86)	-49.86 (62.65)
Hispanic	-10.08** (4.707)	-1.088 (20.32)	-52.28* (30.83)	-7.308* (4.261)	-10.44 (14.88)	-4.916 (75.03)	33.27 (22.92)	-72.19 (69.19)
Female	-30.94*** (5.269)	-10.16 (6.873)	10.38 (32.30)	-31.44*** (5.631)	-27.02 (18.73)	-124.7 (163.4)	-17.19*** (7.562)	-43.45 (33.44)
Young	-19.88*** (5.927)	2.613 (7.031)	2.937 (22.91)	-27.86*** (6.364)	-12.04 (16.76)		-13.12 (10.69)	-46.38 (46.26)
Old	13.44* (7.783)		70.50 (62.64)	-8.571 (10.08)	27.19** (12.26)	202.6 (235.7)	27.44 (39.69)	-68.82 (91.59)
Substance Abuse	-14.51 (10.52)		-35.92 (57.20)	-18.35 (11.67)	1.783 (21.70)		-3.456 (29.22)	-63.44 (132.7)
Community Ties	-0.313 (35.19)			-54.37 (56.46)	-10.06 (48.72)			
Mental Illness	-13.67 (8.491)		-49.47 (53.38)	-15.07* (8.393)	-15.02 (21.67)	219.5 (149.9)	-18.34 (20.49)	-9.243 (96.81)
Employment Hist.	-34.08*** (17.38)	-16.56 (23.54)	-18.75 (64.62)	-10.45 (31.11)	-40.55 (31.46)		-29.54 (28.51)	-88.04 (135.5)
Family Ties/Responsibility	14.06 (11.75)	1.748 (15.85)		-20.46 (15.05)	75.59*** (26.04)		-17.63 (16.16)	-38.18 (137.1)
Intellectual Disability	-25.81 (18.71)			-20.44 (17.47)	-38.96 (46.65)		-14.30 (44.72)	
Educational Attainment	-0.285 (1.165)	3.821 (2.243)	-3.683 (7.689)	-1.551 (1.338)	1.606 (2.258)	8.390 (17.58)	2.254 (2.756)	-2.259 (12.39)
Criminal History	23.02*** (4.625)	13.73 (9.656)	-13.85 (25.71)	24.39*** (6.113)	21.51** (8.371)	106.8 (67.48)	3.692 (9.678)	30.12 (36.37)
Statutory Maximum	0.00923*** (0.000481)	0.0367 (0.0311)	0.00379 (0.00275)	0.0128*** (0.00147)	0.00880*** (0.000632)	0.0108 (0.00954)	0.0274*** (0.00401)	0.0155*** (0.00505)
Constant	55.75*** (7.351)	-9.321 (14.20)	115.5** (46.65)	58.50*** (8.886)	34.65*** (14.29)		14.77 (20.90)	158.8** (76.16)
Observations	2,526	33	81	1,322	738	36	196	120
R-squared	0.170	0.512	0.194	0.133	0.250	0.438	0.296	0.174

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table A-3: 10th Circuit Statutory Range Point Regressions

VARIABLES	(1) Maj. Crimes	(2) Burglary	(3) Arson	(4) Robbery	(5) Rape	(6) Kidnapping	(7) Manslaughter
Native	0.375*** (0.127)	0.543 (0.918)	0.124 (0.771)	0.0208 (0.346)	-0.450* (0.238)	-15.91 (2.755)	-0.953 (0.755)
Black	0.198 (0.150)	-0.662 (2.225)	21.17 (10.472)	0.374** (0.171)	-0.293 (0.426)	-0.769 (1.837)	-0.267 (1.622)
Hispanic	-0.257 (0.180)	-0.257 (0.180)	2.791* (1.534)	-0.334 (0.217)	-0.00854 (0.468)	-2.062 (2.256)	14.53 (795.2)
Female	0.0531 (0.199)	-2.771** (1.354)	-0.429 (1.172)	-0.221 (0.312)	-0.566 (0.639)	-1.076 (3.073)	0.353 (0.424)
Young	-0.741*** (0.248)	0.375 (1.077)	-1.105 (1.114)	-1.265*** (0.451)	-0.948 (0.694)		0.284 (0.575)
Old	0.0603 (0.290)		-16.37 (1.143)	0.548 (0.459)	-0.137 (0.411)		-15.00 (1.501)
Substance Abuse	-14.01 (1.039)						-15.11 (1.501)
Mental Illness	-14.00 (1.039)			-11.65 (421.9)			
Educational Attainment	-0.0535 (0.0416)	0.677 (0.468)	0.268 (0.405)	-0.0212 (0.0614)	-0.130* (0.0720)	-0.543 (0.474)	0.0498 (0.141)
Criminal History	0.249 (0.178)	1.390 (1.468)	0.669 (1.024)	0.500 (0.350)	0.164 (0.263)	-2.482 (2.246)	1.056 (0.731)
Statutory Maximum	-4.25e-06 (1.46e-05)	0.00628 (0.00513)	0.000106 (0.000114)	7.67e-05* (4.30e-05)	-3.59e-05* (2.12e-05)	-0.000145 (0.000202)	-0.000654 (0.00164)
Constant cut4	1.761*** (0.278)	6.142** (2.584)	4.153* (2.440)	2.383*** (0.460)	0.817* (0.465)		1.009 (1.234)
Constant cut1	0.296 (0.274)	3.665 (2.416)	2.037 (2.364)	0.898** (0.453)	-0.776* (0.463)	-6.168 (4.507)	-0.241 (1.234)
Constant cut2	0.852*** (0.274)	4.437* (2.463)	3.058 (2.403)	1.466*** (0.454)	-0.175 (0.461)	-5.084 (4.421)	0.195 (1.232)
Constant cut3	1.250*** (0.275)	5.919** (2.573)	3.430 (2.414)	1.890*** (0.456)	0.254 (0.461)	-4.313 (4.299)	0.554 (1.231)
Observations	1,490	30	39	845	385	14	132

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Table A-4: 10th Circuit Bail Regressions

VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Maj. Crimes	Burglary	Arson	Robbery	Rape	Kidnapping	Manslaughter	Murder
Native	0.398*** (0.0776)	3.033** (1.354)	-0.294 (0.438)	0.0108 (0.230)	0.127 (0.130)		1.435 (0.895)	4.574 (499.4)
Black	0.0252 (0.101)			0.0324 (0.128)	0.293 (0.233)		2.649** (1.297)	5.304 (499.4)
Hispanic	-0.1192* (0.116)		0.843 (0.555)	-0.410** (0.172)	-0.00857 (0.237)		1.217 (1.144)	5.299 (499.4)
Female	0.536*** (0.0959)	3.329** (1.494)	0.221 (0.608)	0.875*** (0.139)	0.431* (0.250)		0.103 (0.281)	0.660 (0.914)
Young	0.260** (0.124)	-0.252 (0.846)	0.830* (0.472)	0.609*** (0.181)	-0.384 (0.353)		-0.385 (0.376)	
Old	0.458*** (0.147)		-0.387 (1.220)	0.474* (0.282)	0.404** (0.192)		0.549 (0.926)	
Substance Abuse	0.0724 (0.177)			0.340 (0.252)	-0.463 (0.412)		-0.207 (0.730)	
Community Ties	0.923*** (0.395)				0.493 (0.591)			
Mental Illness	0.0232 (0.187)		1.011 (1.018)	0.0521 (0.246)	-0.187 (0.436)		0.583 (0.864)	
Employment Hist.	0.849*** (0.264)		1.966** (0.966)	0.437 (0.667)	0.351 (0.389)			
Family Ties/Responsibility	0.192 (0.209)			0.284 (0.401)	0.594 (0.363)		0.354 (0.598)	
Intellectual Disability	0.0236 (0.362)			-0.177 (0.479)	0.764 (0.917)			
Educational Attainment	0.0701*** (0.0247)	-0.402 (0.519)	0.276* (0.160)	0.0979** (0.0416)	0.0491 (0.0383)		0.107 (0.104)	-0.157 (0.301)
Criminal History	-0.894*** (0.0864)	0.533 (1.000)	-0.745 (0.515)	-1.089*** (0.145)	-0.691*** (0.138)		-1.851*** (0.438)	-0.197 (0.984)
Statutory Maximum	-7.56e-05*** (9.87e-06)	0.0143** (0.00710)	-9.27e-05 (7.02e-05)	-0.00130*** (0.000360)	-7.05e-05*** (1.24e-05)		-0.0254*** (0.00516)	-0.000148** (6.22e-05)
Constant	-0.791*** (0.151)	-3.758 (2.794)	-1.484 (0.918)	-0.596** (0.267)	-0.485** (0.243)	-0.674 (0.681)	1.663 (1.078)	-5.104 (499.4)
Observations	3,008	31	80	1,553	863	4	218	155

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Table A-5: 10th Circuit Released on Own Recognizance Regressions

	White		Native American		Black		Hispanic	
	State	Federal	State	Federal	State	Federal	State	Federal
Burglary	65403	227	10190	354	21438	116	4182	41
Arson	3573	671	637	138	776	178	188	76
Robbery	12706	8466	2090	397	15129	9303	1541	1671
Rape	11657	3776	1805	2524	3638	1547	1284	805
Kidnapping	2436	221	489	57	1347	267	334	389
Manslaughter	3124	89	699	885	1104	40	311	34
Murder	3276	428	542	531	1932	537	299	400