

Research

A. MONITORING

Background and Data Collection Activities

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:

- 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 (28 U.S.C. § 95(a)(12));
- the publication of data concerning the sentencing process (28 U.S.C. § 995(a)(14));
- 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 (28 U.S.C. § 995(a)(15)); and
- the systematic collection and dissemination of information regarding the effectiveness of sentences imposed (28 U.S.C. § 995 (a)(16)).

In large part, the Commission's systematic collection and reporting of information on guideline cases drives the agency's research mission. As required by Congress:

The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of the sentence, the offense for which it is imposed,

the age, race, and gender of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis (28 U.S.C. § 994(w)).

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

USSC Data Collection

Throughout fiscal year 1995 (October 1, 1994, through September 30, 1995, hereinafter "1995"), the Commission continued to expand its extensive computerized datafile on defendants sentenced under the guidelines. The Commission routinely collects data in three major modules:

Module I, Receipt Control, is a document control system that provides a mechanism for identifying cases. **Module II, Basic Sentencing Information**,

collects sentencing, demographic, and statutory information on each defendant as documented in the Judgment of Conviction order, the Presentence Report, and the Report on the Sentencing Hearing. **Module III, Guideline Application and Departures**, captures the complete range of court guideline decisions and departure information on each case.

The Commission also maintains additional data collection modules to study a variety of sentencing-related issues. An **Organizational Sentencing Module** records cases involving organizations sentenced under Chapter Eight of the guidelines. The **Appeals Module** tracks appellate review of sentencing decisions (*see* discussion of both modules later in this chapter).

The 1995 Monitoring datafile provides extensive information on all guideline cases sentenced within the fiscal year. This file, without individual identifiers, is available to the public and the research community through the Inter-University Consortium for Political and Social Research at the University of Michigan. The Commission also makes available to the Consortium the Organizational and the Appeals databases.

The **Probation and Supervised Release Violation Module** monitors court decisions regarding probation and supervised release violations. However, due to conflicting interpretations of the revocation statute, some circuits do not use the Commission's Chapter Seven policy statements on revocations, a practice that biases current data collection. In light of legislative correction of the statutory inconsistencies in the 1994 omnibus crime bill, the Commission will refocus efforts on data collection for this module during the coming year.

Following the completion of a final testing phase in 1994, **indictment** information (received for 79% of the cases) was entered during 1995. Intensive validity and reliability tests and initial analyses were performed this year, and the Commission plans to report on indictments in its 1996 Annual Report.

Finally, work is in progress to develop a sample-based module that will record real offense factors and criminal history characteristics to assist the Commission's current simplification and assessment efforts.

Data Collection Issues

The Commission received documentation on 38,500 cases⁴⁶ sentenced under the Sentencing Reform Act (SRA) between October 1, 1994, and September 30, 1995.⁴⁷ The Commission has no direct source for ascertaining the ratio of guideline to preguideline cases or the rate at which guideline cases are reported to the Commission. However, as eight years have elapsed since the implementation of the guidelines, the federal system is now almost exclusively a guidelines system. Despite possible reporting problems, differences in general characteristics or descriptive statistics about the national population of defendants sentenced pursuant to the guidelines are expected to be minor. Note, however, that all data

⁴⁶ A "defendant" or "case" as discussed in this report is defined in the USSC data collection system as a single sentencing event for a single defendant (even if it includes multiple indictments or multiple convictions consolidated for sentencing). Multiple defendants in a single sentencing event are treated as separate cases. If an individual defendant is sentenced more than once during the time period of interest, each sentencing event is identified as a separate case.

⁴⁷ The USSC Monitoring datafile used for this report, MONFY95, includes defendants sentenced during fiscal year 1995 for whom information was received by the Commission as of December 26, 1995. Reported figures exclude cases involving solely petty offenses, organizational defendants, or diversionary sentences. Information on guideline defendants under the witness protection program is not included in this report, with the possible result of slightly under-representing, at least for some districts, the number and rate of substantial assistance motions and departures. Information about defendants sentenced under preguideline law is reported through the AO's data collection systems.

collected and analyzed by the Commission reflect only reported populations (*i.e.*, cases in which appropriate documentation was forwarded to the Commission), and reporting problems specific to individual districts or offices may make generalizations on that level problematic.

While the degree of potential non-reporting is estimated to be small, further study would be required to uncover any biases associated with non-reporting. For example, one known reporting bias arising from receiving an incomplete number of magistrate cases is the potential for slightly higher rates of imprisonment, longer average prison terms, and fewer cases among less serious crimes. Other unknown reporting biases could enhance or counteract these biases.

As noted previously, the Commission should receive up to five documents on each case sentenced pursuant to the guidelines. In 1995, the Commission received Presentence Reports (PSR) for 94.5 percent of the cases (in an additional 2.0% of the cases the PSR was waived), with a notably lower submission rate (82.8%) in the Ninth Circuit and some of its districts (for example, a rate of 66.0% in Eastern California, 65.8% in Southern California). Judgment of Conviction Orders were received for 99.1 percent of all cases.

The submission rate for the Report on the Sentencing Hearing (statement of reasons) remained almost constant at 93.7 percent with the previous year's rate (93.6%). The submission rate was lowest for the Second Circuit, at 82.1 percent; the district with the lowest rate, Central California, submitted statements of reasons (SOR) for only 40.1 percent of its cases. Written Plea Agreements or other comparable documents were received for 71.3 percent of the cases. *See* Table 8 for the submission rate of documents by circuit and district.⁴⁸

⁴⁸ Table 8 does not report the submission rate of written plea agreements by circuit and district. Because the Commission cannot always determine the applicability of a written plea agreement in a particular case, it is

Descriptive Statistics

Implementation of the Guidelines

Of the 38,500 cases sentenced in 1995 under the SRA, 25.3 percent were in seven districts (each with more than 1,000 cases): Eastern New York, Southern New York, Southern Texas, Western Texas, Central California, Southern California, and Southern Florida. The Fourth, Fifth, Ninth, and Eleventh Circuits accounted for more than half (54.8%) of all guideline cases received by the Commission.

Table 9 depicts the distribution of guideline cases across the 12 judicial circuits and 94 judicial districts.

difficult to establish a baseline of what should be received.

For the second time since 1989, the number of federal cases sentenced annually under the guidelines decreased, from 42,107 in 1993 to 39,971 in 1994, to 38,500 in 1995. The number of cases increased compared to last year in the First and Sixth Circuits but decreased in all other circuits. The greatest decreases were in the District of Columbia and Eleventh Circuits (12.8% and 17.6% respectively). Individual districts with the greatest decreases included Southern West Virginia (38.3%), Northern Iowa (34.2%), and Northern Alabama (32.9%).⁴⁹

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

1989	– 21,389	--
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%

Primary Offense and Demographic Characteristics

Primary Offense Type

Forty percent of all defendants sentenced under the guidelines in 1995 were convicted of drug offenses (*i.e.*, either drug trafficking, use of a communication facility in a drug offense, or simple possession of drugs). The other most common offenses of conviction were fraud (15.4%), immigration (8.3%),

firearms (6.7%), and larceny (6.5%). Of the drug violations, the largest number involved powder cocaine, followed by marijuana and crack cocaine. Figure B and Table 10 display the 1995 distribution and frequency of guideline cases across the primary offense categories and the primary drug type involved for defendants convicted of drug offenses.

Since the guidelines were implemented, drug offenses have always constituted the largest group of cases sentenced in the federal system. The 15,288 drug cases in 1995 represent an 8.5 percent ($n=1,412$) decrease from 1994, coming on the heels of a 9.5 percent ($n=1,752$) decrease from 1993 to 1994. This decrease in drug cases appears to account for the overall decrease ($n=1,471$) in cases sentenced under the guidelines in 1995. Sizeable decreases for the past two years were also recorded in larceny and firearms violations, and from 1994 to 1995 in robberies. In contrast, there has been a steady increase in fraud cases since 1990, and a dramatic increase in immigration cases since 1993. For a trend in the relative frequency of the major offense categories by years, *see* Figure C. Further discussion of trends in drug trafficking is included in a subsequent section of this chapter.

Race and Ethnicity

As Table 11 illustrates, 39.2 percent of defendants sentenced under the guidelines in 1995 were identified as White, 29.2 percent as Black, 27.3 percent as Hispanic, and 4.3 percent as American Indian, Alaskan Native, Asian, or Pacific Islander (categorized in this table as “Other”).⁵⁰ Table 11 also displays the distribution of these racial and ethnic groups within primary offense categories.

⁴⁹ Various sections of this chapter include trend analyses of relevant variables for available guideline information between 1988-1995. Unless otherwise noted, the statistics quoted from previous years appear in corresponding tables of the Commission’s Annual Reports.

⁵⁰ While “Black,” “White,” and “Other” refer to racial categories, “Hispanic” refers to ethnic origin irrespective of race.

Compared to their representation in the defendant population (39.2%), Whites were overrepresented in a number of offense categories. They constituted more than 75 percent of arson, tax, antitrust, food and drug, gambling, prostitution, and civil rights offenses. Black defendants were overrepresented primarily in robbery and firearms (47.0% and 40.3% of these categories, respectively), while Hispanics were overrepresented in simple possession of drugs, immigration, and national defense offenses (more than 40% in each of these categories). Blacks and Hispanics each constituted 35.8 percent of all defendants in drug trafficking cases, Whites a considerably lower 26.7 percent, a reversal of the proportions in the overall defendant population. Traced over time, the relative proportion of Whites in the defendant population has steadily declined since 1990, while increasing considerably for Hispanics, and to a lesser degree for Blacks.

Gender

Males comprised 85.1 percent of defendants sentenced under the guidelines, somewhat higher than the 84.6 percent in fiscal year 1994. Table 12 displays the distribution of cases by gender within each primary offense category. While defendants overall were predominantly male, the five primary offense categories showing the least dramatic differences in ratio of male to female defendants included embezzlement (57.2% female), larceny (31.5% female), administration of justice offenses (25.9% female), use of a communication facility in a drug offense (22.9% female), and fraud (22.3%). Women had low representation in three of the five most frequent offense categories (other than fraud and larceny): drug trafficking (11.5%), immigration (6.5%), and firearms (3.7%).

Age

The mean age for all defendants sentenced under the guidelines in 1995 was 35 years, with a median age of 33 years. Patterns of offense behavior appeared to be related to the defendant's age. For example, while

defendants aged 25 years and younger accounted for 22.3 percent of federal convictions, they were represented more frequently in violent offense categories. On the other hand, while defendants aged 41 years and older accounted for 27.9 percent of federal convictions, they were, for example, sentenced for more than two-thirds of the antitrust (94.5%), tax (77.6%), gambling and lottery (70.6%), and bribery (66.3%) offenses. (See Table 13 for the distribution of cases by defendant age for each primary offense category.)

A trend analysis between 1990 and 1995 indicates the slight "aging" of the federal defendant population, with the 41 years and older group increasing its proportion annually, from 22.4 percent in 1990 to 27.9 percent in 1995.

Table 14 combines information on age, race, and gender to present a summary demographic profile of all defendants sentenced in 1995. Close to one-third (32.8%) of federal defendants were White males, while one-fourth (24.5%) were Black males and an equal proportion (24.3%) were Hispanic males. White defendants tended to concentrate in somewhat older age groups than did Black or Hispanic defendants.

Education

Table 15 shows the highest level of education attained by defendants, by primary offense category. Substantially more than half (60.5%) of federal defendants received at least a high school education. Nearly 30 percent (28.1%) received some post-high school education. Drug trafficking was the most prevalent offense of conviction for all education categories except college graduates: 6,722 (46.2%) cases in the "less than high school" category; 4,534 (37.9%) cases in the "high school graduate" category; and 2,292 (30.7%) cases in the "some college" category.

Among college graduates, the most frequent offense type was fraud – 1,092 (37.3%) of the 2,930 defendants. For most offense categories, defendants were most likely to have had no college education. Primary offense categories with the least amount of education (*i.e.*, less than high school), included immigration at 78.0 percent, simple possession of drugs at 52.8 percent, and kidnapping at 52.5 percent. In contrast, defendants convicted of embezzlement, bribery, tax, pornography/prostitution, antitrust, and food and drug offenses were most likely to fall either into the “some college” or “college graduate” categories.

Mode of Conviction

Commission data show that 91.9 percent of all defendants sentenced under the guidelines in 1995 pleaded guilty, while 8.1 percent were convicted at trial. During the past seven years of guideline application (since the Mistretta decision in January 1989), the plea/trial rate varied between 85 and 92 percent plea convictions, and between eight and 15 percent trial convictions.

Figure D displays the national plea/trial rates under the guidelines since January 1989. The continuing decline in trial rates since 1991 may be accounted for by a combination of factors: a proportional increase in offenses with traditionally lower trial rates (*e.g.*, fraud and immigration); a corresponding decrease (at least in the past two years) in drug trafficking cases that have trial rates higher than the average; and incentives to plead guilty and cooperate with authorities in the form of acceptance of responsibility reductions (under an amended §3E1.1) and substantial assistance departures.

Table 16 shows the mode of conviction for 1995 guideline defendants by circuit and district. Considerable variation exists, district to district, in the rate of plea versus trial convictions. The districts of Northern Mariana Islands, New Hampshire, Southern California, New Mexico, Utah, and Arizona all reported plea rates of 97 percent or higher. On the other hand, five districts had trial rates of 15 percent

or higher: Eastern Virginia, Northern Mississippi, Southern Iowa, Middle Alabama, and Northern Florida. Case load, offense type and seriousness, and policies of individual U.S. attorney offices may explain some of this variation.

Among the circuits, the Ninth Circuit reported the highest guilty plea rate at 95.4 percent. Conversely, the Eleventh Circuit reported the highest trial rate – almost triple the 4.6 percent rate of the Ninth Circuit – at 12.3 percent.

An analysis of the mode of conviction by primary offense category (*see* Table 17) indicates that defendants in certain offense categories such as murder, kidnapping, assault, racketeering, or national defense offenses were more than twice as likely to go to trial than the average trial rate of 8.1 percent for all offenses.

The trial rate for drug trafficking offenses was somewhat higher than the national average for all offenses. However, this trial rate of 10.7 percent represents a steady decline from the 13.1 percent trial rate in 1994, 15.7 percent in 1993 and 18.7 percent in 1992. One possible explanation for the drop in the trial rate for drug trafficking is the increase in the rate of substantial assistance motions for these defendants across the years. Another reason may be the post-1995 availability of the “safety valve” departure (guideline 5C1.2) for qualifying drug cases. Note that the trial rates for less serious drug offenses – use of a communication facility and simple possession – are substantially below the national average (in fact, there were only six trials out of 332 communication facility cases). In both of these offenses, the count of conviction may represent a plea agreement that reduced the charges or the scope of relevant conduct (*e.g.*, lesser drug amounts).

Along with use of a communication facility and simple possession, the offense categories of burglary, embezzlement, immigration, and

gambling and lottery offenses had the lowest trial rates, all at three percent or lower.

Sentencing Information on Guideline Cases

Type of Sentence

More than three-fourths (78.7%) of all guideline sentences in 1995 included a term of imprisonment (*see* Table 18). Of these, the vast majority (94% of the 29,982 cases) received straight prison time (*i.e.*, without a term of alternative confinement).⁵¹

Figure E graphically displays the distribution of prison and non-prison sentences for 1995. Data from previous Commission Annual Reports show that the proportion of defendants receiving straight prison time increased from 72.6 percent in 1991 to 74.2 percent in 1995. The rate of receiving any imprisonment – either with or without additional alternative confinement – appears stable at an annual rate between 77 and 78 percent.

Just over one-fifth (21.3%) of all guideline defendants sentenced in 1995 received a sentence of probation. Defendants were more likely to be sentenced to straight probation (*i.e.*, no confinement conditions for 64% of the 8,132 probation cases) than to receive probation with alternative confinement (36% of the 8,132 probation sentences). The proportion of cases receiving straight probation was at its lowest level since 1991.

Type of Sentence by Primary Offense Category.

Table 18 also illustrates the distribution of sentences imposed within primary offense categories. Predictably, the type of sentence imposed most frequently by the court varied by offense type. Three offense types had defendants who received some imprisonment in more than 95 percent of cases:

robbery (98.7%); kidnapping/hostage-taking (98.4%), and murder (95.3%).⁵² Drug trafficking, the offense type with by far the largest number of cases, had an imprisonment rate of 94.8 percent. The lowest imprisonment rates (roughly 25% of cases in these two offense types) were for gambling and food and drug offenses. As expected, offenses with lower imprisonment rates had accompanying higher rates of probation.

Length of Imprisonment

Table 19 reports on sentences of imprisonment⁵³ by both offense type and criminal history category. The median length of imprisonment for all defendants sentenced to prison in 1995 was 33.0 months, while the mean length was 63.2 months; both measures continued a decline begun in 1993.⁵⁴ However, the decline is not due to the court's imposition of shorter sentences for crimes of comparable type and severity. Instead, the aggregate imprisonment lengths are declining due to the changing composition of federal offense convictions; the federal caseload has been proportionally increasing some offense types with typically shorter sentences and decreasing some offense types with typically longer sentences.

Three offenses – drug trafficking, firearms, and robbery – are offense types with sentence lengths

⁵¹ Alternative confinement as defined in guideline §5C1.1 includes community confinement, home detention, or intermittent confinement.

⁵² Other offense types with imprisonment rates above 90 percent were: sexual abuse, firearms, manslaughter, immigration, racketeering/extortion, and prison offenses.

⁵³ The average imprisonment rates reported in the table include only sentences of imprisonment, excluding terms of probation or alternative confinement.

⁵⁴ In fiscal year 1993, the median imprisonment length across all offense types was 37.0 months and the mean imprisonment length was 67.0 months.

higher than most other offense types.⁵⁵ In fiscal year 1993, these three offense types comprised 52.5 percent of all guideline sentencings; by 1995 these offense types were responsible for 47.8 percent of the caseload. At the same time, two other offense types with shorter sentences – fraud and immigration cases⁵⁶ – increased their proportion of the federal caseload from 18.5 percent in 1993 to 23.6 percent in 1995.

Over time, with proportionately fewer cases in longer sentence offense types, and more cases in shorter sentence offense types, the overall mean and median sentence lengths have declined. However, as detailed

in a subsequent section, sentence lengths did not decline systematically across offense types; sentence lengths between 1991 and 1995 typically remained stable (*e.g.*, drug trafficking, fraud, larceny, and money laundering) or increased in length (*e.g.*, firearms and immigration).

Sentence Length by Primary Offense Category. The first two columns of Table 19 contrast the mean and median sentence for all defendants sentenced to imprisonment within each primary offense category. In comparing the two measures, the mean was higher than the median⁵⁷ for all offenses except drugs-

⁵⁵ Median imprisonment lengths for these three offense types in 1995 ranged between 46 and 78 months.

⁵⁶ Median imprisonment lengths for these two offense types in 1995 were 12 and 21 months, respectively.

⁵⁷ The median represents the sentence length (in months) at which 50 percent of defendants received longer sentences and 50 percent received shorter sentences. In general, the median value – rather than the mean – is the better descriptor of the average length of imprisonment. This is because the distribution of sentence

communication facility.⁵⁸ Typically in criminal justice research, the higher the mean value compared to the median value, the greater the number of markedly lengthier sentences that affect the mean more than the median.

As an example, consider firearms offenses: 50 percent of defendants sentenced in this category received a prison sentence of 46 months or less (the median sentence). However, the mean prison sentence for firearms defendants was 80.3 months, reflecting a large number of sentences substantially longer than the 46-month median. Some offense types likewise had sentence length distributions with numerous higher length sentences. For example, three offense types (sexual abuse, drugs-simple possession, and food and drug) had mean sentences more than twice the median sentences. Other offense types with large differences between the median and mean values (mean value approximately 70% higher than the median value) were assault, arson, firearms, and pornography/prostitution.

Confinement Including Alternatives. Under the guidelines, confinement sentences can include imprisonment alone or, in some situations, can carry alternative confinement conditions (either in addition to, or instead of, prison). If mean and median sentence length statistics were computed as the sum of imprisonment and alternative confinement terms, the imprisonment-only sentence median of 33.0 and mean of 63.2 months (*see* Table 19) would be

lengths incorporates those distinctively long sentences imposed upon defendants convicted of the most severe criminal conduct. The median (*i.e.*, “middle”) value is less sensitive to these outlying sentences than is the mean (*i.e.*, the arithmetically computed average) value. It is for this reason that imprisonment length statistics traditionally report higher mean values compared to the median values.

⁵⁸ Drugs-communication facility had a mean of 38.2 months and a median of 41.0 months. The statutory maximum for this offense is four years, thereby capping longer, or outlying, sentences that could produce a higher mean.

reduced to a sentence-plus-alternatives median of 30 months and mean of 58.2 months.⁵⁹

Sentencing Trends

Analysis of sentencing statistics across years permits a focus on sentence length by offense type, underscoring trends in individual offense-specific sentence lengths. In fact, sentence lengths for two frequent offense types – firearms and immigration – increased steadily during the past four years. For firearms, the median sentence increased from 21 months in 1991 to 46 months in 1995, while for immigration the change was from 10 months in 1991 to 21 months in 1995.

However, for most frequent federal offense types the sentence length data remained stable over time, with minimal fluctuations, if any. The drug trafficking sentence median was 60 months in 1991; in 1995 the median remained at 60 months. For fraud (12 months), larceny (10 months), and money laundering (33 months) offenses, the median sentence lengths were each essentially unchanged between 1991 and 1995.

Figure F tracks the average length of imprisonment

⁵⁹ As displayed in Table 18, 28,290 defendants were sentenced solely to imprisonment. This compares with the higher total of 32,949 defendants who received either imprisonment alone, imprisonment with additional months of alternative confinement, or alternative confinement alone with supervision or probation. The increment that these smaller-length alternative sentence months add to total sentence length, relative to the large number of cases with alternative confinement (an additional 4,659 cases had alternative confinement, with or without prison), explains the overall reduction in sentence averages for statistics that combine alternative confinement terms with imprisonment terms.

imposed on guideline cases by grouped offense categories from 1991 through 1995. After increasing between 1991 to 1993, there were small declines in sentence length means for the “violent offenses” category in 1994 and 1995; however, the median sentence lengths remained essentially constant. In contrast, both the drug and white collar offense categories showed no sentence length trend. The 1994/1995 sentence decline of the violent crime category was reflected in a decline shown in the “All Offenses Combined” category.

Comparing offense categories, median sentences for violent offenses averaged approximately 10 months longer than for drug sentences, and 58 months longer than for white collar offenses. Median sentences for drugs were consistently 48 months longer than those for white collar offenses.

Sentence Length by Criminal History Category.

Table 19 also compares prison sentences for offenders by criminal history categories. Independent of offense type, both median and mean measures of incarceration increased progressively with the increasing seriousness of a defendant’s prior criminal record. Median imprisonment lengths changed less dramatically across criminal history categories than did mean imprisonment lengths, with the median for all offenses ranging between 27 months in Criminal History Category I and 50 months in Category VI (for non-career offenders). The mean values ranged between 48.4 and 88.8 months across these same criminal history categories.

Because all defendants classified as career offenders⁶⁰ are placed in Criminal History Category VI, Table 19 divides category VI cases into two groups: non-career offenders (median and mean prison terms of 50 and 88.8 months, respectively), and career offenders (168

and 193.7 months, respectively).

Fines and Restitution

In 38.5 percent of all cases sentenced under the guidelines, defendants were ordered to pay a fine,⁶¹ make restitution, or both. No economic sanction was ordered in the remaining 61.5 percent of the cases, primarily due to findings by the court that either the defendant was unable to pay or the sanction would place an undue burden on the defendant’s family. Sentences including fines or restitution orders increased from 34.3 percent in 1991 to 38.5 percent in 1995. The frequency with which fines and/or restitution were ordered is reported in Table 20.

The imposition of fines or restitution orders varied greatly by offense category. Financial sanctions of some type were most common in convictions for antitrust (nearly 90% of antitrust defendants received a financial sanction), while between 70 percent to 80 percent of defendants convicted of burglary, larceny, embezzlement, or fraud offenses received some type of financial sanctions. Fines – either with or without restitution – were most common in antitrust (88.9%) and environmental/wildlife (62.2%) offenses. Restitution orders – either with or without fines – were most common among burglary (72.8%) and embezzlement(70.2%) offenses.

Immigration cases were the least likely to receive a financial sanction in 1995 (9.3% of these cases). Fewer than 20 percent of defendants convicted of drugs-communication facility, drug trafficking, and prison offenses received either a fine or restitution.

Table 20 also provides the mean, median, and total payments ordered. Median payment amounts have

⁶⁰ Career offenders, as directed by 28 U.S.C. § 994(h) and defined by §4B1.1, are defendants at least 18 years old, with an instant conviction for a controlled substance offense or crime of violence, and with at least two prior felony convictions for either a crime of violence or a controlled substance offense.

⁶¹ Statistics in Table 20 include cost of supervision, as well as fines, in the “Fine” category.

increased by several hundred dollars each year under the guidelines, with a median order of \$3,852 in 1995. The greatest median order in 1995 (as well as for every year except one since 1991) was for antitrust (\$22,500). Other offense types with high payment orders were arson (\$16,601), fraud (\$10,100), and tax (\$9,465).

The total of all financial sanction payments ordered was \$1.587 billion, with 68.7 percent of this amount ordered in fraud cases. This 1995 total was nearly \$147 million less than the total fine and restitution orders from 1994, but still \$662 million more than the total from 1993.

Sentencing Alternatives

The guidelines provide a variety of alternatives to imprisonment for less serious offenses at lower criminal history categories (*see* §5C1.1).

- If the minimum of the applicable guideline range is zero months (Zone A), a sentence of imprisonment is not required (*i.e.*, “straight” probation is available).
- If the minimum of the guideline range is one to seven months (Zone B), probation with a condition of community confinement, intermittent confinement, or home detention is available.⁶²
- If the minimum of the range is eight to ten months (Zone C), a “split” sentence may be imposed, requiring a sentence of imprisonment for at least one-half of the minimum term followed by supervised release with a condition of community confinement or home detention to satisfy the remainder of the term.

⁶² Zone B also allows a split sentence with imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment.

Table 21 presents the distribution of sentences imposed in cases falling within sentencing zones for which alternatives to imprisonment generally are available.⁶³ Judges were most likely to give probation sentences in Zone A (guideline range of zero to six months); in 77.3 percent of the cases in Zone A, the sentence imposed was probation only (69.5%) or probation combined with alternative confinement (7.8%). The probation-only sentencing rate in Zone A has remained relatively steady near 70 percent since 1991, varying up or down by less than three percentage points.

In the next five guideline ranges in which the minimum of the range is one to seven months (Zone B), judges remained more likely than not to order a probation sentence either with or without confinement: 56.0 percent (1,872 of 3,342 Zone B cases). Just over one-third (35.7%) of defendants in Zone B received a straight prison sentence.

In the three final guideline ranges in which alternatives were available (Zone C cases in which the minimum of the guideline ranges was eight to ten months), courts ordered prison time in 80 percent of these cases; nearly half of Zone C cases (47.4%) received straight prison time while an additional one-third of Zone C cases (32.3%) received at least half their guideline range (between four and five months) in prison with the remaining time in alternative confinement.

Finally, 92.8 percent of Zone D cases received a term of imprisonment. At these higher guideline minimum ranges, the imprisonment rate has decreased slowly and slightly over time: from 96.4 percent in 1991 to the 92.8 percent in 1995 data.

Use of Alternative Confinement. Figure G represents the frequency with which defendants eligible for alternatives to imprisonment in various offense

⁶³ Absent departure, imprisonment is the only confinement sanction available in Zone D’s higher offense levels for which the minimum of the guideline range is 12 months or greater.

categories received sentences of incarceration. Of those eligible for non-imprisonment alternative sentences (*i.e.*, defendants in guideline ranges within Zones A or B), larceny offenders were the least likely (21.0%) to be incarcerated and immigration⁶⁴ violators the most likely (71.0%).

The incarceration trends among Zone A and Zone B cases showed differing patterns over the years. Among embezzlement defendants eligible for non-prison sentences, a strong trend indicated that more and more have been receiving confinement; only 11.0 percent were confined in 1991, while 43.0 percent were confined in 1995.

On the other hand, for those defendants eligible for non-prison sentences in two offense types – firearms and drug trafficking – smaller proportions of offenders received confinement in 1995 than in 1991. For firearm defendants eligible for non-confinement sentences, the rate of confinement has dropped steadily from 1991 (48.0%) to 1995 (33.0%). For drug trafficking, 45.0 percent received confinement in 1991, declining to 35.0 percent in 1994 and rising to 38.0 percent in 1995. Drug possession cases with non-prison options saw a similar decline in confinement rates since 1991 (with its confinement rate of 45.0%): the rate was 36.0 percent in 1994 and remained at 36.0 percent in 1995.

Guideline Application

Overview

Data coded in the Commission's Guidelines Application Module reflect specific guideline application factors determined by the court such as

base offense level, specific offense characteristics, victim, role, and acceptance of responsibility adjustments, criminal history points, and guideline range.

Of the reports submitted, complete information to determine the relevant guideline factors was available in 32,855 cases. Because a detailed description of guideline application factors requires complete sentencing information, Table 23 through Table 28 reflect fewer cases than in previous sections of this report.

Chapter Two Guideline Application

The first step in sentencing guideline application involves a determination of the appropriate Chapter Two guideline based on the count(s) of conviction.⁶⁵ Every case in the Commission's database involved at least one statute of conviction which alone (or in combination with other related statutes) generated a guideline computation. The "primary" guideline is defined as either the only guideline applied, or when a cross-reference is used, the guideline that most fully explained the sentence (*see* variable definitions in Appendix A).

Table 22 presents the frequency with which Chapter Two guidelines were applied. The column marked "As Primary Guideline" reports the number of times each guideline was applied as either the only guideline in a case, or (when multiple guidelines were relevant) as the guideline most fully explaining the sentence. The column marked "As Any Guideline" reports all guideline applications, including application as either primary or secondary guidelines. The majority of all cases (93.8%) involved application of only one

⁶⁴ A large proportion of immigration violators with relatively low guideline ranges receive short prison sentences because alternatives to imprisonment are not always available for non-U.S. citizens prior to deportation. Consequently, such immigration defendants must necessarily evidence different incarceration rates than offenders at similar offense levels convicted of non-immigration offenses.

⁶⁵ The guideline system maps federal statutes into a set of generic guidelines that group offenses by crime type. The guidelines rank these offense types according to severity by assigning them "base offense levels" from 4 to 43.

guideline; an additional 4.5 percent of cases involved two separate guideline computations. Only 615 cases involved three or more guideline computations.

The six Chapter Two guidelines most frequently applied as primary guidelines are:

§2D1.1 Drug Trafficking	38.6%
§2F1.1 Fraud	16.3%
§2B1.1 Larceny/Embezzlement	8.5%
§2K2.1 Firearms	6.0%
§2B3.1 Robbery	4.5%
§2L1.2 Immigration	4.4%

Given the predominance of drug offenses in the federal system (*see* Table 10 and Figure B), it is not surprising that the most frequently applied Chapter Two guideline, either as the primary guideline or as any guideline, was drug trafficking (§2D1.1). This was the primary guideline applied in 14,245(38.6%) of the 36,878 primary guidelines reported in Table 22. Considering all guidelines applied, the drug guideline was applied 14,419 times (35.7% of all 40,349 guideline applications).

The six guidelines cited above together accounted for more than three-fourths (78.3%) of all primary guidelines. Moreover, a majority of all cases (54.9%) were accounted for by either the drug trafficking or fraud guidelines.

After determining the relevant guideline and assigning a base offense level, the court decides whether certain attributes are present in the case. These “specific offense characteristics” – for example, use of a firearm or amount of loss – adjust the base offense level to account for the severity of the particular offense. A detailed examination of the specific offense characteristics applied under the drug guidelines is included later in this chapter.

Chapter Three Adjustments

Once the court establishes a base offense level and applies all appropriate specific offense characteristics, it considers certain general adjustments to the offense level. These Chapter Three adjustments apply to any guideline and address aggravating or mitigating factors.

Table 23 describes the frequency of application of Chapter Three adjustments to those 1995 guideline cases submitted to the Commission with complete guideline application information. In general, data showed a greater likelihood of receiving a Chapter Three adjustment in 1995 than in any previous year. Further, most often a Chapter Three adjustment reduced the defendant’s guideline offense level.

Victim-Related Adjustments. An upward adjustment for one of the three victim-related factors was imposed a total of 490 times in 1995. The adjustment for vulnerable victim was applied the most frequently (303 times, or 0.9% of all cases).

The absolute number of cases with the vulnerable victim adjustment has remained historically low (less than one percent) since 1991. However, this low frequency was consistent with the nature of the adjustment; its application was most salient among specific guidelines – for example, fraud, theft, civil rights, or assault – that have identifiable victims or have the potential to target individuals vulnerable due to age, physical or mental condition, or other susceptibility. In fact, for the 303 applications of the vulnerable victim adjustment, two-thirds(65.4%) were for fraud; however, this adjustment was applied in only 3.8 percent of fraud cases. In absolute numbers, other offense types that frequently used this adjustment were theft (20, or 0.7% of theft cases); civil rights (9, or 33.3% of civil rights cases); and first degree murder (7, or 6.5% of first degree murder cases).

responsibility reduction (*see* Table 17). Historically, the plea rate has increased steadily since 1991. A general rise in the rate of acceptance of responsibility adjustments is consistent with the rise in plea rate.

Data for the years 1991 through 1995 show that four of the six most frequent offense types⁶⁶ (accounting for two-thirds of the cases in Table 24) have annually increased their proportion of acceptance reductions.

Chapter Four Assessment of Criminal History

The introduction to Chapter Four of the Guidelines Manual states that a defendant's prior record is relevant to such important sentencing goals as general deterrence, just punishment, and protection of the public. Under the guidelines, criminal history points are assigned to prior adult criminal sentences to account for the frequency and severity of past criminal conduct. Additional points are assigned if the defendant committed the offense within two years after release from imprisonment, was under any criminal justice sentence (including probation and work release), or was in an escape status.

Table 25 reports on Chapter Four guideline application. The distribution of composite criminal history scores shows that federal defendants typically had few or no prior criminal convictions.

Almost half (48.0%) of the federal defendants sentenced in 1995 had no criminal history countable under the guidelines (*i.e.*, total criminal history points equaled zero). Another 10.2 percent of all defendants received only a single criminal history point under Chapter Four guidelines.

Prior Countable Sentences by Length. This section focuses solely on defendants who had prior criminal history countable under the guidelines; therefore, this section excludes the federal defendants described above who had no criminal history points. The "Total Criminal History Points" panel in Table 25 documents that a total of 17,340 defendants (52.0%) had one or more criminal history points. Counting across these 17,340 defendants, a total of 26,324 prior sentences were counted in guideline computations. This produced an average of 1.5 prior convictions per defendant with criminal history.

These prior sentences were most likely short; 51.4 percent (or 13,537 convictions) had a term of between zero to 60 days and accrued one criminal history point each. One-fourth of prior countable sentences (21.1%) were for terms of between 60 days and 13 months (accruing two criminal history points each), while the remaining prior sentences (27.4%) were sentences exceeding 13 months (accruing three criminal history points each).

The court can assign additional points to a prior sentence if the defendant had recent imprisonment, was under any criminal justice sentence, or was in an escape status. Panels in Table 25 indicate that it was not uncommon for these point enhancements to be administered. Of the total 32,855 cases submitted to the Commission with criminal history information, 25.5 percent received additional criminal history points because the defendant committed the instant offense while under another sentence.

Further, 14.6 percent received points under Chapter Four because the defendant committed the instant offense within two years of a prior conviction.

⁶⁶ The six offense types with the most cases in Table 24 are: drug trafficking, fraud, immigration, firearms, larceny, and robbery. All except firearms and robbery had increasing rates for acceptance reductions each year since 1991. Both firearms and robbery – themselves accounting for 11 percent of 1995 cases – consistently increased their acceptance rates from 1991 to 1994, but had a decrease in rates between 1994 and 1995.

Note that these conditions are not mutually exclusive; a given prior conviction could result in additional points for either or both of these reasons.

Career Offender/Armed Career Criminal. The guidelines account for patterns of criminal conduct determined by Congress to warrant especially serious treatment. A “career offender” (§4B1.1) is defined as a defendant at least 18 years of age, with at least two prior felony convictions involving crimes of violence or controlled substance offenses, who commits a crime of violence or a controlled substance offense. For career offenders, the guidelines establish a special set of offense levels calibrated, in conjunction with the most serious criminal history category, to approach the maximum sentence authorized by statute for the instant offense. A similar statutory mandate is addressed in

the armed career criminal guideline (§4B1.4).⁶⁷

In 1995, the court found defendants to be career offenders in 2.5 percent of all cases and armed career criminals in 0.8 percent of all cases (*see* Table 25). Table 26 provides a closer look at career offenders and armed career criminals by primary offense category.

Of the 821 defendants found to be career offenders, drug trafficking comprised the single largest group (61.1%), followed by robbery (27.6%). Examining defendants determined to be armed career offenders,

⁶⁷ The career offender and armed career criminal guidelines implement congressional directives embodied in 28 U.S.C. § 994(h) and 18 U.S.C. § 924(e).

firearm offenses accounted for 92.8 percent of all such cases. Career Offender (§4B1.1) and Armed Career Criminal (§4B1.4) were applied at relatively stable rates between 1992 to 1995.

Trends in Criminal History Status. There was a steady increase from 1991 through 1995 in the proportion of defendants receiving one or more criminal history points. In 1991, 48.5 percent of defendants had one or more criminal history points; by 1995 the proportion had increased to 52.0 percent.

The consequence of the increase in criminal history points was a corresponding upward trend toward higher criminal history categories from 1991 to 1995. Annual figures indicate that the proportion of defendants in Criminal History Category I declined from 61.7 percent in 1991 to 57.4 percent in 1995. The decline in the proportion of Category I defendants was accompanied by increases in the proportion of defendants in Criminal History Categories III, IV, V, and VI.

Chapter Five Determination of the Applicable Sentencing Range

The Sentencing Table in Chapter Five, Part A, sets out offense levels on the vertical axis and criminal history categories on the horizontal axis. A defendant's final offense level results from application of Chapters Two and Three of the Guidelines Manual. The appropriate criminal history category is computed in Chapter Four. The guideline sentencing range is defined in the Sentencing Table by the intersection of the row's final offense level with the column's criminal history category. The court has discretion to impose a sentence at any point within the range or, in unusual cases, to depart above or below the range.

Table 27 presents the distribution of all cases by final offense level and Criminal History Category as determined by the court. Half (50.1%) of all guideline cases resulted in a final offense level of 17 or less; 57.4 percent of all defendants were classified in Criminal History Category I.

Most defendants merited the highest criminal history category because of the frequency, seriousness, or recency of their prior criminal conduct. About one-third of the defendants in Criminal History Category VI were placed there because of an automatic enhancement based on classification as a career offender or armed career criminal. For either of these reasons, the courts placed 8.7 percent of guideline defendants in Criminal History Category VI during 1995. This was essentially unchanged from last year (8.8%), but has almost doubled since 1991 (4.5%).

Table 28 presents final guideline ranges for all cases received by the Commission. The table further documents the increases both in final offense levels and criminal history scores. Almost half (48.3%) of all defendants had final guideline ranges at or below the 27-to-33 months range. The single highest proportion of cases (12.9%) fell into the 0-to-6 months guideline range, the least severe range in the Sentencing Table; note that in 1994 slightly more cases (13.7%) fell into this lowest guideline range. The decrease is countered by an increase in the proportion of cases with guideline ranges between 6-to-12 months and 24-to-30 months.

Departures and Sentences Within the Guideline Range

The Sentencing Reform Act authorizes departures from the applicable guideline range, subject to review by appellate courts. The Reports on the Sentencing Hearing are used to assess guideline sentencing trends and to determine the rate at which defendants are sentenced within, above, or below the guideline range as established by the court. In this section, the Commission reports on the frequency of departures on the national, circuit, and district levels and the reasons provided by the courts for such departures.

The Commission reviewed all case files to determine departure status and reasons for departure. The case was determined to be a non-departure if the sentence imposed was within the guideline range established by the court, as modified by applicable statutory minimum and maximum penalties. If the sentence fell outside the guideline range established by the court, it was recorded as a departure and the applicable reasons were noted.

If no Report on the Sentencing Hearing was provided, or if it contained insufficient information to permit a departure determination, the Commission compared the sentence from the Judgment of Conviction to the guideline range recommended by the probation officer in the presentence report. The Commission assumed no departure when the sentence imposed by the court fell within the range recommended by the probation officer.⁶⁸

⁶⁸ This assumption was tested in a previous Commission departure study analyzing a sample of cases sentenced between November 1, 1987, and March 31, 1989. A random 25-percent sample of cases for which no Report on the Sentencing Hearing was available, but for which the sentence fell within the range recommended by the probation officer, was further investigated by placing telephone calls to probation offices across the country. Of the 196 cases for which calls were made, none involved a departure from the guideline range. As a result, all such cases were considered within-range sentences for the purposes of that study as well as for the present report.

The Commission could not assume a departure if the sentence from the Judgment of Conviction did not correspond to the guideline range recommended by the probation officer. A court, through the fact-finding process, may determine that a different guideline range was correct and impose a sentence within that newly-determined range. Thus, a discrepancy between the sentence and the range indicated in the presentence report does not necessarily indicate a departure. Departure determination for cases in which Reports on the Sentencing Hearing were absent or inadequate were coded as missing.⁶⁹

Departure Rates

Of the 38,500 cases received by the Commission in 1995, a departure determination could be made for 36,975 cases. The summary box reports these within-range and departure statistics:

Rates of Within-Range and Departure Sentences	
71.0%	Sentences Within Guideline Range
19.7%	Sentences Below Guideline Range for Substantial Assistance on Motion of Government
8.4%	Sentences Below Guideline Range
0.9%	Sentences Above Guideline Range

Sentences were within the court-established guideline

⁶⁹ In 1,272 of the 38,500 cases in the Commission's 1995 dataset, no departure determination was made due to absent or inadequate information. In 253 cases, departure determinations were not applicable because the cases had no analogous guidelines. Consequently, departure status was assessed in 36,975 cases.

range in 71.0 percent of the cases for which a departure determination could be made, the same rate as in 1994.⁷⁰ In 19.7 percent of the cases, courts departed downward based on a motion by the government for a reduced sentence due to the defendant's substantial assistance to authorities (§5K1.1).⁷¹ In another 8.4 percent of the cases, the court departed downward for other reasons. In 0.9 percent of the cases, the court departed upward, sentencing above the applicable guideline range.

As displayed in Figure H, the departure rate⁷² increased steadily from 1989 to 1995, with the increase driven by government motions for substantial assistance granted by the court. However, 1995 data showed the first slowing of the substantial assistance departure rate increase. While the §5K1.1 departure rate increased an average 3.2 percentage points annually between 1989 and 1994, in 1995 the increase was only 0.2 percentage points.

Upward departures constituted only 0.9 percent of all

cases in 1995. The reasons given by district courts for these departures are listed in Table 29 and were consistent with reasons for upward departures given in previous years. The most frequently cited upward departure reasons were inadequacy of criminal history in reflecting the offense seriousness (39.2%) and risk of future conduct based on prior conduct or record (13.3%).

Downward departures, other than for substantial assistance, constituted 8.4 percent of all cases sentenced in 1995. Table 30 provides district court reasons for downward departures, the most frequent of which included pursuant to a plea agreement (22.9%) and criminal history category over-representing defendant's involvement(15.1%).

⁷⁰ The departure analysis employed here considers the probation, imprisonment, and confinement alternatives in relation to the guideline range established in Part A of Chapter Five. This analysis does not involve an assessment of the fine range established in Part E of Chapter Five. In addition, no assessment is made regarding terms of supervised release as established by Part D of Chapter Five.

⁷¹ Congress, in 18 U.S.C. § 3553(e), authorized the court to impose a sentence below that required by a mandatory minimum statute "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." In addition, the Commission was instructed in 28 U.S.C. § 994(n) to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed" for substantial assistance to authorities. The Commission specifically addressed such sentence reductions in §5K1.1 of the guidelines.

⁷² The overall departure rate is the sum of the rates for substantial assistance (§5K1.1) departures, other downward departures, and upward departures.

These common reasons were consistent with reasons given in prior years.

Within Guideline Range Sentences and Departures by Circuit and District

Consistent with past years, 1995 departure rates (including upward, downward, and §5K1.1 departures) varied significantly among the 12 judicial circuits (see Table 31). The Seventh Circuit had the lowest departure rate at 20.5 percent; this circuit has had the lowest departure rate since 1993. The Third Circuit had the highest departure rate at 37.5 percent, maintaining its status since 1992 as the circuit with the highest departure rate.

The overall trend of slowing departure rates was also evident at the circuit level. From 1992 through 1994, a sizeable majority of the 12 circuits⁷³ showed increasing departure rates. However, in 1995 only six circuits showed increases in departure rates. This slowing trend in departure rates reflected a reversal of the trend in substantial assistance departure rates. Prior to 1995, circuit declines in §5K1.1 departure rates were rare.⁷⁴ However, in 1995, seven of the 12 circuits – more than half – had a decline in their §5K1.1 departure rate.

Comparing individual districts in 1995, the highest departure rates were in the Districts of New Hampshire (56.8%) and Arizona (54.6%). Other districts with departure rates greater than 40 percent included: Western North Carolina (49.9%); Eastern Pennsylvania (48.7%), Connecticut (47.4%), Eastern New York (44.7%), and Maryland (40.9%). Two classifications emerge when examining these seven districts with the highest departure rates. One

grouping included those districts with the greatest number of departures due to substantial assistance.⁷⁵ The other grouping included those districts with the greatest proportion of all departures due to other downward departure reasons.⁷⁶

Districts with departure rates less than ten percent included: Rhode Island (6.2%); Western Arkansas (7.1%); Western Wisconsin (7.1%); and Eastern Virginia (9.5%).

Discretion Under the Guidelines

The guidelines provide for the exercise of judicial discretion at numerous points in the sentencing process, from deciding facts, to accepting plea agreements, to selecting the guideline sentence. Departing from the guideline range or selecting a particular point within the applicable range provide empirical examples of judicial discretion under the guidelines.

Table 32 presents, by offense type, two key elements underlying this discretion: information on type of departure (for cases sentenced outside the guideline range) and relative sentence location (for cases sentenced within the guideline

⁷³ In 1992, 1993, and 1994 there were (respectively) ten, nine, and 11 circuits with increases in their departure rates.

⁷⁴ In 1992, 1993, and 1994 there were (respectively) only two, three, and one circuits with declines in their §5K1.1 departure rate.

⁷⁵ Districts with high rates of substantial assistance departure cases were: New Hampshire (96%); Western North Carolina (90%); Eastern Pennsylvania (86%); and Maryland (66%).

⁷⁶ High departure districts with more departures due to other downward departure reasons (excluding substantial assistance) were: Arizona (76%); Connecticut (63%); and Eastern New York (55%).

range).⁷⁷ Each column of Table 32 classifies defendants into one of seven sentence-position categories: downward departure; substantial assistance departure; first within-range quarter; second within-range quarter; third within-range quarter; fourth within-range quarter; or upward departure. Based upon the distribution of cases across these categories, offense types can be classified into two major sentence location groupings.

Discretion within the Guideline Range. The first sentence location grouping covered the vast majority of offense types. These offense types had the largest proportion of their cases falling into the lowest quarter of the within-guideline range (as reported by the "First Quarter of Range" column of Table 32). In 24 out of 32 offense types, more than one-third of cases were sentenced within the first quarter of the available guideline range. More than two-thirds of environmental/wildlife cases (70.5%) and embezzlement cases (67.6%) were sentenced within the first quarter of the range. This comports with the fact that in only three offense types were one-fourth or more cases sentenced within the last quarter of the range: burglary (31.3%), manslaughter (27.9%), and kidnapping (25.0%).

Discretion using Departures. The second sentencing location grouping consisted of eight offense types in which downward departures were the most common category. These departure cases appear in either the "Downward Departure" or "Substantial Assistance Departure" columns of Table 32. The eight offense types in this grouping were: murder, kidnapping/hostage-taking, arson, drug trafficking, drug communication facility, money laundering, racketeering/extortion, and antitrust. For these offenses, the most frequent sentence imposed was

below the guideline minimum. Of this second grouping, another subgroup was identified; for drug-communication facility, racketeering/extortion, and antitrust, the defendant was more likely to receive a substantial assistance departure than any other departure or within-guideline quarter sentence.

Trends in Within-Range Discretion. Turning now to examine only cases sentenced within the guideline range, Table 32 classifies defendants into one of four equal parts of the guideline range: first, second, third, or fourth quarter of the range (Table 32's four central columns denoted by solid vertical line borders).

For the past four years, across all offense categories, between 60 percent and 65 percent of within-guideline sentences has fallen into the first guideline range quarter. In 1995, only two offense types had their most frequent within-guideline proportion in another sentencing position: manslaughter or kidnapping/hostage taking. Defendants in these two offense types who were sentenced within the guideline range were most likely to receive a sentence falling in the fourth, or highest, quarter of the range.

Non-U.S. Citizens as Federal Defendants

Federal defendants who were either legal or illegal aliens comprised a substantial minority of the federal caseload. In 1995, nearly one quarter (24.3%) of all guideline convictions involved non-U.S. citizens; this was an increase from 1994 (22.3%) and reflects an increase in alien representation for nine circuits.⁷⁸

⁷⁷ Statistics in this section are based on a smaller number of cases than in the previous departure tables because only cases with available information on guideline ranges, as determined by the court, are included in the analysis. Guideline ranges reflect adjustments to the range based on mandatory minimums and statutory maximums applicable to the case.

⁷⁸ When compared to 1994, the proportion of sentencings involving aliens increased in nine of 12 circuits (D.C., First, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh); decreased in two circuits (Sixth and Seventh); and remained the same in the Second Circuit. The largest increase in absolute number of alien cases occurred in the Ninth Circuit (3,237 alien cases sentenced during 1995 compared to 2,659 cases in 1994). The largest proportional increase in alien cases between 1994 and 1995, relative to the total cases processed within a circuit,

Figure I indicates that more than three-fourths (76.9%) of all aliens in the defendant population were concentrated in four circuits: the Ninth(44.3% aliens); Fifth (31.3% aliens); Second(35.9% aliens); and Eleventh (22.4% aliens).

Table 33 presents information on country of citizenship for alien defendants. Approximately half of all non-citizen cases (51.0%) came from Mexico. The number of cases involving Mexican nationals was nearly five times greater than the number of cases involving individuals from Colombia (10.4%), the next most prevalent country of citizenship among alien cases. The remaining 49 percent of non-U.S. citizens sentenced during 1995 came from a diverse array of at least 65 other countries.

Offense and Offender Characteristics for Non-U.S. Citizens

Table 34 compares defendant information for U.S. and non-U.S. citizens sentenced in 1995. A higher percentage of the non-citizen offenders were male (90.7% compared to 83.4% of U.S. citizens), Hispanic (76.6% compared to 11.4% of U.S. citizens), and without a high school education (62.8% compared to 32.4% for U.S. citizens). Overall, proportions presented in this table for both U.S. citizens and non-citizens were roughly the same as in 1994. Alien offenders were slightly more likely to plead guilty (94.4% compared to 90.9% for U.S. citizens); however, aliens received mitigating role adjustments at about twice the rate (18.7% of U.S. citizens (8.9%), most likely reflecting their lesser roles in drug offenses. Aliens were also less likely to possess weapons (5.0% compared to 13.1% for U.S. citizens). U.S. citizens and aliens were equally likely to be exposed to a mandatory minimum penalty (28.9% for U.S. citizens compared to 29.0% for aliens).

occurred in the D.C. Circuit (14.7% of all alien cases processed in the D.C. Circuit in 1995 compared to 9.5% in 1994).

Table 35 examines the distribution of offense type by citizenship status. Overall, non-U.S. citizens were involved in two percent more sentencings this year than the previous year (24.4% versus 22.3% for 1994). The increase in the proportion of alien cases in 1995 can be attributed to two factors: first, a growth in the absolute numbers of non-citizen cases by 457; and second, a decrease in the absolute number of cases involving U.S. citizens by 1,838. Nearly half of the cases involving aliens were for drug violations.⁷⁹ Non-citizens accounted for more than 25 percent of all sentencings in six other offense categories.⁸⁰

⁷⁹ Drug offenses accounted for 45.5% of sentencings among non-citizens compared to 38.5% of sentencings of U.S. citizens.

⁸⁰ Offense types having more than 25 percent alien defendants were: kidnapping/hostage taking(30.6%), drug trafficking (27.5%), use of communication facility in a drug offense (27.6%), simple possession of drugs (29.1%), money laundering (29.8%), immigration (94.5%), and national defense violations (74.3%). Because kidnapping/hostage taking and national defense were infrequently occurring offenses, the proportions of aliens for these offense types have shown major year-to-year fluctuation that has no analytic importance.

Sentence Lengths for Non-U.S. Citizens

Table 36 compares the median and mean prison sentences of U.S. and non-U.S. citizens for the seven offense types in which non-U.S. citizens accounted for 25 percent or more of convictions. Comparing sentence averages for convictions in all primary offense categories, U.S. citizens' sentence lengths had a median value of 37 months and a mean of 69.5 months; non-U.S. citizens generally received shorter sentences (a median of 24 months and a mean of 47.4 months).

For drug trafficking offenses – the most frequent

federal offense type – the mean and median prison sentences for U.S. citizens were higher than for non-citizens. This difference is likely the result of three factors: non-U.S. citizens received more mitigating role adjustments; non-U.S. citizens were less likely to possess weapons; and non-U.S. citizens were only infrequently involved with crack cocaine (the drug associated with the longest average sentences).⁸¹

However, offense specific sentence comparisons indicated that alien sentences were not shorter for all offense types.

⁸¹ The drug type most frequently cited in drug offenses involving aliens was powder cocaine (37.6%), followed by marijuana (33.5% of all alien drug cases).

- For immigration offenses, longer average imprisonment sentences for non-U.S. citizens (22.5 months for aliens compared to 14.5 months for U.S. citizens) resulted from the large proportion of alien defendants being sentenced under §2L1.2 and receiving the specific offense characteristic for having a previous deportation after a conviction for an aggravated felony (16-level increase). Sixty percent of non-U.S. citizen defendants were sentenced under this guideline and 61.9 percent of these cases received the 16-level enhancement.⁸²
- Prison sentences for national defense offenses did not differ substantially by citizenship status (median sentences were identical at 15.0 months and mean sentences differed by only 0.4 months).

⁸² The 978 cases sentenced under §2L1.2 receiving the 16-level enhancement account for 37.1 percent of all non-U.S. citizen cases sentenced under the guidelines during 1995.

Guideline Drug Defendants

Statutes regulating illegal drug trafficking (*e.g.*, 21 U.S.C. § 841 (b)) specify mandatory minimum penalty levels based on drug type and drug amount. This statutory framework is the basis for the drug trafficking sentencing guidelines that proportionately reflect seriousness levels set by Congress. Chapter Two, Part D, of the Guidelines Manual reflects these provisions through Drug Quantity and Drug Equivalency Tables that assign base offense levels based on drug type and drug amount.

Five Chapter Two guidelines were applied as the primary guideline in the majority (99.4% or 15,190) of 1995 guideline drug sentencings.⁸³

Figure J shows the distribution of all 1995 guideline cases, with 39.8 percent sentenced under one

⁸³ While 189 drug cases were convicted under 21 U.S.C. § 843(b), with §2D1.6 as the applicable guideline, sentences in these cases were determined, based on drug quantities involved, under §2D1.1.

of five drug guidelines. Of these cases, the vast majority (93.8%) were sentenced under the drug trafficking guideline, followed by simple possession (3.9%).

Drug Defendants: Drug Type. Table 37 shows powder cocaine as the most prevalent drug in federal drug sentencings in 1995, followed by marijuana and crack cocaine. Together, these three drugs accounted for 80.8 percent of all drug cases. Cocaine alone – combining both powder and crack – accounted for 54.2 percent of drug cases. Other findings based on drug type and guideline include:

- 126 crack cocaine cases were sentenced under §2D1.2 (protected locations) (56.3% of all cases sentenced under this guideline). There was a substantially greater number of protected location cases involving crack cocaine than any other drug type; the number of crack cocaine cases exceeded the number for all other drugs combined. This finding was consistent with crack cocaine's association with street marketing and open air drug markets.
- Few cases were sentenced under §2D1.5 (continuing criminal enterprise) or §2D1.8 (rent/manage drug establishment). Combined, these two guidelines accounted for just under one percent of all drug cases. Generally, powder cocaine and crack cocaine cases were most often sentenced under these guidelines (88 of the 134 cases, for 65.7%). Marijuana was associated with an additional 16.4 percent (22 cases) of these guideline cases.
- Under §2D2.1 (simple possession), the most prevalent drug was marijuana (390 cases accounting for 66.4 percent of all cases sentenced under this guideline), followed by powder cocaine.

Drug Defendants: Demographics. Table 38 displays race categories by drug type. The three racial/ethnic categories were represented among drug defendants at the following rates: 27.0 percent White, 35.0 percent Black, and 36.1 percent Hispanic. The table shows a relationship between the racial/ethnic category and the type of drug involvement. LSD and methamphetamine cases were concentrated among White defendants (90.2% and 72.3% of these drug types, respectively); crack cocaine cases were concentrated among Black defendants (88.4%); and powder cocaine, heroin, and marijuana cases were most likely to involve Hispanic defendants (48.7%, 51.2%, and 50.8% of these drug types, respectively).

Table 39 indicates little relationship between gender and type of drug. Overall, 87.8 percent of drug defendants were male, accounting for 80 to 90 percent of cases for each drug type. The participation

of women was highest in heroin cases (19.6%) and lowest in LSD (9.8%) and marijuana (9.9%) cases.

Table 40 examines citizenship status and type of drug involvement, indicating a link between drug type and alien status. While 27.5 percent of all drug defendants were non-U.S. citizens (either legal or illegal aliens), 55.0 percent of heroin cases (781 cases) involved aliens – the only drug type for which the proportion of non-citizens was greater than that of U.S. citizens. However, despite the clustering of non-U.S. citizens in heroin, the small number of heroin cases (only 9.4% of all drug cases) meant that other drugs – powder cocaine (1,543 cases) and marijuana (1,330 cases) – had the highest absolute number and percent (68.9%) of alien drug cases. In contrast, 93.9 percent of LSD { Tables 39-40 }

cases and 93.1 percent of crack cocaine cases involved U.S. citizens.

Drug Defendants: Criminal History Category. As reported in Table 41, the majority (57.8%) of defendants sentenced under the drug guidelines were in Criminal History Category I. A notable exception in the table involves crack cocaine; only 37.3 percent of crack cocaine defendants were placed in Criminal History Category I, with a corresponding high representation of these defendants in Criminal History Category VI (11.8%). No more than 8.0 percent of defendants involved with any other drug type were in Criminal History Category VI. Crack cocaine cases aside, one-half to three-quarters (50.2% to 72.5%) of cases involving each drug type fell into Criminal History Category I.

Drug Defendants: Mode of Conviction. Table 42 indicates that, regardless of the type of drug involved, nine out of ten defendants (90.0%) pleaded guilty rather than go to trial. This compares with a 91.9 percent plea rate for all 1995 defendants in all offense categories (*see* Table 16). The percentage of defendants who went to trial was highest for crack cocaine cases (14.9% of all crack cocaine cases). Crack cocaine defendants, given the stiff mandatory minimum statutes, faced lengthy incarceration sentences and likely were more motivated than other drug offenders to take their chances at trial. The percentage of defendants who went to trial was lowest for marijuana cases (6.1% of all marijuana defendants).

Drug Defendants: Guideline Application Issues. In addition to the separate offense of conviction for gun possession, the drug guideline structure includes a specific offense characteristic for weapon possession. As Table 43 shows, 17.1 percent of drug defendants either received a drug guideline weapon enhancement or were convicted under 18 U.S.C. § 924(c). Two drug types were most likely to involve weapons: crack cocaine (30.7% of all crack cocaine cases) and methamphetamine (25.1% of all methamphetamine cases). Drug types least associated with weapons were LSD (8.5% of all LSD cases), heroin (8.9% of all heroin cases), and marijuana (8.9% of all

marijuana cases).

For each drug type, Table 44 presents information on the guidelines' role in the offense adjustment. In the majority of drug cases (71.0%), no adjustment was made for the defendant's role. Defendants involved with heroin were most likely (39.1% of all heroin cases) to receive a downward adjustment due to a minor or minimal role in the offense. LSD defendants were most likely (11.0% of all LSD defendants) to receive an upward adjustment due to aggravating role; both crack cocaine and powder cocaine defendants followed with slightly lower rates of aggravating role adjustments (10.5% and 9.4% of these drug cases, respectively).

Table 45 illustrates that 84.7 percent of defendants sentenced under the drug guidelines received a reduction in their offense levels for acceptance of responsibility. This figure is slightly lower than the 86.7 percent acceptance of responsibility rate for all 1995 defendants. The rate for acceptance of responsibility ranged from a high of 90.0 percent for heroin defendants to a low of 78.7 percent for crack cocaine defendants, most likely related to the higher trial rate for crack (*see* Figure Q in the following section). Of the 11,582 drug defendants who received reductions for acceptance of responsibility, the majority (83.4%) received a three-level reduction.

Drug Defendants: Departures. Table 46 presents departure rates for drug cases by drug type. While a majority of drug defendants (59.3%) were sentenced within the guideline range, 40.7 percent received sentences departing from the guideline range. Recalling rates for all 1995 defendants (*see* Figure H), the overall departure rate for drug defendants was considerably higher (40.7% compared to 28.6% for all defendants). Four-fifths of the drug departure cases (4,709 cases out of 5,995 departures, 78.5%) were downward departures pursuant to a government motion for substantial assistance; this rate was higher than the 69.2 percent of departures attributable to substantial assistance when

considering only departure cases for all defendants in 1995.

The highest rates for substantial assistance departures occurred for defendants involved with LSD and methamphetamine (42.9% and 41.9%, respectively), but these accounted for only one percent (493 cases) of the 4,709 substantial assistance departures in drug cases. The primary drug involved in more than four-fifths of all substantial assistance departures in drug trafficking were powder cocaine, crack cocaine, and marijuana cases.

Drug Defendants: Sentence Length by Drug Type. Crack cocaine defendants received the longest prison sentences among all drug types (*see* Figure K), with median and mean sentence lengths at 97 months and 130.7 months, respectively. Marijuana defendants received the shortest average sentences, with a median of 30 months and a mean of 43.1 months of incarceration.

Trends in Drug Guideline Cases

This section examines historical trends among guideline drug cases (primarily drug trafficking) for the five most prevalent drugs types: powder cocaine, crack cocaine, heroin, marijuana, and methamphetamine. These five drug types accounted for 97.6 percent of drug sentencings in 1995. All discussion in this section pertains solely to these five drug types. The trend analysis begins with 1992, the first year in which the type of drug involved in the offense was recorded in the Commission's monitoring database.

Drug Offense Trends: Number of Cases

Figure L presents trends in the number of cases sentenced by drug type for the years 1992 through 1995. Overall, the number of total drug cases declined by 7.6 percent during this period (16,034 cases in 1992 compared to 14,809 in 1995). Between 1992 and 1995, the number of cases

- declined for powder cocaine (36.5% fewer cases in 1995) and marijuana (7.0% fewer cases in 1995); and
- increased for crack cocaine (53.8% more cases in 1995), methamphetamine (34.6% more cases in 1995), and heroin (2.1% more cases in 1995).

The change in the numbers of powder cocaine and crack cocaine cases during the past four years were substantial. However, cocaine sentencing (combining both powder and crack cocaine cases) have consistently accounted for more than half of the guideline drug cases (59.0% in 1992 and 55.5% in 1995). Likewise, the proportional contribution to the total by each of the remaining drug types remained stable across the years. These trends in the number of cases sentenced by drug type serve as the backdrop for the discussion in the remainder of this section.

Drug Offense Trends: Demographics

Racial/Ethnic Trends. Figure M describes the racial/ethnic composition of defendants within the five drug types over time.⁸⁴ As mentioned above, the

⁸⁴ Race/ethnicity is classified as White, Black, Hispanic, and “Other.” The Other grouping consists of a diversity of ethnic and racial groups (e.g., Native Americans, Asian Americans, Pacific Islanders) and generally accounts for a small proportion of drug cases. Between 1992 and 1995, the proportional contribution of this category has risen, for all drug types combined, from 1.1 percent to 1.6 percent (280 cases in 1992 compared to 234 cases in 1995). Because so few cases are involved, particularly within any specific

absolute number of powder cocaine cases declined over the past four years; additionally the absolute number of cases in each racial/ethnic group declined. However, Hispanic cases declined to a lesser extent than did Whites or Blacks. As a consequence, in 1995, the resulting proportion of Hispanic powder cocaine cases increased. For all years, Hispanics accounted for the largest proportion of powder cocaine cases, with their slower decline in absolute numbers resulting in an increased proportional contribution over the years.⁸⁵ Crack cocaine cases, on the other hand, increased during this period and each racial/ethnic group contributed to the increase. Both Whites and Hispanics had large proportional increases between 1992 and 1995 but still represent a very small proportion of crack cocaine cases.⁸⁶

drug type, conclusions regarding trends for this category are not made.

⁸⁵ Hispanics accounted for 39.1 percent of all powder cocaine cases in 1992 and 48.7 percent of powder cocaine cases in 1995.

⁸⁶ In 1995, there were 85 additional cases of White defendants (compared to 1992), a 102-percent increase. Likewise, Hispanic cases have increased by 118, a 93-percent increase. However, Whites and Hispanics combined accounted for only 11.0 percent of crack cocaine cases in 1995 (compared to 8.6% in 1992). In contrast, during this period, Black cases increased by a much smaller percent (49.3%) but this represents a much larger increase in cases (1,010 cases).

By 1995, the proportional representation of Hispanics in heroin cases had increased, revealing two opposing trends. First, the number of Whites and Blacks sentenced during this period declined (by 21.8% and 29.3%, respectively), and second, the number of Hispanic cases rose (by 62.6%). The racial/ethnic composition of marijuana cases in 1995 resulted from trends similar to the heroin trend described above. Consequently, the number of White and Black defendants in marijuana cases declined (by 25.7% and 11.1%, respectively) and the number of Hispanic defendants increased (by 24.0%).

The total number of methamphetamine cases increased over the four years, with increases in each racial/ethnic group. However, the increase among Hispanics was substantially greater than increases in other groups.⁸⁷

Gender Trends. Information on the gender of defendants by drug type is presented in Figure N. Involvement with drugs (both for possession and trafficking) was traditionally a male dominated activity, as indicated in the full Commission dataset.⁸⁸ Changes over time, when they occurred, were very small and generally showed no clear trends. The exceptions were a small decrease in the proportion of crack cocaine cases involving females and an increase in the proportion of methamphetamine cases involving females.

Citizenship Trends. Figure O presents information on the trends in defendant citizenship status by drug type. Overall, very little difference was found in the proportion of non-citizens sentenced between 1992 and 1995. Aliens accounted for 29.0 percent of drug cases in 1992, and 27.9 percent in 1995. No

consistent trend was observed for powder cocaine, heroin, or marijuana cases during this period, with each drug type showing variations upward and downward. However, for crack cocaine and methamphetamine, there was a consistent trend in defendant citizenship. The proportion of U.S. citizens sentenced for crack cocaine offenses increased from 91.6 percent in 1992 to 93.2 percent in 1995. Methamphetamine cases demonstrated the opposite trend; the proportion of non-citizen cases increased steadily from 7.2 percent in 1992 to 19.2 percent in 1995.

Criminal History Trends. Information on trends in criminal history category is presented in Figure P. Overall, the proportion of defendants in higher criminal history categories increased during the period 1992 to 1995. In 1992, 36.4 percent of these drug cases were classified as Criminal History Category II or above; this proportion increased to 42.8 percent by 1995. This trend was particularly true for crack cocaine and marijuana cases, while no clear trend in criminal history category was seen among powder cocaine, heroin, or methamphetamine cases.

Drug Plea/Trial Trends. Figure Q presents information on the guilty plea rate between 1992 and 1995. During this period, the overall plea rate has shown a steady increase. The rate for all drugs increased from 82.0 percent in 1992 to 89.8 percent by 1995. Mode of conviction is one of two factors examined over time in which each drug-specific trend corresponds to the overall trend. The other factor, acceptance of responsibility, is highly associated with plea rate and is discussed later.

Drug Offense Trends: Guideline Application

Drug Quantity Trends. Drug quantity, *per se*, is not coded into the Commission's Monitoring dataset; the defendant's Base Offense Level (BOL) is used as a proxy for this information. Base Offense

⁸⁷ Among methamphetamine cases, Whites have increased by 15.6 percent (807 cases in 1995 compared to 698 cases in 1992), Blacks have increased by 55.6 percent (14 cases in 1995 compared to nine cases in 1992), and Hispanics have increased by 211.0 percent (255 cases in 1995 compared to 82 cases in 1992).

⁸⁸ About 88 percent of drug defendants are male, regardless of year of sentencing.

Levels in drug cases range from 4 through either level 38 or 42, based solely on the quantity of the drug. From 1992 through 1994, the BOL based on quantity of drugs alone could reach a maximum of level 42. The Drug Quantity Table was amended in fiscal year 1995 by imposing a cap at level 38 for quantity-based sentencing computations.

Figure R presents information on the trends in drug quantity (using the Base Offense Level proxy) for the five selected drug types. For this analysis, the entire range of BOLs was grouped into three categories:

- 5 Years or Less: defendants who, based upon quantity alone, have base offense levels less than 26;
- 5 - 10 Years: defendants who, based upon quantity alone, have base offense levels of 26 to 30; and
- 10+ Years: defendants who, based upon quantity alone, have base offense levels of 32 or greater.⁸⁹

Overall, the trend showed a consistent reduction in the proportion of cases at lower quantities (35.4% of drug cases sentenced in 1992 had quantities at BOL less than 26 compared to only 26.8% in 1995). Correspondingly, there was a consistent increase in the proportion of cases with higher quantities (32.3% had BOLs higher than 30 in 1992 compared to 40.0% in 1995). The proportion of drug cases exposed, by quantity alone, to at least 63 months and less than 121 months (BOL 26-30) remained stable from

1992-1995 at approximately 33 percent.

Powder cocaine followed this overall pattern, but the remaining four drug types varied. Crack cocaine cases saw proportional declines in both lower and mid-level quantities, with a corresponding increase in the high-level quantities. Marijuana, on the other hand, received proportional reductions in the lowest and highest levels, restricting the increase to the middle level. For heroin and methamphetamine cases, no clear pattern emerged. For both drug types, between-year variation showed both increases and decreases at each quantity category.

The decision to group drug quantities in this manner was, as described above, based upon the drug amounts at which defendants are exposed to quantity-driven mandatory minimum sentences of 60 or 120 months. Information on the rate at which these cases are subject to mandatory minimum sentences is available for years 1993, 1994, and 1995. During 1995, 63.0 percent of defendants whose offense involved one of these five drug types received a mandatory minimum sentence. The increase in the number of cases with exposure to mandatory minimum sentences has mirrored the increase in drug quantity. That is, a greater proportion of drug defendants were subject to mandatory minimum penalties in 1995 than were in 1993 (56.6% in 1993 compared to 63.0% in 1995).

During 1995, the proportion of cases sentenced under a mandatory minimum penalty within each drug type were: powder cocaine (71.9%), crack cocaine (77.5%), heroin (58.9%), marijuana (38.7%), and methamphetamine (71.3%). For each drug type, a greater percentage of cases were sentenced under a mandatory minimum in 1995 than in 1993.

⁸⁹ Drug quantity is partitioned at these points consistent with the potential exposure of defendants to quantity-based mandatory minimum penalties. Defendants at BOL less than 26 are not exposed to mandatory minimums based upon drug quantity. At the remaining two groupings (BOL 26-30 and BOL 32 and greater), defendants are exposed to quantity-driven mandatory minimum penalties of at least 60 months or 120 months, respectively. Mandatory minimum sentencing is applied based upon reaching a threshold quantity, congressionally specified for each drug type, during any single drug transaction or conspiracy.

Weapon Possession Trends. The drug guideline includes an enhancement for weapon possession as a Specific Offense Characteristic. Figure S presents information on weapon involvement⁹⁰ among these cases from 1992 through 1995. In general, the proportion of cases involving a weapon decreased slightly from 1992 to 1993 and then increased both from 1993 to 1994 and 1994 to 1995. The net effect was that a slightly smaller proportion of drug cases involved weapons enhancements during the past four years (17.3% in 1992 compared to 16.2% in 1995).

As with the previous comparisons, drug-specific trends varied. The proportion of powder cocaine and marijuana cases involving weapons steadily decreased over this time period. Powder cocaine weapon involvement fell from 16.1 percent in 1992 to 13.7 percent in 1995, and weapons in marijuana cases decreased from 11.9 percent in 1992 to 9.2 percent in 1995. The proportion of crack cocaine cases involving weapons steadily increased during this period from 23.9 percent in 1992 to 30.3 percent in 1995.

Methamphetamine cases had a relatively large decline in the proportion of weapon-involved cases from 1992 to 1993 and then rebounded the following two years. Though the proportions of these cases have increased during the last two years, the proportion of weapon cases in 1995 remains less than the 1992 level (25.0% in 1995 compared to 27.2% in 1992). No pattern among heroin cases was discernable.

Drug Role in the Offense Trends. The guidelines have provisions for consideration of the role of the defendant in the criminal offense. Figure T presents information on the trends in role adjustments by drug type for the years under review. Overall, the trend has been a small decline in the proportion of drug cases receiving an aggravating role adjustment or no adjustment, which corresponds to an increase in the

proportion of cases receiving an adjustment for a mitigating role. Each drug type experienced a different trend. Powder cocaine cases followed the overall pattern just described.

Cases involving crack cocaine also saw a small reduction in the proportion of cases receiving no adjustment. However, the rate of mitigating role adjustments remained the same over the period while aggravating role adjustments increased. This is the only drug type that experienced a consistent increase in the rate of aggravating role adjustments.⁹¹

Between 1992 and 1994, heroin cases experienced little variation in the rates of these adjustments. In 1995, the rate of mitigating role adjustments increased, corresponding to declines in both the proportion of cases receiving no adjustment and cases receiving an aggravating role adjustment.

Among marijuana cases during this period, the rate of no role adjustment declined while mitigating role adjustments increased. A small decrease in the rate of aggravating role adjustments occurred from 1992 to 1993, but this has subsequently remained stable. Methamphetamine cases presented a complex picture of activity during this period. The rate of no adjustment decreased from 1992 to 1993 and slowly increased from 1993 to 1995, recovering some of the decline but not yet returning to 1992 levels. Mitigating role adjustments increased substantially from 1992 to 1993 (10.7% in 1992 {Figures S-T}

⁹⁰ Weapon involvement includes cases convicted of either a separate drug-associated weapon offense or those cases receiving a sentence enhancement under the drug guidelines for weapon possession.

⁹¹ This finding of an increased rate of aggravating role adjustments is consistent with the data presented in Figure R. The trend for crack cocaine cases has been an increase in the proportion of cases at the highest quantity levels; crack is the only drug to present such a trend. One possible explanation is that the increasing rate of the aggravating role adjustment, combined with the information regarding drug quantity, results from the conviction of higher-level crack cocaine distributors.

compared to 15.8% in 1993). Since 1993, the rate has been stable. The proportion of cases receiving aggravating role was stable from 1992 to 1993; decreased from 1993 to 1994; and was stable from 1994 to 1995.

Acceptance of Responsibility Trends. Under the guidelines, the final offense level may be reduced by two levels if the defendant accepts responsibility for his/her offense. An additional one-level reduction may be granted if the defendant provides complete information regarding the case or notifies the court in a timely manner about his or her intention to plead guilty (thus saving court resources). This additional one-point reduction was made effective on November 1, 1992 (fiscal year 1993) and, consequently, was not available in fiscal year 1992, the first year reported in the trends analysis.

Figure U presents information on trends in granting acceptance of responsibility sentence reductions. During the four-year period, there was an overall increase in the proportion of drug cases receiving the acceptance reduction (in 1992, 78.1% received acceptance compared to 84.6% in 1995). The proportion of cases receiving the three-point reduction also increased from 1993 to 1995 (in 1993, 49.6% of all cases received three points compared to 70.9% in 1995). These patterns are replicated in examinations of each drug type. The relative likelihood, for any drug, of receiving the acceptance reduction also has remained consistent. For each of the years, marijuana and heroin cases were the most likely to receive the reduction for acceptance; conversely, crack cocaine cases were the least likely (the proportion of crack cocaine cases not receiving this reduction is approximately twice that of heroin and marijuana cases).⁹²

⁹² The proportion of crack cocaine cases not receiving the reductions for acceptance were: 1992 (32.2%), 1993 (25.8%), 1994 (24.1%), and 1995 (21.3%). The proportion of marijuana cases not receiving the reduction were: 1992 (15.6%), 1993 (15.2%), 1994 (12.6%), and 1995 (10.8%). The proportion of heroin cases not receiving the reduction were: 1992 (18.8%),

Drug Offense Trends: Departures and Sentence Length

Departure Status Trends. Sentencing practices (within guideline range sentences, upward departures, substantial assistance departures, and other downward departures) are examined in Figure V. For all drug types combined, the trend shows a ten percent decline in the proportion of cases sentenced within guideline range (69.1% in 1992 compared to 59.3% in 1995) and an increase in the proportion of substantial assistance departures (24.0% in 1992 compared to 31.0% in 1995).⁹³ The proportion of other downward departures has also increased during this period but to a lesser extent (6.3% in 1992 compared to 8.5% in 1995).

Identifying trends in upward departures is difficult because of the very small numbers of cases involved. The rate of upward departures in drug cases was steady at approximately 0.6 percent from 1992 through 1994. In 1995, this rate dropped by half to 0.3 percent. However, because of the small number of cases involved and the recency of the shift, this finding requires additional study over several years to determine if this is a stable change or merely a one-year aberration in the data.

In general, each of the five drug types followed the overall pattern of sentencing practices. All experienced a decline in within-range sentencings and all but heroin had an increase in the proportion of cases receiving a substantial assistance departure. Trends in the rate of other downward departures are not as consistent or clear for all drugs; powder cocaine and heroin showed steady increases during this period; marijuana rates were steady until 1994 and then increased in 1995; and

1993 (15.2%), 1994 (15.1%), and 1995 (10.0%).

⁹³ The percent decrease in within-guideline sentencings (9.8%) is almost completely accounted for by the increase in substantial assistance departures (7.9%).

for crack cocaine and methamphetamine cases, both upward and downward variation from year-to-year was found with no obvious pattern emerging. Upward departures at the drug-specific level generally include too few cases to confidently interpret trends over time.

Drug Sentence Trends. Figure W presents trends in average length of prison sentence for drug cases for 1992 through 1995 (measured as mean number of months of incarceration). Sentences for powder cocaine, heroin, marijuana, and methamphetamine have declined from 1992 levels by 9.3 percent, 20.6 percent, 13.3 percent, and 8.0 percent respectively. The only drug type for which average sentence length increased during this period was crack cocaine, which by 1995 had increased by 7.9 percent above 1992 sentences. Many factors, described above, impact sentence length: drug type and quantity, criminal history, weapon involvement, mode of conviction, role in the offense, acceptance of responsibility, and likelihood of departure. Understanding trends in these factors, which can lengthen or shorten sentences, can help in understanding the changes in average sentence length depicted in Figure W.

Organizational Sentencing Practices

Organizational Guidelines

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.⁹⁴ The organizational guidelines establish fine ranges to deter and punish illegal conduct, require full restitution to compensate victims for any harm, disgorge illegal gains, regulate probationary sentences, and implement other statutory penalties such as forfeiture.

While the organizational guidelines apply to all felonies and Class A misdemeanors committed by

⁹⁴ See Guidelines Manual, Chapter Eight – Sentencing of Organizations.

organizational defendants, their fine provisions (Chapter Eight, Part C) are primarily applicable to offenses for which pecuniary loss or harm can be more readily quantified (*e.g.*, fraud, theft, and tax violations). The fine provisions also apply to some offenses for which pecuniary loss or harm is not readily quantified but for which the Commission was able to identify other reasonable measures of offense seriousness. These latter offenses include antitrust violations, money laundering, and other money transaction offenses.⁹⁵ The guidelines' fine provisions do not yet apply to most environmental, food and drug, and export control violations.

In response to its statutory mandate to collect systematically and disseminate information concerning sentences actually imposed, the Commission developed a data collection module for organizational defendants sentenced pursuant to the guidelines. Like the data collection system for individual defendants, the module for organizational defendants captures information describing the defendant; the charging, plea, and sentencing documents received by the Commission; the offense of conviction; the mode of adjudication; and the sanctions imposed. Additionally, this module records information describing the organization's structure, size, and economic viability and the application of the Chapter Eight guidelines.⁹⁶

Even though the Chapter Eight guidelines took effect November 1, 1991 (and according to statute should be applied to all sentencings that occur on or after that date), the Department of Justice has instructed its prosecutors, in light of relevant court

⁹⁵ See U.S. Sentencing Commission, Supplemental Report on Sentencing Guidelines for Organizations (1991).

⁹⁶ The 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.

decisions, to apply the guidelines only to offenses that occur on or after November 1, 1991. As a consequence, sentencing is still taking place in cases that are not subject to the organizational guidelines.⁹⁷

Over time, the proportion of cases subject to the organizational guidelines will grow and eventually reach 100 percent. In 1995, 111 organizational defendants were sentenced pursuant to the organizational guidelines, with Chapter Eight fine provisions applicable in 83 of those cases.

Offender Characteristics

During 1995, 96.3 percent of the cases sentenced pursuant to Chapter Eight involved closely held organizations (*i.e.*, privately held companies owned by a small number of people). Companies sentenced under Chapter Eight ranged from the old to the young. The oldest company was incorporated in 1899, the youngest in 1994. Although there is a 95-year difference between the oldest and youngest companies, more than 50 percent of the companies sentenced under Chapter Eight were 14 years old or less. More than 25 percent of the companies had been incorporated for fewer than seven years. Fifty-two percent of the defendant organizations were businesses employing fewer than 15 persons. More than 40 percent of the organizational defendants sentenced were companies that had been incorporated for 15 years or less and had 20 or fewer employees.

These organizations engaged in varied lines of business such as manufacturing or distributing consumer commodities (18.3%) and industrial commodities (14.7%), providing services such as banking, management and consulting, health care, or shipping and transportation (16.5%), and mining natural resources (5.5%).

Approximately 34 percent of organizations

sentenced under the Chapter Eight guidelines had ceased operations or were in poor financial condition at the time of sentencing. For example, 21.1 percent were defunct; one percent had filed for reorganization under Chapter 11; and 11.9 percent were experiencing substantial financial stress.

The data indicate that no organization sentenced in 1995 received recognition under the guidelines for having an effective program to prevent and detect violations of law in place at the time of the offense. Court documents do indicate, however, that in at least three cases, compliance efforts were examined. In one case, the defendant company had been convicted of fraudulent billing and claimed that it had in place a system designed to prevent billing errors. Without elaborating on the specific reasons, the presentence report concluded that this system fell short of the guidelines' due diligence requirements for maintaining an effective program.

The other two cases in which effective compliance efforts are known to have been considered involved environmental violations. Even though Chapter Eight's culpability scoring factors were not directly applicable in determining the relevant fines, the organization's compliance efforts were examined. In one case, the company was in the electroplating business and its compliance efforts were still in the development stage. The presentence report noted a number of actions that the company was in the process of taking to prevent future violations. The company received a \$5,000 fine and was directed, as a condition of probation, to continue those efforts.

The other case involved a company in the agricultural chemical business. The presentence report indicated that the company "has taken a proactive approach to regulatory compliance." Among the compliance efforts detailed in the presentence report were a description of the duties and reporting obligations of the company's "compliance specialist" position. The position was described as reporting directly to a designated senior official at the company's headquarters, working with local facilities – such as the one where the violation occurred – to achieve compliance along several specified avenues, and

⁹⁷ The Commission does not regularly receive sentencing information on organizations not sentenced under the guidelines.

providing training on compliance issues. The company also was described as having had written compliance policies and having employed an outside expert to assist in providing technical training on specific environmental issues. The company received a \$10,000 fine.

The guidelines state that fines for organizations that operate primarily for criminal purposes or by criminal means should be set high enough to result in divestment of the organization's assets (subject to the statutory maximum). In 1995, three organizations were identified as operating primarily for a criminal purpose or primarily by criminal means. The presentence investigation reports indicated that two of the three defendant companies were engaged in the manufacturing or selling of products that did not meet safety and quality standards. In addition to selling substandard products, the companies also had provided fraudulent documentation that indicated the products met applicable standards. The third company manufactured and distributed false identification documents.

Offense Characteristics

In the cases sentenced under the organizational guidelines during 1995, fraud was the most frequent offense committed by an organization, accounting for 38.9 percent of the cases sentenced. Other offense categories included: environmental (20.4%), tax (13.0%), and antitrust (7.4%) offenses (*see* Table 47).

Culpability Score

As an incentive for organizations to engage in serious efforts to prevent and self-report criminal conduct, the guidelines mandate high fines for organizations that fail to take such actions and that demonstrate other indicia of culpability such as having senior management involved in the offense. Overall, the guidelines seek to take into account a broad range of organizational culpability, from an offense committed by a low-level employee in contravention of clearly

communicated and vigorously enforced corporate policy to an offense committed by an organization created solely for criminal purposes.

The culpability score, an essential element in determining the guideline fine range, is an index of six factors that assess the organization's blameworthiness with respect to the commission of the offense. Points are added based on:

- the extent to which higher-echelon personnel, as defined in the guidelines, were involved in or tolerated the criminal activity;
- whether the organization had a history of similar violations, and if so, the recency of the prior violation;
- whether the organization violated a judicial or administrative order or a condition of probation; and
- whether the organization obstructed the official investigation, prosecution, or sentencing of the instant offense.

Points are subtracted from the culpability score based on:

- whether the organization had in place, prior to the offense, an effective program to prevent and detect violations of law; and
- whether the organization self-reported the violation to the appropriate authorities, fully cooperated with the official investigation, or accepted responsibility for the offense.

During 1995, the only culpability score factors applied with regularity were the enhancement for "Involvement in or Tolerance of Criminal Activity"

(59.3%) and the reduction for “Self-Reporting, Cooperation, or Acceptance of Responsibility” (87.7%).

Of the organizations receiving a reduction under this latter adjustment, 22.2 percent received the smallest reduction available (one point) because they demonstrated only acceptance of responsibility. The majority (61.7%) received a two-point reduction for cooperating and demonstrating acceptance of responsibility. Only three organizations received the full five-point reduction for self-reporting, cooperating, and demonstrating acceptance of responsibility.

Other culpability factors applied were prior history,

violation of an order, and obstruction of justice. As noted, no organizations received credit for having an effective program to detect violations of law. Table 48 describes the application of the guideline culpability factors.

Sanctions Imposed

More than 78 percent of defendants sentenced pursuant to the Chapter Eight guidelines received a sentence that included a criminal fine. The mean

fine imposed was \$242,892 (median=\$30,000).⁹⁸ The largest fines were imposed on defendants convicted of antitrust (mean=\$1,397,268; median=\$460,000). The one corporation sentenced for racketeering ordered to pay a fine was assessed \$2,266,711. Table 49 describes the fines imposed by primary offense category.

In addition to criminal fines, defendants sentenced pursuant to Chapter Eight also were ordered to pay restitution in 32.4 percent of the cases. The mean amount of restitution was \$232,988 (median=\$27,912). Fraud offenses made up the largest percent of cases with restitution imposed (54.3%).

Table 50 describes the amount of restitution assessed by primary offense category.

Other monetary penalties paid by defendants sentenced under Chapter Eight included: asset forfeiture (7.2%); disgorgement (4.8%); cost of prosecution (1.8%); and cost of supervision (1.8%).

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

- 63.1 percent were placed on probation;

⁹⁸ As measures of central tendency, the mean is more sensitive to extreme values than the median. The large difference between the mean fine amount and median fine amount indicates that there are a few cases with very high fine amounts.

- 13.5 percent were ordered to implement a

compliance program to prevent further violations of law;

- 6.3 percent were ordered to notify their victims of the conviction; and
- 2.7 percent were ordered either to dissolve or sell the organization.

Organizations Sentenced Under Pre-November 1991 Antitrust Guideline

Prior to November 1, 1991, the guidelines applied only to organizations convicted of antitrust violations (guideline 2R1.1 provided a fine range equal to 20 to 50 percent of the volume of commerce affected by the offense). During 1995, four organizational defendants were sentenced pursuant to the fine provisions of §2R1.1 (1987).

Organizational defendants sentenced under the pre-Chapter Eight antitrust fine provisions received sentences including a criminal fine, with a mean of \$229,375 (median=\$6,250). Table 51 describes the fines imposed by the volume of commerce attributable to the organizational defendant and indicates that, consistent with instructions in §2R1.1, imposed fines generally increased as the volume of commerce attributable to the defendant increased.

In addition to fines imposed, one organizational defendant sentenced pursuant to §2R1.1 received a sentence that included probation.

Sentencing Appeals

Introduction

Prior to 1987, trial judges exercised broad discretion in sentencing federal criminal defendants, and sentences imposed within the statutory limits could not be appealed except under extraordinary circumstances. Generally, a sentence was subject to review only for constitutional or statutory violations or under statutes that specifically authorized either

the defendant or the government to seek review.⁹⁹ However, with the passage of the Sentencing Reform Act,¹⁰⁰ Congress 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.¹⁰¹ The result of this statutory change, not surprisingly, has been a substantial increase in the number of federal criminal appeals.

Three years ago, the Commission implemented a data collection system to track appellate review of sentencing decisions. What follows is a summary of 1995 information from this growing database.

Appellate Data Collection

Pursuant to its general authority at 28 U.S.C. § 995(a)(8), the Commission requested from the Clerk of the Court in each court of appeals final opinions and orders, both published and unpublished, in all federal criminal appeals. The Commission also requested *habeas corpus* decisions (although technically civil matters) because such cases often involve sentencing issues. During 1995, the Commission supplemented these opinions and orders with cases available on computerized legal databases.

The appeals database is a collaborative effort of the Commission's legal, monitoring, and policy analysis staffs. The unique structure of the database requires

⁹⁹ See, for example, 18 U.S.C. § 3575, 3576 (1970) (repealed by the Sentencing Reform Act, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (1984), effective November 1, 1986).

¹⁰⁰ Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3586 (1985)).

¹⁰¹ 18 U.S.C. § 3742.

both monitoring information¹⁰² and legal analysis. The monitoring staff enters identifying information about each appealed case, including defendant name, appellate and district court docket numbers, date of opinion, and judges who decided the appeal. The legal staff then analyzes and enters information into the database, including: the sentencing issues before the appellate court, the party raising each issue, the court disposition of each sentencing issue, and the overall court disposition of the case. The policy analysis staff edits and analyzes the data and then prepares reports about trends in appellate review of guideline sentencing.

The system uses both the “group” and the “defendant” units of analysis. Each “group” comprises individual records representing all codefendants participating in a consolidated appeal. Each defendant's record comprises the sentencing-related issues corresponding to that particular defendant. These records, linked together by a unique Commission-assigned appeals identification number, constitute a single group. Structuring the database on two units of analysis provides the flexibility to assess the number and types of sentencing issues decided at the appellate level. At the same time, this method enables the Commission to track information by individual defendant consistent with the Commission's other data collection modules and with data from the Administrative Office of the U.S. Courts.

The appeals database attempts to match each defendant named in an appeal with information from the Commission monitoring database that tracks district court sentencing decisions. A positive match enables the Commission to continue tracking federal

criminal defendants beyond initial sentencing. The match rate of current appeals database defendants (those who (1) appealed cases involving sentencing issues only, or (2) appealed both sentencing and conviction issues) to monitoring data is 91.6 percent.¹⁰³ Because the database in part is defendant-based, the issues represented in each record correspond to the defendant who raised the issue on appeal or, in the case of a government cross appeal, to the defendant against whom the issue was raised. Each record includes the chapter and section number of the guideline appealed or, in the case of a general challenge, the type of constitutional or statutory issue involved as well as the circuit court disposition of each sentencing issue. After all the information on sentencing issues is entered into the database, the overall case disposition is entered, and the record is subject to quality control.

Summary of Information Received

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 appeals, including appeals of convictions. The following statistics in the text, tables, and figures are from the defendant-based files of the appeals database. Each defendant-based file will be referred to as a case. In 1995, the Commission received information on 6,863 appellate court cases.¹⁰⁴ The defendant was the appellant in 96.6 percent of the cases, with the United States as the appellant in 2.4 percent of the cases. The remaining cases (1.0 %) involved a cross appeal by one of the parties. Approximately 85 percent (n=

¹⁰² In general, the Commission's monitoring datafile contains information about the identity of each criminal defendant, the type of offense(s) committed, and the guideline sentence imposed. The appeals database incorporates monitoring information on statutes of conviction, the original sentence imposed, the sentencing district, and the name of the sentencing judge.

¹⁰³ The match rate reflects the number of defendants who appealed a sentencing issue for whom original sentencing information was submitted to the Commission.

¹⁰⁴ This figure represents the number of defendants who appealed along with those involved in government appeals.

5,846) of the cases were resolved in opinions as compared to 14.8 percent (n=1,017) that were resolved in orders. Sixty-three percent (n=4,329) of the opinions and orders were unpublished. Only 5.8 percent (n=398) of the cases involved appeals of district court *habeas corpus* decisions.

Using information from both the appeals database and the monitoring database in district court sentencing cases, the Commission is able to track defendants throughout the entire sentencing process. Tracking the 42,107 guidelines cases sentenced in 1993 showed that, by the end of 1995, 7.3 percent (n=3,085) of the cases had been “appealed”¹⁰⁵ on sentencing issues. Similar results were shown with regard to the 39,971 guidelines cases sentenced in 1994. By the end of 1995, appellate decisions on sentencing issues had occurred in 6.1 percent (n=2,443) of the cases. Therefore, looking solely at sentencing issues, more than 92 percent of the 83,078 guidelines cases sentenced in 1993 and 1994 had not been “appealed.”

Table 52 displays, by circuit and district, appeals cases received by the Commission. Of the cases appealed in 1995, 2,345 (35.2 %) were appeals of the conviction only compared to 2,600 (39.0 %) appeals of the sentence only. The remaining 1,714 (25.7%) appeals involved a combination of conviction and sentencing issues. Figure X illustrates the distribution of the types of appellate court cases and the overall case dispositions of sentencing cases for which complete information was available.

Table 53 shows the overall case disposition of sentencing cases by circuit and district. The total number of sentencing cases analyzed was 4,314.

¹⁰⁵ These figures are based on information in the Commission’s monitoring and appeals databases. The Commission’s databases do not include the filings in the appellate courts. Thus, the term “appealed” refers to the number of defendant-based cases in which appellate courts have issued an order or opinion on a sentencing-related issue. The appellate courts, in 1996, may issue additional orders and opinions on cases sentenced in 1993 and 1994.

Three circuits, the Ninth, Fourth, and Eleventh, accounted for almost half, 1,866 (43.3%), of these cases. The overall case disposition rate for 1995 sentencing cases was:

Affirmed	77.1 percent
Reversed	8.9 percent
Affirmed in part/ Reversed in part	9.9 percent
Dismissed	4.1 percent

The affirmance rate of sentencing cases increased 0.3 percent from 76.8 percent in fiscal year 1994. The number of dismissed sentencing cases also increased more than one percent. The Eighth Circuit had the highest rate of affirmed cases (90.4%); the Second Circuit had the lowest (55.9%). Of the 385 sentencing cases reversed, the appellate courts remanded 349 (90.6%) to the district courts for further action. The appellate courts remanded 397 sentencing cases (93.0%) that were affirmed in part and reversed in part. Thus, in 1995 the appellate courts remanded to the district court 17 percent (n=746) of the 4,314 sentencing cases.

Issues and Guidelines Appealed

The Commission collected 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. Tables 54 and 55 report the number of times issues pertaining to a particular guideline were the bases for appeal by the defendant or government. Issues involving the drug trafficking guideline, §2D1.1, were the basis for appeal by the defendant 964 times out of 4,327 cases. The guidelines that formed the bases for the greatest number of appeals by the defendant were

§2D1.1 (Drug Trafficking) (12.6%), §1B1.3 (Relevant Conduct) (6.6%), and §3E1.1 (Acceptance of Responsibility) (5.7%). For cases in which the government was the appellant, §5K2.0 (Departures) (26.3%), §2D1.1 (Drug Trafficking) (6.6%), and §2F1.1 (Fraud and Deceit) (4.8%) were the guidelines most frequently appealed.

Table 56 presents six of the most frequently appealed guidelines, each listing several component issues and their frequency along with the overall issue affirmance rates.¹⁰⁶ The table examines issues appealed under Relevant Conduct, Drug Trafficking, Role in the Offense, Acceptance of Responsibility, Departures, and Criminal History. For example, under Relevant Conduct, the most frequently appealed issues were the definition/scope of “otherwise accountable” or “reasonably foreseeable” (38.9%), the relevant conduct determination when the offense includes a conspiracy (33.9%), and the definition/scope of “common scheme or plan” or “same course of conduct” (7.6%). The overall affirmance rate for appeals of the relevant conduct guideline is 85.1 percent.

Under the drug trafficking guideline, the most frequently raised issues were challenges to the weight/amount of drugs involved in the offense (39.2%), constitutional challenges to the penalty for cocaine base (15.8%), and questions regarding possession of a dangerous weapon (14.6%). The overall affirmance rate for appeals of the drug trafficking guidelines is 91.5 percent. Under the role in the offense guidelines, the most frequently raised issues on appeal are the determination of whether the defendant was an organizer or leader (34.3%), whether the defendant was a minor participant in the offense (18.2%), and other questions concerning culpability (12.9%). The overall affirmance rate for appeals of the role in the offense guidelines is 92.6

percent.

In the acceptance of responsibility guideline, the three most litigated areas concern application and definition issues (42.8%), conduct necessary to receive the adjustment (36.9%), and timely notification of authorities of intention to plead guilty (9.7%). The overall affirmance rate for appeals of the acceptance of responsibility guideline is 93.7 percent. In appeals of the departure policy statements, the most frequently appealed issues were questions regarding the district court’s refusal to depart downward (17.6%), other mitigating circumstances for departure (7.6%), and defendant claims to entitlement to a substantial assistance departure (7.5%).¹⁰⁷ The overall affirmance rate for appeals of the departure policy statements is 87.2 percent. Only 12.8 percent (n=91) of the district court determinations on departure issues were reversed on appeal. Finally, Table 56 sets out the most frequently appealed issues under the criminal history guidelines. The most litigated issues involved the constitutionality of prior convictions (9.3%), the definition of related cases (7.1%), and the determination that prior offenses met the criterion for the armed career criminal enhancement (5.6%). The overall affirmance rate for appeals of the criminal history guidelines is 90.0 percent.

Offense and Offender Characteristics

Table 57 data reveal that 41.4 percent of defendants in appellate court cases were White, 38.7 percent Black, 16.9 percent Hispanic, and 3.0 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, 39.2% were White and 29.1% were Black). More than 83 percent of the defendants in appellate court cases were United States citizens, and

¹⁰⁶ The reported overall issue affirmance rate does not include determinations that the issue lacked merit, harmless error, or dismissals. Therefore, the reversal rate is not equal to the difference between 100 percent and the affirmance rate.

¹⁰⁷ This analysis includes issues involving all Chapter 5 departure policy statements, but does not include criminal history departures.

16.3 percent were non-citizens. In 33 percent of the appellate court cases, the defendants were sentenced under mandatory drug sentencing statutes, 7.0 percent were sentenced under mandatory gun sentencing statutes, and 6.6 percent under both drug and gun mandatory sentencing statutes. Table 57 also shows that mandatory minimums applied to 46.6 percent of the appellate court cases, as compared to 28.6 percent of the district court cases.¹⁰⁸

Table 58 compares, by primary offense category, average imprisonment length of defendants whose cases were appealed to imprisonment length of all defendants sentenced in district court in 1995. The mean sentence of appealed cases was 138.4 months (median=108.0 months) compared to 49.5 months (median=24 months) for all district court cases. More than 52 percent of the appellate court cases involved defendants whose primary offense of conviction was drug trafficking, which comprised 37.0 percent of all cases sentenced in the district court. The mean length of imprisonment for district court cases involving drug trafficking convictions was 85 months (median=60 months) compared to a mean of 181.8 months (median=151 months) for appellate court cases. The higher sentences for defendants in appellate court cases were likely the result of a greater incidence of mandatory minimum sentences, larger quantities of drugs, and the lack of substantial assistance departures in this population.¹⁰⁹

¹⁰⁸ Cases were excluded from analyses in each category when relevant information was not available.

¹⁰⁹ Five hundred fifteen cases were excluded from this analysis because there was: (1) no match rate to monitoring datafiles, and (2) missing sentence length information, or 3) missing offense type information.

B. RESEARCH STUDIES

Just Punishment Research Project

In 1995, consultants to the Commission completed their work on a study addressing one of the four statutory purposes of sentencing: just punishment. The three-phase project used a national survey to capture public opinion regarding just punishment for federal offenses. To identify both causes and influences on public perceptions of appropriate punishments, the project identified links between these perceptions and three components of the offense: the crime itself, the relevant characteristics of the defendant, and the consequences of the criminal act. While previous studies have examined public perceptions of crime seriousness, none have looked exclusively at federal offenses.

The design phase produced a set of crime “vignettes” based on a selected group of 96 federal offenses and 42 applicable characteristics. For example, one vignette might describe an unmarried male, currently unemployed and without previous criminal history, convicted of possessing a small amount of powder cocaine. A second vignette, addressing the same crime of cocaine possession, might describe a female defendant, married with two children, currently unemployed, and with two previous prison sentences. A computer program generated all possible vignettes resulting from combinations of the survey’s different offenses and characteristics. In total, more than 100,000 unique vignettes were produced.

The national survey phase of the study involved interviews with one member in each of more than 1,700 randomly selected U.S. households. Each survey respondent was presented with a unique computer-generated booklet containing a set of 40 different vignettes randomly drawn from the overall set of 100,000. Respondents recorded their opinions of the most appropriate punishment (*i.e.*, probation, prison term, or the death penalty) for the defendant in each vignette. Finally, respondents answered questions about their personal demographic

characteristics and experiences with the criminal justice system.

The analytic phase examined the survey data from approximately 68,000 vignettes. Specific attention focused on assessing how variations in the vignette factors (the crime, the defendant, and the offense consequences) affected perceptions of suitable sentence type and length. The study, containing both descriptive and multivariate analyses, is under review by the Commission.

Selective Incapacitation Project

The Commission is addressing a second statutory purpose of sentencing with a study of selective incapacitation in the federal system. Judges (and the sentencing guidelines) base decisions about imprisonment on some prediction of an offender’s future dangerousness. Selective incapacitation identifies for incarceration the segment of offenders predicted to commit more and/or more serious crime.

The first phase of the project involved a comprehensive literature survey of definitions, theories, ethical considerations, and research findings involving selective incapacitation. A number of important questions emerged from the literature review, which was submitted to the Commission in 1995 for review:

- What is the prevalence of high-frequency, chronic offenders within the federal criminal justice system? What is the rate at which these high-frequency offenders commit crime?
- How well does the guidelines’ criminal history score predict future crime? Can other factors that improve its predictive ability be identified?
- How much crime is prevented under current federal sentencing practices?
- What would be the effect on crime rates and prison resources if high-risk offenders are selectively incapacitated?

- How should low-risk offenders be punished? What are the appropriate sentencing options for low-risk offenders?
- What are the costs and consequences of using these approaches to sentencing?

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 1995, the Commission assessed the potential prison impact of 27 proposed guideline amendments sent to Congress. Of these, five would affect sentences and involve a sufficient number of cases to use the Commission's computerized prison impact model.¹¹⁰

The Commission's prison impact model builds a reasonable assessment of the impact of an amendment to the guidelines using estimated changes in a hypothetical "steady-state" prison system.¹¹¹ In 1994, the Commission calculated that 39,225 defendants sentenced in the federal courts would serve a total of 144,479 person-years of imprisonment. Under the prison impact model,

therefore, the estimate of the hypothetical "steady-state" prison population is 144,479 inmates (approximately 46,000 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 1995 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.¹¹²

¹¹⁰ Of the 22 amendments not evaluated through the prison impact model, nine involved a minimal number of cases and were determined to have a negligible prison impact; five involved new departure language for which no basis for estimating impact existed; five were clarifying, added new commentary, or did not affect sentences; one was resentenced manually in a case-coding project; one involved supervised release; and one involved a new offense.

¹¹¹ A long term, "steady-state" population envisions a hypothetical prison system in balance. That is, the number of offenders admitted into the system each year is equal to the number of inmates discharged from the system during that year. By focusing on the "steady-state" prison 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.

¹¹² 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 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 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 earned pursuant to

The prison impact of the following guideline amendments was evaluated using the Commission's computerized modeling technique:

Amendment 5 (Drug Trafficking) – This amendment included several changes to §2D1.1, including: equalizing the quantity ratio of crack cocaine to powder cocaine; expanding the current specific offense characteristic for a dangerous weapon; and adding a new enhancement for possession of specific types of weapons. The amendment also eliminated the cross-reference to §2D1.1 in the case of simple possession of crack cocaine, establishing under §2D2.1 a base offense level of eight for these cases.

This amendment would potentially affect 4,740 defendants, currently serving an average of 104.9 months of imprisonment. To assess the impact of all elements of the amendment, two estimates were developed. One estimate presumed a five-percent rate of application of the special firearm enhancement; the alternative presumed a 25-percent rate. It was estimated that, with the proposed amendment in effect, these defendants would serve an average of 65.9 (based on the 5% rate) to 68.6 (based on the 25% rate) months imprisonment. As a result, the amendment was expected to decrease the federal prison population by 10.2 to 11 percent, or by 14,339 to 15,405 inmates.

Amendment 7 (Safety Valve) – Promulgated in response to section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, the “safety valve” provides an exception to otherwise applicable mandatory minimum sentences for certain defendants convicted of specific drug offenses. This amendment provided a new two-level decrease in offense level for cases meeting the criteria set forth in the Commission's safety valve guideline. To estimate its potential impact, the Commission

18 U.S.C. § 3624 and (2) for the defendant's estimated remaining life expectancy. The new estimates of the size of the prison population are achieved by totaling all the estimated prison terms.

analyzed 1994 cases using variables, available in the monitoring database, which approximate the criteria referenced in guideline 5C1.2.¹¹³

The selection procedure identified 4,257 cases (27.1% of the 1994 drug trafficking cases) as potential recipients of this sentence reduction. The prison impact assessment required the recomputation of adjusted offense levels for these cases. These 4,257 defendants currently serve an average of 49.0 months of imprisonment. The Commission's prison impact model estimated that with this amendment in effect, these defendants could expect to serve an average of 40.2 months of imprisonment, a decrease in the “steady state” federal prison population of 2.2 percent or 3,122 inmates.

Amendment 8 (Marijuana Plants) – This amendment established a uniform 100-grams-per-plant equivalency for marijuana plants, regardless of the number of plants.

The amendment was potentially applicable to all cases sentenced pursuant to §2D1.1 in which one of the drugs involved was marijuana (n=5,514). A random sample of 260 (4.7%) marijuana cases was selected in order to estimate the frequency of marijuana plant cases. Of the 260 cases reviewed, approximately seven percent (n=18) were identified as involving marijuana plants. Based upon the sample estimate of seven percent, approximately 381 cases would be affected by this amendment.

These 381 defendants currently serve an average of 60.8 months imprisonment. Under the proposed amendment, these defendants would be expected to serve an average of 44.0 months imprisonment. This

¹¹³ The case criteria, as specified in §5C1.2(1)-(5), were: (1) was convicted under 21 U.S.C. §§ 841, 844, 846, 960 or 963; (2) had a Criminal History Category I; (3) had no current conviction for a weapons offense; (4) had no sentence enhancement for a dangerous weapon under §2D1.1; (5) did not receive an adjustment for an aggravating role in the current offense; and (6) received credit for acceptance of responsibility at sentencing.

amendment was expected to decrease the prison population by approximately 0.4 percent, or 535 inmates.

Amendment 14 (Semiautomatic Assault Weapons) – This amendment provided offense levels for possession of semiautomatic assault weapons corresponding to those currently provided for possession of machine guns and other weapons described in 26 U.S.C. § 5845(a).

The semiautomatic assault weapon provision of this amendment was potentially applicable to all §2K2.1 cases (n=1,202) in which a special weapon enhancement had not been made. A random sample of 100 cases (8.3%) was selected to estimate the frequency with which defendants possessed semiautomatic assault weapons. Of the 100 cases reviewed, 17.0 percent (n=17) involved weapons labeled as semiautomatic assault weapons. Therefore, based upon the sample estimate, approximately 204 cases could be impacted by this amendment. These 204 defendants currently serve an average of 52.6 months imprisonment. If the proposed amendment were to take effect, it is estimated that these defendants would serve an average of 57.5 months imprisonment. This amendment was expected to increase the federal prison population by less than 0.1 percent or 82 inmates.

Amendment 18 (Money Laundering) – This amendment revised and consolidated §§2S1.1 and 2S1.2 and tied the offense level more closely to the underlying conduct.

The prison impact assessment of the amendment required the recomputation of adjusted offense levels for the 747 cases sentenced pursuant to §2S1.1 and the 114 cases sentenced pursuant to §2S1.2. A random sample of 130 cases (15.0%) sentenced during fiscal year 1994 pursuant to §§2S1.1 and 2S1.2 was selected to estimate the prevalence of the amendment's new offense characteristics.

Ninety-six percent of the cases in the sample had final offense levels that would be affected by this

amendment. Given the original 861 cases, this percentage translates to 825 defendants, currently serving an average of 36.9 months imprisonment. It is estimated that these defendants would serve an average of 39.4 months imprisonment if the amendment were to go into effect. This amendment was expected to increase the federal prison population by approximately 0.1 percent or 172 inmates.

Retroactivity – The Commission's prison impact model is also used to estimate the impact of potential retroactive application of a Commission amendment. In 1995, estimates were developed for six amendments considered for retroactivity. For these analyses, the prison impact model is applied to earlier Commission datasets. If these datasets do not contain the information necessary for the model's calculations, estimates for those years are derived from data from the year closest to the one containing the required information.

The Commission's prison impact model is analyzed and revised on an ongoing basis. Current efforts focus on: standardizing procedures and creating a detailed manual for its use; modifying the model to assure its compatibility with recent changes to the Commission's datasets; developing methods to evaluate the accuracy of the model's predictions; and evaluating the impact of various decisions (*e.g.*, the method of resentencing cases with upward or downward departures) within the model.

Symposium on Corporate Crime

The Sentencing Commission sponsored a second Symposium on Crime and Punishment in September, focusing this year on "Corporate Crime in America: Strengthening the 'Good Citizen' Corporation." The symposium looked at the ways in which companies, industries, and enforcement officials have responded to the organizational sentencing guidelines' "carrot and stick" incentives by developing effective compliance programs and adopting other crime-controlling measures. More than 450 attendees heard presentations and panel discussions about a variety of changes in corporate culture and governmental

practice that have occurred since sentencing guidelines for organizational offenders became effective in 1991. The participants included a wide range of federal enforcement officials, representatives of Fortune 500 as well as smaller corporations, private attorneys and other consultants who advise organizations, and academics who focus on business ethics and crime. Sentencing Commissioners Wayne A. Budd and Michael Goldsmith co-chaired the event.

The Commission's inaugural Crime and Punishment Symposium, held in 1993, focused on drugs and violence in America. With an attendance of more than 350, this symposium studied drug abuse and violence from three perspectives: causation, prevention, and treatment and policy options.

With a general focus on the organizational guidelines' policy of tying potential penalties for criminal offenses to the quality of corporate self-policing efforts, the second symposium addressed the following specific issues:

- corporate experiences in developing "effective" compliance programs;
- whether government can (or should) do more to foster "good corporate citizenship";
- whether and when compliance practices should be protected from disclosure;
- new models and proposals for evolving compliance standards;
- the role of ethics, incentives, and private inspectors general in achieving compliance;
- whether and how overlapping enforcement schemes might be coordinated more effectively; and
- the views and experiences of the enforcement community on compliance and related "good corporate citizenship" issues.

The symposium began with a welcoming address from Judge Richard P. Conaboy, Chairman of the

Sentencing Commission, who stated that he hoped the symposium would "provide a window" on the way in which corporations, industry groups, and government enforcement personnel are responding to the organizational sentencing guidelines' emphasis on compliance programs and other crime-detering measures.

Two presentations followed that provided participants an overview of the organizational guidelines' operation and goals, discussing: (1) the operation of the organizational guidelines' culpability score and other guideline features providing structured sentencing for organizations; and (2) the "carrot and stick" philosophy that underlies the organizational guidelines. This philosophy strongly encourages the establishment and maintenance of effective compliance plans to prevent and detect wrongdoing by providing for substantially reduced penalties for companies that have undertaken these actions but have nevertheless sustained a criminal conviction.

The program next turned to the first of 11 topical panels. The first panel discussed experiences with compliance programs in the defense and general manufacturing, financial services, and health care industries, respectively. The following panel, consisting of representatives from four associations, discussed the sharing of "best practices" information.

The first day's luncheon keynote address was given by Senator Edward M. Kennedy (D-Mass.), one of the principal architects of the Sentencing Reform Act that created the Sentencing Commission. Senator Kennedy discussed how the organizational guidelines brought greater rationality to federal enforcement of corporate crime. This system, he said, had been characterized by "law without order," with penalties largely dependent on the views of individual judges. He emphasized that corporate crime is not "an overblown, anti-business invention of career-hungry prosecutors, regulators, and politicians," but is "both serious and distressingly common." In this regard, he praised the "serious commitment to compliance" that some companies are making.

The first afternoon panel presented the results of empirical research on compliance practices – cataloging what compliance practices companies are undertaking and shedding light on the differences between what companies believe they are doing and what employees actually perceive. The first three panelists presented results from Commission-sponsored studies: one panelist presented preliminary results from a national study of compliance practices; a second presented the preliminary results of a study of small business compliance practices; and a third presented preliminary results from a study of compliance practices in “compliance aware” companies. Two additional panelists described, respectively, the Ethics Resource Center’s survey of ethics practices and employee perceptions, and the Council of Ethical Organizations’s study of organizational factors and their effect on compliance.

Two breakout sessions followed. One session was devoted to new models and proposals for compliance standards. The second began with a presentation on the flexibility of the guidelines’ approach to defining “effective” compliance strategies. This was followed by discussions of the value of using an “Independent Private Sector Inspector General” in fostering effective, credible compliance programs within organizations, and the principal causes of serious misconduct in organizations.

The second day of the symposium began with a panel presenting empirical data on organizational cases. Panelists discussed cases sentenced to date under the guidelines and criteria for consent decrees.

The next two panels examined the interaction between the enforcement community and those subject to enforcement. In the first, panelists discussed: (1) the successes of the Defense Department’s Voluntary Disclosure Program; (2) the seeming lack of coordination in federal enforcement; and (3) the ways in which inconsistent policies can undercut strong compliance and suggested possible reforms. The next panel was comprised of senior Justice Department officials who detailed their approaches to enforcement, especially with respect to

compliance programs.

The luncheon keynote address on the second day was given by Stephen L. Hammerman, Vice Chairman of the Board of Merrill Lynch & Company, Inc. Mr. Hammerman said that the securities industry generally believes that good compliance is “good business,” noting that an attack on a corporation’s reputation in the securities industry will cause an important lack of confidence both in the company and the capital markets.

The first afternoon panel updated the status of legal privileges and their relationship to compliance practices. Commissioner Michael Goldsmith of the Sentencing Commission discussed the relationship of privilege to the organizational guidelines’ carrot and stick features. After canvassing current law, Commissioner Goldsmith observed that the compliance practices contemplated by the guidelines do pose some disclosure and liability risks. He discussed the possible implications of these risks and ways practitioners may respond to them. Another panelist discussed recently enacted legislation in Colorado designed to respond to these risks – at least in the environmental area – by (1) giving privileged status to self-evaluative audits that companies perform voluntarily in administrative, civil, and criminal contexts; and (2) giving immunity to a company that performs a voluntary audit, discloses to authorities any violations found by that audit, and corrects the violations.

The ideal role of government in fostering “good corporate citizenship” was the subject of the next panel, featuring two perspectives on enforcement and compliance assurance. The final panel was comprised of four experts of diverse backgrounds who described what they found to be the most important themes and issues – for both the business community and government – raised during the course of the conference.

The Commission will continue to monitor sentencing practices for organizational defendants, amend the guidelines as experience warrants, and encourage organizational guideline training. In addition, the

Commission will communicate with the private sector, business and law schools, and other interested parties to promote a more ethical, law-abiding corporate culture, and will work with law enforcement on issues concerning consistent, effective enforcement policies.

The Commission subsequently published a symposium proceedings book, which is available from the Commission's Office of Communications.