

# CHAPTER FIVE

## Research

### Statutory Requirements

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The Commission collects and analyzes data on guideline sentences to support its varied activities. As authorized by Congress, the Commission's numerous research responsibilities include:

(1) the establishment of a research and development program to serve as a clearinghouse and information center for the collection, preparation and dissemination of information on federal sentencing practices; (2) the publication of data concerning the sentencing process; (3) the systematic collection and dissemination of information concerning sentences actually imposed and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code; and (4) the systematic collection and dissemination of information regarding the effectiveness of sentences imposed (28 U.S.C. § 995(a)).

### Data Collection

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The Sentencing Commission maintains a comprehensive, computerized data collection system. These data provide the basis for the Commission's clearinghouse of federal sentencing information, which, in large part, supports the agency's research mission. Pursuant to its authority under 28 U.S.C. §§ 994(w) and 995(a)(8), and after discussions with the Judicial Conference Committee on Criminal Law and the Administrative Office of the U.S. Courts (AO), the Commission requested that each probation office in each judicial district submit the following documents on every defendant sentenced under the guidelines:

- Indictment
- Presentence Report (PSR)
- Report on the Sentencing Hearing (statement of reasons for imposing sentence as required by 18 U.S.C. § 3553(c))
- Written Plea Agreement (if applicable)
- Judgment of Conviction

Data from these documents are extracted and coded for input into various databases. It should be noted that data collection is a dynamic rather than a static process. When research questions arise, the Commission either analyzes existing data or adds information to its monitoring system. Throughout fiscal year 1996 (October 1, 1995, through September 30, 1996, hereinafter "1996"), the Commission continued to add data elements (*e.g.*, drug amount, amount of monetary gain or loss, and type of counsel) to its extensive computerized datafile on defendants sentenced under the guidelines. For each case in its **Monitoring Dataset**, the Commission routinely collects case identifiers, sentencing data, demographic variables, statutory information, the complete range of court guideline decisions, and departure information.

The Commission also maintains additional datasets to study a variety of sentencing-related issues. The **Organizational Dataset** captures information on organizations sentenced under Chapter Eight of the guidelines. The data collected describe organizational structure, size, and economic viability; offense of conviction; mode of adjudication; sanctions imposed; and application of the sentencing guidelines. The **Appeals Dataset** tracks appellate review of sentencing decisions. Information captured in this module includes district, circuit, dates of appeal and opinion, legal issues, and the court's disposition. In addition to its standard data collection, the Commission often codes additional variables to study various discrete issues (*e.g.*, immigration offenses, child sex offenses).

The Commission's computerized datasets, without individual identifiers, are available via tape and the Internet through the Inter-University Consortium for Political and Social Research at the University of Michigan (ICPSR).<sup>53</sup>

### ***Data Collection Issues***

The Commission received documentation on 42,436 cases sentenced under the Sentencing Reform Act (SRA) between October 1, 1995, and September 30, 1996. As nine years have elapsed since the implementation of the guidelines, the federal system is now almost exclusively a guidelines system. Note, however, that all data collected and analyzed by the Commission reflect only reported populations (*i.e.*, guidelines cases for which appropriate documentation was forwarded to the Commission), and reporting problems specific to individual districts or offices may make generalizations to the district level problematic.

The Commission is working closely with other federal agencies to collect comprehensive statistical information for the federal criminal justice system and to reconcile differences among agencies in the number of reported cases, offense category definitions, and other relevant and commonly used variables. An Interagency Working Group on Criminal Case Processing Statistics (composed of the Commission, the Administrative Office of the U.S. Courts, the Executive Office for U.S. Attorneys, the Federal Bureau of Prisons, the Department of Justice's Criminal Division, and the Bureau of Justice Statistics) is seeking to improve data collection across the entire system and to produce a more comprehensive and user-friendly profile of all cases under federal jurisdiction.

### ***Sentencing Individual Defendants***

#### **Primary Offense and Offender Characteristics**

In 1996, the Ninth and Fifth Circuits accounted for more than a third of all 42,436 cases sentenced. The districts of Southern California, Southern Texas, Western Texas, Southern Florida, and Eastern New York had the highest case loads, all with more than 1,500 cases.

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<sup>53</sup> The Consortium can be contacted using the following Internet address: <http://www.ICPSR.umich.edu>. For more information, contact Dr. Christopher S. Dunn, ICPSR, P.O. Box 1248, Ann Arbor, MI 48106 or call 1-800-999-0960 or (313) 763-5011.

Reversing a two-year decline, the 42,436 cases sentenced in 1996 represent an increase of more than ten percent over the previous year, resulting in the largest number of defendants sentenced under the guidelines since their promulgation in 1987. While drug cases increased by approximately 2,000 over the 1995 figures, their proportion of all cases remained near 40 percent (40.7%), similar to previous years. More than half of the drug offenses involved trafficking in cocaine, with slightly more sentences for crack than for powder cocaine. This marked the first time crack cocaine was the most prevalent illegal substance cited in drug offenses. Compared to 1995, fraud, 1996's second most common offense type, slightly decreased in its proportion to all offenses (14.2%), as did larceny (5.7%) and firearms violations (6.0%). The most notable increase, from 3,170 to 4,930 cases, occurred in immigration offenses, which constituted 11.6 percent of all cases in 1996, compared to 8.3 percent in 1995. For a detailed statistical description of 1996 cases by document submission rates, judicial district, and offense types, see Tables 1-3 and Figures A & B of the Commission's *1996 Sourcebook of Federal Sentencing Statistics*.

**Number of Guideline Cases Sentenced by Year, and Percent Change**

1989	21,389	N/A
1990	29,011	+35.6%
1991	33,419	+15.2%
1992	38,258	+14.5%
1993	42,107	+10.1%
1994	39,971	-5.1%
1995	38,500	-3.7%
1996	42,436	+10.2%

The number and percentage of female defendants increased only slightly from 1995 (14.9% of all cases) to 1996 (15.4%), but a shift occurred in the race/ethnic composition of defendants. The proportion of both White and Black defendants declined (to 35.9% and 28.4%, respectively), while the proportion of Hispanic defendants increased significantly (to 31.0%), driven by the rise in immigration convictions, and the greater number of Hispanics sentenced for drug trafficking. The average age of federal defendants was 34.7 years (median = 33 years). Nearly sixty percent (59.4%) completed their high school education, and 7.8 percent graduated from college. (Census data indicate that, by 1994, approximately 81 percent of the U.S. population had completed four years or more of high school and approximately 22 percent had completed college.)<sup>54</sup>

The proportion of non-U.S. citizens increased to 27.3 percent, continuing a five-year trend. Non-citizens comprised more than a quarter of all defendants for immigration, drug trafficking, kidnapping, money laundering, and national defense violations. For additional demographic information on the federal defendant population, see Tables 4-9 in the Commission's *1996 Sourcebook of Federal Sentencing Statistics*.

**Guideline Cases**

Trial rates under the guidelines have declined steadily from a high of approximately 15 percent in 1991 to approximately eight percent for the last two years. However, these rates vary by

<sup>54</sup> For persons 25 years old and over. U.S. Department of Commerce, *Statistical Abstract of the United States* 157 (1995).

both district (in 1996 ranging from 1.2% in North Dakota to 23.1% in Northern Florida) and offense type (in 1996 ranging from no trials in antitrust cases to 33.0% in murder cases).

The vast majority of defendants (80.8%) were sentenced to some form of incarceration. Drug trafficking, robbery, firearms, and immigration offenders were incarcerated nearly 90 percent of the time. More than half of the defendants sentenced for simple drug possession, larceny, tax violations, gambling, environmental, antitrust, and food and drug offenses received a probationary sentence.

The average sentence for all cases in 1996 was 50.7 months (median = 24 months), counting probation sentences as zero months imprisonment. Of those defendants sentenced to some form of incarceration, the average term was 62.3 months (median = 33 months), representing a small but steady decline in the length of prison sentences that began in 1993. With the exception of immigration offenders, the majority of defendants who were in guideline zones eligible for non-prison sentences did, in fact, receive an alternative sentence. In addition to a term of prison or probation, 36.1 percent of the defendants were also ordered to pay a fine, restitution, or both. For a detailed statistical description of the mode of disposition and sentences imposed, see Tables 10-16 and Figures C-F of the *1996 Sourcebook of Federal Sentencing Statistics*.

#### **Guideline Application**

Of the more than 180 Chapter Two guidelines in the *Guidelines Manual*, only seven were applied in a thousand or more of the 1996 cases: Theft (§2B1.1), Robbery (§2B3.1), Drug Trafficking (§2D1.1), Fraud (§2F1.1), Firearms (§2K2.1), Smuggling Unlawful Alien (§2L1.1), and Unlawful Entry into U.S. (§2L1.2). Victim-related enhancements (part of Chapter Three of the guidelines) were applied at a consistently low rate (in less than two percent of all cases), as were the enhancements for obstruction of justice (4.4%), reckless endangerment (0.3%), and abuse of position of trust (3.3%). Approximately seven percent (7.3%) of the defendants received an adjustment for an aggravating role in the offense, 11.1 percent for a mitigating role. While the acceptance of responsibility rate of 86.8 percent remained remarkably similar to 1995's rate (86.7%), the percentage of defendants receiving the three-level reduction increased from 47.7 percent in 1995 to 50.6 percent in 1996.

Slightly more than half of all defendants (54.1%) had some criminal history (Chapter Four of the guidelines). The five-year trend towards higher criminal history categories continued from previous years; 55.8 percent of the defendants were placed in Category I (down from 57.4% in 1995), and 9.3 percent were placed in Category VI (up from 8.7% in 1995). More than three percent of defendants qualified for career offender or armed career criminal status. For further details of the guideline application components, see Tables 17-23 of the *1996 Sourcebook of Federal Sentencing Statistics*.

#### **Departures and Sentences Within the Guideline Range**

Nearly seventy percent (69.6%) of 1996 sentencings were within their applicable guideline ranges. Substantial assistance departures, for the third straight year, remained higher than 19 percent (19.2% in 1996). Upward departures remained at approximately one percent (0.9% in

1996) for the fourth straight year, while downward departures, following a six-year increase, for the first time surpassed the ten percent mark (10.3%). Most notable was the increase in the number (and percentage) of cases in which deportation was cited as the reason to depart, from 198 cases (7.1%) in 1995 to 901 cases (19.3%) in 1996.

Departures for deportation were concentrated primarily in Southern California (41.5%) and Western Texas (27.6%) and in immigration (68.6%) and drug trafficking cases (27.4%).

**Rates of Within-Range  
and Departure Sentences**

69.6%	Sentences Within Guideline Range
19.2%	Sentences Below Guideline Range for Substantial Assistance on Motion of Government
10.3%	Sentences Below Guideline Range
0.9%	Sentences Above Guideline Range

Great variation in departure rates existed among circuits and districts. The highest rates of substantial assistance departures were in the Third Circuit (35.1% of all cases) and the Eastern District of Pennsylvania (47.5%). Other downward departures were granted most frequently in Ninth Circuit cases (21.3%), which had a high of 44 percent in the District of Arizona. Departure rates varied by primary offense type, with other downward departures highest for immigration violations (32.4%) and lowest for simple possession of drugs (1.8%). Substantial assistance motions were most prevalent in drug trafficking (35.0%), racketeering (35.0%), and gambling offenses (35.1%), and least prevalent in sexual abuse cases (0.6%). Within-range sentences were most common in simple drug possessions (91.9%) and least common in racketeering (45.5%). Upward departures were imposed most frequently in civil rights violations (11.2%); several categories of offenses had no upward departures (e.g., burglary, food and drug offenses). Sentences within the range were most likely to fall within the first quarter of the applicable range, at or near the minimum. For further departure statistics, see Tables 24-27 and Figure G in the 1996 *Sourcebook of Federal Sentencing Statistics*.

**Drug Cases**

The majority of drug cases were sentenced under the primary drug trafficking guideline (§2D1.1); more than half involved cocaine trafficking (26.0% powder and 26.8% crack cocaine), followed by marijuana (24.7%), heroin (10.3%), and methamphetamine (9.5%). Of drug defendants, 37.1 percent were of Hispanic origin, 35.2 percent were Black, and 25.7 percent were White; 87.3 percent were male; and 27.9 percent were non-U.S. citizens. Except for crack cocaine traffickers, drug defendants tended to be in Criminal History Category I.

Less than ten percent (9.8%) of the drug defendants were convicted at trial (a low of 1.1% in LSD and a high of 14.0% in crack cocaine cases). Weapons were involved in 14.5 percent of all the drug cases; this figure approached 25 percent in crack cocaine (24.7%) and methamphetamine (24.4%) cases. While on average only 8.8 percent of the drug cases received aggravating role adjustments, 20.2 percent of the cases were granted a mitigating role reduction, with wide variations in the rate among drug types (29.2% in heroin compared to 10.1% in crack cocaine cases). Almost three-fourths of drug defendants (74.7%), received the three-level reduction for acceptance of responsibility, a figure considerably higher than the 50.6 percent for all 1996 cases.

Two-thirds of the drug defendants were convicted under a mandatory minimum provision, with the highest proportion evident in crack cocaine (79.9%) and LSD (79.6%) cases. A ten-year

mandatory minimum was applicable in more than half of the crack cocaine and methamphetamine cases. For the first time this year, the “safety valve” combination<sup>55</sup> (§5C1.2 with §2D1.1) was in effect and provided reductions for 19.2 percent of the drug defendants by lowering their offense levels by two and sentencing them under the guidelines without regard to any applicable drug statutory minimums. The highest proportion of safety valve cases (34.5%) was in heroin trafficking, and the lowest in crack cocaine trafficking (11.8%).

More than thirty percent of drug defendants received substantial assistance departures, with approximately nine percent being granted other downward departures. Heroin defendants were the most likely to be sentenced within the guideline range (63.2%); LSD defendants were the least likely (45.6%). The average prison term for drug offenses was 84.3 months, varying widely by drug type, from a mean of 125.4 months for crack cocaine (median = 97 months) to 83.6 months for powder cocaine (median = 60 months) to 40.6 months for LSD (median = 30 months). See Tables 28-40 and Figures H-U of the *1996 Sourcebook of Federal Sentencing Statistics* for statistics and trends on drug cases.

### Immigration Cases

Reflecting a significant increase over previous years, one-tenth of all cases in 1996 were sentenced under one of the immigration guidelines. Most immigration defendants were male (92.8%), of Hispanic origin (88.1%), non-U.S. citizens (92.5%), and with less than a high school education (77.9%). Almost all convictions were the result of a guilty plea (97.6%). Defendants in the most frequently applied immigration guideline, §2L1.2 (“Unlawful Entering or Remaining in the United States”) were more often than not repeat offenders previously deported from the U.S. Sentences under §2L1.2, although mitigated by a very high rate of downward departures (36.1%), were also more severe (mean = 28.9 months; median = 24 months) than under the other immigration guidelines. For detailed statistics on immigration violations, see Tables 41-45 in the Commission’s *1996 Sourcebook of Federal Sentencing Statistics*.

### Summary

The number of guideline cases rose to an all-time high of 42,436 in 1996, driven by an increase in the number of drug cases and by the growing number of immigration convictions. For the first time, crack cocaine was the most prevalent illegal substance cited in drug offenses. Crack and powder cocaine together accounted for more than half of all drug trafficking cases. Federal defendants were sentenced to an average term of 62 months in prison (51 months when counting sentences of probation as zero months of incarceration). While sentence averages varied widely, drug defendants received the combined benefit of new statutory and guideline provisions when qualifying for the “safety valve” reduction. Seventy percent of all defendants were sentenced within their applicable guideline range. The rate of departures for substantial assistance stabilized at 19

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<sup>55</sup> Under this provision, certain non-violent drug defendants with little or no criminal history can receive the full benefit of applicable mitigating adjustments under the guidelines and receive sentences below mandatory minimum penalty levels. Effective November 1, 1995, was a guidelines amendment that provided an additional 2-level reduction for qualified defendants whose offense level is 26 or greater.

percent, but other downward departures increased (especially those departures with deportation cited as the reason).

The preceding pages highlight federal sentencing practices on a national level. Individual district profiles are presented in the Commission's *1996 Sourcebook of Federal Sentencing Statistics*.

## Organizational Sentencing Practices

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Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.<sup>56</sup> The organizational guidelines establish fine ranges to deter and punish illegal conduct, require full restitution and the payment of remedial costs to compensate victims for any harm, disgorge illegal gains, regulate probationary sentences, and implement other statutory penalties such as forfeiture and the assessment of prosecution costs.

The Chapter Eight organizational guidelines apply to all federal felonies and Class A misdemeanors committed by organizational defendants. The fine provisions of Chapter Eight cover offenses for which pecuniary loss or harm can be more readily quantified, such as fraud, theft, and tax violations. In addition, the sentencing guidelines for bribery and kickbacks, antitrust, and money laundering offenses contain specific formulations for calculating fines for organizations.<sup>57</sup> The organizational guidelines do not presently contain fine provisions for most environmental, food and drug, and export control violations; in these cases, courts must look to the statutory provisions of title 18, sections 3553 and 3572 to determine an appropriate fine. The guidelines also provide that, under certain circumstances, fines imposed upon owners of closely held corporations who are convicted of the same offense conduct as the corporation may offset the total amount of the corporate fine.

According to statute, the sentencing guidelines should be applied to all *sentencings* that occur on or after their effective date of November 1, 1991. The Department of Justice, in light of relevant court decisions, has sought application of the organizational guidelines only when the offense conduct occurred on or after this effective date. As a consequence, some organizations sentenced in 1996 are not subject to the organizational guidelines. However, the proportion of these cases is consistently declining.

In 1996, the Commission received information on 157 organizations that were sentenced under Chapter Eight,<sup>58</sup> a 41-percent increase from 1995 and a 83-percent increase from 1994.<sup>59</sup> Fines were imposed upon 119 organizations. In 34 of the 41 cases in which no fines were

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<sup>56</sup> See *Guidelines Manual*, Chapter Eight - Sentencing of Organizations.

<sup>57</sup> See USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d); 2S1.1(c); and 2S1.2(c).

<sup>58</sup> The Commission also received three antitrust cases that were sentenced under §2R1.1 because the offense conduct occurred before the November 1, 1991, effective date of Chapter Eight.

<sup>59</sup> As with individual defendants, the Commission datafile describing organizational defendants (with individual identifiers deleted) is available through the Inter-University Consortium for Political and Social Research at the University of Michigan (1-800-999-0960).

imposed, the organization was unable to pay the fine after making restitution, or the organization had ceased operations and was insolvent at the time of sentencing.

### ***Offense Characteristics***

As in 1995, fraud was the most frequent offense committed by an organization, accounting for 35.5 percent of cases sentenced. Other significant offense categories included: environmental (waste discharge) (14.2%), money laundering (11.0%), and antitrust (9.0%).

### **Offender Characteristics**

The organizations sentenced in 1996 ranged in size from a closely held private corporation with five employees, to the nation's largest privately owned provider of home health care with offices in 450 locations throughout 22 states, to a publicly traded company with more than 8,500 employees and annual revenues of more than \$1 billion.

None of the organizations sentenced in 1996 had in place an effective program to prevent and detect violations of law, and none reported the suspected wrongdoing – two aspects of organizational conduct which can result in a decrease in the culpability score for sentencing purposes.<sup>60</sup> Once under investigation by the authorities, 50.0 percent of the organizations were considered to have cooperated with the government's investigation and another 26.1 percent were given credit for accepting responsibility for their wrongdoing. Only two organizations had a history of prior criminal or administrative offenses in the past five years.

### **Sanctions Imposed**

The largest organizational fine imposed in 1996 – \$25 million – was imposed upon three separate corporations for environmental offenses.<sup>61</sup> The largest Chapter Eight fine imposed for fraud was \$7 million for convictions of illegal remunerations/kickbacks and false statements and related offenses in connection with the Medicare program. The single racketeering conviction reported in 1996 resulted in a fine of \$5.6 million.<sup>62</sup>

Restitution was imposed as part of the organization's sentence in 47 of the 160 reported cases (29.4%), and ranged from a high of \$7,486,458 for a fraud and money laundering conviction

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<sup>60</sup> See §8C2.5(f) and (g).

<sup>61</sup> The Commission's current datafile does not include a highly publicized case involving a financial institution in which a \$340 million criminal fine was imposed, nor a number of other organizational convictions and fines obtained as a result of negotiated plea agreements.

<sup>62</sup> See Chapter Three, Legal Issues, for significant case law on organizational defendants.

to a low of \$32 for a drug conviction. The highest restitution imposed in connection with a fraud offense was \$2,914,529; the average restitution amount for fraud offenses is \$493,564.86.<sup>63</sup>

In addition to monetary penalties and restitution, defendants sentenced under the organizational guidelines were subject to other sanctions:

- 60.0 percent were placed on probation;
- 11.7 percent were ordered to implement a compliance program to prevent and deter future violations of law;
- 4.8 percent were ordered to notify their victims of the conviction or make a public apology; and
- 1.3 percent were ordered either to dissolve or sell the organization.

Of the 14 antitrust cases, the maximum fine imposed was \$10 million. In one of these instances, it was determined that the calculation of the volume of commerce affected was too speculative and that calculation of the pecuniary gain or loss attributable to the offense (under the alternative fine provision of 18 U.S.C. § 3571(d)) would unduly prolong adjudication. Therefore, the offense was referenced to the fraud guideline and resulted in a fine of \$112,000.

## Appeals Data

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The Sentencing Reform Act authorized appellate review of guideline sentences imposed: (1) in violation of law; (2) as a result of an incorrect application of the sentencing guidelines; (3) as a departure from the applicable guideline range or from a plea agreement; or (4) for an offense that is plainly unreasonable and for which there is no sentencing guideline.

Four years ago, the Commission implemented a data collection system to track appellate review of sentencing decisions. What follows is a summary of 1996 information from this growing database.

### **Summary of Information Received**

In 1996, the Commission gathered information on 6,710 appellate court cases of which 2,448 were “conviction only” cases. The defendant was the appellant in 96.8 percent of the cases, with the United States as the appellant in 2.0 percent of the cases.<sup>64</sup> The remaining cases (1.2%)

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<sup>63</sup> When restitution or remedial costs are paid prior to criminal conviction or in connection with a prior or subsequent civil or administrative action, such information is not necessarily furnished to the Commission.

<sup>64</sup> Although the Commission is interested primarily in information on appellate court cases that involve sentencing issues, it requests that the circuit courts of appeals provide information on all criminal

involved a cross appeal by one of the parties. The total number of sentencing cases analyzed was 4,262.<sup>65</sup> Less than seven percent of the sentencing cases were reversed in full. The overall case disposition rate for 1996 sentencing cases was:

Affirmed	79.7 percent
Dismissed	3.4 percent
Reversed	6.9 percent
Affirmed in part/ Reversed in part	10.0 percent

The affirmance rate of sentencing cases increased 2.6 percent from 77.1 percent in fiscal year 1995. The Eighth Circuit had the highest rate of affirmed cases (87.2%); the Ninth Circuit had the lowest (69.3%). Of the 279 cases reversed, the appellate courts remanded 255 (91.3%) to the district courts for further action. Of the 403 cases that were affirmed in part and reversed in part, the appellate courts remanded 373 (91.2%) to the district courts for further action. Thus, in 1996, the appellate courts remanded to the district court 15.5 percent (n= 628) of the 4,039 sentencing cases reviewed that year.

### ***Issues and Guidelines Appealed***

The Commission collects data on the guidelines and other sentencing issues that were bases of appeal for cases involving sentencing issues only and those cases involving both sentencing and conviction issues. Defendants appealed the drug trafficking guideline (§2D1.1) 17.4 percent of the time (1,157 times). Other guidelines that frequently formed the bases for appeals by defendants were §5K2.0 (Departures) (6.7%), §3E1.1 (Acceptance of Responsibility) (5.4%), §3B1.2 (Mitigating Role) (4.4%), and §3B1.1 (Aggravating Role) (4.3%). For cases in which the government was the appellant, §5K2.0 (Departures) (18.2%), §2D1.1 (Drug Trafficking) (9.1%), and §2F1.1 (Fraud and Deceit) (4.8%) were the guidelines most frequently appealed.

### **Offense and Offender Characteristics**

The data reveal that 39.5 percent of defendants in appellate court cases<sup>66</sup> were Black, 38.2 percent White, 19.0 percent Hispanic, and 3.3 percent other. Whites and Blacks comprise a larger proportion of the appeals population than of the district court population (of the defendants sentenced in district court, 35.9% were White and 28.4% were Black). More than 83 percent of the defendants in appellate court cases were United States citizens, and 16.9 percent were non-citizens.

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appeals, including appeals of convictions. The statistics used in this report are from the defendant-based files of the appeals database. Each defendant-based file will be referred to as a case.

<sup>65</sup> Four circuits, the Fourth, Sixth, Ninth, and Eleventh, accounted for approximately half of these cases (n= 2,044).

<sup>66</sup> These data include *all* appellate cases gathered by the Commission, not merely cases involving a sentencing issue.

In 34.5 percent of the appellate court cases, the defendants were sentenced under mandatory drug sentencing statutes, 6.7 percent were sentenced under mandatory gun sentencing statutes, and 4.6 percent sentenced under both drug and gun mandatory sentencing statutes. Mandatory minimum penalties applied to 45.7 percent of the appellate court cases, as compared to 30.2 percent of the district court cases.

As might be expected, appealed cases had considerably longer sentences. The mean sentence of appealed cases was 133.6 months (median=97 months) compared to 50.3 months (median=24 months) for all district court cases. Fifty-four percent of the appellate court cases involved defendants whose primary offense of conviction was drug trafficking, which comprised 40.9 percent of all cases sentenced in district court.

## Research Studies

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### ***Just Punishment Study***

The Sentencing Reform Act of 1984 charged the Commission with developing the “means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing....” These statutory purposes are: just punishment, deterrence, incapacitation, and rehabilitation. In developing the guidelines, the Commission was instructed to consider both “the community view of the gravity of the offense” and “the public concern generated by the offense.” To address these directives, the Commission undertook a survey of 1,700 citizens throughout the United States to assess public opinion about just punishment for federal offenses — the first-ever such effort.

Following its nationwide survey, Commission staff compared guideline sentencing ranges with the public’s sentencing opinions for four types of federal crimes: drug trafficking, bank robbery, immigration offenses, and fraud. The study identified links between the public’s just punishment perceptions and elements of guideline calculations: the crime itself, relevant characteristics of the defendant (*e.g.*, prior criminal history), circumstances surrounding the commission of the crime (*e.g.*, loss amount or weapon use), specific crime features that may enhance or mitigate punishment (*e.g.*, role in the offense or abuse of a position of trust), and the consequences of the criminal act (*e.g.*, injury to a victim).<sup>67</sup>

The study found:

- For drug trafficking offenses, the public was more likely to recommend longer punishment than the guidelines for drug trafficking scenarios with smaller drug quantity amounts, and shorter punishment than the guidelines for drug trafficking

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<sup>67</sup> Data were gathered through a national survey of randomly-selected U.S. households. The survey used a series of crime scenarios that incorporated different combinations of offense and offender characteristics. These scenarios were presented at more than 1,700 personal interviews and respondents were asked to record what they considered to be a “just” and appropriate punishment in each case. Responses from these interviews generated data on approximately 72,000 scenarios. In addition, respondents completed a short questionnaire about their experiences, attitudes, and opinions about the criminal justice system.

scenarios with greater drug quantity amounts. Compared to scenarios that involved powder cocaine, heroin, or marijuana, a crack cocaine scenario was the most likely to receive a survey punishment level below the guideline range.

- For bank robbery offenses, the public was more likely to recommend punishment shorter than provided by the guidelines. In addition, survey respondents were more likely to recommend longer punishment when the scenario included injury to a victim.
- For immigration offenses, the public's punishment opinions were generally consistent with current guideline sentence lengths for illegal entry or smuggling of a defendant's family members. However, the public recorded a preference for longer punishment than provided by the guidelines for defendants who smuggle illegal aliens for profit.
- For fraud offenses, the public's opinions varied by the type of fraud. For submitting false Medicare claims and selling fraudulent and worthless stocks, the public was more likely to recommend punishments higher than the guidelines. For causing the failure of a savings and loan, the public was more likely to prefer punishments lower than the guidelines.

In addition to the Commission's in-house comparison study, noted professors Dr. Peter H. Rossi of the University of Massachusetts, Amherst, and Dr. Richard A. Berk of the University of California at Los Angeles prepared a separate report under contract to the Commission summarizing the survey data. The report examined factors associated with respondents' punishment recommendations such as the different offense and offender characteristics depicted in the scenarios; social and individual characteristics of the respondents; and the respondents' geographic regions and community sizes. The study also compared the public's punishment preferences to sentences provided by the federal guidelines.

The Berk and Rossi report concluded that: (1) most of the variation in punishment preferences given by survey respondents was a function of the crimes committed, not the background of the defendant; (2) while survey respondents recorded longer punishment preferences for defendants with longer criminal records, the size of the punishment increment grew smaller as the number of prior convictions increased; (3) preferences for punishment length increased as did increased economic gain from the crime, but not in equal proportion to the gain (*e.g.*, a robber netting \$200,000 did not receive twice the sentence of a robber netting \$100,000); (4) the punishment increments associated with a particular crime element were not constant, but varied with the overall offense severity (*i.e.*, the incremental punishment associated with a given aggravating circumstance was longer for more serious offenses); and (5) there were strong regional differences in respondents' punishment preferences with residents of New England recommending shorter sentences and residents of Texas, Oklahoma, Alabama, Kentucky, and Tennessee recommending longer sentences.

## **Prison Impact Assessment**

As directed by Congress, the Commission regularly assesses the impact of changes to the sentencing guidelines on the federal prison population. During 1996, the Commission assessed the potential prison impact of five guideline amendments sent to Congress. Of these, three would affect sentences and involve a sufficient number of cases to use the Commission's computerized prison impact model.<sup>68</sup>

The Commission's prison impact model assesses the impact of an amendment to the guidelines using estimated changes in a hypothetical "steady-state" prison system.<sup>69</sup> In 1995, the Commission calculated that 29,649 defendants sentenced to prison in the federal courts would serve a total of 156,151 person-years of imprisonment.<sup>70</sup> Under the prison impact model, therefore, the estimate of the hypothetical "steady-state" prison population is 156,151 inmates (approximately 56,000 more than are housed currently by the Federal Bureau of Prisons). This estimate constitutes the baseline against which sentencing policy changes are measured.

The prison impact model calculates how sentences for defendants would have differed had the 1996 amendments been in effect at the time of sentencing. As these amendments impact sentences, they also affect the total person-years of imprisonment imposed. The difference between the actual number of person-years of imprisonment imposed and the number that would be imposed with the amendments in effect represents the change in the long-term prison population. The ratio of this prison population change to the actual prison population represents the percentage difference in the prison population attributable to an amendment.<sup>71</sup>

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<sup>68</sup> Of the two amendments reviewed but not assessed using the computerized model, one (§2G1.1, Promoting Prostitution or Prohibited Sexual Conduct) involved a consolidation of two existing guidelines and was determined to have no impact on sentencing, and the other created a new Chapter 3 adjustment (§3A1.4, Terrorism) for which no historical sentencing data were available for analysis.

<sup>69</sup> A long-term, "steady-state" population envisions a hypothetical prison system in balance. That is, the number of offenders admitted each year is equal to the number of inmates discharged from the system during that year. By focusing on the "steady-state" population, the impact of a policy change is isolated from other changes in the system that may affect the prison population. In general, change is estimated to increase or decrease the size of the prison population over a 30-year period.

<sup>70</sup> During 1995, 38,500 defendants were sentenced in federal courts. From these, 8,851 cases were excluded from the analysis because no term of imprisonment had been imposed (8,306 cases) or sentencing information was missing (545 cases).

<sup>71</sup> The basis of the prison impact model is the resentencing algorithm. A review of each defendant's presentence report determines whether or not the imposed sentence would have been different under a proposed guideline amendment or statutory change. If the amendment affects the defendant's sentence (*e.g.*, the final offense level or criminal history category), a hypothetical new sentence for the defendant is computed using, as a starting point, the position of the defendant's sentence within the original guideline range. The new sentence is imposed at the same relative position as in the original guideline range.

Sometimes actual sentencing practices require a modification to the assumption that sentencing under the proposed amendments would be at the same position as sentencing prior to the amendments. For example, assumptions are made that defendants cannot be resentenced above statutory maximum

The prison impact of the following three guideline amendments, all of which stem from congressional directives in the Sex Crimes Against Children Prevention Act of 1995, was evaluated using the Commission's computerized modeling technique:

- **§2G2.1** (*Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production*) – This amendment included two primary changes to §2G2.1, raising the base offense level from 25 to 27 and adding a specific offense characteristic for use of a computer in the crime.

This amendment would potentially affect 13 defendants who currently serve an average of 78.2 months of imprisonment. It was estimated that, with the proposed amendment in effect, these defendants would serve an average of 94.3 months imprisonment.

- **§2G2.2** (*Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffick*) – This amendment raised §2G2.2's base offense level from 15 to 17 and added a specific offense characteristic for use of a computer in the crime.

This amendment would potentially affect 42 defendants who currently serve an average of 15.2 months of imprisonment. It was estimated that, with the proposed amendment in effect, these defendants would serve an average of 21.7 months imprisonment.

- **§2G2.4** (*Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct*) – This amendment raised §2G2.4's base offense level from 13 to 15 and added a specific offense characteristic for use of a computer in the crime.

This amendment would potentially affect 15 defendants who currently serve an average of 7.5 months of imprisonment. It was estimated that, with the proposed amendment in effect, these defendants would serve an average of 19.6 months imprisonment.

**Retroactivity** – The Commission's prison impact model is also used to estimate the impact of potential retroactive application of Commission amendments that lower guideline sentences. In 1996, the effect of each amendment was to increase defendant sentences. Consequently, retroactive application of amendments was not considered.

In addition to these analyses, the prison impact model was used to respond to specific requests from Congress and commissioners. Estimates were developed for potential guideline changes to: §2L1.1 (Smuggling, Transporting, or Harboring Aliens); §2L2.1 (Trafficking in Fraudulent Documentation Relating to Immigration); §2L2.2 (Fraudulently Acquiring

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or below statutory minimum penalties (except in cases of downward departures for substantial assistance pursuant to §5K1.1). After computing the new sentence for each defendant, the prison impact model estimates the minimum time the defendant can expect to serve by discounting the sentence (1) for good conduct time pursuant to 18 U.S.C. § 3624 and (2) for the defendant's remaining life expectancy. The new estimates of the size of the prison population are achieved by totaling all the estimated prison terms.

Documentation Relating to Immigration); §2G1.2 (Transportation for Purpose of Prostitution); §3A1.1 (Hate Crime Motivation or Vulnerable Victim); Loss Tables in Fraud and Theft; and the Drug Quantity Table (methamphetamine, powder cocaine, and crack cocaine). The Commission also examined the impact of eliminating time off for good behavior while in prison.

The Commission's prison impact model is revised on an ongoing basis. During the past year, a detailed manual for the model was developed, modifications to the model were made to assure its compatibility with recent changes to the Commission's datasets, and internal validity checks were developed to account for all potentially affected cases. Currently, the Commission is focusing on developing independent methods to evaluate the accuracy of the model's predictions and is evaluating the impact of various decisions (*e.g.*, the method of resentencing cases with upward or downward departures) within the model.

### ***Research Papers for ASC Meeting***

Commission staff prepared a variety of research papers and works in progress for the American Society of Criminology's annual meeting, held November 1996 in Chicago.

The reports displayed the wide array of Commission datasets, the scope of variables collected, and the depth of information available for research and policy analysis of sentencing and related criminal justice issues. The research questions addressed in the papers ranged from a descriptive profiling of specific offense and offender groups to a policy study of prosecutorial discretion and comparative analyses of discretion in preguideline and guideline cases.

The study, "Disparity and Sentence Dispersion under the Guidelines," offered a comparative analysis of sentencing discretion in preguideline and guideline convictions for a select group of districts and judges. The paper, "Drug Trafficking: Mandatory Minimum Sentences and the Safety Valve," analyzed the impact of recent statutory and guideline provisions on sentences for first-time, non-violent drug offenders in non-leadership roles.

"Substantial Assistance to Authorities: A Tool for Law Enforcement, Disparity or Justice?" was part of a comprehensive staff report on substantial assistance practices nationwide. The study employed multiple sources of information including the Commission's comprehensive monitoring database, on-site interviews with judges and criminal justice professionals at eight randomly selected districts, an analysis of conspiracy networks, telephone interviews with assistant U.S. attorneys; and a survey of written policies for all 94 U.S. Attorney offices.

The study, "The Public's View of Just Punishment: Comparisons with the Federal Sentencing Guidelines," examined the relationship between the penalties recommended by the public and those prescribed by the guidelines for a select set of crime "scenarios."

The final ASC paper, "The Comparative Context: State and Federal Guidelines," reviewed guidelines approaches to measuring the severity of the instant offense and the offender's prior criminality.