

1996 Annual Report

UNITED STATES SENTENCING COMMISSION



Table of Contents

U.S. Sentencing Commission – Year In Review	vii
Chapter One – Commission Overview	1
Introduction	1
A Brief History of Federal Sentencing Reform	1
Agency Overview	2
<i>Commissioners</i>	2
<i>Organization</i>	2
<i>Staffing</i>	4
<i>Budget and Expenditures</i>	5
Chapter Two – The Sentencing Guidelines	7
Guideline Simplification	7
Guideline Assessment	10
<i>Intensive Study Sample</i>	10
<i>Criminal History</i>	10
<i>Drug Offense Analysis</i>	11
<i>Disparity Studies</i>	11
<i>Comparing State and Federal Guidelines</i>	12
Guideline Amendments	12
<i>Introduction</i>	12
<i>Amendments Promulgated</i>	13
Assistance to Congress	14
Chapter Three – Legal Issues	15
Introduction	15
U.S. Supreme Court Decisions	15
<i>Certiorari Granted</i>	15
<i>Decisions on Guideline Sentencing Issues</i>	16
Post-Koon Appellate Decisions	18
<i>The “Safety Valve”</i>	21
Significant Case Law on Organizational Defendants	23
Data Analyses for the Courts	24
Chapter Four – Guideline Training and Education	25
Internet Web Site and Electronic Bulletin Board	25
Public Information	25
Publications and Training Materials	26
Training	26
<i>Training New Appointees</i>	27
<i>District-Based Guideline Education</i>	28
<i>“High-Tech” Approaches to Training</i>	28
<i>Hotlines</i>	28
Calls Received in 1996	28
<i>Temporary Assignment Programs</i>	29
ASSYST	29

Chapter Five – Research	31
Statutory Requirements	31
Data Collection	31
<i>Data Collection Issues</i>	32
<i>Sentencing Individual Defendants</i>	32
Primary Offense and Offender Characteristics	32
Guideline Cases	33
Guideline Application	34
Departures and Sentences Within the Guideline Range	34
Drug Cases	35
Immigration Cases	36
Summary	36
Organizational Sentencing Practices	37
<i>Offense Characteristics</i>	38
Offender Characteristics	38
Sanctions Imposed	38
Appeals Data	39
<i>Summary of Information Received</i>	39
<i>Issues and Guidelines Appealed</i>	40
Offense and Offender Characteristics	40
Research Studies	41
<i>Just Punishment Study</i>	41
<i>Prison Impact Assessment</i>	43
<i>Research Papers for ASC Meeting</i>	45

CHAPTER ONE

Commission Overview

Introduction

The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purpose is to establish sentencing policies and practices for the federal courts, including detailed guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes. The development, monitoring, and implementation of the sentencing guidelines is the centerpiece of the agency's work. Further, the Commission utilizes its highly respected sentencing dataset to conduct research on sentencing-related issues and serve as an information resource for Congress, criminal justice practitioners, and the public.

The Sentencing Commission was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984, and its authority and duties are specified in chapter 58 of title 28, United States Code. Procedures for implementing guideline sentencing are prescribed in chapter 227 of title 18.

The sentencing guidelines established by the Commission are designed to take into account the classic purposes of sentencing: just punishment, rehabilitation, deterrence, and incapacitation. The guidelines provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct. At the same time, the guidelines permit judicial flexibility to account for relevant aggravating and mitigating factors. The guidelines are constructed to reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process.

A Brief History of Federal Sentencing Reform

Disparity in sentencing has long been a concern for Congress, the criminal justice community, and the public. After decades of research and debate, Congress created the Commission as a permanent agency charged with formulating national sentencing standards to guide federal trial judges in their sentencing decisions.

Organized in October 1985, the Commission submitted to Congress on April 13, 1987, its original sentencing guidelines and policy statements. Prior to this submission, the Commission held 13 public hearings, published two drafts for public comment, and received more than 1,000 letters and position papers from hundreds of individuals and organizations. The guidelines became effective November 1, 1987, following the requisite period of congressional review, and apply to all offenses committed on or after that date.

Shortly after implementation of the guidelines, defendants throughout the country challenged the constitutionality of the Sentencing Reform Act and the Commission on the basis of improper legislative delegation and violation of the separation of powers doctrine. The U.S. Supreme Court rejected these challenges January 18, 1989, in *Mistretta v. United States*, and upheld

the constitutionality of the Commission as an independent judicial branch agency. This decision cleared the way for nationwide implementation of the guidelines. Since January 1989, federal judges have sentenced nearly 300,000 defendants under the guidelines.

Agency Overview

Commissioners

The Sentencing Commission's seven voting members are appointed to staggered six-year terms by the President with the advice and consent of the Senate. At least three of the commissioners must be federal judges, and no more than four can be members of the same political party. By statute, the chair and vice chairs hold full-time positions, while other commissioners have part-time status.

Judge Richard P. Conaboy of Scranton, PA, was sworn in as Commission Chairman on October 11, 1994. In addition to his duties as Chairman, he serves as a United States District Judge for the Middle District of Pennsylvania. The Commission's three Vice Chairmen during 1996 were **Commissioner Michael S. Gelacak** of Centreville, Virginia, **Commissioner Michael Goldsmith** of Salt Lake City, Utah, and **Judge A. David Mazzone** of Boston, Massachusetts. Prior to his appointment as Commissioner, Vice Chairman Gelacak was a practicing attorney in Washington, D.C. and Buffalo, New York. Vice Chairman Goldsmith is currently on leave from Brigham Young University where he is a Professor of Law. Vice Chairman Mazzone is a United States District Judge for the District of Massachusetts.

Other Commission members serving during 1996 were: **Commissioner Wayne A. Budd**, **Judge Julie E. Carnes**, and **Judge Deanell R. Tacha**. Commissioner Budd of Boston, Massachusetts, is Senior Vice President of NYNEX; Judge Carnes of Atlanta, Georgia, is a United States District Judge for the Northern District of Georgia; and Judge Tacha of Lawrence, Kansas, is a United States Circuit Judge for the Tenth Circuit. Judge Mazzone and Judge Carnes served until October 4, 1996.

Ex-officio members during 1996 were **Commissioner Mary Frances Harkenrider**, Counsel to the Assistant Attorney General for the Criminal Division, U.S. Department of Justice, and **Commissioner Edward F. Reilly, Jr.**, Chairman of the U.S. Parole Commission. In early 1997, **Commissioner Michael J. Gaines**, the new Chairman of the U.S. Parole Commission, replaced Commissioner Reilly as an *ex-officio* member.

Organization

The Commission staff (approximately 100 employees) is headed by a staff director who oversees five offices: General Counsel, Monitoring, Policy Analysis, Training and Technical Assistance, and Administration (*see* organization chart, Figure A). The **Office of the Staff Director** supervises, supports, and coordinates all agency functions. The five office directors report to the staff director. The staff director's office, in addition, houses the communications and computer support units. The communications unit coordinates all public information matters as well as principal editing, graphic design, and printing for published Commission materials. The

computer support unit maintains and services the Commission's computer hardware and software. In 1997, the Commission's Office of Administration will join the Office of the Staff Director.

The **Office of General Counsel** provides support to the Commission on a variety of legal issues, including the formulation and application of guidelines and guideline amendments, legislative proposals, and statutory interpretations. Legal staff members monitor district and circuit court application and interpretation of the guidelines and advise commissioners about statutes and legislation affecting the Commission's work. The legal staff provides training support in conjunction with the Office of Training and Technical Assistance.

The **Office of Monitoring** maintains a comprehensive computerized data collection system to report on federal sentencing practices and to track application of the guidelines for individual cases. The staff receives and enters case data and produces periodic reports about guideline application, providing significant information for Commission review as it monitors the national implementation process or considers amending individual guidelines. In addition to information related to individual offenders, the Commission collects data on appeals, indictments, and organizational guideline sentences. The office maintains a master file of guideline sentencing data, available to the public through the Inter-University Consortium for Political and Social Research at the University of Michigan.

The **Office of Policy Analysis**, working with the Commission's comprehensive sentencing database, provides short- and long-term guideline and sentencing-related research and analyses. The office studies a variety of research topics including just punishment, sentencing disparity, substantial assistance to authorities, the effect of proposed guideline amendments on projections of the federal prison population, sentencing practices related to organizational defendants, and appeals. In addition, the office provides data and analyses on specific criminal justice issues at the request of Congress and the courts.

The **Office of Training and Technical Assistance** teaches guideline application to judges, probation officers, prosecuting and defense attorneys, and other criminal justice professionals. The staff develops training materials, participates in the sentencing guideline segments of training programs sponsored by other agencies, and informs the Commission of current guideline application practices. The office also operates a "hotline" to respond to guideline application questions from members of the court family.

The **Office of Administration** provides general administrative support to commissioners and staff regarding budget and finance, contracting, personnel management, library reference services, facilities, and a variety of other office activities. The office provides support to the staff director and senior managers in accomplishing project planning and budget forecasting on a short- and long-term basis.

Staffing

During fiscal year 1996, the Commission used staff resources totaling 103 workyears. Approximately 32 percent of staff resources was spent in various aspects of sentence monitoring efforts, 13 percent in research and analysis, ten percent in technical assistance and training,

16 percent in legal activities, seven percent in the commissioners' offices, 13 percent in the Office of the Staff Director, and nine percent in the Office of Administration.

Budget and Expenditures

For fiscal year 1996, Public Law 104-134 provided an appropriation of \$8,500,000 for the Commission's salaries and expenses. For fiscal year 1997, Public Law 104-208 granted the Commission an appropriation of \$8,490,000 (see Table 1).

Table 1
BUDGET AUTHORITY AND OBLIGATIONS
(dollar amounts in thousands)

New Budget Authority	<u>FY 1996</u> \$8,500	<u>FY 1997</u> \$8,490
Personnel Compensation	\$5,474	\$5,652
Personnel Benefits	1,190	1,595
Travel and Transportation	325	350
Communications, Utilities and Other Rent	157	160
Printing and Reproduction	187	125
Other Services	945	862
Supplies and Equipment	343	301
Total Obligations*	\$8,621	\$ 9,045

*Total obligation amounts include funds carried forward from previous "no-year" appropriations.

CHAPTER TWO

The Sentencing Guidelines

Guideline Simplification

The Commission identified comprehensive review of the sentencing guidelines as a top agency priority in 1995. The objective of this review is to improve federal sentencing by working closely with the judiciary and others to simplify and refine the guidelines. Dr. John H. Kramer, Executive Director of the Pennsylvania State Sentencing Commission and an expert in structured sentencing systems, accepted the Commission's request to lead the effort. The Commission decided that such a review was timely, given vast amounts of information available on: (1) approximately 300,000 cases sentenced under the guidelines since their inception, (2) numerous appellate opinions, (3) a growing body of academic literature and public comment, and (4) the empirical analyses of the guidelines conducted to date.

In the first phase of the simplification process, staff working groups prepared briefing papers on major guideline topics to provide a foundation for Commission consideration of relevant issues and possible options for refinement. Each paper:

- reviewed the history behind the original policy decisions,
- assessed how the particular guideline is working,
- identified the ways in which state sentencing commissions have addressed similar issues,
- summarized empirical and other research information, and
- outlined broad options for refinement.

The topics covered include: relevant conduct, the level of detail in Chapter Two, multiple counts, Chapter Three adjustments, sentencing options, departures, and the Sentencing Reform Act. The papers produced by these working groups provided sound bases for commissioners, staff, and the public to understand the major features of the current guidelines and assess proposals for change. At the conclusion of this phase of the simplification project, the background papers were posted on the Commission's Internet home page, and copies were made available to interested individuals and groups.

The Commission declared a moratorium on guideline amendments in 1996 (except for those necessary to implement congressional directives) in large measure to focus on the voluminous material produced by staff and gather insights from judges, attorneys, probation officers, and the academic community about the need for changes. During the second phase of the simplification project, commissioners received input from a variety of sources. One such source was a public hearing held August 12, 1996, in the Bryon White U.S. Courthouse in Denver (*see* Table 2). Devoted entirely to simplification issues, the hearing was divided into three major segments: (1) general comments from guidelines practitioners, (2) testimony from individuals who had testified at

Table 2
PUBLIC HEARING WITNESS LISTS

Proposed Amendments to the Sentencing Guidelines Washington, D.C. — March 11, 1996	Simplification of the Sentencing Guidelines Denver, Colorado — August 12, 1996
Mary Lou Soller <i>American Bar Association</i>	Judge Lewis Babcock Judge Zita Weinsienk Judge Wiley Daniel
David Wikstrom <i>New York Council of Defense Lawyers</i>	<i>U.S. District Court, District of Colorado</i>
Julie Stewart <i>Families Against Mandatory Minimums</i>	Richard Miklic Frederick Bach Kurt Thoene Christopher Perez
Alan Chaset <i>National Association of Criminal Defense Lawyers</i>	Suzanne Wall Juarez <i>U.S. Probation Office, District of Colorado</i>
Atlee W. Wampler III <i>Wampler Buchanan & Breen</i>	Michael Katz David Connor Raymond Moore Virginia Grady <i>Federal Public Defender's Office District of Colorado</i>
Judith Hall	Robert Litt <i>U.S. Department of Justice</i>
Lisa Campanella	Patrick Burke <i>Criminal Justice Act Panel Attorneys, CO</i>
	Arthur Nieto
	Michael Bender
	Kevin Reitz <i>University of Colorado Law School</i>
	Jeralyn Merrit

the Commission's 1986 hearing in Denver about their experience with nearly ten years of guideline sentencing, and (3) commentary from practitioners and researchers on relevant and acquitted conduct, drug offenses and the defendant's role in the offense, and departures/offender characteristics.

Commissioners considered additional important input from:

- a Judges Advisory Group composed of one judge from each circuit and members of the Criminal Law Committee of the Judicial Conference;
- discussions with Professors Michael Tonry and Daniel J. Freed and former Commission Chairman William W. Wilkins, Jr. at a February planning retreat;
- attendance at two meetings of the Criminal Law Committee and a separate meeting with the group's subcommittee on sentencing guidelines;
- a detailed survey of district court and appellate judges on guideline simplification issues conducted by the Federal Judicial Center;
- participation in three regional workshops for district court judges sponsored by the Federal Judicial Center;
- a seminar on guideline issues at the American Bar Association's annual convention; and
- numerous informal meetings with district court judges, prosecutors, federal defenders, and probation officers.

Beginning at its July meeting, commissioners voted to publish a series of simplification-related proposals in the *Federal Register* for comment in early January 1997, as part of the annual guideline amendment cycle. By the end of fiscal year 1996, five proposals had been approved for publication. These proposals covered the topics of relevant conduct, acquitted conduct, acceptance of responsibility, guideline consolidation, and circuit conflicts. Additional proposals, including potential revisions to the theft and fraud guidelines, role in the offense guidelines, and departure policy statements are under active consideration.

While the Commission had intended to focus its attention primarily on guideline simplification issues this amendment cycle, significant sentencing-related legislation was enacted in the closing weeks of the 104th Congress. Some of this legislation contained specific directives to the Commission; other legislation, while not containing directives, effected changes requiring Commission attention. The legislation addressed, among other issues, mandatory restitution, immigration, drug precursors, special assessments, terrorism, international counterfeiting, carjacking, and methamphetamine penalties. In addition, the Commission continued its work on developing new recommendations for cocaine sentencing policy as mandated by Congress.

Guideline Assessment

The Commission's assessment project is reviewing the sentencing guidelines to study their effectiveness at accomplishing the purposes of sentencing and to guide the Commission's simplification efforts. In 1996, the Commission initiated the following assessment program projects: the Intensive Study Sample Project (ISS); a review of sentencing and guideline literature; a comparison of state and federal sentencing guidelines; and studies of disparity, offense seriousness, criminal history, drug offenses, and the ways in which the guidelines are applied.

Intensive Study Sample

On an ongoing basis, federal courts supply the Commission with documents about each defendant sentenced. The Commission, in turn, reviews basic sentencing and demographic data and enters this information into its Monitoring database. The data provide a record that includes characteristics of the offense (*e.g.*, monetary loss) and of the defendant (*e.g.*, prior criminality), court decisions (*e.g.*, fact-finding, guideline application, departures), and the court's disposition (*e.g.*, type and length of sentence imposed).

This database is the Commission's primary statistical resource for its *Annual Report and 1996 Sourcebook of Federal Sentencing Statistics*. It suggests areas where guideline amendments may be needed and informs the Commission's deliberations about new amendments, research projects, reports to Congress, prison impact projections, and responses to the many special requests for statistical information from Congress, the courts, governmental agencies, and the academic community.

The Intensive Study Sample (ISS) will supplement the existing Monitoring database with information that will assist the assessment program's disparity, offense seriousness, drug offense, and criminal history projects. Variables to be collected for the ISS include personal characteristics such as: the defendant's employment history, military background, drug and alcohol use, and number of children; whether or not the defendant was financially supporting children; and whether or not the defendant was on welfare. New offense-related variables will include the presence or absence of victims, the age of any victims, defendant culpability and function in the offense, and the number and type of weapons used.

In 1996, four offices within the Commission assisted with the development of a detailed data-collection instrument for the ISS. Subsequently, Commission staff began coding a five-percent random sample of 1995 cases (approximately 2,000 cases). The pertinent variables will be extracted, coded, and merged with existing data elements from the Monitoring files to provide the basis for a variety of assessment analyses.

Criminal History

Using the ISS data to supplement the Monitoring database, staff will: (1) assess the effectiveness of the current method of calculating criminal history in distinguishing offenders with less serious prior records from those with more serious prior records, and (2) compare other criminal history measurement models to the current structure. The goal of this project is to determine whether the Commission can develop a more effective criminal history measure. ISS

prior offense variables for the analyses will include: type of offense, weapon use, drug use, dollar loss, and type and length of sentence, along with additional measures of violence associated with these past offenses.

Drug Offense Analysis

To expand the Commission's information base on drug offenses, Commission staff examined approximately 800 drug cases drawn from the Intensive Study Sample. This sample was representative of all drug offenders sentenced under the guidelines during 1995 and was drawn to help identify patterns of offender functions within drug conspiracies and to examine the effectiveness of the guidelines in linking punishment with the offender's role. Staff examined characteristics of drug offenders and offenses along two primary dimensions: drug type (*i.e.*, powder cocaine, crack cocaine, heroin, marijuana, and methamphetamine) and the defendant's role within a conspiracy (*e.g.*, high-level supplier, defendant employing special skill, manager/supervisor, street-level dealer, courier, lookout).

Disparity Studies

In constructing the Sentencing Reform Act of 1984, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. In a 1991 study mandated by Congress, the Commission found that sentences imposed on offenders convicted of bank robbery, cocaine trafficking, heroin distribution, and bank embezzlement were dramatically more uniform under the guidelines than were sentences imposed on similar offenders before the guidelines.

The Commission is currently engaged in several additional studies concerning sentencing disparity. In 1996, a study of sentencing disparity among judges before and after guideline implementation was undertaken, and its preliminary report proceeded to review. This study is using a "natural experiment"¹ methodology to determine if disparities due to philosophical and other differences among judges have been reduced under the guidelines. The study will include factors such as offense type, the defendant's criminal history, and demographic factors.

Other Commission studies concerning disparity focus on differences among offenders rather than differences across judges. For example, the Commission has engaged an outside contractor to study the effects of race, gender, and other personal characteristics on sentences. The Commission has also continued its in-house research to evaluate the effects of extra-legal factors (*e.g.*, gender, race) and the impact of some legally relevant factors (*e.g.*, drug type) on the likelihood and length of incarceration.

¹ The study examined differences among judges who belong to identical random case assignment pools before and after guideline implementation. Random assignment ensures that cases received by judges are comparable.

Comparing State and Federal Guidelines

Over the last ten years, the number of states adopting sentencing guidelines has increased dramatically. For the State and Federal Guideline Comparative Context Project, Commission staff: (1) collected and updated information on all state guideline systems, and (2) used 14 federal cases sentenced in 1994 to compare federal guideline sentences with those of four state guideline systems. For its state comparisons, the study selected the Minnesota, Oregon, Pennsylvania, and Virginia guidelines systems.

To ensure accuracy of the state guideline calculations, Commission staff provided important facts from each federal case to staff at the four state sentencing commissions and asked them to “sentence” these defendants using their own guidelines. Once calculated, the state guideline ranges were compared to the defendant’s federal guideline range. The comparisons illustrated similarities and differences in guidelines application between the state and federal systems, and provided specific information on the ways different jurisdictions calculate offense severity and criminal history.

The study found that, on average, the federal system exposed defendants to higher expected time to be served than the four states, with an average time served in these cases of 76.6 months. The averages for the states were: Minnesota (44.3 months), Virginia (38.4 months), Pennsylvania (27.6 months), and Oregon (20.5 months). The sentencing differences reflected different penalty structures in the guidelines and limits and sensitivity to correctional resources in the states.

Guideline Amendments

Introduction

The legislation creating the Sentencing Commission provided that “[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.” 28 U.S.C. § 994(o). Given this congressional direction, the Commission has adopted an evolutionary approach to guideline development under which it periodically refines the guidelines in light of district court sentencing practices, appellate decisions, research, congressional enactment of new statutes, and input from federal criminal justice practitioners.

By statute, the Commission annually may transmit guideline amendments to the Congress on or after the first day of a regular session of Congress but not later than May 1. Such amendments become effective automatically

The following is a list of enactments from the second session of the 104th Congress that require Commission review:

- Telecommunications Act of 1996
- Antiterrorism and Effective Death Penalty Act of 1996
- Anti-counterfeiting Consumer Protection Act of 1996
- Church Arson Prevention Act of 1996
- Health Insurance Portability and Accountability Act of 1996
- National Defense Authorization Act for Fiscal Year 1997
- Omnibus Consolidated Appropriations Act
- Public Law 104-214, relating to witness retaliation and jury tampering
- Carjacking Correction Act of 1996
- Comprehensive Methamphetamine Control Act of 1996
- Economic Espionage Act of 1996
- Drug-Induced Rape Prevention and Punishment Act of 1996

upon expiration of a 180-day congressional review period unless the Congress, by law, provides otherwise.

Amendments Promulgated

In 1996, the Commission decided not to promulgate guideline amendments except as necessary to implement legislation enacted by Congress. This one-year hiatus in the amendment process was important to allow a period of time for previous changes to “settle in” and to permit more deliberate consideration of broader guideline issues. Consequently, the Commission published a limited number of proposed amendments for public comment in the *Federal Register* in early 1996. In addition, as part of the Commission’s normal amendment process, a public hearing on the proposals (see Table 2) was conducted in Washington, D.C., on March 11, 1996.

On May 1, 1996, the Commission submitted to Congress two legislatively directed amendments to the sentencing guidelines. These amendments took effect on November 1, 1996, following the requisite 180-day period of congressional review. The amendments made the following changes in the operation of the guidelines:

- increased the guideline penalties for offenses involving the sexual exploitation of minors and the promotion of prostitution or other prohibited sexual conduct; and
- increased the guideline penalties if a computer was used to advertise or transmit material involving the sexual exploitation of a minor, if possession of the material resulted from the defendant’s use of a computer, or if a computer was used to solicit participation of a minor in sexually explicit conduct to produce the material.

Before the 104th Congress adjourned, it passed and the President signed a number of legislative initiatives that involved changes in criminal law, prompting their review by the Commission for possible amendment action. Although not all of the legislation requires modification of the guidelines, some of the new laws may require an extensive Commission response. For example, the Antiterrorism and Effective Death Penalty Act of 1996 requires the Commission to create or amend existing guidelines relating to restitution, special assessments, and conditions of probation and supervised release. The same Act also calls for changes in the guidelines’ terrorism enhancement and requires minimum guideline penalties for various computer crimes. The Commission used the emergency authority provided by the Act to expand the guidelines’ definition of terrorism to cover both international and domestic terrorism. This amendment took effect November 1, 1996.

In addition, during the second session of the 104th Congress, the Commission submitted two reports to Congress in response to legislation. It issued a report on child pornography and other sex offenses, as directed by the Sex Crimes Against Children Prevention Act of 1995. The Commission also prepared a report on the deterrent effect of existing guidelines as they apply to computer crimes, as required by the Antiterrorism and Effective Death Penalty Act of 1996. These reports were submitted to Congress in June and are available on the Commission’s Internet web site.

Assistance to Congress

The Commission continues to expand its ability to provide policymakers with timely and complete information, devoting particular effort to providing it at the outset of sentencing policy discussion. During 1996, Commission staff responded to more than a hundred congressional requests for assistance. These inquiries, both written and oral, included requests for technical assistance in drafting legislation, explanations of guideline operation, and Commission publications and resource materials.

Other requests require the Commission to analyze its comprehensive federal sentencing database. In 1996, congressional requests included analyses of carjacking offenses, elimination of good conduct time for certain crimes of violence, the impact of the implementation of the Child Pornography Protection Act, the prevalence of mules and couriers in powder cocaine cases, median powder cocaine quantities, the distribution of drug type among "safety valve" cases, the frequency of crack cocaine possession cases, and the impact of granting good conduct time to defendants sentenced to less than one year in prison. To provide policymakers with the broadest possible range of information, the Commission, when feasible, will provide Congress with data beyond its sentencing database. For example, to inform a member of Congress who was considering raising federal penalties for prison escape, the Commission recently compared state experiences with prison escapes to the federal record on this issue.

CHAPTER THREE

Legal Issues

Introduction

The Commission closely follows the sentencing decisions of the federal courts to identify areas where guideline amendments, research, or legislative action may be needed. This section addresses a number of the more significant sentencing-related legal issues decided by the United States Supreme Court and the courts of appeals during 1996.

U.S. Supreme Court Decisions

During 1996, the United States Supreme Court interpreted guideline sentencing issues in three cases. Subsequently, the Court granted *certiorari* in another two cases to be decided in the coming year.

Certiorari Granted

The two cases granted *certiorari* involve interpretation of the guidelines and their relationship to the statutes to which they apply. In *United States v. Gonzalez*², the Court will consider whether the five-year consecutive sentence required by 18 U.S.C. § 924(c) should be served concurrently or consecutively to a state sentence imposed for an offense involving the same course of conduct. The Tenth Circuit Court of Appeals ruled that imposing a concurrent sentence was consistent with guideline §5G1.3.

In the other case, *United States v. LaBonte*,³ the Court granted *certiorari* to decide whether the Sentencing Commission exceeded its authority when it amended the career offender guideline (§4B1.1) to define the term “offense statutory maximum” as the maximum term of imprisonment authorized for the offense of conviction, rather than an enhanced maximum term due to a prior conviction. The validity of this amendment has been challenged by the government and is an issue that has divided the courts of appeals.⁴

² 65 F.3d 814 (10th Cir. 1995), *cert. granted*, 116 S. Ct. 2522 (1996).

³ 70 F.3d 1396 (1st Cir. 1995), *cert. granted*, 116 S. Ct. 2545 (1996).

⁴ The Courts of Appeals for the First and Ninth Circuits have held that this amendment is a permissible exercise of the Commission’s authority in implementing Congress’s directive. The Courts of Appeals for the Seventh and Tenth Circuits have held that this amendment is inconsistent with the statute, and that the statutory maximum must be the higher or “enhanced” maximum term of imprisonment provided by statute for that category of career offender.

Decisions on Guideline Sentencing Issues

In *Neal v. United States*,⁵ the Supreme Court determined whether the 0.4 milligram per dose presumptive weight assigned to LSD by the amended sentencing guideline also governed the LSD weight calculation for the statutory minimum sentence mandated for certain drug trafficking offenses by 21 U.S.C. § 841. Justice Kennedy wrote for a unanimous court. It held that the principle of *stare decisis* required adherence to its holding in *Chapman v. United States*⁶ that the statute provides for mandatory minimum sentences based on the weight of “a mixture or substance containing a detectable amount” of the drug. Thus, the weight of the blotter paper carrier medium must be included when the statutory minimum sentence is determined. The Court noted that although the Commission is “entrusted within its sphere to make policy judgments” and “may abandon its old methods in favor of what it has deemed a more desirable ‘approach’ to calculating LSD quantities,” the Court does “not have the same latitude to forsake prior interpretations of a statute.”⁷

The Court again examined the application of a statute and its guideline counterpart in *Melendez v. United States*.⁸ Justice Thomas delivered the opinion of the court, which examined whether a government motion that specifies only a guideline departure based on the defendant’s substantial assistance to authorities could also serve as a motion for departure below the statutory minimum under 18 U.S.C. § 3553(e). The Court concluded that, where the guideline range was higher than the statutory minimum, one motion was not sufficient for both purposes. According to the Court, “nothing in 3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant’s cooperation when the Government has not authorized such a sentence, but has instead moved for a departure only from the applicable guidelines range.”⁹

In *Koon v. United States*,¹⁰ the Court examined the standard of review to be applied by appellate courts in reviewing district court guideline departure decisions. *Koon* involved two Los Angeles police officers who previously had been acquitted of state charges of assault and excessive use of force in the beating of a suspect during an arrest. The two officers subsequently were convicted in federal court of violating the victim’s constitutional rights under color of law. In sentencing the defendants, the district court departed below the indicated sentencing guideline range of 70 to 87 months, sentencing them to 30 months of imprisonment. The district court granted the departure based on: (1) victim misconduct; (2) defendants’ susceptibility to abuse in prison; (3) defendants’ loss of employment; (4) defendants’ successive state and federal prosecutions; and (5) their low risk of recidivism. The Court unanimously joined in Justice Kennedy’s opinion that an

⁵ 116 S. Ct. 763 (1996).

⁶ 500 U.S. 453 (1991).

⁷ 116 S. Ct. 763 at 769.

⁸ 116 S. Ct. 2057 (1996).

⁹ 116 S. Ct. 2057 at 2061.

¹⁰ 116 S. Ct. 2035 (1996).

appellate court should not review the district court's departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion. The Court recognized that the district court occasionally would be confronted with questions of law in deciding whether to depart. It concluded that labeling parts of the review as *de novo* would not be necessary even in those scenarios because "the abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."¹¹

In reaching its decision, the Court emphasized the role of the Sentencing Commission as a permanent body empowered to periodically review and amend the guidelines. The Commission, not the appellate courts, has the role of monitoring district court decisions on departures and refining the guidelines to specify precisely when departures are permitted. The Court further noted that sentencing courts are given "considerable guidance" in the *Guidelines Manual* about the factors that make a case atypical. A number of factors are "discouraged" in that they are to be used only in exceptional cases. Others are "encouraged" if the guideline has not taken that factor into account fully, or it has taken the factor into account but it is present to a degree far in excess of the ordinary. The Commission has categorically "forbidden" departure for only a few factors. Finally, the Court recognized that departure might occur for a factor "unmentioned" in the guidelines if, "after considering the structure and theory of both relevant individual guidelines and in the guidelines taken as a whole,"¹² the factor is sufficient to take the case out of the guidelines heartland. The Court further noted that the Commission expected that departures based on grounds not mentioned in the *Guidelines Manual* will be "highly infrequent."¹³

Against this background, the court reviewed the appellate review standard of the Sentencing Reform Act (SRA).¹⁴ The Court rejected the government's argument that the statute requires a *de novo* review of departure decisions to reduce unjustified disparities in sentencing. While the Court recognized that Congress was concerned about sentencing disparities, the Court was convinced that "Congress did not intend, by establishing limited appellate review, to vest in appellate courts' wide-ranging authority over district court sentencing decisions."¹⁵ Relying on its decision in *Williams v. United States*,¹⁶ the Court reiterated its holding that the establishment of limited appellate review in the SRA "did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." A district court decision to depart from the guidelines, unlike a claim of mathematical error in applying the guidelines, is entitled to substantial deference as the traditional exercise of discretion by a sentencing court. The Supreme Court viewed the departure decision of a district court as primarily factual and judgmental. The opinion describes the departure decision as

¹¹ 116 S. Ct. 2035 at 2048.

¹² 116 S. Ct. 2035 at 2045 (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1992)).

¹³ *Id.*

¹⁴ 18 U.S.C. § 3742.

¹⁵ 116 S. Ct. 2035 at 2046.

¹⁶ 503 U.S. 193 (1992).

making a “refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.”¹⁷

Applying this deferential standard, a divided Court held that the district court did not abuse its discretion in making a downward departure based on: (1) the victim’s misconduct in provoking the defendant’s offenses, (2) susceptibility to abuse in prison, and (3) successive prosecutions. However, downward departures could not be based on: (1) the defendant’s low likelihood of recidivism and (2) the defendant’s collateral employment consequences. The Court held that these factors were adequately considered by the Commission.

Post-*Koon* Appellate Decisions

The appellate courts have taken different approaches to interpreting *Koon*. For example, the First Circuit in *U.S. v. Cali*,¹⁸ in reviewing an upward departure based on defendant’s management of a large-scale criminal enterprise, adopted a two-part test of appellate review. In contrast, the Fourth Circuit in *U.S. v. Rybicki*,¹⁹ in reviewing a downward departure based on several different factors, prescribed a five-part analysis for sentencing courts to follow in deciding when to depart, and clarified the standards of review for each part.²⁰ A review of the few appellate court opinions since the *Koon* decision does not provide a clear picture on how departure jurisprudence and practice will develop.

While differing somewhat in their overall approaches, the appellate decisions since *Koon* have not created additional conflicts with respect to particular departure factors. The *Koon* decision does, however, raise doubt about numerous earlier appellate decisions that found, as a matter of law, that certain departure factors were prohibited. According to the Supreme Court, “for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission.”

In the post-*Koon* departure cases discussed below, appellate courts have reversed and affirmed departure sentences based on numerous factors.

Appellate courts **reversed downward departures** in the following three cases:

- A downward departure based on the defendant’s alcohol problem, 20 years of military service, offense conduct not deemed a “serious fraud,” susceptibility to abuse in prison because the defendant was a law enforcement officer, and problems associated with the defendant’s status as a convicted felon. According to the

¹⁷ *Id.* at 194.

¹⁸ 87 F.3d 571 (1st Cir. 1996).

¹⁹ 96 F. 3d 754 (4th Cir. 1996).

²⁰ One of the five parts does not require appellate review. Another part of the analysis, the factual determination, requires a clearly erroneous standard of review. The remaining three parts require a *de novo* review to determine whether the district court abused its discretion.

appellate court, “none of the six factors underlying the district’s decision justified a departure from the applicable guideline range.”²¹

- A downward departure based on the defendant’s “extraordinary” restitution. According to the appellate court, restitution was a discouraged factor and the amount of restitution in the instant case was not “extraordinary.”²²
- A downward departure based on the defendant’s exposure to civil forfeiture. According to the appellate court, the mandate of §5E1.4 (Forfeiture) means “that the Commission viewed monetary forfeiture as entirely distinct from the issue of imprisonment.” Therefore, exposure to civil forfeiture was not a valid reason for departure under §5K2.0.²³

Appellate courts **remanded downward departures** in the following four cases:

- A downward departure that the district court attempted to put under the heading of diminished mental capacity (§5K2.13) based on the defendant’s lack of education and inability to speak English. According to the appellate court, these factors do not constitute diminished mental capacity as a matter of law, and are otherwise invalid or discouraged. The other ground for the departure, “lesser harms” (§5K2.11), based on the defendant’s belief that his girlfriend was in danger, was not plainly erroneous. On remand, the district court was directed to explain the magnitude of the departure.²⁴
- A case in which the defendant voluntarily disclosed the offense prior to its discovery but the district court did not make particularized findings that discovery was unlikely absent disclosure.²⁵
- A case in which the defendant’s conduct was not a “single act of aberrant behavior,” and the district court did not make a “refined assessment” of the difficulty of reservation life, steady employment, and stable family ties.²⁶
- A case in which the departure was based on the increased severity of the defendant’s sentence resulting from her status as a deportable alien. According to the appellate

²¹ *United States v. Rybicki*, 96 F.3d 754, 759 (4th Cir. 1996).

²² *United States v. Hairston*, 96 F.3d 102 (4th Cir.), *cert. denied*, 1996 WL 724041 (Feb. 18, 1997) (No. 96-944).

²³ *United States v. Weinberger*, 91 F.3d 642 (4th Cir. 1996).

²⁴ *United States v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996).

²⁵ *United States v. Besler*, 86 F.3d 745 (7th Cir. 1996).

²⁶ *United States v. Weise*, 89 F.3d 502 (8th Cir. 1996).

court, because this was not a factor mentioned in the guidelines, the district court must make a “refined assessment” of the facts.²⁷

In the following two cases, appellate courts **reversed in part upward departures and remanded** to the district court:

- A determination of the extent of the departure “in view of scant grounds” articulated. The basis for the upward departure, that the defendant’s conduct resulted in a significant disruption of a governmental function, was affirmed.²⁸
- An upward departure based in part on the unusually close relationship between the kidnapped victim and her father. According to the appellate court, a departure pursuant to §3A1.1 was not warranted on that basis. However, a departure based on “extreme conduct” was valid. The case was remanded for further consideration.²⁹

Appellate courts **affirmed downward departures** made in the following two cases:

- A downward departure where the defendant received no personal benefit from money laundering. According to the appellate court, because the money laundering guideline makes no mention of failure to receive personal benefit as a mitigating factor, the district court did not abuse its discretion in making the departure.³⁰
- A downward departure because the defendant’s conduct did not threaten the harm sought to be prevented by the statutes of conviction. According to the appellate court, the “special factor” in this case was an encouraged departure factor.³¹

Appellate courts **affirmed upward departures** in the following three cases:

- An upward departure based on a finding that the defendant’s management of a large-scale criminal enterprise’s assets is outside the heartland of the aggravated role adjustment.³²
- An upward departure based on a finding of “extreme conduct,” an encouraged factor under §5K2.0. The specific circumstances involved prolonged (20 years) harassing and humiliating conduct directed towards the defendant’s former high school

²⁷ *United States v. Charry Cubillos*, 91 F.3d 1342 (9th Cir. 1996).

²⁸ *United States v. Horton*, 98 F.3d 313 (7th Cir. 1996).

²⁹ *United States v. Sherwood*, 98 F.3d 402 (9th Cir. 1996).

³⁰ *United States v. Walters*, 87 F.3d 663 (5th Cir.), *cert. denied*, 117 S. Ct. 498 (1996).

³¹ *United States v. Bernal*, 90 F.3d 465 (11th Cir. 1996).

³² *United States v. Cali*, 87 F.3d 571 (1st Cir. 1996).

girlfriend and her family. The defendant had also violated state and federal court orders to leave the victim's family alone.³³

- An upward departure based on a finding that the defendant's conduct was part of a systematic corruption of a governmental function, causing loss of public confidence in government.³⁴

The "Safety Valve"

During 1996, the appellate courts also issued a number of important decisions interpreting the statutory and guideline provisions known as the "safety valve" (18 U.S.C. § 3553(f), USSG §5C1.2). This provision allows district courts to sentence using the guidelines without regard to mandatory minimum penalties for certain non-violent, first-time offenders convicted of specified drug offenses. The most frequently litigated safety valve criterion provides that "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." This section discusses the cases interpreting that provision and other legal issues surrounding the safety valve.

In *United States v. Ivester*,³⁵ the Fourth Circuit considered whether the defendant has the burden of ensuring that he or she has provided to the government all the information regarding the offense. In *Ivester*, the government sought no information from the defendant, and the defendant did not volunteer any. The appellate court held that "defendants seeking to avail themselves of downward departures under 18 U.S.C. § 3553(f) bear the burden of affirmatively acting, no later than sentencing, to ensure that the Government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes."³⁶

In *United States v. Montanez*,³⁷ the First Circuit also addressed the actions required by a defendant to satisfy a similar requirement under the guidelines. The appellate court determined that defendants were not required to offer themselves for debriefing in order to comply with the guideline. However, the appellate court noted that because it is up to the defendant to persuade the district court that he or she has "truthfully provided" the required information and evidence to the

³³ *United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996).

³⁴ *United States v. Shenberg*, 89 F.3d 1461 (11th Cir.), cert. denied, 1996 WL 745172 (Feb. 18, 1997) (No. 96-1003).

³⁵ 75 F.3d 182 (4th Cir.), cert. denied, 116 S. Ct. 2537 (1996).

³⁶ See also *United States v. Flanagan*, 80 F.3d 143 (5th Cir. 1996) (holding that defendant has the burden of ensuring that he has provided all information regarding the offense to the government).

³⁷ 82 F.3d 520 (1st Cir. 1996).

government, “a defendant who declines to offer himself for a debriefing takes a very dangerous course.”³⁸

The Ninth Circuit addressed the scope of §5C1.2(5) in *United States v. Real Hernandez*,³⁹ holding that eligibility for the safety valve does not require the defendant to give information to a specific government agent. According to the appellate court, “the prosecutor’s office is an entity, and knowledge attributed to one prosecutor is attributable to others as well.”⁴⁰

In *United States v. Stewart*,⁴¹ the Fifth Circuit upheld the constitutionality of the information requirement of the safety valve, concluding that it did not impose cruel and unusual punishment. According to the appellate court, “a more lenient sentence imposed on a defendant who gives authorities all of the information possessed by the defendant does not compel a defendant to risk his family’s lives.” A defendant can refuse the option and receive the statutory sentence under the regular sentencing scheme.⁴²

The appellate courts also have addressed the issue of the similarity between guideline §3E1.1, relating to Acceptance of Responsibility, and guideline §5C1.2. In *United States v. Arrington*,⁴³ the Seventh Circuit concluded that satisfying the criteria for an acceptance of responsibility reduction is not necessarily sufficient for the safety valve requirement. Relief under the safety valve requires “the defendant to provide all information concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” In contrast, acceptance of responsibility limits the defendant’s admission to the conduct comprising the offense of conviction.⁴⁴

The Ninth Circuit similarly analyzed the differing requirements for these guideline provisions. In *United States v. Shrestha*,⁴⁵ the government contended that the defendant’s recantation at trial cast doubt on his original confession. It further argued that perjury at trial should automatically defeat a claim for sentence reduction under the safety valve provision. The appellate court rejected this argument, stating, “The safety valve is not concerned with sparing the government the trouble of preparing for and proceeding with trial, as is [guideline] §3E1.1.”⁴⁶ The

³⁸ *Id.* at 524.

³⁹ 90 F.3d 356 (9th Cir. 1996).

⁴⁰ *Id.* at 361.

⁴¹ 93 F.3d 189 (5th Cir. 1996).

⁴² *Id.* at 196.

⁴³ 73 F.3d 144 (7th Cir. 1996).

⁴⁴ *Id.* at 149.

⁴⁵ 86 F.3d 935 (9th Cir. 1996).

⁴⁶ *Id.* at 940.

appellate court added, “We see no reason to require a defendant to meet the requirement for acceptance of responsibility in order to qualify for relief under the safety valve provision.”⁴⁷ Because the defendant provided the government with complete information by the time of sentencing, the defendant had satisfied the basis for the reduction.

Appellate courts have also addressed the requirement under guideline 5C1.2(1) that the safety valve apply only to defendants with no more than a single criminal history point. The Second⁴⁸ and Ninth⁴⁹ Circuits concluded that when a court departs to Criminal History Category I from Category II, the defendant does not satisfy this safety valve provision.

To qualify for a safety valve reduction, the defendant – in addition to: (1) providing full and truthful information and (2) not having more than one criminal history point – cannot possess a firearm or other dangerous weapon “in connection with the offense.” The Eighth Circuit,⁵⁰ in addressing this issue, rejected the defendant’s contention that his gun possession was not “in connection with” the offense. The appellate court concluded that the term “in connection with” should be interpreted consistently with the firearms guideline, which gives a defendant an enhancement if he or she used or possessed a firearm “in connection with” another felony offense.

Significant Case Law on Organizational Defendants

In the first reported appellate case addressing a specific Chapter Eight guideline, the Ninth Circuit ruled that §8C3.3 permits a court to impose a criminal fine of such magnitude that it effectively jeopardizes an organization’s continued viability.⁵¹ Noting that the \$1.5 million fine for falsifying analytical data under government contracts was properly calculated under the Chapter Eight fine table, the court stressed that reduction of a fine which would effectively put the company out of business is purely within the discretion of the sentencing court. In contrast, the court emphasized that §8C3.3(a) of the sentencing guidelines mandates a fine reduction only in situations in which the imposition of the fine would impair the organization’s ability to make restitution.

Another significant judicial decision in 1996 relating to the organizational guidelines arose in the context of a shareholder derivative action. In assessing whether the board of directors was negligent in its duty to monitor and supervise the corporation’s operations (which formed the basis of a criminal conviction resulting in a multimillion dollar fine), the Delaware Chancery Court found the existence of the Chapter Eight guidelines to be a fundamental factor in defining the parameters of the directors’ personal liability. Observing that “[a]ny rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions through

⁴⁷ *Id.* at 939.

⁴⁸ *United States v. Resto*, 74 F.3d 22 (2d Cir.1996).

⁴⁹ *United States v. Valencia-Andrade*, 72 F.3d 770 (9th Cir. 1995).

⁵⁰ *United States v. Burke*, 91 F.3d 1052 (8th Cir. 1996).

⁵¹ *United States v. Eureka Laboratories, Inc.*, 103 F.3d 908 (9th Cir. 1996).

compliance programs that [the enactment of the guidelines] offers,” the court acknowledged that the organizational sentencing guidelines “offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial actions.”⁵²

Data Analyses for the Courts

In 1996, detailed information on sentencing activities was compiled for each federal district and circuit and was distributed to the courts. In addition, this information was made available to the general public via the Commission’s Internet web site. These data present the distribution of cases, mode of conviction, type of sentence imposed, incarceration rate, length of imprisonment, and departure rate by primary offense type. The data are organized by circuit and district and provide comparisons to national figures. These informational packets are also used in the guidelines orientation of new chief circuit and district court judges by Commission staff.

Commission staff continued to respond to numerous data requests from the courts in 1996. Responses included providing information for district- or circuit-based annual reports, supplying the courts with Commission data on specific types of offenses or guideline applications (*e.g.*, drug offenses, departure rates), and examining relationships between guideline application characteristics and defendant demographic characteristics (*e.g.*, gender and role in the offense). Commission staff involvement on the various requests ranged from serving as a consultant about a particular data analysis to performing substantial, sophisticated data analyses.

⁵² *In Re Caremark International Inc. Derivative Litigation*, 1996 Del. Ch. LEXIS 125 (September 25, 1996) at 34.

CHAPTER FOUR

Guideline Training and Education

In 1996, the Commission continued to provide guideline application assistance and education through a variety of different means.

Internet Web Site and Electronic Bulletin Board

The Commission joined the Internet community in 1996 by inaugurating a home page on the World Wide Web. The Commission's web site (*USSC Online*) allows anyone with a computer, a modem, and an account with an Internet service provider to have 24-hour access to information about the agency and federal and state sentencing practices.

Users can choose from seven main informational categories that allow documents to be read on-screen before a user elects to down-load or print the material. The categories are: General Information about the Commission and its Activities, Publications, Guidelines Manuals and Amendments, Federal Sentencing Statistics by State, Reports to Congress, Guideline Training and Education, and State Sentencing Commissions.

The home page is updated frequently to keep the public abreast of Commission meetings, hearings, legislative developments, and training and employment opportunities. Since its inception, the home page has been accessed by approximately 2,000 individuals per month. Each month has seen an increased rate of access.

Users visiting the Commission's web site at the address *http://www.ussc.gov* can browse as well as download documents in either HTML or .PDF formats. In August, the Commission's Internet site was honored with *USA TODAY Online's* "Hot Site Award."

The content of the Commission's Internet home page generally mirrors that available on its electronic bulletin board. In early 1997, the Commission anticipates discontinuing the electronic bulletin board and relying exclusively on the web site.

Public Information

In 1996, Commission staff responded to thousands of information requests from Congress, attorneys, government agencies, researchers, inmates and their families, and the public.

Telephone Inquiries. In 1996, Commission staff responded to more than 9,000 public information telephone calls. Some of these information requests were fulfilled by providing callers with copies of Commission publications; in other instances, staff orally provided answers to the callers' questions. When appropriate, callers were referred to one of the Commission's hotlines (see discussion below).

Written Requests. The Commission also receives thousands of letters, most of which are from inmates or their families. Other letters come from members of Congress, attorneys, libraries,

government agencies, and the research community. While some letters request Commission publications, others pose questions on such topics as “time off for good behavior,” new legislation, or the application of the guidelines to their cases. In 1996, Commission staff responded to approximately 2,000 written inquiries.

Public Comment. During the Commission’s guideline amendment cycle, the public is invited to comment on proposed amendments. Even though the Commission declared an informal hiatus on new guideline amendments, it received approximately 600 comment letters in 1996.

Publications and Training Materials

The Commission issues numerous publications each year in addition to its *Annual Report*. The Commission’s voluminous *Corporate Crime in America: Strengthening the “Good Citizen” Corporation* details the proceedings of the Commission’s second symposium on crime and punishment, held in September of 1995. In 1996, the Commission published two issues of its periodic newsletter, *Guide Lines*, which presents information on current Commission activities, research findings, proposed guideline amendments, training opportunities, and guideline application and legal issues. In 1996, the Commission also completed work on three special reports to Congress on the topics of sex offenses against children, the deterrent effect of the computer fraud guidelines, and the penalty provisions of pending immigration legislation. In June 1996, the Commission published a revised edition of its *Guide to Publications & Resources*, which describes all available Commission publications and datasets. In the fall, the Commission published *Amendments to the Sentencing Guidelines*, an interim publication to be used in conjunction with the 1995 *Guidelines Manual*, which contains the official guidelines, policy statements, and commentary issued by the Sentencing Commission.

In 1996, the Commission also published its *Ongoing Circuit Conflicts*, which presents guidelines issues that have been resolved by the courts differently in different jurisdictions. The Commission also published its annual summary entitled *Amendment Highlights* which describes the new amendments to the sentencing guidelines. Another publication, *Supreme Court Cases*, summarizes selected Supreme Court decisions that involve application of the guidelines.

Under an agreement with the U.S. Government Printing Office (GPO), copies of all Sentencing Commission publications are made available in hard copy or on microfiche to patrons using the GPO Regional Depository Libraries across the nation. The location of the nearest Depository Library – there are 600 nationwide – can be determined in several ways: (1) requesting a free copy of the Directory of Depository Libraries from GPO; (2) checking with local libraries; or (3) using the Internet at http://www.access.gpo.gov/su_docs, selecting “Information Available for Free Public Use in Federal Depository Libraries.”

Training

Congress authorized the Commission to “devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process.” 28 U.S.C. § 995(a)(17) and (18). The Commission recognizes that an evolving guideline system, together with the steady influx of new practitioners,

creates a continuing need for effective training programs and materials. In 1996, the Commission provided training on the guidelines and sentencing issues to approximately 3,150 individuals at 63 training sessions across the country.

Participants included circuit and district court judges, probation officers, prosecuting and defense attorneys, congressional staff members, law clerks, and other government agency personnel. At the sessions, Commission faculty provided intensive training on guideline application, developing case law, guideline amendments, statutory changes, and other sentencing issues.

Training New Appointees

The Commission continued its collaborative training efforts with the Federal Judicial Center (FJC) and the Department of Justice (DOJ) to develop and refine permanent, academy-based guideline education programs. Working with the FJC and DOJ, the Commission plays an active role in the training of newly appointed judges, probation officers, and prosecutors. The Commission continued in 1996 to participate in the FJC's orientation program for newly appointed district and appellate court judges, providing three days of training on guideline application and sentencing-related topics to 32 new judges. The Commission and the FJC also collaborated in training 233 federal judges at numerous workshops and seminars including national workshops for district court judges in Sea Isle, New Jersey; Grand Trevor City, Michigan; Point Clear, Alabama; and Williamsburg, Virginia.

In 1996, the Commission presented four days of guideline application training to approximately 135 newly appointed probation officers during three orientation programs at the National Probation and Pretrial Services Academy near Baltimore, Maryland. In addition to presenting the basics of guideline application, these programs included two half-day workshops and a panel discussion specifically designed for new officers. The first workshop concentrated on Chapter Seven of the *Guidelines Manual* (Violations of Probation and Supervised Release) and the second on advanced guideline topics including multiple counts and relevant conduct. Staff also participated in a panel discussion to help new officers better understand the functions of the key judicial agencies.

In conjunction with the DOJ's Office of Legal Education, the Commission provided guideline training to approximately 170 newly appointed assistant U.S. attorneys at the Federal Practice Skills Seminars held in Los Angeles, California and Salt Lake City, Utah.

The Commission continues its efforts to provide training to defense attorneys across the nation. During 1996, more than 328 defense attorneys attended Commission training seminars. In April 1996, the Sentencing Commission jointly sponsored the Fifth Annual National Seminar on the Federal Sentencing Guidelines with the Federal Bar Association. Topics included: drug and money laundering guidelines; environmental guidelines; the calculation of loss; substantial assistance and other downward departures; and strategies and tactics of guideline advocacy. In addition, the Commission continued to work with the Sentencing Guidelines Group (Washington, DC-based federal defenders) to produce training programs for defense attorneys. These programs reflect the Commission's continued commitment to advance the guideline knowledge of court-appointed and private defense attorneys.

Also in 1996, Commission staff made presentations to 450 participants across the country at five different speaking engagements on the topic of sentencing guidelines for organizations.

District-Based Guideline Education

In 1996, the Commission responded to training requests from probation officers, judges, defense attorneys, and prosecutors by conducting guideline education programs in 27 localities. To maximize resources, when a district office requested training, the Commission typically contacted other members of the court family and invited them to participate. In addition, the Chairman and commissioners actively participated in panel discussions and various other speaking engagements across the country on approximately 23 occasions. The Commission staff also lectured widely on sentencing issues at training sessions, academic seminars, judges' meetings, and professional conferences.

“High-Tech” Approaches to Training

During the year, the Commission explored the use of new technologies such as multi-media programs, video teleconferencing, satellite broadcasting, and online conferencing. To maximize resources, this exploration was conducted in cooperation with the Federal Judicial Center and other federal agencies. In the future, the Commission plans to supplement its existing training programs with some or all of these new technologies.

Hotlines

The Commission's two hotlines – one serving judges and probation officers, the other prosecuting and defense attorneys – continued to assist callers with specific guideline application questions and promote guideline and sentencing education. The hotlines are open to callers Monday through Friday between 8:30 a.m. and 5:30 p.m., EST.

In an advisory capacity, the hotline staff assists callers in applying the sentencing guidelines. Subject to the caution given all callers that hotline advice is neither binding on the court nor to be represented as the official position of the Sentencing Commission, the staff answers questions not involving subjective judgments. Those questions involving a subjective determination by the judge, such as whether a defendant should receive an adjustment for acceptance of responsibility, are addressed by reference to pertinent guidelines, commentary, or policy statements. For debatable questions or interpretations of correct application, the staff assists the caller in understanding alternative approaches, emphasizing that such decisions are left to the courts.

Calls Received in 1996

The judge and probation officer hotline staff responded to 1,341 questions in 1996, an average of 111 questions per month. Since its inception in 1987, the hotline staff has responded to more than 16,000 questions from probation officers, judges, and law clerks. During 1996, the attorney hotline staff responded to approximately 520 calls from assistant U.S. attorneys and defense

attorneys. In January 1997, the two hotlines will merge into one to maximize operational efficiency. The telephone number for the combined service will be (202) 273-4545.

In 1996, the greatest number of hotline questions related to criminal history (182). Inquiries relating to drug guidelines ranked second (152), followed by firearm guidelines (81), violations of probation and supervised release (65), and multiple counts (62).

In the process of responding to hotline questions, Commission training and legal staffs regularly consult with each other to ensure that questions are researched fully and answered accurately. To assist with quality control, staff maintains a log of the calls received and responses provided. The Commission began its log in 1988 using a computer program specifically developed to document hotline calls. The program's database allows staff to check whether a similar question has been asked previously, thereby speeding research efforts and enabling more consistent and accurate responses.

Temporary Assignment Programs

The Commission's temporary assignment program for assistant U.S. attorneys and assistant federal defenders continued through 1996. Two assistant federal defenders (Daniel I. Siegel, Eastern District, PA; and Gustavo A. Gelpi, District of Puerto Rico) and two assistant U.S. attorneys (Frank Bowman, Southern District, FL; and Delonia A. Watson, Northern District, TX) worked with the Commission during 1996. Since the visiting attorney program began in 1988, 13 assistant federal defenders and 15 assistant U.S. attorneys have participated.

The visiting U.S. probation officer program, however, was suspended due to limitations on the Commission's fiscal and staff resources. With the suspension of this program, the hotline will be handled exclusively by Commission staff. Two probation officers (James M. Patterson, Western District, NC; and C. Warren Maxwell, District of Connecticut) participated during the remaining months of the program in 1996. They represented districts that were participating for the first time. Since the program's inception, a total of 135 probation officers, representing 64 districts, have participated.

These temporary duty assignments lasted an average of six weeks for probation officers and six months for attorneys. While at the Commission, participants helped staff the hotlines, became involved in the amendment process, and assisted with various projects.

ASSYST

ASSYST (Applied Sentencing System) is a software package developed by the Sentencing Commission as an aid to guideline application. This software helps users calculate the guideline sentencing range and contains applicable case law and other help functions. In January 1996, the Commission released its most recent version of the package, ASSYST 2.1. This new version's enhancements include the incorporation of 1995 guideline amendments, Chapters Seven and Eight from the *Guidelines Manual* (Violations of Probation and Supervised Release, Sentencing of Organizations), and improvements to the user interface such as refinements to the print selection function and color change when a cross reference is selected.

Equipped with all of the features of its predecessor version, ASSYST 2.1 also provides increased flexibility to move through the guideline application process, allows for multi-user access on a local area network, and offers pull-down menus that have a “Windows™-like” appearance.

The updated software was made available to U.S. probation offices, the Executive Office for U.S. Attorneys, federal public defenders, the American Bar Association, the Federal Bar Association, the Internal Revenue Service, and the National Association of Criminal Defense Lawyers. The non-judiciary version of ASSYST, which excludes PSR generation, can be downloaded from the Commission’s web page, <http://www.usc.gov>. Because of resource considerations, the Commission anticipates that ASSYST 2.1 will be the last version of the program.

CHAPTER FIVE

Research

Statutory Requirements

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

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).⁵³

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.

⁵³ 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.)⁵⁴

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

⁵⁴ 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” combination⁵⁵ (§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

⁵⁵ 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

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.⁵⁶ 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.⁵⁷ 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,⁵⁸ a 41-percent increase from 1995 and a 83-percent increase from 1994.⁵⁹ Fines were imposed upon 119 organizations. In 34 of the 41 cases in which no fines were

⁵⁶ See *Guidelines Manual*, Chapter Eight - Sentencing of Organizations.

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

⁵⁸ 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.

⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶²

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

⁶⁰ See §8C2.5(f) and (g).

⁶¹ 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.

⁶² 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 \$493,564.86.⁶³

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

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.⁶⁴ The remaining cases (1.2%)

⁶³ 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.

⁶⁴ 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 4,262.⁶⁵ 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 cases⁶⁶ 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.

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.

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

⁶⁶ 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

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).⁶⁷

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

⁶⁷ 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.⁶⁸

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.⁶⁹ 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.⁷⁰ 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.⁷¹

⁶⁸ 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.

⁶⁹ 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.

⁷⁰ 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).

⁷¹ 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

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.