

Report to the Congress:

MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM



UNITED STATES SENTENCING COMMISSION
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MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM



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Executive Summary

A. OVERVIEW AND RECOMMENDATIONS

1. Introduction

This report assesses the impact of mandatory minimum penalties on federal sentencing, particularly in light of the Supreme Court’s decision in *Booker v. United States*, which rendered the federal sentencing guidelines advisory. The United States Sentencing Commission [hereinafter the Commission] prepared this report pursuant to a congressional directive contained in section 4713 of the Matthew Shepherd and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub L. No. 111–84, and the Commission’s general authority under 28 U.S.C. §§ 994–995, as well as its specific authority under 28 U.S.C. § 995(a)(20) to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.”

Chapter 1 explains the methodology and definitions used by the Commission to prepare this report. For purposes of this report, the Commission considered an offender to have been “convicted of” an offense carrying a mandatory minimum penalty if the court so indicated on a statement of reasons form or other sentencing documentation received by the Commission. This report refers to an offender convicted of an offense carrying a mandatory minimum penalty who received a lower sentence due to operation of one of two relief mechanisms (commonly known as “substantial assistance” and the “safety valve”) as having been “relieved from application of” a mandatory minimum penalty. If neither of these two mechanisms apply to an offender convicted of an offense carrying a mandatory minimum penalty, this report refers to that offender as having been “subject to” a mandatory minimum penalty at the time of sentencing.

The Commission reviewed legislation, analyzed sentencing data, and studied scholarly literature to prepare this report. The Commission sought the views of stakeholders in the criminal justice system in a variety of ways. The Commission consulted with its advisory groups and representatives from all three branches of the federal government, and heard from social scientists, scholars, and others who apply or study mandatory minimum sentencing provisions.

2. History of Mandatory Minimum Penalties and Statutory Relief Mechanisms

As detailed in Chapter 2 of this report, mandatory minimum penalties have historically been prescribed for a core set of serious offenses, such as murder and treason, and also have been enacted to address immediate problems and exigencies. Beginning in the mid-twentieth century, however, Congress changed how it used mandatory minimum penalties in three significant ways. First, Congress enacted more mandatory minimum penalties. Second, Congress expanded its use of mandatory minimum penalties to offenses not traditionally covered by such penalties. Today, the majority of convictions under statutes carrying mandatory minimum penalties relate to controlled substances, firearms, identity theft, and child sex offenses. Third, Congress enacted mandatory minimum penalties that are generally lengthier than mandatory minimum penalties in earlier eras.

Congress has provided mechanisms by which a district court may impose a term of imprisonment lower than an otherwise applicable mandatory minimum penalty prescribed by statute in certain cases. Chapter 2 discusses two related provisions that allow a district court to impose a term of imprisonment lower than a mandatory minimum penalty in cases where a defendant provides substantial assistance in the investigation or prosecution of another person. The chapter also discusses the historical development of the safety valve provision, which provides relief from the applicable mandatory minimum penalty for certain low-level drug offenders.

3. *The Interaction Between Mandatory Minimum Penalties and the Sentencing guidelines*

The statutory directive requires the Commission to assess the compatibility of mandatory minimum penalties with the federal guideline system established under the Sentencing Reform Act and as modified by *Booker*. As part of that assessment, Chapter 3 presents an overview of the interaction between mandatory minimum penalties and the sentencing guidelines. First, the chapter provides a history of the Sentencing Reform Act, its directives to the Commission, the operation of the guidelines, and an overview of how the Commission promulgates amendments to the guidelines. Next, the chapter describes how the guidelines incorporate mandatory minimum penalties in formulating sentencing ranges for various offenses. Finally, the chapter discusses the significant structural differences in how the guidelines and mandatory minimum penalties determine sentences. In sum, the chapter concludes that the guidelines' flexibility increases the likelihood that offenders with similar criminal histories convicted of similar offenses will receive similar sentences and that dissimilar offenders will receive different sentences. The guidelines measure offense severity using a variety of facts and, as a result, draw more precise distinctions among offenders.

4. *Changes in the Federal Criminal Justice System, Mandatory Minimum Penalties, and the Federal Prison Population*

Chapter 4 addresses the requirement in the statutory directive to assess the impact of mandatory minimum penalties on the federal prison population. The chapter describes how statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. The chapter also discusses other systemic changes to the federal criminal justice system, including expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. The changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.

5. *Policy Views About Mandatory Minimum Penalties*

Chapter 5 presents the range of policy positions supporting and opposing mandatory minimum sentencing provisions expressed by stakeholders in the federal criminal justice system. In particular, disagreements concerning mandatory minimum penalties center on whether such

penalties establish appropriate sentences, reduce unwarranted sentencing disparities, and serve as effective as investigative and resource-preserving tools.

6. *The Use of Mandatory Minimum Penalties in Selected Districts*

Chapter 6 summarizes the results of the Commission staff interviews of prosecutors and defense attorneys in 13 selected districts. The Commission conducted the interviews to aid the Commission in responding to those provisions of the statutory directive requiring “an assessment of the effect of mandatory minimum sentencing provisions under Federal law on the goal of eliminating unwarranted sentencing disparity and other goals of sentencing,” and “a description of the interaction between mandatory minimum sentencing provisions under Federal law and plea agreements.” During these interviews, the Commission learned that inconsistencies in application of mandatory minimum penalties exist between districts, and often within districts, where individual prosecutors exercise their discretion differently. In part, these differences may have developed to avoid the overly severe consequences that result from certain mandatory minimum penalties applying in individual cases.

7. *Overview of Data Analyses*

The statutory directive requires the Commission to provide a detailed empirical research study of the effect of mandatory minimum penalties under federal law. Chapter 7 details the results of the Commission’s data analyses of the application of mandatory minimum penalties for all offenses. The statutory directive also directs the Commission to provide an assessment of the impact of mandatory minimum sentencing provisions on the federal prison population. Chapter 7 provides an overall assessment of the prison impact of statutes carrying mandatory minimum penalties.

Chapter 7 describes the dataset used for the analyses in this report. In fiscal year 2010, the Commission received sentencing information on 83,946 individual offenders. The Commission excluded 11,068 cases because those cases lacked the complete documentation needed for all the analyses performed in this report. Accordingly, the total number of cases used in the analyses in this report was 73,239 (87.2% of all cases reported to the Commission in fiscal year 2010). Because the analyses for this report were limited to these cases, the numbers reported in this report differ from those reported in the Commission’s *2010 Sourcebook of Federal Sentencing Statistics*, which uses a larger dataset.

The analyses presented in Chapter 7 demonstrate the following:

- More than one-quarter of the 73,239 offenders sentenced in the federal courts in fiscal year 2010 (27.2%, n=19,896) included in this analysis were convicted of an offense carrying a mandatory minimum penalty.
- Over three-quarters (77.4%) of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses.

- Hispanic offenders accounted for the largest group (38.3%) of offenders convicted of an offense carrying a mandatory minimum penalty, followed by Black offenders at 31.5 percent, White offenders at 27.4 percent and Other Race offenders at 2.7 percent.
- More than 90 percent (90.3%) of the offenders convicted of an offense carrying a mandatory minimum penalty were men.
- United States citizens accounted for 73.6 percent of all offenders convicted of an offense carrying a mandatory minimum penalty.
- Seven out of 94 districts accounted for 27.0 percent (n=5,367) of the 19,896 cases involving a conviction of an offense carrying a mandatory minimum penalty in fiscal year 2010.
- Offenders convicted of an offense carrying a mandatory minimum penalty pled guilty at a slightly lower rate (94.1%) than offenders who were not convicted of an offense carrying a mandatory minimum penalty (97.5%). Furthermore, offenders facing longer mandatory minimum penalties were less likely to plead guilty.
- Offenders convicted of an offense carrying a mandatory minimum penalty but who were eligible for the statutory safety valve relief pled guilty at a rate (99.4%) higher than for both offenders convicted of an offense not carrying a mandatory minimum penalty (97.5%) and offenders who were not eligible for safety valve relief (94.6%).
- Almost half (46.7%) of offenders convicted of an offense carrying a mandatory minimum penalty were relieved from the application of such a penalty at sentencing because they provided substantial assistance to the government or qualified for the safety valve provision, or both.
 - Black offenders received relief from a mandatory minimum penalty least often (in 34.9% of their cases), compared to White (46.5%), Hispanic (55.7%) and Other Race (58.9%) offenders. Black offenders qualified for relief under the safety valve at the lowest rate of any other racial group (11.1%), compared to White (26.7%), Hispanic (42.8%) and Other Race (36.6%), either because of their criminal history or the involvement of a dangerous weapon in connection with the offense.
 - Prior to the enactment of the safety valve (in fiscal year 1994), Black and Hispanic offenders received relief from the mandatory minimum penalty at comparable rates (34.3% and 34.2%, respectively), although lower than Other Race (46.4%) and White (44.2%) offenders. After enactment of the safety valve provision, the rate at which Hispanic, White, and Other Race offenders obtained relief from a mandatory minimum penalty increased appreciably, while the rate for Black offenders did not.

- o Female offenders obtained relief from a mandatory minimum penalty at sentencing more often than male offenders (65.5% compared to 44.7%). Not only did female offenders qualify for the safety valve at a higher rate than male offenders (46.4% compared to 26.3%), but female offenders also received relief by providing substantial assistance to the government at a higher rate (36.0%) than male offenders (24.7%).
 - o Non-citizens received relief from mandatory minimum penalties at sentencing more often than United States citizens (64.6% compared to 40.3%). Although United States citizen offenders provided substantial assistance to the government at a higher rate (28.0%) than non-citizen offenders (19.8%), the majority of non-citizen offenders (54.4%) qualified for relief from the mandatory minimum penalty under the safety valve, compared to United States citizens at 18.9 percent.
- Only 14.5 percent of all federal offenders were subject to a mandatory minimum penalty at sentencing.
 - o Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to a mandatory minimum penalty at sentencing at the highest rate of any racial group, in 65.1 percent of their cases, followed by White (53.5%), Hispanic (44.3%), and Other Race (41.1%).
 - o Male offenders convicted of an offense carrying a mandatory minimum penalty remained subject to the mandatory minimum penalty at sentencing more often than female offenders (55.3% compared to 34.5%).
 - o United States citizens convicted of an offense carrying a mandatory minimum penalty remained subject to the mandatory minimum penalty at sentencing more often than non-citizens (59.7% compared to 35.4%).
- Receiving relief from an applicable mandatory minimum sentence made a significant difference in the sentence ultimately imposed. Offenders who were convicted of an offense carrying a mandatory minimum penalty and remained subject to that penalty at sentencing received an average sentence of 139 months, compared to 63 months for those offenders who received relief from a mandatory penalty.
 - o Offenders who received relief from a mandatory minimum penalty by providing substantial assistance to the government received longer average sentences than offenders who received relief under the safety valve provision.
- 75,579 (39.4%) of the 191,757 offenders in BOP custody as of September 30, 2010, were subject to a mandatory minimum penalty at sentencing.
- Although the number of offenders in BOP custody who were subject to a mandatory minimum penalty at sentencing has grown steadily over the past 20 years, the proportion of such offenders in BOP custody has remained relatively stable.

Chapters 8 through 11 of this report present the results of the data analyses performed for specified offenses types. The results of the analyses in those chapters are set forth in Part B, *infra*.

8. *General Conclusions and Recommendations*

The statutory directive requires the Commission to assess the compatibility of mandatory minimum penalties with the federal guideline system established under the Sentencing Reform Act and as modified by the Supreme Court’s decision in *Booker v. United States* and to discuss mechanisms other than mandatory minimum sentencing laws by which Congress may take action with respect to sentencing policy. To fulfill this part of the statutory directive, Chapter 12 first provides general findings and conclusions regarding mandatory minimum penalties and the federal sentencing guidelines and then provides specific recommendations regarding the four major offense types studied in this report.

a. Recommendations

The Commission makes the following specific recommendations for congressional consideration:

- A strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act. Although the continued importance and influence of the guidelines on sentencing decisions is evident from both Supreme Court decisions and sentencing data, the Commission has observed increasing inconsistencies in sentencing practices since *Booker*. The Commission is concerned about these developments and stands ready to work with Congress on possible legislative reforms to strengthen and improve the sentencing guidelines system.
- If Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties, the Commission believes that such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently. Sentencing data and interviews with prosecutors and defense attorneys indicate that mandatory minimum penalties that are considered excessively severe tend to be applied inconsistently.
- Congress should consider whether a statutory “safety valve” mechanism similar to the one available for certain drug trafficking offenders at 18 U.S.C. § 3553(f) may be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.
- Congress should request prison impact analyses from the Commission as early as possible in its legislative process whenever it considers enacting or amending mandatory minimum penalties. The Commission believes that early analyses of prison impact may assist Congress in focusing increasingly strained federal prison resources on offenders who commit the most serious offenses.

- Congress should consider marginally expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines.
- Congress should reassess both the severity and scope of the recidivist provisions at 21 U.S.C. §§ 841 and 960.
- Congress should consider amending 18 U.S.C. § 924(c) so that the enhanced mandatory minimum penalties for a “second or subsequent” offense apply only to prior convictions, and should consider amending the penalties for such offenses to lesser terms.
- Congress should eliminate the “stacking” requirement and amend 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other.
- Congress should consider clarifying the statutory definitions of the underlying and predicate offenses that trigger mandatory penalties under 18 U.S.C § 924(c) and the Armed Career Criminal Act to reduce the risk of inconsistent application and litigation that those definitions have fostered. To further reduce the risk of inconsistent application, Congress should also consider more finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.
- The Commission’s preliminary review of the available sentencing data suggests that the mandatory minimum penalties for certain non-contact child pornography offenses may be excessively severe and as a result are being applied inconsistently. The Commission is undertaking a more comprehensive study of child pornography offenses and expects to issue a report in the near future.
- The problems associated with certain mandatory minimum penalties are not observed, or are not as pronounced, in identity theft offenses. The Commission believes this is due, in part, to 18 U.S.C. § 1028A requiring a relatively short mandatory penalty and not requiring stacking of penalties for multiple counts. The statute is relatively new and is used in only a handful of districts, however, so specific findings are difficult to make at this time.

b. Conclusion

The Commission intends for the information contained in this report to contribute to the ongoing assessment of mandatory minimum penalties by Congress and others in the federal criminal justice system. While there is a spectrum of views among members of the Commission regarding mandatory minimum penalties, the Commission continues to believe that a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act. The Commission stands ready to work with Congress on measures that can be taken to enhance the strength and effectiveness of the current guidelines system and address the problems with

certain mandatory minimum penalties identified in this report. To that end, as required by the Sentencing Reform Act, the Commission will continue providing timely and objective sentencing data, information, and analysis to assist the efficient and effective exercise of congressional power to direct sentencing policy.

B. SUMMARY OF DATA ANALYSES BY OFFENSE TYPE

Chapters 8 through 11 of this report present the results of the data analyses by specified offense types carrying mandatory minimum penalties. These chapters also discuss the prison impact of those offenses.

1. Drug Offenses

Chapter 8 details the results of the Commission's data analyses of the application of mandatory minimum penalties for drug offenses in fiscal year 2010. Some degree of caution should be exercised in drawing conclusions from the crack cocaine data analyzed in this report because the majority of the crack cocaine offenders sentenced in fiscal year 2010 were sentenced before August 3, 2010, the date of enactment of the Fair Sentencing Act.

In sum, these analyses demonstrate the following:

- In fiscal year 2010, two of every three offenders convicted of an offense carrying a mandatory minimum penalty were drug offenders. Almost half of all drug offenders (48.7%) who were convicted of an offense carrying a mandatory minimum penalty were convicted of an offense carrying a 10-year penalty.
- The type of drug involved in drug cases significantly impacts the application of mandatory minimum penalties. In fiscal year 2010, the highest rate of conviction of such penalties was in methamphetamine cases (83.2%) while the lowest rate for the major drug types was in marijuana cases (44.3%).
- The demographic and offense characteristics of drug offenders vary widely by the type of drug involved in the offense.
- In fiscal year 2010, five of the 94 judicial districts reported more than 500 drug cases involving a mandatory minimum penalty.
- The Commission's analysis of a 15-percent sample of fiscal year 2009 cases indicates that the mandatory minimum penalties for drug offenses sweep more broadly than Congress may have intended.
 - Among all drug cases, Courier was the most common function, representing 23.0 percent of all offenders, followed by Wholesaler (21.2%), Street-Level Dealer (17.2%), and High-Level Supplier/Importer (10.9%).

- o The majority of offenders in nearly every function, including low-level Secondary and Miscellaneous functions, were convicted of an offense carrying a mandatory minimum penalty, although higher level functions tended to be convicted of such statutes at higher rates.
- o The Commission's analysis found that, for every function, the quantity of drugs involved in the offense resulted in a base offense level that included or exceeded the five-year mandatory minimum penalty.
- o Furthermore, the Commission's analysis revealed that the quantity of drugs involved in an offense was not closely related to the offender's function in the offense.
- o As a result of the combined effect of the safety valve and applicable guideline adjustments, offenders performing lower-level functions received significantly shorter sentences overall than offenders performing higher-level functions. For example, Mules (29 months) and Couriers (39 months) received significantly shorter average sentences than High Level Suppliers/Importers (101 months), Organizer/Leaders (154 months), Wholesalers (103 months), and Managers (147 months).
- In fiscal year 2010, drug offenders convicted of a statute carrying a mandatory minimum penalty went to trial more than twice (4.5%) as often as drug offenders who were not convicted of an offense carrying a mandatory minimum penalty (1.6%). Furthermore, on average, the longer the mandatory minimum penalty an offender was facing, the less likely the offender was to plead guilty.
- In fiscal year 2010, more than half (54.4%) of drug offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory minimum penalty. One-quarter (26.1%) of these offenders received relief through operation of the safety valve alone; 19.3 percent by providing substantial assistance to the government; and 9.0 percent through both the safety valve and substantial assistance provisions.
- The analysis of the 15-percent sample of fiscal year 2009 cases revealed that the rate at which offenders received relief from a mandatory minimum penalty varied by function, but did so differently depending on the type of relief. Offenders who performed high-level functions generally obtained relief for substantial assistance at higher rates than offenders who performed low-level functions. Offenders who performed low-level functions were more likely to obtain relief through the safety valve provision than were offenders who performed high-level functions.
- In fiscal year 2010, the rate at which offenders received relief from the mandatory minimum penalty through these provisions varied by race, gender, and citizenship.
 - o Other Race offenders qualified for some form of relief from a mandatory minimum penalty most often, in 72.3 percent of the cases in which they were

convicted of an offense carrying such a penalty, followed by White (63.7%) and Hispanic (59.0%) offenders. Black offenders qualified for relief from mandatory minimum penalties least often, in 39.4 percent of the cases in which they were convicted of an offense carrying such a penalty.

- Black offenders received substantial assistance relief alone from a mandatory minimum penalty most often, in 25.0 percent of their offenses carrying such a penalty, followed by White (24.2%) and Other Race (23.9%) offenders. Hispanic offenders received relief from mandatory minimum penalties through substantial assistance the least often, in 12.6 percent of their cases.
- Hispanic offenders received safety valve relief alone most often, in 36.8 percent of their cases, followed by Other Race (29.5%) and White (26.9%) and offenders. Black offenders received relief from mandatory minimum penalties through the safety valve the least often, in 9.8 percent of their cases.
- Other Race offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief most often, in 18.9 percent of their cases, followed by White (12.6%), Hispanic (9.5%) and Black (4.6%) offenders
- Female offenders qualified for some form of relief from a mandatory minimum penalty in 73.0 percent of the cases in which they were convicted of an offense carrying such a penalty.
 - Male offenders received substantial assistance relief alone from a mandatory minimum penalty more often, in 19.5 percent of their cases, compared to female offenders (18.2%).
 - Female offenders received safety valve relief alone more often, in 35.0 percent of their cases, compared to male offenders (25.1%).
 - Female offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often in 19.7 percent of their cases, compared to 7.8 percent of cases involving male offenders.
- Non-citizen drug offenders received relief from the mandatory minimum penalty at a higher rate (69.5%) than United States citizen drug offenders (48.0%).
 - United States citizen drug offenders received substantial assistance relief alone from a mandatory minimum penalty more often, in 23.4 percent of their cases, compared to non-citizen offenders (9.8%).

- Non-citizen offenders received safety valve relief alone more often, in 49.3 percent of their cases, compared to United States citizens (16.2%).
 - Non-citizen offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often, in 10.4 percent of their cases, compared to 8.4 percent of cases involving United States citizens.
- In fiscal year 2010, courts imposed a sentence within the applicable guideline range in fewer than half (43.7%) of all cases involving an offense carrying a mandatory minimum penalty. In 28.3 percent of such cases, the sentence was below the applicable guidelines range at the request of the government because the offender had provided substantial assistance to the government in the investigation of another offense.
- In fiscal year 2010, the average extent of substantial assistance departures in drug offenses was 48.8 percent (67 months) from the minimum of the otherwise applicable guideline range. However, the average extent of substantial assistance departures varied by major drug type.
 - The average extent of substantial assistance departures in powder cocaine cases was 48.6 percent (66 months).
 - The average extent of substantial assistance departures in crack cocaine cases was 49.7 percent (87 months). This was the highest in number of months for any major drug type.
 - In fiscal year 2010, the average extent of substantial assistance departures in marijuana cases was 52.5 percent (40 months) from the bottom of the otherwise applicable guideline range. This was lowest in number of months for any major drug type.
 - The average extent of substantial assistance departures in methamphetamine cases was 45.2 percent (66 months).
 - In fiscal year 2010, the average extent of substantial assistance departures in heroin cases was 52.8 percent (61 months) from the bottom of the otherwise applicable guideline range. This was the highest percentage for any major drug type.
- In fiscal year 2010, the average extent of non-government sponsored below range sentences in drug offenses that carried a mandatory minimum penalty was 29.8 percent (34 months) from the minimum of the otherwise applicable guideline range.
 - The average extent of non-government sponsored below range sentences in powder cocaine cases that carried a mandatory minimum penalty was 29.0 percent (31 months).

- o The average extent of non-government sponsored below range sentences in crack cocaine cases was 30.3 percent (45 months). This was the highest in number of months for any major drug type.
- o The average extent of non-government sponsored below range sentences in marijuana cases was 35.5 percent (21 months). This was the highest percentage for any major drug type, but the lowest in number of months.
- o The average extent of non-government sponsored below range sentences in methamphetamine cases was 26.1 percent (32 months) from the bottom of the otherwise applicable guideline range. This was the lowest percentage for any major drug type.
- o The average extent of non-government sponsored below range sentences in heroin cases was 31.3 percent (27 months).
- In fiscal year 2010, 45.6 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which drug offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - o Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 60.6 percent of their offenses carrying such a penalty, followed by Hispanic (41.0%) and White (36.3%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 27.7 percent of their cases.
 - o Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (47.7% of their cases, compared to 27.0% of cases involving female offenders).
 - o United States citizens were subject to the mandatory minimum penalty at sentencing more often than non-citizens offenders (52.0% of their cases, compared to 30.5% of cases involving non-citizen offenders).
- The average sentence for drug offenders convicted of an offense carrying a mandatory minimum varied, and was largely dependent upon the type of drug involved in the offense and whether the offender obtained relief from the mandatory minimum penalty.
 - o The average sentence for powder cocaine offenders who remained subject to the mandatory minimum penalty was 138 months and the average sentence for those

offenders who obtained relief from the mandatory minimum penalty was 62 months.

- o The average sentence for crack cocaine offenders who remained subject to a mandatory minimum penalty was 139 months. The average sentence for crack cocaine offenders who obtained relief from a mandatory minimum penalty was 80 months, which was the highest for any major drug type.
 - o Marijuana offenders received the lowest sentences of any major drug type. The average sentence for marijuana offenders who remained subject to a mandatory minimum penalty was 93 months and the average sentence for marijuana offenders who obtained relief from a mandatory minimum penalty was 34 months.
 - o Methamphetamine offenders who remained subject to a mandatory minimum penalty received the highest sentences of any major drug type. The average sentence for methamphetamine offenders who remained subject to a mandatory minimum penalty was 144 months. The average sentence for methamphetamine offenders who obtained relief from a mandatory minimum penalty was 72 months.
 - o The average sentence for heroin offenders who remained subject to a mandatory minimum penalty at the time of sentencing was 119 months. The average sentence for heroin offenders who obtained relief from a mandatory minimum penalty was 51 months.
- The Commission's analyses of a sample of cases from fiscal years 2006, 2008, and 2009 indicates that in the majority of the districts, at least one quarter of all drug offenders were eligible for enhancement under section 851.
 - o In 62 of 94 judicial districts (66.0%), the rates of drug offenders eligible for enhancement under section 851 were between 25 and 49 percent.
 - o In 29 districts (30.8%), the rates of eligible drug offenders were between 50 and 74 percent.
 - o There were only three districts (3.2%) in which less than 25 percent of drug offenders were eligible for enhancement.
 - The Commission's analysis of a sample of cases from fiscal years 2006, 2008, and 2009 revealed significant variation in the manner in which the enhancement provision was applied.
 - o In six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty as an enhancement.

- o In contrast, in eight districts, none of the eligible drug offenders received the enhanced penalty.
- More than half (58.0%) of Black offenders were eligible for the enhancement, but only 17.3 percent received it. More than one-third (36.5%) of White offenders were eligible for the enhancement while 9.1 percent received it. Hispanic offenders were eligible in 30.5 percent of their cases, but 6.0 percent received the enhancement. Finally, 24.1 percent of Other Race offenders were eligible for the enhancement, while 6.0 percent received it.
- Black offenders who were eligible to receive the enhanced penalty received it in 29.9 percent of the cases. This rate was only slightly higher than the rates for White offenders (25.0%) and Other Race offenders (24.8%). Eligible Hispanic offenders received the enhanced penalty at the lowest rate of any racial group (19.9%).
- Within each drug type the number of offenders who were eligible for the enhancement was higher than the number of offenders who received the enhancement.
- Crack cocaine offenders had the highest application rate (29.9%) of the enhancement, followed by powder cocaine offenders (26.9%) and methamphetamine offenders (25.2%). heroin drug offenders received the enhancement least often (20.0%).
- At the end of fiscal year 2010, slightly more than half (53.8%, n=103,194) of the 191,757 offenders incarcerated in the BOP were drug offenders.
 - o 13.4 percent (n=25,767) were powder cocaine offenders.
 - o 17.0 percent (n=32,694) were crack cocaine offenders.
 - o 6.5 percent (n=12,473) were marijuana offenders.
 - o 12.0 percent (n=22,935) were methamphetamine offenders.
 - o 3.0 percent (n=5,817) were heroin offenders.
- Slightly more than half (52.9%, n=54,635) of these drug offenders were subject to a mandatory minimum penalty at sentencing.

2. *Firearms Offenses*

Chapter 9 details the results of the Commission's data analyses of the application of mandatory minimum penalties for firearm offenses. In sum, these analyses indicate the following:

- In fiscal year 2010, 2,294 (3.1%) offenders were convicted of an offense under section 924(c). Of the 2,294 offenders convicted of an offense under section 924(c), 2,147

(93.6%) were convicted of a single count of an offense under section 924(c) and 147 (6.4%) were convicted of multiple counts of an offense under section 924(c).

- o Over two-thirds of offenders convicted of a single count of an offense under section 924(c) were convicted of offenses carrying a five- or seven-year mandatory minimum penalty (64.8% and 22.7%, respectively). Only 3.7% of offenders convicted of a single count of an offense under section 924(c) were convicted of offenses carrying a mandatory minimum penalty of more than ten years of imprisonment.
- o More than half of all offenders convicted of an offense under section 924(c) were Black (55.9%). Less than one-quarter (21.0%) were Hispanic, followed by White (20.1%) and Other Race (3.1%) offenders. Among offenders convicted of multiple counts of an offense under section 924(c), 61.0 percent were Black, 21.2 percent were Hispanic, 15.1 percent were White, and 2.7 percent were Other Race.
- o The overwhelming majority of all offenders convicted of an offense under section 924(c) (97.1%) and those offenders convicted of multiple counts of an offense under section 924(c) (99.3%) were male.
- o United States citizens accounted for over 80 percent of all offenders convicted of an offense under section 924(c) (86.7%) and those offenders convicted of multiple counts of an offense under section 924(c) (84.4%).
- In fiscal year 2010, 592 (0.8%) offenders qualified as an armed career criminal under ACCA.
 - o More than 60 percent of the offenders who qualified as an armed career criminal under ACCA were Black (63.7%), followed by White (29.5%), Hispanic (5.2%), and Other Race (1.5%) offenders.
 - o The overwhelming majority of offenders who qualified as an armed career criminal under ACCA were male (99.3%).
 - o United States citizens accounted for 98.6 percent of offenders who qualified as an armed career criminal under ACCA.
- Cases involving a conviction of an offense under section 924(c) or involving offenders who qualified as armed career criminal under ACCA were geographically concentrated.
 - o In fiscal year 2010, 12 districts reported 43.7 percent of the cases involving a conviction of an offense under section 924(c) (and only five of those districts reported having at least 100 such cases).

- o Cases involving convictions of multiple section 924(c) counts were more geographically concentrated than cases involving a conviction of an offense under section 924(c) as a whole. In fiscal year 2010, the ten districts that reported the highest number of cases involving multiple convictions of section 924(c) accounted for 62.7 percent of all such cases.
- o In fiscal year 2010, the ten districts with the highest number of cases involving offenders who qualified as armed career criminals under ACCA reported 47.9 percent of all such cases.
- In fiscal year 2010, offenders convicted of an offense under section 924(c) and offenders who qualified as armed career criminals under ACCA proceeded to trial at a higher rate than all offenders convicted of an offense carrying a mandatory minimum penalty (5.9%).
 - o Of the 2,294 offenders convicted of an offense under section 924(c), 12.8 percent (n=293) proceeded to trial.
 - o Of the 147 offenders convicted of multiple counts of an offense under section 924(c) in fiscal year 2010, 34.7 percent (n=51) proceeded to trial. Of the 2,147 offenders convicted of a single count of an offense under section 924(c), 11.3 percent (n=242) proceeded to trial.
 - o Of the 592 offenders who qualified as armed career criminals under ACCA, 17.4 percent (n=103) proceeded to trial.
- In fiscal year 2010, 24.3 percent of offenders convicted of an offense under section 924(c) were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government.
 - o Black, White, and Hispanic offenders convicted of an offense under section 924(c) obtained relief at comparable rates (24.7%, 24.4%, and 24.4%, respectively), followed by Other Race offenders (17.1%).
 - o Female offenders constituted only a small percentage of offenders convicted of an offense under section 924(c), but obtained relief from the mandatory minimum penalty at a higher rate (45.4%) than male offenders convicted of such an offense (23.6%).
 - o Non-citizen offenders convicted of an offense under section 924(c) obtained relief from the mandatory minimum penalty at a higher rate (27.3%) than United States citizens convicted of such an offense (23.8%).
 - o Offenders convicted of multiple counts of an offense under section 924(c) were relieved of the mandatory minimum penalty in 36.7% of the cases.

- In fiscal year 2010, 17.4 percent of offenders who qualified as an armed career criminal under ACCA were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government.
- In fiscal year 2010, the rate at which offenders received substantial assistance relief varied by race, gender and citizenship
 - Other Race offenders who qualified as armed career criminals under ACCA obtained relief at the highest rate of any racial group (22.2%), followed by White (18.4%), Black (17.0%), and Hispanic (12.9%) offenders.
 - Male offenders who qualified as armed career criminals under ACCA obtained relief from the mandatory minimum penalty at a higher rate (17.5%) than qualifying female offenders (0.0%).
 - United States citizen offenders who qualified as armed career criminals under ACCA obtained relief from the mandatory minimum penalty at a higher rate (17.5%) than qualifying non-citizen offenders (12.5%).
- Less than half (48.2%) of all offenders convicted of an offense under section 924(c) were sentenced within the applicable guideline range.
 - More than one-quarter (28.2%) of offenders convicted of an offense under section 924(c) received a government sponsored below range sentence, and 18.8 percent received a non-government sponsored below range sentence.
- Over 60 percent (62.8%) of offenders who qualified as armed career criminals under ACCA were sentenced within the applicable guideline range.
 - Nearly one-quarter (22.6%) of offenders who qualified as armed career criminals under ACCA received a government sponsored below range sentence, and 13.0 percent received a non-government sponsored below range sentence.
- In fiscal year 2010, 75.5 percent of offenders convicted of an offense under section 924(c) were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of an offense under section 924(c) were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - Other Race offenders were subject to the mandatory minimum penalty at sentencing most often, in 82.9 percent of their offenses carrying such a penalty, followed by Hispanic (75.6%) and White (75.6%) offenders. Black offenders were subject to the mandatory minimum penalty at sentencing the least often, in 75.3 percent of their cases.

- o Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (76.4% of their cases, compared to 54.6% of cases involving female offenders).
 - o United States citizens were subject to the mandatory minimum penalty at sentencing more often than non-citizens offenders (76.1% of their cases, compared to 72.7% of cases involving non-citizen offenders).
- The average sentence for offenders convicted of an offense under section 924(c) who remained subject to the mandatory minimum penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 182 months. The average sentence for offenders convicted of an offense under section 924(c) but who were relieved of the mandatory minimum penalty was 109 months. These sentences include the sentence imposed on the underlying offenses and other counts of conviction, if any, in addition to the mandatory minimum penalty under section 924(c).
 - o The average sentence for offenders convicted of a single count of an offense under section 924(c) was 151 months. The average sentence for offenders convicted of a single count of an offense under section 924(c) who were relieved of the mandatory minimum penalty was 100 months.
 - o The average sentence for offenders convicted of multiple counts of an offense under section 924(c) was 351 months. The average sentence for offenders convicted of multiple counts of an offense under section 924(c) who were relieved for the mandatory minimum penalties was 198 months.
- In fiscal year 2010, 82.6 percent of offenders who qualified as armed career criminals under ACCA were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders who qualified as armed career criminals under ACCA were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - o Hispanic offenders were subject to the mandatory minimum penalty at sentencing most often, in 87.1 percent of their offenses carrying such a penalty, followed by Black (83.0%) and White (81.6%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 77.8 percent of their cases.
 - o Female offenders were subject to the mandatory minimum penalty at sentencing more often than male offenders (100.0% of their cases, compared to 82.5% of cases involving male offenders).
 - o Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizen offenders (87.5% of their cases, compared to 82.5% of cases involving United States citizen offenders).

- The average sentence for offenders who qualified as armed career criminals under ACCA and who were subject to the mandatory minimum penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 210 months. The average sentence for offenders who qualified as armed career criminals under ACCA but who were relieved of the mandatory minimum penalty was 122 months.
- At the end of fiscal year 2010, 10.5 percent of the offenders in the custody of the Bureau of Prisons were convicted of an offense under section 924(c). The percentage of prisoners convicted of an offense under section 924(c) has remained relatively steady over time, constituting 10.3 percent of the federal prison population at the end of fiscal year 1995.
- At the end of fiscal year 2010, 2.9 percent of the offenders in the custody of the Bureau of Prisons qualified as armed career criminals under ACCA. The percentage of prisoners who so qualified has slowly increased over time, rising from 1.4 percent of the federal prison population at the end of fiscal year 1995.

3. *Sex Offenses*

Chapter 10 details the results of the Commission's data analyses of the application of mandatory minimum penalties for sex offenses. In sum, these analyses demonstrate the following:

- In fiscal year 2010, 2,317 (3.2%) offenders were convicted of a sex offense. Of the 2,317 offenders convicted of a sex offense, 640 (27.6%) were convicted of a sexual abuse offense and 1,677 (72.4%) were convicted of a child pornography offense.
- Of the 2,317 offenders convicted of a sex offense, 1,176 (50.8%) were convicted of an offense carrying a mandatory minimum penalty.
- Of the 640 offenders convicted of a sexual abuse offense, 336 (52.5%) were convicted of an offense carrying a mandatory minimum penalty.
 - Among sexual abuse offenders convicted of an offense carrying a mandatory minimum penalty, over three-quarters (76.4%) of the offenders were White, followed by Black (11.9%), Hispanic (8.7%), and Other Race (3.0%) offenders. By comparison, among all offenders convicted of a sexual abuse offense, 55.2 percent were White, followed by Other Race (22.5%), Black (12.5%), and Hispanic (9.7%) offenders.
 - The overwhelming majority of offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty (97.9%) were male.
 - United States citizens accounted for 94.9 percent of offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty.

- Of the 1,677 offenders convicted of a child pornography offense, 840 (50.1%) were convicted of an offense carrying a mandatory minimum penalty.
 - Among child pornography offenders convicted of an offense carrying a mandatory minimum penalty, 88.2 percent were White, followed by Hispanic (6.4%), Black (3.2%), and Other Race (2.2%) offenders.
 - The overwhelming majority of offenders convicted of a child pornography offense carrying a mandatory minimum penalty (99.4%) were male.
 - United States citizens accounted for 97.9 percent of offenders convicted of a child pornography offense carrying a mandatory minimum penalty.

- No district had more than 50 convictions for sexual abuse offenses. Convictions occurred most often in the Districts of Southern Georgia (n=16, 0.7% of all cases sentenced in the district), Northern New York (n=11, 2.5%), Eastern California (n=10, 1.0%), and Northern Georgia (n=10, 1.5%). These four districts together accounted for 14.0 percent of all federal sexual abuse cases.

- No district had more than 50 convictions for child pornography offenses. Convictions occurred most often in Eastern Virginia (n=39, 3.2% of all cases sentenced in the district), Middle Florida (n=34, 2.0%), Southern Florida (n=30, 1.4%), Southern Indiana (n=28, 8.6%), and Western Texas (n=27, 0.4%). These districts together accounted for 18.8 percent of all child pornography cases.

- The vast majority of sexual abuse and child pornography offenders had no prior criminal record at the time they were sentenced and only a very small percentage were in Criminal History Categories IV through VI.

- In fiscal year 2010, the trial rate for sexual abuse offenders was 15.2 percent – more than twice the rate for sexual abuse offenders not convicted of an offense carrying a mandatory minimum penalty (6.9%). The trial rate for child pornography offenders convicted of an offense carrying a mandatory minimum penalty was 6.4 percent – four times the rate for child pornography offenders not convicted of an offense carrying a mandatory minimum penalty (1.6%).

- In fiscal year 2010, 4.2 percent of offenders convicted of a sexual abuse or child pornography offense carrying a mandatory minimum penalty were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government.
 - The number of cases is too small to draw any meaningful conclusions about the role of race, gender, or citizenship as it relates to substantial assistance relief in sexual abuse cases.

- Over 60 percent (63.7%) of offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty and 42.5 percent of offenders convicted of a child pornography offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range.
 - Approximately 13 percent of offenders convicted of a sexual abuse or child pornography offense carrying a mandatory minimum penalty received a government sponsored below range sentence (13.1% and 13.4%, respectively).
 - Offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty received a non-government sponsored below range sentence in 17.3 percent of the cases, compared to 41.9 percent of offenders convicted of a child pornography offense carrying a mandatory minimum penalty.
- The average extent of substantial assistance departures in sexual abuse cases was 35.9 percent (70 months) from the bottom of the otherwise applicable guideline range; the average extent of substantial assistance departures in child pornography cases was 31.9 percent (45 months) from the bottom of the otherwise applicable guideline range.
- The average extent of non-government sponsored below range sentences in sexual abuse cases that carried a mandatory minimum penalty was 19.2 percent (59 months) from the bottom of the otherwise applicable guideline range; the average extent of non-government sponsored below range sentences in child pornography cases that carried a mandatory minimum penalty was 36.0 percent (64 months) below the otherwise applicable guideline range.
- In fiscal year 2010, 95.8 percent of offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of a sexual abuse offense who were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - White offenders were subject to the mandatory minimum penalty at sentencing most often, in 97.3 percent of their offenses carrying such a penalty, followed by Hispanic (96.6%) and Other Race (90.0%) offenders. Black offenders were subject to the mandatory minimum penalty at sentencing the least often, in 87.5 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (96.4% of their cases, compared to 71.4% of cases involving female offenders).

- o Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizen offenders (100.0% of their cases, compared to 95.6% of cases involving United States citizen offenders).
- The average sentence for offenders convicted of a sexual abuse offense who were subject to the mandatory minimum penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 235 months. The average sentence for those offenders who obtained relief from the mandatory minimum penalty was 139 months. The average sentence for offenders convicted of a sexual abuse offense not carrying a mandatory minimum penalty was 73 months.
- In fiscal year 2010, 95.8 percent of offenders convicted of a child pornography offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of a child pornography offense who were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.

Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 100.0 percent of their offenses carrying such a penalty, followed by Hispanic (96.3%) and White (95.7%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 94.4 percent of their cases.

Female offenders were subject to the mandatory minimum penalty at sentencing more often than male offenders (100.0% of their cases, compared to 95.8% of cases involving male offenders).

Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizen offenders (100.0% of their cases, compared to 95.7% of cases involving United States citizen offenders).

- The average sentence for offenders convicted of a child pornography offense who remained subject to the mandatory minimum penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 132 months. The average sentence for those offenders who obtained relief from the mandatory minimum penalty was 121 months. The average sentence for offenders convicted of a child pornography offense not carrying a mandatory minimum penalty was 54 months.
- At the end of fiscal year 2010, 4.6 percent of the offenders in the custody of the Bureau of Prisons were convicted of a sex offense. Of those offenders, 52.2 percent were convicted of an offense carrying a mandatory minimum penalty. The percentage of prisoners convicted of a sex offense has slowly increased over time, rising from less than one percent in 1995 (of those prisoners, only 6.5 were convicted of an offense carrying a mandatory minimum penalty).

- The Commission’s special coding project of a 20-percent random sample of child pornography cases indicates that approximately half of offenders convicted of possession (who did not face a mandatory minimum penalty) could have been prosecuted and sentenced for distribution of child pornography, an offense carrying a mandatory minimum penalty.
- The preliminary analysis of data concerning child pornography offenses contained in this report will be followed up by a more comprehensive analysis of child pornography offenses and offenders in a future report issued by the Commission.

4. *Identity Theft Offenses*

Chapter 11 details the results of the Commission’s data analyses of the application of mandatory minimum penalties for identity theft offenses. In sum, these analyses demonstrate the following:

- In fiscal year 2010, 1,870 offenders (2.6%) were convicted of an identity theft offense. Of those 1,870 offenders, 797 (42.6%) were convicted of an offense under section 1028A.
- Over 40 percent of offenders convicted of an offense under section 1028A were Black (40.2%), followed by White (32.8%), Hispanic (22.3%), and Other Race (4.7%) offenders.
- The majority of offenders convicted of an offense under section 1028A (71.8%) were male.
- United States citizens accounted for 74.4 percent of offenders convicted of an offense under section 1028A.
- A disproportionately large number of cases involving a conviction of an offense under section 1028A came from only three judicial districts in fiscal year 2010.
- Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 6.8 percent (n=54) proceeded to trial. By contrast, of the 1,072 identity theft offenders not convicted of an offense under section 1028A, 2.1 percent (n=22) proceeded to trial.
- Identity theft offenders who committed more severe identity theft offenses or who had more significant criminal histories were generally more likely to be convicted of an offense under section 1028A.
 - Identity theft cases involving a conviction of an offense under section 1028A had a 28.2 percent higher median loss amount and were more likely to involve ten or more victims than identity theft cases that did not involve such a conviction.

- o A higher percentage of identity theft offenders convicted of an offense under section 1028A were in Criminal History Category VI, and a lower percentage were in Criminal History Category I, than identity theft offenders not convicted of an offense under section 1028A.
- In fiscal year 2010, 15.4 percent of offenders convicted of an offense under section 1028A were relieved of the mandatory penalty at sentencing because they rendered substantial assistance to the government.
 - o Other Race offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at the highest rate (18.9%), followed by Black (17.2%), Hispanic (14.7%), and White (13.1%) offenders.
 - o Female offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at a higher rate (20.0%) than male offenders convicted of such an offense (13.6%).
 - o United States citizen offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at a higher rate (17.3%) than non-citizens convicted of such an offense (10.3%).
- Of the 797 cases in fiscal year 2010 that involved a conviction of an offense under section 1028A, 10.2 percent (n=82) involved convictions of multiple counts of an offense under section 1028A. In 69 of those 82 cases, the court exercised its discretion to impose the mandatory penalties for violating section 1028A concurrently.
- In fiscal year 2010, 84.6 percent of offenders convicted of an offense under section 1028A were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of an offense under section 1028A were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - o White offenders were subject to the mandatory minimum penalty at sentencing most often, in 86.9 percent of their offenses carrying such a penalty, followed by Hispanic (85.3%) and Black (82.8%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 81.1 percent of their cases.
 - o Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (86.4% of their cases, compared to 80.0% of cases involving female offenders).
 - o Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizens (89.7% of their cases, compared to 82.7% of cases involving non-citizen offenders).

- The average sentence for offenders convicted of an offense under section 1028A who were subject to the mandatory penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 50 months. The average sentence for offenders convicted of an offense under section 1028A but who were relieved of the mandatory penalty was 32 months. By contrast, identity theft offenders not convicted of an offense under section 1028A received an average sentence of 22 months.
- Among offenders convicted of an offense under section 1028A, Other Race and Black offenders received higher average sentences (53 and 54 months, respectively) than White and Hispanic offenders (45 and 40 months, respectively).
- The higher average sentences for Other Race and Black offenders convicted of an offense under section 1028A may be attributable to the fact that those offenders tended to be convicted of more severe offenses than White and Hispanic offenders, as measured by the amount of loss and number of victims involved in the offense.
- At the end of fiscal year 2010, 0.9 percent of the offenders in the custody of the Bureau of Prisons were convicted of an offense under section 1028A. The percentage of prisoners convicted of an offense under section 1028A has slowly increased over time, rising from 0.2% of the federal prison population at the end of fiscal year 2006.

OVERVIEW

A. INTRODUCTION

The United States Sentencing Commission [hereinafter the Commission] submits to Congress this report on mandatory minimum sentencing provisions in federal law pursuant to the statutory directive contained in section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009¹ [hereinafter the statutory directive].

The statutory directive requires that this report include:

- (1) a compilation of all mandatory minimum sentencing provisions under Federal law;
- (2) an assessment of the effect of mandatory minimum sentencing provisions under Federal law on the goal of eliminating unwarranted sentencing disparity and other goals of sentencing;
- (3) an assessment of the impact of mandatory minimum sentencing provisions on the Federal prison population;
- (4) an assessment of the compatibility of mandatory minimum sentencing provisions under Federal law and the sentencing guidelines system established under the Sentencing Reform Act of 1984 (Public Law 98–473; 98 Stat. 1987) and the sentencing guidelines system in place after *Booker v. United States*, 543 U.S. 220 (2005);
- (5) a description of the interaction between mandatory minimum sentencing provisions under Federal law and plea agreements;
- (6) a detailed empirical research study of the effect of mandatory minimum penalties under Federal law;
- (7) a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can take action with respect to sentencing policy; and

¹ Division E of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, 123 Stat. 2190, 2843 (enacted October 28, 2009). The Commission also submits this report pursuant to its general authority under 28 U.S.C. §§ 994–995, and its specific authority under 28 U.S.C. § 995(a)(20) which provides that the Commission shall have authority to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.”

- (8) any other information the Commission determines would contribute to a thorough assessment of mandatory minimum sentencing provisions under Federal law.

As discussed in Chapter 2, federal statutory mandatory minimum penalties have existed since the early days of the nation. Examination of their use has been ongoing since then as well, including by Congress² and many others, as discussed in Chapter 5. In 1991, the Commission submitted a report to Congress about mandatory minimum penalties, concluding that “the most efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of the sentencing guidelines, permitting the sophistication of the guidelines structure to work, rather than through mandatory minimums.”³ This report is intended to contribute to the more recent efforts to examine federal statutory mandatory minimum penalties, particularly in light of the Supreme Court’s decision in *Booker v. United States*,⁴ which rendered the federal sentencing guidelines advisory.

² See 156 CONG. REC. S1680–1683 (daily ed. Mar. 17, 2010) and 156 CONG. REC. H6196–6204 (daily ed. July 28, 2010) (for debate associated with passage of Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372). See also 150 CONG. REC. H4808–4811 (daily ed. June 23, 2004) and 150 CONG. REC. S7527 (daily ed. June 25, 2004) (for debate associated with passage of Identity Theft Penalty Enhancement Act, Pub. L. No. 108–275, 118 Stat. 831). See also 149 CONG. REC. S2573–2590 (daily ed. Feb. 24, 2003), 149 CONG. REC. H2440–2443 (daily ed. Mar. 27, 2003), 149 CONG. REC. H3059, 3066–3076 (daily ed. Apr. 10, 2003), 149 CONG. REC. H2950–2968 (daily ed. Apr. 9, 2003), 149 CONG. REC. S5113–5135, S5137–5157 (daily ed. Apr. 10, 2003) (for debate associated with passage of Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650). See also general debate on mandatory minimums and limitation on applicability of statutory minimums in certain cases (associated with passage of Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796).

³ See U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (AS DIRECTED BY SECTION 1703 OF PUBLIC LAW 101–647) (Aug. 1991) [hereinafter 1991 COMMISSION REPORT] at iv. At the time, the sentencing guidelines were binding on the courts. See also *Hearing on Federal Mandatory Minimum Sentencing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. (July 28, 1993) (statement of Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission), reprinted in 6 Fed. Sent’g Rep. 67 (1993); *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) (statement of Hon. Ricardo H. Hinojosa, Chairman, United States Sentencing Commission); U.S. SENT’G COMM’N, REPORT TO CONGRESS REGARDING FED. MANDATORY MINIMUM SENT’G PENALTIES (on record in *Mandatory Minimums and Unintended Consequences, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 124 (July 14, 2009)); *Mandatory Minimum Penalties Hearing Before the U.S. Sentencing Commission* (May 27, 2010).

⁴ 543 U.S. 220 (2005).

B. OVERVIEW OF REPORT

1. Methodology

In preparing this report, the Commission reviewed legislation, analyzed sentencing data,⁵ and studied scholarly literature.⁶ The Commission sought the views of stakeholders in the criminal justice system in a variety of ways, including conducting seven regional public hearings on sentencing generally,⁷ one public hearing devoted solely to the role of statutory mandatory minimum penalties in federal sentencing,⁸ a survey of federal judges,⁹ and interviews with practitioners in selected districts.¹⁰ The Commission consulted with its advisory groups¹¹ and

⁵ The Commission maintains a comprehensive, computerized data collection system and acts as the clearinghouse of federal sentencing information pursuant to 28 U.S.C. §§ 995(a)(14), (15). The Commission relies on this database for its ongoing monitoring and evaluation of the guidelines, many of its reports and research projects, and for responding to hundreds of data requests received from Congress and other criminal justice entities each year. Pursuant to 28 U.S.C. § 994(w), within 30 days of entry of judgment in every felony and class A misdemeanor case, the Commission receives: (1) the judgment and commitment order; (2) the statement of reasons imposed; (3) the plea agreement, if any; (4) the indictment or other charging information; and (5) the presentence report (unless waived by the court). For each such case, the Commission routinely collects hundreds of pieces of information, including defendant demographics, statute(s) of conviction, application of any statutory mandatory minimum penalty, application of any relief from an applicable statutory mandatory minimum penalty, sentencing guideline applications, and sentences imposed.

⁶ See Appendix I for a bibliography of relevant literature compiled for this report.

⁷ The Commission held seven regional public hearings to coincide with the 25th anniversary of the enactment of the Sentencing Reform Act of 1984 to solicit the views of judges, prosecutors, defense attorneys, probation officers, academics, and others on a variety of federal sentencing and criminal justice topics, including mandatory minimum penalties. These hearings were held in Atlanta, GA (Feb. 10–11, 2009), Palo Alto, CA (May 27–28, 2009), New York, NY (July 9–10, 2009), Chicago, IL (Sept. 9–10, 2009), Denver, CO (Oct. 20–21, 2009), Austin, TX (Nov. 19–20, 2009), and Phoenix, AZ (Jan. 20–21, 2010). Witness statements and transcripts for the public hearings are available on the Commission’s webpage at www.uscc.gov. Summaries of the testimony relating to mandatory minimum penalties can be found in Appendix J of this Report.

⁸ On May 27, 2010, in Washington, DC, the Commission held a public hearing on the topic of mandatory minimum sentencing provisions in federal law in response to Congress’s directive to report on the topic. Witness statements and transcripts for the public hearing are available on the Commission’s webpage at www.uscc.gov. Summaries of the testimony can be found in Appendix G of this Report.

⁹ In early 2010, the Commission conducted a survey of federal district judges to solicit their views on a variety of sentencing topics, including mandatory minimum penalties. See U.S. SENT’G COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 (June 2010) [hereinafter 2010 JUDGES’ SURVEY], which is available on the Commission’s webpage at www.uscc.gov.

¹⁰ The Commission interviewed one or more representatives of the United States Attorney and the Federal Public Defender, and a Criminal Justice Act panel attorney in 13 districts across the nation as part of this study of mandatory minimum penalties and federal sentencing. The Commission conducted similar interviews in 1991 when preparing the 1991 COMMISSION REPORT. As was the case in 1991, this report will not identify the districts visited, nor will individual respondents be identified or identifiable in the Commission’s public documents. The interview topics inquired about the use of mandatory minimum penalties in each district and included questions about charging decisions, plea practices, and the use of two mechanisms discussed in Chapter 2 (*i.e.*, substantial assistance and the safety valve) that provide relief from application of mandatory minimum penalties. The input received from these interviews is discussed in Chapter 6, and a copy of the interview questions is provided in Appendix F of this Report.

representatives from all three branches of the federal government, and heard from judges, prosecutors, defense attorneys, probation officers, social scientists, scholars, and others who apply or study mandatory minimum sentencing provisions.

2. *Definitions of Key Terms*

For purposes of this report, “mandatory minimum penalty,” “mandatory minimum sentencing provision,” “statute carrying a mandatory minimum penalty,” “convicted of an offense carrying a mandatory minimum penalty,” and related terms refer to a federal criminal statute requiring, upon conviction of a federal criminal offense and the satisfaction of criteria set forth in that statute, the imposition of a specified minimum term of imprisonment. A provision that requires a mandatory minimum fine, mandatory minimum term of probation, mandatory minimum term of supervised release, or any other mandatory component of a sentence other than imprisonment is not considered a mandatory minimum penalty for purposes of this report.

The statutory criteria that trigger mandatory minimum penalties typically are one of three types. First, many mandatory minimum penalties are triggered by offense characteristics or elements of the offense of conviction. For example, some of the most commonly applied federal mandatory minimum penalties are for drug trafficking offenses. Under the relevant statutes, the mandatory minimum penalty applies if the offense involved a quantity of a particular type of drug above a specified threshold amount, a sale to a person under 21 years of age, a sale occurring within 1,000 feet of a school, or the employment of a person under 18 years of age.¹²

Second, some mandatory minimum penalties specified in one statute are triggered by reference to another underlying offense. Typically in these cases, a mandatory minimum penalty does not apply to the underlying offense, but an additional, consecutive, mandatory minimum penalty applies if criteria specified in a separate statute are met. The most commonly applied mandatory minimum penalty of this type is 18 U.S.C. § 924(c), which requires a mandatory consecutive term of imprisonment for the possession or use of a firearm in connection with certain underlying offenses. Another example is 18 U.S.C. § 1028A, which requires a mandatory consecutive term of imprisonment for identity theft committed in connection with certain underlying offenses.

Third, some mandatory minimum penalties are triggered by the offender’s criminal history. The most frequently applied mandatory minimum penalty of this type is 18 U.S.C. § 924(e), commonly known as the Armed Career Criminal Act. Section 924(e) provides a mandatory minimum of 15 years of imprisonment if a person commits a firearms offense and has previously been convicted of three or more violent felonies or serious drug offenses.

¹¹ The Commission has three standing advisory groups: the Practitioners Advisory Group, the Probation Officers Advisory Group, and the Victims Advisory Group. Information on each of these advisory groups can be found on the Commission’s webpage at www.ussc.gov.

¹² *See, e.g.*, 21 U.S.C. §§ 841, 859, 860, and 861.

For purposes of this report, the Commission considered an offender to have been “convicted of” an offense carrying a mandatory minimum penalty if the court so indicated on a statement of reasons form or other sentencing documentation received by the Commission and conclusively established that one or more of the statutes of conviction carried such a penalty.¹³

Not all offenders convicted of an offense carrying a mandatory minimum penalty are sentenced to at least the mandatory minimum term of imprisonment specified in the statute of conviction. As will be discussed throughout the report, many offenders convicted of an offense carrying a mandatory minimum penalty receive a lower sentence due to operation of one of two relief mechanisms commonly known as “substantial assistance” and the “safety valve.” First, as discussed in Chapter 2, the court “has authority to impose a sentence below a level established by statute as a minimum sentence” if the government files a motion to reflect a defendant’s “substantial assistance in the investigation or prosecution of another person who has committed an offense.”¹⁴ Second, in the case of an offense under 21 U.S.C. §§ 841, 844, 846, 960, or 963, if the defendant meets five “safety valve” criteria specified in 18 U.S.C. § 3553(f), the court “shall impose a sentence . . . without regard to any statutory minimum sentence.”¹⁵ If either of these two mechanisms apply to an offender convicted of an offense carrying a mandatory minimum penalty, this report refers to that offender as having been “relieved from application of” a mandatory minimum penalty. If neither of these two mechanisms apply to an offender convicted of an offense carrying a mandatory minimum penalty, this report refers to that offender as having been “subject to” a mandatory minimum penalty at the time of sentencing.

3. *Organization*

To meet the objectives of the statutory directive, this report is organized in the following manner:

Chapter 2 explores the historical development of mandatory minimum penalties. It also describes the development of the safety valve and substantial assistance provisions.

Chapter 3 discusses the requirements in the Sentencing Reform Act of 1984¹⁶ that govern promulgation of the federal sentencing guidelines, the operation of the guidelines, and the process by which the Commission amends the guidelines. It also discusses the manner in which the Commission has responded to and incorporated mandatory minimum penalties into the guidelines. Finally, it examines means by which the guidelines account for conduct that is similar to conduct subject to mandatory minimum penalties.

¹³ Sentencing courts are required to send the Commission five sentencing documents, *see supra* note 5. The statement of reasons form sets forth the sentencing court’s reasons for the sentence imposed in a particular case. *See* 28 U.S.C. § 994(w); 18 U.S.C. § 3553(c).

¹⁴ 18 U.S.C. § 3553(e); USSG §5K1.1 (Substantial Assistance to Authorities).

¹⁵ 18 U.S.C. § 3553(f); USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); subsection (b)(11) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

¹⁶ Pub. L. No. 98–473, 98 Stat. 1837 (1984) [hereinafter the Sentencing Reform Act].

Chapter 4 focuses on recent changes that affect the examination of mandatory minimum penalties and the impact of the use of mandatory minimum penalties on the federal prison population. It also discusses the impact on the federal prison population resulting from other factors, such as new federal crimes, changes in the size and composition of the federal criminal docket, federal incarceration rates, and average sentence length.

Chapter 5 discusses the policy implications of mandatory minimum penalties. In particular, it describes the reasons often cited in support of and in opposition to such penalty provisions.

Chapter 6 discusses the results of interviews with prosecutors and defense attorneys in thirteen selected districts about how mandatory minimum penalties are used in the selected districts and the impact of mandatory minimum penalties on charging, guilty pleas, and sentencing practices in the districts.

Chapter 7 reviews both current and cumulative sentencing data on mandatory minimum penalties. In particular, it provides general comparisons between offenders convicted of offenses carrying mandatory minimum penalties and offenders in the overall federal population.

Chapter 8 reviews current sentencing data about offenders convicted of drug offenses carrying mandatory minimum penalties.

Chapter 9 reviews current sentencing data about offenders convicted of firearms offenses carrying mandatory minimum penalties.

Chapter 10 reviews current sentencing data about offenders convicted of sex offenses carrying mandatory minimum penalties.

Chapter 11 reviews current sentencing data about offenders convicted of an aggravated identity theft offense that carries a mandatory minimum penalty.

Chapter 12 sets forth the Commission's conclusions and policy recommendations in light of the data and information contained in the preceding chapters.

HISTORY OF MANDATORY MINIMUM PENALTIES AND STATUTORY RELIEF MECHANISMS

A. INTRODUCTION

This chapter provides a detailed historical account of the development and evolution of federal mandatory minimum penalties. It then describes the development of the two statutory mechanisms for obtaining relief from mandatory minimum penalties.

B. MANDATORY MINIMUM PENALTIES IN THE EARLY REPUBLIC

Congress has used mandatory minimum penalties since it enacted the first federal penal laws in the late 18th century. Mandatory minimum penalties have always been prescribed for a core set of serious offenses, such as murder and treason, and also have been enacted to address immediate problems and exigencies.

The Constitution authorizes Congress to establish criminal offenses and to set the punishments for those offenses,¹⁷ but there were no federal crimes when the First Congress convened in New York in March 1789.¹⁸

Congress created the first comprehensive series of federal offenses with the passage of the 1790 Crimes Act, which specified 23 federal crimes.¹⁹ Seven of the offenses in the 1790 Crimes Act carried a mandatory death penalty: treason, murder, three offenses relating to piracy, forgery of a public security of the United States, and the rescue of a person convicted of a capital crime.²⁰ One of the piracy offenses specified four different forms of criminal conduct, arguably increasing to 10 the number of offenses carrying a mandatory minimum penalty.²¹ Treason,

¹⁷ See U.S. Const. art. I, §8 (enumerating powers to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States” and to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); U.S. Const. art. III, § 3 (providing that “Congress shall have Power to declare the Punishment of Treason”). In addition to powers specifically relating to criminal offenses, Congress “routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth.” *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010).

¹⁸ See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”).

¹⁹ Act of Apr. 30, 1790, Chap. IX (the “1790 Crimes Act”), 1 Stat. 112.

²⁰ See 1790 Crimes Act, §§ 1 (Treason), 3 (Murder), 8 (Piracy), 9 (Citizens as pirates), 10 (Accessory to piracy before the fact), 14 (Forging public security of the United States), and 23 (Rescue of a person convicted of a capital crime), 1 Stat. 112-115, 117.

²¹ See 1790 Crimes Act, § 8, 1 Stat. 112, 113-114. The conduct at section 8 was later separated into individual statutes with each carrying a mandatory penalty, as discussed later. Several of those individual statutes still exist in title 18, United States Code, and carry mandatory penalties. Compare § 8 with 18 U.S.C. §§ 1651 (Piracy under the law of nations) and 1655 (Assault on commander as piracy), which carry mandatory life imprisonment. One of the

murder, and piracy remain punishable by a mandatory penalty today.²² Thirteen of the crimes in the 1790 Crimes Act were punishable by a term of imprisonment with a statutory maximum of up to one year (three offenses²³), three years (seven offenses²⁴), or seven years (three offenses²⁵). The remaining three crimes were punishable by fines and corporal punishment²⁶ or left to the court's discretion.²⁷

The 1790 Crimes Act was consistent with a late 18th century movement among the states to reduce the types of crimes punishable by death. The colonies, reflecting a more pronounced trend in England, had increased the number of capital crimes throughout the 17th and 18th centuries, making death the “standard penalty for all serious crimes.”²⁸ However, spurred by Enlightenment ideals of utilitarianism and proportionality in punishment, the states reduced the number of capital crimes in the decades following the American Revolution.²⁹ The 1790 Crimes Act reflected this trend, imposing death for only seven of the enumerated offenses, and establishing only maximum terms of imprisonment for others. Some of these other offenses, such as manslaughter and larceny, were crimes commonly punished by death in the colonial period.³⁰ Indeed, the debates over the 1790 Crimes Act in the House of Representatives show

statutes no longer carries a mandatory minimum penalty. *Compare* § 8 with 18 U.S.C. § 1656 (Conversion or surrender of vessel) (10-year statutory maximum term of imprisonment).

²² *See* 18 U.S.C. §§ 2381 (Treason) (punishable by death or by imprisonment of not less than five years), 1111 (Murder) (first degree murder punishable by death or by imprisonment for life), 1651 (Piracy under the law of nations) (requiring life imprisonment), and 1652 (Citizens as pirates) (requiring life imprisonment). Treason carried the mandatory death penalty until 1862, when Congress amended the penalty to require death or, in the court's discretion, at least five years of imprisonment. *See infra* note 76 and accompanying text.

²³ *See* 1790 Crimes Act, §§ 5 (Rescuing the body of an executed individual ordered for medical dissection by the court), 22 (Obstruction of process), and 23 (Rescuing a person before conviction of a capital crime), 1 Stat. 112, 113, 117.

²⁴ *See* 1790 Crimes Act, §§ 6 (Misprision of a felony), 7 (Manslaughter), 11 (Concealing a pirate or property taken by a pirate), 12 (Manslaughter and confederacy to become pirates), 18 (Perjury), 26 (Instituting legal action against a foreign ambassador), 28 (Violating safe conduct or assaulting a foreign ambassador), 1 Stat. 112, 113-16, 118. The punishment for perjury also included one hour standing in a pillory.

²⁵ *See* 1790 Crimes Act, §§ 2 (Misprision of treason), 13 (Maiming), 15 (Falsifying court records), 1 Stat. 112, 115-16.

²⁶ *See* 1790 Crimes Act, §§ 16 (Larceny), 17 (Receiving stolen goods), 1 Stat. 112, 116. Both larceny and receiving stolen goods were punishable by a fine of four times the value of the goods taken and not more than 39 stripes.

²⁷ *See* 1790 Crimes Act, § 21 (Bribery), 1 Stat. 112, 117.

²⁸ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 6-9, 23 (2002); *see also* Woodson v. North Carolina, 428 U.S. 280, 289 (1976) (explaining the history of capital punishment in the colonial and post-Revolutionary period). Although many crimes carried the death penalty in the colonial period, “the colonies used the death penalty rather sparingly.” LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 42 (1993). Pardons, lack of enforcement, the fiction of “benefit of clergy,” and jury nullification contributed to the lack of executions in the colonies. *See id.* at 41-43.

²⁹ BANNER, *supra* note 28, at 88-100.

³⁰ *Id.* at 5.

the House's concern with utility and proportionality in assigning punishments. The House debated at length whether certain crimes should mandate medical dissection in addition to death, and whether merely passing (as opposed to producing) counterfeit public securities should mandate death.³¹ In both instances, opponents argued that the more severe punishments were disproportional to the offense and thus unnecessary; supporters countered that the punishments served needful purposes and fit the severity of the crime.³² Although Congress ultimately elected to impose the more severe penalties,³³ the debates and Congress's decision to impose death for seven offenses and discretionary terms of imprisonment for the others was a departure from the prevalent use of mandatory death penalties during the colonial period.

Congress enacted the first mandatory minimum terms of imprisonment at the close of the 18th century as part of its response to strained relations between the United States and France. Following the XYZ Affair³⁴ and in preparation for a possible war with France, Congress passed the Sedition Act of 1798, which among other provisions created a new offense of opposing or impeding a federal officer by means of insurrection, riot, or unlawful assembly.³⁵ The offense carried a mandatory minimum penalty of at least six months of imprisonment.³⁶ Congress again used a mandatory minimum penalty in 1799 with its passage of the Logan Act.³⁷ The Logan Act provided that any citizen who, without the consent of the United States, corresponded with a foreign power about "disputes or controversies with the United States" with the intent to influence the foreign government or "to defeat the measures of the United States" was to be imprisoned for at least six months.³⁸ The Sedition Act contained a sunset provision and automatically expired on March 3, 1801, on the last day of President John Adams' term in

³¹ 13 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, DEBATES IN THE HOUSE OF REPRESENTATIVES 968-74 (Helen E. Veit et al. eds, 1994); *see also* Banner, *supra* note 28, at 76-77 (describing dissection as a method of "intensifying" a death sentence, and noting that "[b]y adding dissection to a death sentence the state could simultaneously furnish bodies to physicians and deter crime").

³² *Id.*

³³ *See* 1790 Crimes Act §§ 3 & 14, 1 Stat. 112, 113, 115.

³⁴ The XYZ Affair refers to an incident occurring in 1798 during which three French agents (identified as X, Y, and Z) demanded that American diplomatic emissaries pay a bribe and other concessions in return for the continuance of peace talks between the two nations. *See* U.S. Department of State, Office of the Historian, *The XYZ Affair and the Quasi-War with France, 1798-1800*, available at <http://history.state.gov/milestones/1784-1800/XYZ>.

³⁵ Act of July 14, 1798, ch. LXXIV, § 1, 1 Stat. 596; *see* Dwight F. Henderson, *Treason, Sedition and Fries' Rebellion*, 14 AM. J. LEGAL HIST. 308, 308-09 (1970); David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 155-56 (2001).

³⁶ Act of July 14, 1798, ch. LXXIV, § 1, 1 Stat. 596.

³⁷ *See* Act of Jan. 30, 1799, ch. I, 1 Stat. 613.

³⁸ *Id.* Congress passed the Logan Act following an unauthorized attempt by Dr. George Logan, a private citizen, to conduct diplomacy with French authorities. *See* Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 292-94 (1987).

office.³⁹ The offense created in the Logan Act remains in force, but no longer carries a mandatory minimum penalty.⁴⁰

Congress also used mandatory minimum penalties in its efforts to end the importation of slaves. The Constitution prohibited Congress from curtailing or abolishing the importation of slaves before 1808.⁴¹ In advance of the 1808 date, and with President Thomas Jefferson's urging, Congress passed an Act prohibiting the importation of slaves in February 1807.⁴² Among other provisions, the 1807 Act prohibited citizens from bringing slaves into the United States or serving on a vessel that transported slaves.⁴³ These offenses carried mandatory minimum penalties of at least five years and two years of imprisonment, respectively.⁴⁴ However, the mandatory minimum penalties were much less severe than the mandatory death penalty many in the House of Representatives wanted to attach to these offenses, on grounds that importing human beings was a crime of morality and akin to murder.⁴⁵ Other offenses created by the 1807 Act, such as outfitting slave vessels and purchasing or selling illegally imported slaves, carried only fines.⁴⁶

In 1818, Congress enacted additional mandatory minimum penalties for slave-related offenses in response to a number of problems caused by illegal slave trafficking. First, illegal slave smuggling and piracy in territories near New Orleans necessitated the use of military force against the smugglers.⁴⁷ Second, slave trafficking interfered with the United States' policy of neutrality in the ongoing wars between Spain and its colonies in the Americas, as these smugglers operated under revolutionary flags but used primarily crews of United States citizens and vessels outfitted in United States ports.⁴⁸ In response to these problems, Congress enacted a law that proscribed outfitting vessels for use in the slave trade, citizens from transporting slaves, and importing slaves to the United States – all subject to mandatory minimum terms of

³⁹ Act of July 14, 1798, ch. LXXIV, § 4, 1 Stat. 596, 597.

⁴⁰ See 18 U.S.C. § 953.

⁴¹ U.S. Const. art. I, §9.

⁴² DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829, at 166-67 (1985).

⁴³ See Act of Mar. 2, 1807, ch. XXII, §§ 5 (Citizens bringing slaves to the United States) and 7 (Individuals serving on vessels holding slaves), 2 Stat. 426, 427-428.

⁴⁴ *Id.*

⁴⁵ HENDERSON, *supra* note 42, at 168-69.

⁴⁶ See Act of Mar. 2, 1807, ch. XXII, §§ 2 (Outfitting vessels for the slave trade) and 6 (Purchasing or selling illegally imported slaves), 2 Stat. 426, 426-28.

⁴⁷ HENDERSON, *supra* note 42, at 175-80.

⁴⁸ *Id.* at 126-43.

imprisonment of three years.⁴⁹ These penalties did not stop the trade in slaves, however,⁵⁰ leading Congress in 1820 to declare that persons who served on the crew of a vessel used for trading slaves or who forcibly confined individuals for the slave trade were pirates and subject to mandatory death.⁵¹

In 1825, Congress passed another crimes act⁵² that created new offenses and amended some of the offenses and penalties established 35 years earlier in the 1790 Crimes Act. The 1825 Crimes Act is notable for its lack of mandatory minimum penalties. Then-Representative Daniel Webster, Chairman of the House Judiciary Committee responsible for drafting the bill, explained that “the present bill would be found, upon the whole, to be a mitigation of the laws as they previously stood.”⁵³ United States Attorney General Benjamin Franklin Butler argued before the Supreme Court that Congress passed the 1825 Crimes Act, in part, because “[t]he penalties imposed by the [1790 Crimes Act] were found to be too heavy.”⁵⁴ Of the 21 crimes enumerated in the 1825 Crimes Act, only the debasement of United States gold and silver coins by a United States treasury employee carried a mandatory minimum penalty, requiring a term of imprisonment of at least one year.⁵⁵ Although the 1825 Crimes Act punished three offenses with mandatory death (burning a dwelling house on a military post, committing certain felonies on the high seas, and setting fire to a vessel of the United States),⁵⁶ it also repealed the 1790 Crime Act’s mandatory death penalty for counterfeiting certificates and public securities of the United States, which the 1825 Crimes Act replaced with a sentence of up to 10 years of imprisonment.⁵⁷

⁴⁹ See Act of Apr. 20, 1818, ch. XCI, §§ 3 (Outfitting vessels for the slave trade), 4 (Citizens transporting slaves), and 6 (Importing slaves to the United States), 3 Stat. 450, 451-52.

⁵⁰ Justice Joseph Story, charging a federal jury in Maryland in his role as a Circuit Justice, explained in 1819 that one would expect the severe penalties Congress imposed for engaging in slave smuggling would “extinguish[]” the slave trade because “virtuous men would, by their abhorrence, stay its polluted march, and wicked men would be overawed by its potent punishment.” He lamented, though, that “unfortunately the case is far otherwise. We have but too many melancholy proofs from unquestionable sources, that it is still carried on with all the implacable ferocity and insatiable rapacity of former times.” 1 LIFE AND LETTERS OF JOSEPH STORY 339-40 (William W. Story ed., 1851).

⁵¹ See Act of May 15, 1820, ch. CXIII, §§ 4 (Crew of foreign vessel seizing persons for the slave trade) and 5 (Persons forcibly confining individuals destined for slave trade), 3 Stat. 600, 600-01.

⁵² See Act of Mar. 3, 1825, ch. LXV (the “1825 Crimes Act”), 4 Stat. 115.

⁵³ 1 REG. DEB. 156 (1825).

⁵⁴ *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 73 (1838).

⁵⁵ See 1825 Crimes Act, § 24 (Debasement of U.S. gold or silver coins), 4 Stat. 115, 122.

⁵⁶ See 1825 Crimes Act, §§ 1 (Burning of a dwelling house), 4 (Murder and rape committed on the high seas), and 11 (Setting fire to a vessel of the United States), 4 Stat. 115-18.

⁵⁷ Compare 1825 Crimes Act, §§ 17, 4 Stat. 115, 119-20 with 1790 Crimes Act, § 14, 1 Stat. 115. The 1825 Crimes Act also amended the punishment for receiving stolen goods from a fine of four times the value of the goods involved and 39 stripes to a term of imprisonment not exceeding three years. Compare 1825 Crimes Act, § 8, 4 Stat. 115, 116 with 1790 Crimes Act, § 17, 1 Stat. 112, 116.

The remaining 17 crimes were punishable by terms of imprisonment of up to six months,⁵⁸ one year,⁵⁹ three years,⁶⁰ five years,⁶¹ and 10 years.⁶²

Congress relied heavily on mandatory minimum penalties when establishing crimes for the District of Columbia. The 1831 District of Columbia Crimes Act included 18 offenses with punishments for conduct occurring in the District of Columbia, fifteen of which carried mandatory minimum penalties.⁶³ For example, receiving stolen goods carried a mandatory minimum penalty of at least one year of imprisonment.⁶⁴ Fifteen of the offenses also specified mandatory minimum penalties for a second or subsequent offense.⁶⁵ A second conviction for receiving stolen goods carried a mandatory minimum penalty of at least two years of imprisonment.⁶⁶ In some instances, Congress prescribed mandatory minimum penalties for offenses committed in the District of Columbia even where analogous federal offenses of general application did not carry such penalties. The first offense for receiving stolen goods in the District of Columbia carried a mandatory minimum penalty of one year of imprisonment and a maximum term of five years of imprisonment, but under other federal law the offense of receiving stolen goods carried no mandatory minimum penalty and a statutory maximum term of imprisonment of three years.⁶⁷

⁵⁸ See 1825 Crimes Act, § 10 (Abandoning a mariner), 4 Stat. 115, 117.

⁵⁹ See 1825 Crimes Act, § 12 (Extortion by officer of the United States), 4 Stat. 115, 118.

⁶⁰ See 1825 Crimes Act, §§ 8 (Receiving stolen goods), 19 (Forging ship's certificates), 21 (Forging copper United States coins), and 22 (Assault at sea), 4 Stat. 115, 116, 120-22.

⁶¹ See 1825 Crimes Act, § 7 (Breaking and entering a vessel) and the two offenses at § 13, (Perjury) and (Procuring perjury), 4 Stat. 115, 116, 118.

⁶² See 1825 Crimes Act, §§ 2 (Burning of a non-dwelling house), 6 (Attacking a vessel of the United States), 9 (Plundering a vessel in distress), 16 (Embezzlement of Bank of the United States funds), 17 (Forging a public security issued by the United States), 18 (Forging a financial instrument), 20 (Forging gold or silver United States coins), and 23 (Conspiracy to destroy a vessel), 4 Stat. 115, 115-16, 118-22.

⁶³ See 1831 DC Crimes Act, §§ 2 (Manslaughter, Assault with intent to kill), 3 (Arson), 4 (Rape), 5 (Assault and battery with intent to rape), 6 (Burglary, Robbery), 7 (Horse stealing, Mayhem, Bigamy), 8 (Perjury), 9 (Larceny), 11 (Forgery), 12 (Obtaining goods by false pretenses, Keeping a gaming table), 4 Stat. 448, 448-50.

⁶⁴ See 1831 DC Crimes Act, § 10, 4 Stat. 448, 449.

⁶⁵ See 1831 DC Crimes Act, §§ 2 (Manslaughter, Assault with intent to kill), 3 (Arson), 4 (Rape), 5 (Assault and battery with intent to rape), 6 (Burglary, Robbery), 7 (Horse stealing, Mayhem, Bigamy), 8 (Perjury), 9 (Larceny), 11 (Forgery), 13 (Petty larceny), 4 Stat. 448, 448-50.

⁶⁶ See 1831 DC Crimes Act, § 10, 4 Stat. 449.

⁶⁷ Compare 1831 DC Crimes Act, § 10, 4 Stat. 448, 449 with Crimes Act of 1825, § 8, 4 Stat. 115, 116. Also compare 1831 DC Crimes Act §§ 8 (Perjury) (punishable by a term of imprisonment of not less than two nor more than 10 years) and 11 (Forgery) (punishable by a term of imprisonment of not less than one nor more than seven years), 4 Stat. 448, 449 with 1825 Crimes Act § 13 (Perjury) (punishable by a term of imprisonment of a term not exceeding five years) and either § 20 (forgery of U.S. gold or silver coins) or § 21 (U.S. copper coins) (punishable by a term of imprisonment not to exceed 10 or three years, respectively), 4 Stat. 115, 118, 121.

In subsequent years, Congress continued to enact criminal laws that addressed specific needs, and these new laws sometimes imposed mandatory minimum penalties. In 1835, Congress enacted statutes concerning mutiny, encouragement of mutiny, and mistreatment of a ship's crew by the ship's master or officers, which carried terms of imprisonment not to exceed ten, five, and five years, respectively.⁶⁸ In doing so, however, Congress also repealed the 1790 Crimes Act's mandatory death penalty for mutiny.⁶⁹ In 1840, Congress enacted legislation to provide for the collection and safeguarding of public revenue, which included a mandatory minimum penalty of at least six months of imprisonment for embezzlement of funds by an officer charged with custody of public funds.⁷⁰ In the late 1850s, Congress enacted a mandatory minimum penalty of at least three years of imprisonment for offenses related to the forgery of land titles in California and forging military land-warrants.⁷¹

C. MANDATORY MINIMUM PENALTIES IN THE CIVIL WAR ERA

In the 1860s, as the federal government responded to the Civil War and its aftermath, Congress enacted mandatory minimum penalties targeting individuals allied with the Confederacy. In 1861, Congress created an offense intended to punish individuals who conspired to overthrow the Government of the United States with a mandatory minimum penalty of at least six months of imprisonment.⁷² A second offense punished individuals recruiting personnel for military service against the United States with a mandatory minimum penalty of at least one year of imprisonment, and also punished the recruit by the same mandatory minimum penalty.⁷³

In 1862, Congress enacted a law mandating death for certain Confederate spies.⁷⁴ A second offense created by the 1862 Act provided a mandatory minimum penalty of five years of imprisonment for kidnapping a freed person with intent to sell the person into slavery.⁷⁵ The 1862 Act also amended the penalty for treason created in the 1790 Crimes Act, reducing it from mandatory death to "death; or, at the discretion of the court, . . . imprison[ment] at hard labor for

⁶⁸ See Act of Mar. 3, 1835, ch. XL, §§ 1 (Mutiny), 2 (Endeavoring to mutiny), and 3 (Mistreatment of ship's crew), 4 Stat. 775, 775-77.

⁶⁹ See Act of Mar. 3, 1835, ch. XL, § 1 (Mutiny), 4 Stat. 775, 776.

⁷⁰ See Act of July 4, 1840, ch. XLI, § 17 (Embezzlement), 5 Stat. 385, 389. Congress repealed this Act the following year but re-enacted a similar embezzlement offense with the same mandatory minimum. See Act of Aug. 13, 1841, ch. VII, §§ 1 (repealing Act of July 4, 1840), 2 (Embezzlement), 5 Stat. 439, 439-40.

⁷¹ See Act of May 18, 1858, ch. XL, 11 Stat. 290, 290-91; Act of Feb. 5, 1859, ch. XXIII, 11 Stat. 381, 381.

⁷² See Act of July 31, 1861, ch. XXXIII, 12 Stat. 284, 284.

⁷³ See Act of Aug. 6, 1861, ch. LVI, 12 Stat. 317, 317.

⁷⁴ See Act of Feb. 13, 1862, ch. XXV, § 4, 12 Stat. 339, 340.

⁷⁵ See Act of Apr. 16, 1862, ch. LIV, § 8, 12 Stat. 376, 378. The maximum penalty was 20 years of imprisonment.

not less than five years.”⁷⁶

In 1863, Congress prohibited communications with the “present pretended rebel Government” intended to affect the operations of the federal government without its permission and punished such communications with a mandatory minimum penalty of not less than six months of imprisonment.⁷⁷ This offense was similar to the Logan Act of 1799, discussed *supra*, which imposed a mandatory minimum penalty for like conduct with a foreign government. The same year, Congress passed legislation regulating the drafting of men into military service that included a mandatory minimum penalty of at least six months of imprisonment for anyone encouraging desertion or sheltering a deserter.⁷⁸ Fraud against the government carried a mandatory minimum penalty of at least one year of imprisonment.⁷⁹

In 1864, Congress created an offense targeting individuals who entice or aid seamen to desert from the United States Navy and provided a mandatory minimum penalty of at least six months of imprisonment.⁸⁰ Other offenses enacted during the war carrying mandatory minimum penalties included embezzlement by an officer or agent of a national bank, which carried a mandatory minimum penalty of at least five years of imprisonment;⁸¹ creating or circulating forged notes or possessing counterfeit engraving plates, which carried a mandatory minimum penalty of at least five years of imprisonment;⁸² and damaging post office boxes, which carried a mandatory minimum penalty of one year of imprisonment.⁸³ For some other offenses, Congress set mandatory minimum penalties of imprisonment for two years,⁸⁴ six months,⁸⁵ or three months.⁸⁶ In the period immediately following the war, Congress established several more

⁷⁶ See Act of July 17, 1862, ch. CXCIV, § 1, 12 Stat. 589, 589-90. Regardless of whether the offender was punished with death or imprisonment, the Act required that “all his slaves, if any, shall be declared and made free.” *Id.*

⁷⁷ See Act of Feb. 25, 1863, ch. LX, 12 Stat. 696, 696.

⁷⁸ See Act of Mar. 3, 1863, ch. LXXV, § 24, 12 Stat. 731, 735.

⁷⁹ See Act of Mar. 2, 1863, ch. LXVII, § 3, 12 Stat. 696, 698.

⁸⁰ See Act of July 1, 1864, ch. CCIV, 13 Stat. 343, 343.

⁸¹ See Act of Feb. 25, 1863, ch. LVIII, § 52 (Embezzlement), 12 Stat. 665, 680; see also Act of June 3, 1864, ch. CVI, § 55 (Embezzlement), 13 Stat. 99, 116; Act of Mar. 3, 1869, ch. CXLV, 15 Stat. 339, 339 (extending penalties to those who aid or abet such embezzlement). The maximum penalty was 10 years of imprisonment.

⁸² See Act of Feb. 25, 1863, ch. LVIII, §§ 57-58, 12 Stat. 665, 680-81. The maximum term of imprisonment was 15 years. See also Act of June 3, 1864, ch. CVI, §§ 59-60, 13 Stat. 99, 117.

⁸³ See Act of Mar. 3, 1865, ch. LXXXIX, § 13, 13 Stat. 504, 506-07. The maximum term of imprisonment was three years.

⁸⁴ See Act of July 3, 1866, ch. CLXII, § 2, 14 Stat. 81, 81-82 (death caused by transporting nitroglycerine in a passenger conveyance; no maximum).

⁸⁵ See Act of Mar. 3, 1863, ch. LXXXI, § 2, 12 Stat. 755, 755 (federal officer’s disobeying a judicial order to discharge a prisoner; no maximum).

⁸⁶ See, e.g., Act of Mar. 3, 1865, ch. LXXIX, § 17, 13 Stat. 487, 489-90 (enlisting a person not eligible to serve, or depriving a soldier of a bounty earned for service; maximum two years).

mandatory minimum penalties, most commonly with a minimum term of one year of imprisonment.⁸⁷

D. THE REVISED STATUTES: MANDATORY MINIMUM PENALTIES AFTER THE CIVIL WAR

In the 1870s, Congress codified federal law, resulting in the Revised Statutes, a predecessor of the current United States Code.⁸⁸ The absence of a prior codification makes it difficult to state with precision how many mandatory minimum penalties were in effect at any particular time because Congress tended to overwrite old laws with new ones and repealed an uncertain number of provisions by implication. The Revised Statutes thus provide a snapshot of all federal crimes and penalties in force in 1878.⁸⁹

At least 108 offenses codified in the Revised Statutes carried a mandatory penalty. Of these 108 offenses, 16 mandated death. Those capital offenses included murder, piracy, various maritime crimes, and arson.⁹⁰ Murder, piracy, and slave trafficking had carried the death penalty

⁸⁷ For statutes carrying a mandatory minimum penalty of one year of imprisonment, *see, e.g.*, Act of July 13, 1866, ch. CLXXXIV, § 45, 14 Stat. 98, 163 (for trafficking in distilled spirits, either imprisonment for not less than three months or a fine); Act of Mar. 2, 1867, ch. CXCIII, 14 Stat. 557, 557 (for robbery or larceny of property of the United States, either imprisonment at hard labor from one year to 10 years, or a fine, or both); Act of Mar. 2, 1867, ch. CLXIX, § 26, 14 Stat. 471, 483-84 (for unlawful claims settlement by a revenue officer, maximum 10 years of imprisonment); Act of July 14, 1870, ch. CCLIV, § 1, 16 Stat. 254, 254 (for perjury in connection with immigration, maximum five years of imprisonment).

For statutes carrying mandatory minimum penalties of other lengths, *see, e.g.*, Act of July 13, 1866, § 38, 14 Stat. 98, 159 (for fraudulent packaging of distilled spirits, imprisonment for a minimum of two years and a maximum of five years); Act of Mar. 2, 1867, ch. CLXIX, §§ 9, 28, 29, 14 Stat. 471, 473, 484 (for evading liquor or tobacco taxes, imprisonment for a minimum of 60 days and a maximum of two years; for impersonating a revenue officer, imprisonment for a minimum of six months and a maximum of two years; for unlawfully mixing or selling illuminating oils, imprisonment for a minimum of six months and a maximum of three years); Act of July 20, 1868, ch. CLXXVI, §§ 44, 45, 48, 57, 71-72, 15 Stat. 125, 142-44, 149-50, 156-57 (for various offenses involving liquor and tobacco taxes, imprisonment for minimum terms ranging from 10 days to two years); Act of Dec. 22, 1869, ch. III, § 5, 16 Stat. 59, 60 (for hindering a member of the reconstructed legislature of Georgia from attending or participating at session, imprisonment at hard labor for a minimum of two years and a maximum of 10 years); Act of July 14, 1870, ch. CCLIV, § 2, 16 Stat. 254, 254-55 (for immigration fraud, either imprisonment at hard labor from one year to five years, or a fine, or both); and Act of Mar. 3, 1871, ch. CXX, § 3, 16 Stat. 544, 570 (for making an unlawful contract with Indians, imprisonment for a minimum of six months (with no maximum)).

⁸⁸ *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012-16 (1938). Congress enacted the first Revised Statutes of the United States in June 22, 1874, thereby consolidating all of the general and permanent laws into a single act. *See* Act of June 22, 1874, §§ 5595-96, 18 Stat. 1, 1091. However, because of errors in that version, Congress authorized the publication of a second edition of the Revised Statutes, which became law in 1878. *See* Act of Mar. 2, 1877, 19 Stat. 268, 268-69; Dwan & Feidler, *supra*, at 1014-16.

⁸⁹ *See* Revised Statutes (1878) [hereinafter the Revised Statutes or Rev. Stat.].

⁹⁰ Rev. Stat. §§ 5323 (accessory before the fact to piracy), 5339 (murder), 5345 (rape in maritime jurisdiction), 5365 (owner destroying his vessel at sea), 5366 (person other than owner destroying a vessel at sea), 5368 (piracy under the laws of nations), 5369 (seaman laying violent hands upon his commander), 5370 (robbery upon the high seas), 5371 (robbery on shore by crew of piratical vessel), 5372 (murder upon the high seas), 5373 (piracy under color of a foreign commission), 5374 (piracy by subjects or citizens of a foreign state), 5375 (piracy in confining,

since the 1790 Crimes Act or, in the case of slave trafficking, since the 1820s. The Revised Statutes repealed the mandatory death penalty for counterfeiting, one of the original capital crimes established in the 1790 Crimes Act.⁹¹ The Revised Statutes also reflected Congress's 1863 amendment to the treason offense, which was punishable by death or, in the court's discretion, by a term of at least five years of imprisonment.⁹²

Of the 108 offenses codified in the Revised Statutes that carried a mandatory penalty, at least 92 of those offenses carried a mandatory minimum term of imprisonment.⁹³ Only one offense — robbery of United States mail — required life imprisonment, but even then only upon a second conviction; otherwise, the offense carried a mandatory minimum penalty of five years of imprisonment.⁹⁴ The remaining offenses required mandatory minimum penalties ranging from 10 days (for offenses relating to the destruction of tobacco package tax stamps) to five years of imprisonment (for counterfeiting national bank notes).

Over half (50) of the offenses in the Revised Statutes that carried a mandatory minimum penalty involved internal revenue taxation, primarily aimed at preventing fraud in the collection and payment of excise taxes on tobacco and alcohol. Shortly after the Civil War began, the federal government levied excise taxes — for the first time since the late 18th century — on alcohol, tobacco, and other goods in order to raise funds for the costly war effort.⁹⁵ Excise taxes constituted a large percentage of the federal government's overall revenue, and therefore thorough collection was a crucial goal, but it proved difficult.⁹⁶ As one of many efforts aimed at increasing compliance with the alcohol and tobacco duties, Congress enacted a variety of mandatory minimum penalties.⁹⁷ Of these mandatory minimum penalties, only one required more than one year of imprisonment (a two-year mandatory minimum penalty for affixing false

detaining, or transferring Negroes on vessels for the purpose of slavery), 5385 (arson of a dwelling house within a United States fort), 5387 (arson of a United States vessel of war), 5400 (rescue of an individual sentenced to death).

⁹¹ See Rev. Stat. § 5415.

⁹² See Rev. Stat. § 5332.

⁹³ See Table C-1 (mandatory minimums penalties in the 1878 revised statutes) in Appendix C of this Report.

⁹⁴ Rev. Stat. § 5472.

⁹⁵ See Report of the Commissioner of Internal Revenue, at iv–vii (1875).

⁹⁶ See ALBERT SIDNEY BOLLES, A FINANCIAL HISTORY OF THE UNITED STATES, FROM 1861 TO 1885, at 421 (1886) (“The frauds began soon after enacting the law, and quickly reached gigantic proportions. A congressional investigating committee, in 1868, declared that if the tax were honestly paid, \$200,000,000 would be collected annually, when, in truth, not much more than one-eighth of that sum had been received.”). See Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1875, at xiv–xx (1875) (detailing the nature of the distilled spirits fraud and the government's collection efforts).

⁹⁷ These mandatory minimums were largely enacted in 1868. See Act of July 20, 1868, 15 Stat. 125. The Secretary of the Treasury viewed the new legislation as an improvement over former law, in part because it was “more rigorous in its punishment of offenders,” but cautioned that “its successful operation must depend upon the vigilance and fidelity of the local officers. The corruption of storekeepers, gaugers, and assistant assessors . . . will always open sources of ruin to honest tax-payers and loss to the treasury, which neither the wisest legislation nor the most stringent regulations of the department can close.” Annual Report of the Secretary of the Treasury 480 (1868).

tobacco stamps); eight required one year of imprisonment; 26 required at least six months of imprisonment; eight required at least three months of imprisonment; and the remaining seven required from 10 days to one month of imprisonment.⁹⁸ However, evidence suggests that while criminal prosecutions were a key feature of combating tax evasion,⁹⁹ these mandatory minimum penalties resulted in relatively few offenders being imprisoned¹⁰⁰ and did not effectively increase compliance with the revenue laws.¹⁰¹ Moreover, widespread evasion of the excise taxes ended by the mid-1880s, apparently due not to the mandatory minimum penalties, but to advances in the government’s ability to monitor alcohol output and reforms in the hiring and supervision of revenue officers.¹⁰²

Beyond revenue offenses, the Revised Statutes primarily employed mandatory minimum penalties for offenses involving counterfeiting and forgery, piracy, and slave trafficking, in addition to misconduct by government agents and interference with governmental functions. The use of mandatory minimum penalties for offenses relating to counterfeiting, piracy, and slave trafficking is unsurprising because they all were historically punishable by death. Moreover, the mandatory minimum penalties in effect in 1878 were relatively short compared to

⁹⁸ See Table C-1 of this Report.

⁹⁹ Annual Report of the Secretary of the Treasury on the State of the Finances, at xxxv-xxxvii (1875) (“The Secretary considers it important to the future collection of the revenue, that all parties engaged in persistent and systemic frauds shall be visited with the severest penalties of the law. To this end, instructions have been repeatedly given . . . to render all proper assistance to the officers of the Department of Justice in the prosecution of the cases now pending, and in the detection and punishment of such guilty parties as have not yet been indicted.”).

¹⁰⁰ In 1889, the Attorney General reported to Congress that there were 14,588 federal criminal prosecutions, of which 5,648 were brought under the internal revenue laws. Although the 14,588 prosecutions yielded 3,158 convictions, the federal government received only 29 prisoners that year who “were committed for violation of the revenue laws.” Annual Report of the Attorney General of the United States, at vii to viii, xii (1889). Data for earlier years is apparently unavailable for, as the Attorney General reported in 1873, it was difficult and costly to collect imprisonment data from the wardens of the many state penitentiaries that held federal prisoners. See Annual Report of the Attorney General of the United States for the Fiscal Year Ending June 30, 1873, at 5 (1873). However, based on the data the Attorney General was able to collect in 1873, of the 16,201 persons in federal custody, 1,117 were convicted of miscellaneous offenses (a category that apparently included those imprisoned for internal revenue crimes in addition to many other types of offenses). See *id.* at 36-39.

¹⁰¹ See BOLLES, *supra* note 96, at 424-25 (“To destroy these frauds, which had grown to enormous dimensions, and stretched their strong roots in so many directions, was not easy. The harder Congress tried to combat them, the more they grew. Every remedy proved unavailing.”); *United States v. Ulrici*, 28 F. Cas. 328, 331 (C.C. Mo. 1875) (“Notwithstanding the heavy penalties denounced against crimes which go to defraud the government of its revenue from internal taxes, and notwithstanding the minuteness and particularity in the description of these crimes, and notwithstanding all of the aids which Congress has given by legislation to the enforcement of the revenue laws, they have been very imperfectly executed, and that the government is cheated out of perhaps one-half of its revenue, especially that from the tax on whisky and tobacco.”).

¹⁰² See Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1882, at xv (1882). (declaring a “successful close of the struggle to establish and maintain the internal-revenue laws of the United States” and that “[f]rauds in the manufacture and sale of whisky and tobacco in the districts where they have hitherto most prevailed have become the exception rather than the rule”); BOLLES, *supra* note 96, at 437 (attributing the “marked improvement” in the collection of alcohol excise taxes to “[t]he method adopted in 1868 of measuring the product at the still, and of requiring the payment of a tax on that quantity, together with the selection of better officers for administering the law”).

those Congress enacted in the 20th century, discussed *infra*. Only 19 of the 42 statutes carrying a mandatory minimum penalty for offenses unrelated to revenue required a term of imprisonment of more than one year, and most of those 19 offenses were lesser versions of capital slave trafficking and maritime offenses.¹⁰³ Only nine offenses carried a mandatory minimum penalty of three years of imprisonment, and only two offenses carried a mandatory minimum penalty of five years of imprisonment. Thus, many of the mandatory minimum penalties in the Revised Statutes applied to offenses that historically had carried severe penalties, and the mandatory minimum penalties in the Revised Statutes were generally shorter than the mandatory minimum penalties that are most commonly applied today.

E. THE 1909 CRIMINAL CODE AND SUBSEQUENT CODIFICATIONS IN THE FIRST HALF OF THE 20TH CENTURY

In the late 1800s, Congress initiated a chain of events that led to the repeal of some of the mandatory minimum penalties codified in the Revised Statutes. In 1897, Congress created the Commission to Revise and Codify the Criminal and Penal Laws of the United States.¹⁰⁴ Congress initially charged the Revision Commission with revising and codifying the federal criminal and penal codes,¹⁰⁵ but before the Revision Commission submitted its report, Congress expanded its duties to include a complete revision and codification of all federal laws.¹⁰⁶

In its reports to Congress, the Revision Commission recommended the abolition of mandatory minimum penalties for many crimes not punishable by death.¹⁰⁷ The Revision Commission explained in a 1901 interim report that prescribing only statutory maximum sentences instead of mandatory minimum penalties embraced “the more enlightened practice [of] fit[ting] the punishment to the criminal” rather than assigning penalties based solely on the offense committed.¹⁰⁸ The Revision Commission further explained in its final report in 1906 that it had changed criminal penalties “in some instances to mitigate the severity that characterized former times, and in others to respect the principle of proportioning the punishment to the relative gravity of the offenses.”¹⁰⁹

¹⁰³ See Table C-1 of this Report.

¹⁰⁴ See Act of June 4, 1897, 30 Stat. 11, 58 [hereinafter the Revision Commission].

¹⁰⁵ *Id.* at 58.

¹⁰⁶ See S. REP. NO. 60–10, pt. 1, at 1-2 (1908).

¹⁰⁷ See Revision Commission to Revise and Codify the Laws of the United States, *Final Report of the Commission to Codify and Revise the Laws of the United States* (1906). The Revision Commission’s revisions and codifications of the criminal code did not include the mandatory minimum penalties relating to internal revenue enforcement. See *id.* Thus, the Revision Commission’s final report left those penalties in place. See *id.*

¹⁰⁸ See Revision Commission to Revise and Codify the Criminal and Penal Laws of the United States, *Report on the Penal Code of the United States*, at xxii (1901). The Revision Commission also favored a parole system but recognized that such a system was impractical because most federal prisoners were then housed in state rather than federal institutions. See *id.* at xxxii–xxxiii.

¹⁰⁹ See Revision Commission to Revise and Codify, *supra* note 107, at 100.

In 1907, Congress established a Special Joint Committee on the Revision of the Laws, which it directed “to examine, consider, and submit to Congress recommendations upon the revision and codification of the laws reported by the statutory [R]evision [C]ommission.”¹¹⁰ The Committee first took up the portion of the Revision Commission’s work dealing with criminal offenses, resulting in the enactment in 1909 of a new criminal code [hereinafter the 1909 Criminal Code].¹¹¹ The Special Joint Committee largely agreed with the Revision Commission’s opposition to mandatory minimum penalties.¹¹²

In its report, the Special Joint Committee on the Revision of the Laws gave the following reasons for repealing mandatory minimum penalties:

The committee has also adopted a uniform method of fixing in all offenses not punishable by death the maximum punishment only, leaving the minimum to the discretion of the trial judge.

The criminal law necessarily subjects to its corrective discipline all who violate its provisions. The weak and the vicious, the first offender and the atrocious criminal, the mere technical transgressor and the expert in crime are alike guilty of the same offense. In the one case the utmost severity of punishment can scarcely provide the protection to which society is entitled; in the other anything except a nominal punishment may effectually prevent the reclamation of the offender.

The argument most frequently urged against leaving the minimum punishments to the discretion of the trial judge is that it affords parties convicted of a crime of a heinous character an opportunity to obtain immunity because of the weakness or dishonesty of judges. It has been well said by a distinguished authority upon this subject that—

Instances of the former are rare, and of the latter none is believed by us ever to have existed. The purity of our judiciary is one of the things which calumny has yet left untouched.

This recommendation will be found in accordance with the humane spirit of advanced criminal jurisprudence. The early English statutes were proverbially cruel; the gravest crimes and the most trivial offenses alike invoked the penalty of death. Our own crimes act of 1790 reflected this barbarous spirit and denounced the death penalty for thirteen distinct offenses, but this spirit of vindictive retribution has entirely disappeared. We have abolished the punishment of death in all but three cases—treason, murder, and rape—and have provided that even in these cases it may be modified to imprisonment for life; and as humane judges in England availed themselves of the most technical irregularities in pleadings and proceedings as an excuse for discharging prisoners from the cruel rigors of the

¹¹⁰ See S. REP. NO. 60–10, pt. 1, at 1 (1908); H.R.J. Res. 19, 59th Cong., 34 Stat. 1423, 1423 (1907).

¹¹¹ See Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088.

¹¹² See S. REP. NO. 60–10, pt. 1, at 14 (1908).

common law, so jurors here often refuse to convict for offenses attended with extenuating circumstances rather than submit the offender to what in their judgment is the cruel requirement of a law demanding a minimum punishment.¹¹³

The 1909 Criminal Code repealed at least 31 of the mandatory minimum terms of imprisonment codified in the Revised Statutes, representing mandatory minimum penalties for offenses including misconduct by government employees, counterfeiting and forgery, and slave trafficking.¹¹⁴ Although the Revision Commission had recommended the repeal of additional mandatory minimum penalties as part of its codification of all federal law, Congress enacted only the Revision Commission's work on the Criminal Code and the Judicial Code.¹¹⁵ Thus, mandatory minimum penalties with respect to offenses that were not included in the Criminal Code remained in force after 1909. The substantial majority of the remaining mandatory minimum penalties related to internal revenue collection, discussed *supra*.¹¹⁶

In addition to eliminating some mandatory minimum penalties, Congress in enacting the 1909 Criminal Code reduced the penalties for various offenses from mandatory death to mandatory life imprisonment. Those offenses were detaining or transferring slaves aboard a vessel, seizing slaves on foreign shores, piracy, a seaman laying violent hands upon his commander, robbery on shore by a piratical crew, piracy under color of foreign commission, and piracy by aliens—all of which had been punishable by death since the early republic.¹¹⁷ The 1909 Criminal Code replaced the mandatory death penalty for rescuing a condemned person and arson with statutory maximum terms of up to 25 and 20 years of imprisonment, respectively.¹¹⁸

¹¹³ See S. REP. NO. 60–10, pt. 1, at 14 (1908).

¹¹⁴ Compare 1909 Criminal Code § 341 (enumerating repealed sections of the Revised Statutes), with Table C-1 (Mandatory Minimum Penalties in the 1878 Revised Statutes) in Appendix C of this Report.

¹¹⁵ See Dwan & Feider, *supra* note 88, at 1018.

¹¹⁶ The evidence indicates that the mandatory minimum penalties relating to internal revenue collection were rarely used in the late-19th century. Revenue officials observed as early as 1882 that the government had successfully ended widespread fraud in collection of excise taxes, and incarceration statistics from the post-Reconstruction era show that not many defendants were imprisoned for committing internal revenue offenses. See *supra* notes 96 to 104 and accompanying text. This trend continued into the 20th century. For example, in 1910, the Attorney General reported that there were 15,371 completed criminal prosecutions nationwide. While 4,355 of those prosecutions involved internal revenue offenses, only 161 of newly-incarcerated federal prisoners were held on account of violating the internal revenue laws. See Annual Report of the Attorney General of the United States for the Year Ended June 30, 1910, at 36, 67 (1910). The same year, fines totaling \$278,746.58 were assessed in internal revenue criminal cases. See *id.* at 67.

¹¹⁷ See 1909 Criminal Code §§ 246 (confining, detaining or transferring slaves aboard a vessel, punished by life imprisonment), 247 (seizing slaves on foreign shores, punished by life imprisonment), 290 (piracy under the law of nations, punished by life imprisonment), 294 (seaman laying violent hands upon his commander, punished by life imprisonment), 302 (robbery on shore by a piratical crew, punished by life imprisonment), 304 (piracy under color of foreign commission, punished by life imprisonment), 305 (piracy by aliens, punished by life imprisonment); see also *supra* note 90 (mandatory capital crimes in the Revised Statutes).

¹¹⁸ See 1909 Criminal Code §§ 142 (rescue of a condemned person going to or at an execution), 285 (arson of a dwelling house in the maritime or territorial jurisdiction), 286 (arson of another building or a vessel in the maritime or territorial jurisdiction).

First degree murder and rape remained mandatory capital crimes in the 1909 Criminal Code;¹¹⁹ second degree murder, obstructing the escape of a shipwrecked person, and holding out a false light to a vessel in distress carried mandatory minimum penalties of 10 years of imprisonment;¹²⁰ destruction of a vessel required imprisonment for life or a “term of years”;¹²¹ and treason continued to carry an alternative penalty structure requiring either death or a mandatory minimum of five years of imprisonment.¹²²

Congress subsequently enacted offenses carrying mandatory minimum penalties in the Prohibition Era. Congress passed the Volstead Act in October 1919, in anticipation of the ratification of the Eighteenth Amendment.¹²³ The Act placed significant restrictions on the unlawful manufacture or sale of alcohol and punished some violations with mandatory minimum penalties. A first offense for unlawful manufacture or sale received a maximum penalty of six months of imprisonment; a second or subsequent offense received a mandatory minimum penalty of at least one month but not more than five years of imprisonment.¹²⁴ Additional mandatory minimum penalties were prescribed for maintaining a premise where alcohol was unlawfully sold¹²⁵ (at least 30 days of imprisonment) and contempt for violating an injunction concerning any provision of the Volstead Act¹²⁶ (at least 30 days of imprisonment). These mandatory minimum penalties were as short-lived as Prohibition itself; Congress repealed the Volstead Act and its penalty provisions upon ratification of the Twenty-First Amendment.¹²⁷

In 1948, with the enactment of Title 18 of the United States Code, Congress changed the punishment for rape from mandatory death to “death, or imprisonment for any term of years or for life,”¹²⁸ but added a mandatory minimum penalty of 10 years of imprisonment for homicide or kidnapping during a bank robbery or larceny.¹²⁹ Congress also reduced the applicable penalty

¹¹⁹ See 1909 Criminal Code §§ 275 (first degree murder), 278 (rape).

¹²⁰ See 1909 Criminal Code §§ 275 (second degree murder), 297 (obstructing escape of a shipwrecked person), 297 (holding out false light to a vessel in distress).

¹²¹ See 1909 Criminal Code §§ 300 (owner destroying vessel at sea), 301 (other person destroying, or attempting to destroy, a vessel at sea).

¹²² See 1909 Criminal Code § 2 (treason).

¹²³ See National Prohibition (Volstead) Act, Pub. L. No. 66–66, 41 Stat. 305 (1919); Amendment to the Constitution, 40 Stat. 1941, 1941–42 (1919) (certifying the ratification of the Eighteenth Amendment).

¹²⁴ See Pub. L. No. 66–66, § 29, 41 Stat. 305, 316 (1919).

¹²⁵ See Pub. L. No. 66–66, § 3, 41 Stat. 305, 306 (1919).

¹²⁶ See Pub. L. No. 66–66, § 24, 41 Stat. 305, 315 (1919).

¹²⁷ See U.S. Const. amend. XXI; see also Liquor Law Repeal and Enforcement Act, Pub. L. No. 74–347, 49 Stat. 872 (1935) (repealing titles I and II, and amending title III, of the Volstead Act).

¹²⁸ See 18 U.S.C. § 2031 (1948), 62 Stat. 683, 795.

¹²⁹ See 18 U.S.C. § 2113(e) (1948).

for seizing persons on foreign shores to sell into slavery and holding slaves aboard a vessel from mandatory life imprisonment to indefinite terms of imprisonment of up to seven or four years, respectively.¹³⁰

F. MANDATORY MINIMUM PENALTIES FROM THE MID-TWENTIETH CENTURY

1. Introduction

As detailed herein, beginning in 1951, Congress changed how it used mandatory minimum penalties in three significant ways. First, Congress enacted more mandatory minimum penalties. Second, Congress expanded its use of mandatory minimum penalties to offenses not traditionally covered by such penalties. Before 1951, mandatory minimum penalties typically punished offenses concerning treason, murder, piracy, rape, slave trafficking, internal revenue collection, and counterfeiting. Today, the majority of convictions under statutes carrying mandatory minimum penalties relate to controlled substances, firearms, identity theft, and child sex offenses. Third, the mandatory minimum penalties most commonly used today are generally lengthier than mandatory minimum penalties in earlier eras.

In the second half of the 20th century, Congress reversed its prior policy of disfavoring mandatory minimum penalties to combat what it perceived as widespread problems resulting from drug trafficking and related crime. In 1951, Congress enacted a mandatory minimum penalty of two years of imprisonment for violating the Narcotic Drugs Import and Export Act, which broadly prohibited the importation, sale, purchase, and receipt of controlled substances.¹³¹ Second and third violations of the Act carried mandatory minimum penalties of five and 10 years of imprisonment, respectively.¹³² And when Congress created additional controlled substances offenses in 1956, it set a mandatory minimum penalty of 10 years of imprisonment for selling heroin to a juvenile and five years of imprisonment for a first offense of possessing narcotics on a vessel.¹³³

By the late 1960s, however, as mandatory minimum penalties for drug offenses became increasingly unpopular, the Nixon administration proposed a sweeping reform of the controlled substance sentencing laws.¹³⁴ As a result, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970,¹³⁵ which repealed nearly all mandatory minimum penalties for drug offenses. Congress believed that changes in the existing penalties, “particularly through elimination of mandatory minimum sentences,” would establish “a more realistic, more flexible,

¹³⁰ See 18 U.S.C. §§ 1585 (Seizure, detention, transportation or sale of slaves), 1587 (Possession of slaves aboard vessel) (1948), 62 Stat. 683, 773.

¹³¹ See Pub. L. No. 82–255, § 1, 65 Stat. 767, 767 (1951).

¹³² See *id.*

¹³³ See Narcotics Control Act of 1956, §§ 103, 105, 107, 108, Pub. L. No. 84–728, 70 Stat. 567, 568, 570-71.

¹³⁴ See, e.g., 116 Cong. Rec. 33,315 (1970) (statement of Rep. MacGregor).

¹³⁵ Pub. L. No. 91–513, 84 Stat. 1236 (1970).

and thus more effective system of punishment and deterrence of violations of the federal narcotics laws.”¹³⁶

Congress’s repeal of mandatory minimum penalties for drug offenses did not necessarily reflect a general policy disfavoring mandatory minimum penalties for all types of offenses. For example, Congress also amended 18 U.S.C. § 924(c) to require a mandatory minimum penalty of at least one year of imprisonment for using or carrying a firearm during the commission of a felony, as well as a mandatory consecutive two-year term of imprisonment for second and subsequent offenses.¹³⁷ In 1970, the same year it repealed mandatory minimum penalties for drug offenses, Congress created a mandatory minimum penalty of at least one year of imprisonment for using or carrying explosives while committing certain other crimes.¹³⁸

Congressional action in the 1980s resulted in the enactment of many additional mandatory minimum penalties and an increase in the length of existing penalties—particularly for drug offenses and violent crimes.¹³⁹ Congress’s use of mandatory minimum penalties in this period followed a shift in sentencing attitudes away from a rehabilitative model toward controlling crime using “more certain, less disparate, and more appropriately punitive” sentences.¹⁴⁰ This shift contributed to the enactment of the mandatory minimums that are most commonly applied today, particularly the penalties for firearm and drug trafficking crimes.

2. *Mandatory Minimum Penalties for Drug Offenses*

The Anti-Drug Abuse Act of 1986¹⁴¹ established the basic framework of mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties, which ranged from five years to life imprisonment, differed for various drugs and, in some cases, including cocaine, for different forms of the same drug. Congress expedited passage of the 1986 Act in response to a number of circumstances, including the increased incidence of drug use and trafficking and well-publicized tragic incidents such as the June 1986 death of Boston Celtics’ first-round draft pick, Len Bias. Because of the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically, Congress bypassed much of its usual deliberative legislative

¹³⁶ H. REP. NO. 91–1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566.

¹³⁷ *See* Omnibus Crime Control Act of 1970, Pub. L. No. 91–644, tit. II, § 13, 84 Stat. 1880, 1889–90 (1971).

¹³⁸ *See* Pub. L. No. 91–452, tit. XI, § 1102, 84 Stat. 922, 957 (1970) (codified as amended at 18 U.S.C. § 844(h)).

¹³⁹ During this time period Congress also developed and passed the Sentencing Reform Act.

¹⁴⁰ 1991 COMMISSION REPORT at 7.

¹⁴¹ *See* Pub. L. No. 99–570, 100 Stat. 3207 (1986).

process.¹⁴² As a result, Congress held no committee hearings and produced no reports related to the 1986 Act (although there were 17 related reports on various issues).¹⁴³

Floor statements delivered by members in support of the 1986 Act and a committee report on a predecessor bill suggest that Congress intended to create a two-tiered penalty structure for discrete categories of drug traffickers. Specifically, Congress intended to link the five-year mandatory minimum penalties to what some called “serious” traffickers and the ten-year mandatory minimum penalties to “major” traffickers. Drug quantity would serve as a proxy for identifying the type of trafficker.¹⁴⁴

Senator Robert Byrd, then the Senate Minority Leader, summarized the intent behind the legislation:

For the kingpins — the masterminds who are really running these operations — and they can be identified by the amount of drugs with which they are involved — we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail — a minimum of 5 years for the first offense.¹⁴⁵

A report issued by the House Judiciary Subcommittee on Crime following its consideration of a predecessor bill also provides evidence of Congress’s intent to establish two-tiered mandatory minimum penalties for serious and major traffickers. The Subcommittee determined that the five and ten-year mandatory minimum sentencing structure would encourage the Department of Justice to direct its “most intense focus” on “major traffickers” and “serious traffickers.”¹⁴⁶ “One of the major goals of this bill is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”¹⁴⁷

The 1986 Act distinguished between powder cocaine and cocaine base (also known as crack cocaine), by treating quantities of cocaine base differently than similar quantities of

¹⁴² See e.g., 132 CONG. REC. 26,436 (Sept. 26, 1986) (statement of Sen. Hawkins) (“Drugs pose a clear and present danger to America’s national security. If for no other reason we should be addressing this on an emergency basis.”).

¹⁴³ See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 5-6 (May 2002).

¹⁴⁴ See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6 (May 2002).

¹⁴⁵ 132 CONG. REC. 27,193–94 (Sept. 30, 1986); see also 132 CONG. REC. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) (“[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.”).

¹⁴⁶ H.R. REP. NO. 99–845, pt. 1, at 11-12 (1986).

¹⁴⁷ *Id.* at 11.

powder cocaine.¹⁴⁸ Under the so-called “100-to-1” ratio, the 1986 Act established a mandatory minimum penalty of five years of imprisonment for trafficking offenses involving at least five grams of crack cocaine, whereas trafficking offenses involving powder cocaine required at least 500 grams of the substance to trigger the same mandatory minimum.¹⁴⁹ The legislative history of the ratio shows that, in addition to viewing the ratio as consistent with the Act’s general serious/major trafficker penalty structure,¹⁵⁰ Congress predicated the ratio upon its conclusion that crack cocaine was more dangerous than powder cocaine because of its especially deleterious effects on the communities where it was becoming increasingly prevalent.¹⁵¹ Congress has since altered the penalties applicable to crack cocaine in the Fair Sentencing Act of 2010, as discussed in more detail below.

In 1988, the Omnibus Anti-Abuse Act established a five-year mandatory minimum penalty for possessing more than five grams of crack cocaine, in addition to increasing the mandatory minimum penalty for engaging in a continuing drug enterprise (from 10 to 20 years of imprisonment).¹⁵² The 1988 Act also extended the mandatory minimum penalties for drug trafficking crimes to include conspiracies to commit those substantive offenses, thereby broadening the scope of mandatory minimum penalties to include virtually all offenders in drug trafficking organizations.¹⁵³

3. *Mandatory Minimum Penalties for Firearms Offenses*

With respect to firearms offenses, in 1984 Congress amended 18 U.S.C. § 924 to provide a mandatory penalty of five years of imprisonment for using or carrying a firearm during a “crime of violence,”¹⁵⁴ and elsewhere established mandatory sentencing enhancements for

¹⁴⁸ See Pub. L. No. 99–570, § 1002, 100 Stat. 3207, 3207-2 (1986) (amending 21 U.S.C. § 841(b)(1)).

¹⁴⁹ See *id.*

¹⁵⁰ 132 CONG. REC. 26,447 (Sept. 26, 1986) (statement of Sen. Chiles) (“Those who possess 5 or more grams of cocaine freebase will be treated as serious offenders. Those apprehended with 50 or more grams of cocaine freebase will be treated as major offenders. Such treatment is absolutely essential because of the especially lethal characteristics of this form of cocaine.”)

¹⁵¹ See, e.g., 132 CONG. REC. 31,329-30 (Oct. 15, 1986) (statement of Sen. Chiles) (“And so we find that people, when they are addicted, will go out and steal, rob, lie, cheat, take money from any savings, take refrigerators out of their houses, anything they can get their hands on to maintain that habit. That, of course, has caused crime to go up at a tremendously increased rate in our cities and in our States – the crimes of burglary, robbery, assault, purse snatching, mugging, those crimes where people are trying to feed that habit.”); 132 CONG. REC. 27,176 (Sept. 30, 1986) (statement of Sen. Hart) (“Then along came crack-cocaine – and the high was available to all. So too, however, were the lows: The raging paranoia, the addiction rooted deep in the brain’s chemical structure, and worst, the senseless deaths.”); 132 CONG. REC. 5983 (Mar. 21, 1986) (statement of Rep. Rangel) (“What is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth.”).

¹⁵² See Pub. L. 100–690, §6371, 102 Stat. 4181, 4370 (1988) (amending 21 U.S.C. § 844); *id.* § 6481(a) (amending 21 U.S.C. § 848(a)).

¹⁵³ See *id.* § 6470(a) (amending 21 U.S.C. §§ 846, 963).

¹⁵⁴ See Pub. L. No. 98–473, § 1005(a), 98 Stat. 1837, 2138-39 (1984) (amending 18 U.S.C. § 924(c)).

possessing dangerous ammunition during drug and violent crimes.¹⁵⁵ Two years later, in 1986, Congress expanded the scope of section 924(c) to include carrying or using a firearm during a drug trafficking crime.¹⁵⁶ Congress also substantially expanded the armed career criminal provision at section 924(e), and its mandatory minimum penalty of 15 years of imprisonment, to cover firearms possession offenses committed by those with three convictions for crimes broadly defined as “violent felonies” and “serious drug offenses.”¹⁵⁷

In 1998, Congress again amended 18 U.S.C. § 924(c) in three ways,¹⁵⁸ primarily in response to the Supreme Court’s decision in *Bailey v. United States*, in which the Court interpreted the prior version of section 924(c) to require the defendant’s “active employment” of a firearm in the predicate offense.¹⁵⁹ First, prior law had established a mandatory minimum penalty of five years of imprisonment for an offender who “use[d] or carrie[d]” a firearm during and in relation to a crime of violence or drug trafficking crime.¹⁶⁰ Congress amended the statute also to require a mandatory minimum penalty of five years of imprisonment if the offender “possesses a firearm” “in furtherance of any such crime.”¹⁶¹ Second, Congress established more severe mandatory minimum penalties for certain offenders depending on whether, in violating section 924(c), a firearm was “brandished” or “discharged”— requiring mandatory minimum penalties of seven years and 10 years of imprisonment, respectively.¹⁶² Finally, Congress increased the mandatory minimum penalty for second or subsequent convictions under section 924(c) from 20 years to 25 years of imprisonment.¹⁶³ Thus, in addition to responding to the decision in *Bailey*, Congress also amended section 924(c) to ensure that more serious offenses carried progressively higher mandatory minimum penalties.¹⁶⁴

¹⁵⁵ See Pub. L. No. 98–473, § 1006(a), 98 Stat. 1837, 2139 (1984) (codified as amended at 18 U.S.C. § 929).

¹⁵⁶ See Pub. L. No. 99–308, § 104, 100 Stat. 449, 456 (1986) (amending 18 U.S.C. § 924(c)).

¹⁵⁷ See Career Criminals Amendment Act of 1986, Pub. L. No. 99–570, § 1402, 100 Stat. 3207, 3207-39 to 40. Previously, § 924(e) applied only to those convicted of burglaries and robberies. *Id.*

¹⁵⁸ Pub. L. No. 105–386, 112 Stat. 3469 (1998).

¹⁵⁹ 516 U.S. 137, 143 (1995).

¹⁶⁰ See 18 U.S.C. § 924(c) (1994). Both prior and present versions of section 924(c) establish longer, 10- and 30-year mandatory minimum penalties for certain types of firearms, such as assault weapons, short-barreled shotguns and rifles, machineguns, destructive devices, and firearms equipped with silencers or mufflers. *See id.*

¹⁶¹ Pub. L. No. 105–386, 112 Stat. 3469 (1998).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 144 CONG. REC. 1,715–16 (Feb. 24, 1998) (statement of Rep. McCollum); 144 CONG. REC. 1,718 (Feb. 24, 1998) (statement of Rep. Buyer). 144 Cong. Rec. 1,717 (Feb. 24, 1998) (statement of Rep. Myrick). As originally passed by the House, the amendment would have imposed substantially more severe sentences than the enacted version: requiring 10 years of imprisonment for possession, 15 years of imprisonment for brandishing, and 20 years of imprisonment for discharging the firearm, along with more severe penalties for subsequent convictions. H.R. 424, 105th Cong. § 1 (1998) (as passed by the House of Representatives, Feb. 24, 1998), *reprinted in* 144 CONG. REC. 1,715 (Feb. 24, 1998). The Senate’s version contained less severe penalties (five years for possession, 10 years

4. *Mandatory Minimum Penalties for Child Sexual Exploitation and Related Offenses*

Congress also has enacted mandatory minimum penalties to combat child sexual exploitation. When Congress outlawed the production of child pornography in 1978, it established a mandatory minimum penalty of two years of imprisonment for repeat offenders.¹⁶⁵ By 1996, Congress had increased the penalties for production of child pornography to require a mandatory minimum penalty of 10 years of imprisonment for first-time offenders, 15 years of imprisonment for offenders with a prior conviction of a child sexual exploitation offense, and at least 30 years of imprisonment for offenders with two such prior convictions.¹⁶⁶ Similarly, Congress prescribed mandatory minimum penalties of 20 years of imprisonment when it established offenses in 1988 for the buying or selling of children.¹⁶⁷ In addition, since 1978, Congress has set mandatory minimum penalties for recidivist offenders who possess, receive, and traffic in child pornography.¹⁶⁸

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003¹⁶⁹ established new mandatory minimum penalties and increased existing mandatory minimums for certain child sexual abuse and child pornography crimes. Among other changes, Congress increased the mandatory minimum penalties for producing child pornography and related conduct from 10 to 15 years of imprisonment for first-time offenders, from 15 to 25 years of imprisonment for repeat child exploitation offenders, and from 30 to 35 years of imprisonment for offenders with more than two prior child exploitation convictions.¹⁷⁰ The Act further increased the mandatory minimum penalty for the buying or selling of children

for discharge, and no separate penalty for brandishing), *see* S. 191, 105th Cong. § 1 (as passed by Senate, Nov. 13, 1997), *reprinted in* 143 CONG. REC. S12712 (daily ed. Nov. 13, 1997), and the final amendment was the product of a compromise between the House and Senate versions, *See* 144 CONG. REC. 25,036 (Oct. 9, 1998) (statement of Rep. McCollum).

¹⁶⁵ *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, § 2(a), 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. § 2251).

¹⁶⁶ *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121(4), 110 Stat. 3009 (amending 18 U.S.C. § 2251(d)).

¹⁶⁷ *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100–690, § 7512(a), 102 Stat. 4181 (codified as amended at 18 U.S.C. § 2251A).

¹⁶⁸ The Protection of Children Against Sexual Exploitation Act of 1977 established a mandatory minimum penalty of two years of imprisonment for repeat offenders who traffic and are in receipt of child pornography. *See* Pub. L. No. 95–225, § 2(a), 92 Stat. 7 (codified as amended at 18 U.S.C. § 2252). Later amendments extended these penalties to trafficking and receipt child pornography offenders who had at least one conviction for a broad range of child sexual exploitation offenses. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 160001, 108 Stat. 1796 (amending 18 U.S.C. § 2252(b)). In 1996, Congress established a mandatory minimum penalty of at least two years of imprisonment for offenders with a prior sexual exploitation conviction who possess child pornography. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121(5), 110 Stat. 3009 (amending 18 U.S.C. § 2252(b)(2)).

¹⁶⁹ Pub. L. No. 108–21, 117 Stat. 650 [hereinafter PROTECT Act].

¹⁷⁰ PROTECT Act, § 103(b)(1)(A) (amending 18 U.S.C. § 2251).

from 20 to 30 years of imprisonment,¹⁷¹ and the mandatory minimum penalty for possession of child pornography by a recidivist offender from two to 10 years of imprisonment.¹⁷² Finally, Congress established new mandatory minimum penalties for existing offenses, most notably by requiring at least five years of imprisonment for receipt and distribution of child pornography,¹⁷³ as well as a new mandatory minimum penalty of five years of imprisonment for enticing a minor to travel in interstate commerce for criminal sexual activity.¹⁷⁴

Congress viewed the PROTECT Act's enhanced and new mandatory minimum penalties as necessary to address child exploitation offenses, primarily by correcting what it perceived as unduly lenient sentences for defendants who commit those crimes. The conference committee concluded "[t]he increased mandatory minimum sentences are responsive to real problems of excessive lenience in sentencing under existing law."¹⁷⁵ The conference committee found that mandatory minimum penalties were necessary because "courts have been disposed to grant downward departures from the guidelines for child pornography possession offenses . . . based on the misconception that these crimes are not serious."¹⁷⁶ Senator Hatch, who introduced the Act in the Senate, observed before final passage that "[t]he sentencing reforms will prevent sentencing abuses in cases involving child and sexual crimes where too often we have seen lenient sentences imposed."¹⁷⁷

Three years later, in the Adam Walsh Child Protection and Safety Act of 2006,¹⁷⁸ which included the Sex Offender Registration Notification Act (SORNA),¹⁷⁹ Congress again increased existing mandatory minimum penalties and established new mandatory minimum penalties for certain sex offenses. The Adam Walsh Act, among other provisions, added a new mandatory minimum penalty of at least 15 years of imprisonment for sex trafficking,¹⁸⁰ increased the mandatory minimum penalty from five to 10 years of imprisonment for enticing a minor to

¹⁷¹ *Id.* § 103(b)(1)(B) (amending 18 U.S.C. § 2251A(a), (b)).

¹⁷² *Id.* § 103(b)(1)(D) (amending 18 U.S.C. § 2252(b)(2)).

¹⁷³ *Id.* § 103(b)(1)(C) (amending 18 U.S.C. § 2252(b)(1)); *id.* § 103(b)(E) (amending 18 U.S.C. § 2252A(b)(1)).

¹⁷⁴ *Id.* § 103(b)(2)(A) (amending 18 U.S.C. § 2422(b)).

¹⁷⁵ H.R. CONF. REP. NO. 66, at 43 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 685.

¹⁷⁶ *Id.*

¹⁷⁷ 149 CONG. REC. 9,387 (Apr. 10, 2003) (statement of Sen. Hatch). By contrast, Senator Feinstein spoke against the extensive use of mandatory minimum penalties in the final version: "I am disappointed that Congress is poised, once again, to demonstrate that we are 'tough on crime' by enacting new mandatory minimum sentences." *Id.* at 9,376–77 (statement of Sen. Feinstein). She argued that the final bill expanded "the mandatory sentencing scheme that is gradually replacing the guidelines system." *Id.*

¹⁷⁸ Pub. L. No. 109–248, 120 Stat. 587 [hereinafter the Adam Walsh Act].

¹⁷⁹ Pub. L. No. 109–248, 120 Stat. 587, 590 [hereinafter SORNA].

¹⁸⁰ *Id.* § 208 (amending 18 U.S.C. § 1591(b)(1)).

engage in criminal activity,¹⁸¹ and established a mandatory minimum penalty of at least 20 years of imprisonment for engaging in a child exploitation enterprise.¹⁸² SORNA created new offenses relating to failing to register as a sex offender, for which Congress provided mandatory minimum penalties triggered by specific aggravating circumstances. Those mandatory minimum penalties apply to offenders who, having failed to register as a sex offender, commit a crime of violence (consecutive mandatory minimum penalty of five years of imprisonment)¹⁸³ or certain federal felonies involving a child (consecutive mandatory minimum penalty of 10 years of imprisonment).¹⁸⁴

5. Mandatory Minimum Penalties for Identity Theft Offenses

Congress enacted the Identity Theft Penalty Enhancement Act in 2004, which established new mandatory minimum penalties for identity theft offenses.¹⁸⁵ The Act's key provision requires imprisonment for two years for aggravated identity theft, defined as knowingly transferring, possessing, or using another person's means of identification during and in relation to enumerated identity theft offenses.¹⁸⁶ The Act further requires the sentencing court to impose the penalty consecutively to any sentence imposed for the underlying identity theft offense.¹⁸⁷ Congress viewed these enhanced penalties as necessary to correct lenient sentences imposed for identity theft offenses. As the House Judiciary Committee reported, "many perpetrators of identity theft receive little or no prison time," which "has become a tacit encouragement to those arrested to pursue such crimes."¹⁸⁸

G. RECONSIDERATION OF CERTAIN MANDATORY MINIMUM PENALTIES: THE FAIR SENTENCING ACT OF 2010

Congress repealed and amended mandatory minimum penalties for crack cocaine offenses in the Fair Sentencing Act of 2010.¹⁸⁹ These mandatory minimum penalties had drawn widespread criticism since their enactment in the 1980s. Beginning in 1995, for example, the

¹⁸¹ *Id.* § 203 (amending 18 U.S.C. § 2422(b)).

¹⁸² *Id.* § 701 (codified at 18 U.S.C. §2252A(g)).

¹⁸³ *Id.* § 141 (codified at 18 U.S.C. §2250(c)).

¹⁸⁴ *Id.* § 702 (codified at 18 U.S.C. § 2260A).

¹⁸⁵ Pub. L. No. 108–275, 118 Stat. 831 (2004).

¹⁸⁶ *Id.* § 2(a) (codified at 18 U.S.C. § 1028A(a)).

¹⁸⁷ *Id.* (codified at 18 U.S.C. § 1028A(b)(2)).

¹⁸⁸ H.R. REP. NO. 108–528, at 5 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 781.

¹⁸⁹ Pub. L. No. 111–220, 124 Stat. 2372.

Commission submitted four reports to Congress calling for changes to federal cocaine sentencing policy.¹⁹⁰

The Act altered the mandatory minimum penalties established by the 1986 and 1988 Acts by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively.¹⁹¹ There was broad bipartisan support for these changes among members of Congress.¹⁹² Members cited various reasons for supporting the Act, including lack of evidentiary support for the 100-to-1 ratio,¹⁹³ racial disparities produced by the existing penalties,¹⁹⁴ and the unfairness of the existing mandatory penalties.¹⁹⁵ Demonstrating an increased focus on the offender, the Act also directed the Commission to provide for higher guideline sentences for all drug offenders based on the presence of specified aggravating factors, such as bribing a law enforcement official to facilitate the offense, maintaining an establishment for manufacturing or distributing controlled substances, or obstructing justice while holding an aggravating role in the offense. The Act

¹⁹⁰ See U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995); U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002); U.S. SENT’G COMM’N, REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY (2007).

¹⁹¹ See Pub. L. No. 111–220, § 2, 124 Stat. 2372 (amending 21 U.S.C. §§ 841, 844).

¹⁹² The ranking member of the House Judiciary Committee, however, spoke against the Act in floor debates. See 156 CONG. REC. H6197 (daily ed. July 28, 2010) (statement of Rep. Lamar Smith) (“Now Congress is considering legislation to wind down the fight against drug addiction and drug-related violence. Reducing the penalties for crack cocaine could expose our neighborhoods to the same violence and addiction that caused Congress to act in the first place.”).

¹⁹³ See 155 Cong. Rec. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Specter) (explaining that intervening research has undermined Congress’s original belief “that crack was uniquely addictive and was associated with greater levels of violence than powder cocaine”); 156 CONG. REC. H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren) (“We didn’t really have an evidentiary basis [for the 100-to-1 ratio], but that’s what we did, thinking we were doing the right thing at the time.”); 156 CONG. REC. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) (“This disparity made no sense when it was initially enacted and makes absolutely no sense today . . .”).

¹⁹⁴ See, e.g., 156 CONG. REC. S1680–81 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin) (explaining that the “net result” of the crack-powder disparity “was that the heavy sentencing we enacted years ago took its toll primarily in the African-American community . . . and a belief in the African-American community that it was fundamentally unfair”); 155 CONG. REC. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Specter) (“I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does.”).

¹⁹⁵ See 156 CONG. REC. H6197 (July 28, 2010) (statement of Rep. Scott) (“The legislation does not fully eliminate the 100-to-1 disparity in sentencing for crack and powder, but it does make good progress in addressing what is widely recognized as unfair treatment of like offenders based simply on the form of cocaine they possessed.”); 155 CONG. REC. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Sessions) (“I will not favor alterations that massively undercut the sentencing we have in place, but I definitely believe that the current system is not fair and that we are not able to defend the sentences that are required to be imposed under the law today.”).

further directed the Commission to provide for lower guideline sentences for certain offenders who receive a guideline adjustment for minimum role.¹⁹⁶

H. MECHANISMS FOR RELIEF FROM MANDATORY MINIMUM PENALTIES

1. Introduction

For almost a century, mechanisms have been in place permitting a court to impose a sentence lower than a mandatory minimum penalty in certain cases. This section discusses the historical development of such “relief” mechanisms.

In the early 20th century, district courts avoided imposing a term of imprisonment, even for offenses carrying a mandatory minimum penalty, by suspending the sentence or by placing the defendant under the supervision of a state probation officer.¹⁹⁷ There were no federal statutes governing probation at that time. In 1916, however, the Supreme Court held that district courts lacked the authority to suspend sentences¹⁹⁸ and further observed that federal courts were without power to offer probation in the absence of congressional authorization.¹⁹⁹

In 1925, Congress responded to the Supreme Court by passing the Federal Probation Act,²⁰⁰ which expressly authorized district courts to suspend sentences and impose probation in lieu of prison terms.²⁰¹ Under the Act, a district court could avoid imposing a mandatory minimum penalty, at least where the statute in question did not expressly preclude probation or a suspended sentence.²⁰² Congress repealed this relief mechanism as part of the broader reform of sentencing policy provided by the Sentencing Reform Act.²⁰³

¹⁹⁶ See Pub. L. No. 111–220, § 6, 7, 124 Stat. 2372, 2373-74.

¹⁹⁷ See *United States v. Murray*, 275 U.S. 347, 354 (1928) (prior to 1916, “the District Courts exercised a form of probation either by suspending sentence or by placing the defendants under state probation officers or volunteers” (quoting H.R. REP. NO. 68-1377, at 1 (1925))).

¹⁹⁸ See *Ex Parte United States*, 242 U.S. 27, 37 (1916) (the *Killits* case).

¹⁹⁹ See *id.* at 52; *Murray*, 275 U.S. at 354.

²⁰⁰ Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259.

²⁰¹ 18 U.S.C. § 3651 (repealed in 1987), provided in part: “Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment . . . any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby,” may suspend the imposition or execution of sentence and place the defendant “on probation for such period and upon such terms and conditions as the court deems best.”

²⁰² See *id.*; *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (statute at issue “is no different from many other federal statutes requiring minimum sentences, which have uniformly been held to be subject to the suspension authority of § 3651”).

²⁰³ The enactment of the Sentencing Reform Act is discussed in Chapter 3, *infra*.

Nevertheless, Congress has provided other mechanisms by which a district court may impose a term of imprisonment lower than a mandatory minimum penalty prescribed by statute. These mechanisms are discussed below.

2. *Substantial Assistance to the Authorities*

Two related provisions allow a district court to impose a term of imprisonment lower than a mandatory minimum penalty in cases where a defendant provides substantial assistance in the investigation or prosecution of another person: Federal Rule of Criminal Procedure 35(b) and 18 U.S.C. § 3553(e). At the time they went into effect, section 3553(e) and Rule 35(b) were essentially identical, except that section 3553(e) applied at sentencing, and Rule 35(b) applied post-sentencing.²⁰⁴

First, Federal Rule of Criminal Procedure 35(b) allows a court, upon the government's motion, to reduce a sentence after it is imposed if the defendant provides substantial assistance in investigating or prosecuting another person. Prior to the enactment of the Sentencing Reform Act, Rule 35(b) allowed the court to reduce a sentence for any reason within 120 days after the sentence was imposed or probation was revoked,²⁰⁵ and the court had authority to change a sentence from a term of incarceration to probation.²⁰⁶ The time limit was viewed as jurisdictional; once the time limit expired, the court was without jurisdiction to consider a reduction.²⁰⁷

The Sentencing Reform Act amended Rule 35(b) and made three significant changes.²⁰⁸ First, the government was required to make a motion seeking a reduction, which deprived the court of authority to reduce a sentence on its own. Second, the time period was expanded from 120 days to one year. Third, the reduction was limited to reflect the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense, in

²⁰⁴ Although these provisions provide relief even from a statutory minimum sentence based on a defendant's "substantial assistance," the legislative history does not articulate the rationale for the substantial assistance framework. *See* United States v. Revis, 22 F. Supp. 2d 1242, 1259 (N.D. Okl. 1998) (citing G. Adam Schweikert, III, Note, *Third Party Cooperation: A Welcome Addition to Substantial Assistance Departure Jurisprudence*, 30 CONN. L. REV. 1445, 1450, n. 29 (1998)), United States v. Severich, 676 F. Supp. 1209, 1212 (S.D. Fla. 1988).

²⁰⁵ The 1983 version of Rule 35(b) provided that the court, "may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of appeal. . . . Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of a sentence under this subdivision." FED. R. CRIM. P. 35(b) (1983).

²⁰⁶ *Id.*

²⁰⁷ *See* United States v. Hayes, 983 F.2d 78, 80 (7th Cir 1992) (citing United States v. Kajevic, 711 F.2d 767 (7th Cir. 1983); Gaetner v. United States, 763 F.2d 787 (7th Cir. 1985)).

²⁰⁸ "The court, on motion of the government, may within one year after the imposition of the sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." FED. R. CRIM. P. 35(b) (1986).

accordance with the guidelines and policy statements issues by the Sentencing Commission.”²⁰⁹ Thus, only the defendant’s “substantial assistance” could be considered when granting or determining the size of a Rule 35 reduction. In addition, before the Act became effective, Congress added language to Rule 35(b) authorizing the court to reduce a sentence lower than the statutory minimum.²¹⁰ Rule 35(b) was further amended in 1991 and 2002 to allow consideration of substantial assistance provided beyond one year in certain circumstances.²¹¹

Second, 18 U.S.C. § 3553(e), which was enacted two years after the Sentencing Reform Act as part of the Anti-Drug Abuse Act of 1986,²¹² grants a court limited authority to impose a sentence below a mandatory minimum penalty at the time of sentencing. Specifically, the section provides that “[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”²¹³ Section 3553(e) further requires such a sentence to “be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.” As directed by Congress, the Commission incorporated this statutory mechanism for relief from mandatory minimum sentences into the guidelines at USSG§5K1.1 (Substantial Assistance to Authorities (Policy Statement)), which provides that the court may depart from the guidelines “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”²¹⁴

²⁰⁹ *Id.*; *see also* United States v. Poland, 562 F.3d 35 (1st Cir. 2009).

²¹⁰ *See* FED. R. CRIM. P. 35(b) (1986) (“When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.”).

²¹¹ Federal Rule of Criminal Procedure 35(b)(2) provides:

Upon the government’s motion made more than one year after sentencing, the court may reduce a sentence if the substantial assistance involved:

- (A) information not known to the defendant until one year or more after sentencing;
- (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
- (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonable apparent to the defendant.

²¹² *See* Pub. L. No. 99–570, 100 Stat. 3207 (1986). A large piece of legislation, the Anti-Drug Abuse Act of 1986 contained twelve new acts, amended three others, and addressed numerous other topics.

²¹³ 18 U.S.C. § 3553(e). For additional discussion of section 3553(e) and relevant case law, *see infra* Appendix E(A)(2), (B)(3) of this Report.

²¹⁴ *See* 28 U.S.C. § 994(n) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

3. *The Safety Valve*

Following the Commission's 1991 report on mandatory minimum penalties,²¹⁵ the Commission worked directly with Congress to enact new legislation that would address the impact of mandatory minimum penalties on low-level drug-trafficking offenders. In July 1993, Judge William W. Wilkins, Jr., then-Chair of the Commission, testified at a hearing before the House Subcommittee on Crime and the Criminal Justice. Judge Wilkins discussed the drawbacks of mandatory minimum penalties and their incompatibility with the guidelines system as outlined in the report, and offered a legislative proposal that would “bring[] about greater coordination between mandatory minimums and the sentencing guidelines.”²¹⁶ Specifically, he proposed legislation for drug offenses that would require the Commission to use mandatory minimum penalties only in establishing base offense levels, and would otherwise permit the guidelines through downward adjustments or departures to provide for sentences below the mandatory minimum penalties.²¹⁷ Although Congress did not adopt the proposal, his testimony encouraged other legislation that resulted in a more limited relief mechanism.²¹⁸

In October 1993, the Senate considered a new bill, the Sentencing Improvement Act of 1993, the sole purpose of which was to enact a statutory “safety valve.” As proposed, the safety valve would have permitted offenders convicted of certain drug offenses to avoid mandatory minimum sentences if the defendant had no more than one criminal history point under the guidelines, did not cause or threaten to cause death or serious injury during the offense, and did not hold a leadership role in the offense.²¹⁹ When introducing the bill, Senator Kennedy explained that he “would prefer more comprehensive reform of mandatory sentencing laws,” but that the proposal was a “small but important step in the effort to recapture the goals of sentencing reform.”²²⁰ Similarly, Senator Simpson argued that the proposal would “correct” the injustice of “nonviolent first-time offenders . . . being sentenced to terms under the Federal system that, as a practical reality, even far exceed the terms served by some of the most violent criminals punished under other laws and guidelines.”²²¹

²¹⁵ See 1991 COMMISSION REPORT.

²¹⁶ See *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. (July 28, 1993) (statement of William W. Wilkins, Jr., Chairman, United States Sentencing Commission), reprinted in 6 FED. SENT'G REP. 67 (1993).

²¹⁷ *Id.*

²¹⁸ See 140 CONG. REC. S14,716 (daily ed. Oct. 7, 1994) (statement of Sen. Kennedy) (describing the enacted safety valve as “a version of the Wilkins proposal”).

²¹⁹ Sentencing Improvement Act of 1993, S. 1596, 103d Cong. (1993), reprinted in 139 CONG. REC. 26,483–85 (Oct. 27, 1993).

²²⁰ 139 CONG. REC. 26,484–85 (Oct. 27, 1993) (statement of Sen. Kennedy).

²²¹ 139 CONG. REC. 26,845 (Oct. 27, 1993) (statement of Sen. Simpson).

Shortly after its introduction in the Senate, the proposed Sentencing Improvement Act of 1993 was incorporated into a proposed crime bill, the Violent Crime Control and Law Enforcement Act.²²² Although the Senate rejected an amendment that would have removed the proposed safety valve provision altogether, it accepted an amendment by Senator Hatch that significantly narrowed its application to offenders with no criminal history points, who had never been imprisoned for a criminal conviction, whose offense did not result in death or serious bodily injury, who did not carry or possess a firearm or dangerous weapon during the offense, who played no leadership role, and who did not use or attempt to use physical force against another person in the course of the offense.²²³ Senator Hatch explained that his safety valve proposal was a “narrow reform needed to return a small degree of discretion to the courts for a small percentage of nonviolent drug cases.”²²⁴

The Senate passed the narrower safety valve provision as an amendment to a version of the Violent Crime Control and Law Enforcement Act already passed by the House, which contained no safety valve.²²⁵ Before conference, the House amended its bill to include a broader safety valve than passed by the Senate, by permitting up to one criminal history point and allowing eligibility regardless of whether the defendant had previously been incarcerated. The conference committee ultimately adopted the House’s broader version of the safety valve.²²⁶ The House and Senate passed the bill as recommended by the conference committee,²²⁷ creating the safety valve as codified at 18 U.S.C. § 3553(f).²²⁸

The enacted safety valve provision, entitled “Limitation on Applicability of Mandatory Minimum Penalties in Certain Cases,” provided that judges shall impose a sentence without regard to the statutory mandatory minimum penalty for offenses under section 401, 404, and 406 of the Controlled Substances Act (21 U.S.C. §§ 841 (possession with intent to distribute), 844

²²² See Violent Crime Control and Law Enforcement Act of 1993, S. 1607, 103d Cong. § 2404, (1993) (as introduced Nov. 1, 1993).

²²³ Amend. 1131 to S. 1607 (as modified Nov. 8, 1993, amending Amend. 1130 to S. 1607), *reprinted in* 139 CONG. REC. 27,839-40, 27847-48, 27914-15 (Nov. 8, 1993).

²²⁴ 139 Cong. Rec. 27,842 (Nov. 8, 1993) (statement of Sen. Hatch). Senator Hatch stated that by returning this discretion to the courts, his proposal would reduce disparities in the application of mandatory minimum penalties, particularly disparities resulting from low-level nonviolent drug offenders’ inability to obtain relief from the mandatory minimum penalty for rendering substantial assistance because they “have no information to provide the authorities.” *Id.*

²²⁵ See 139 CONG. REC. S16301 (daily ed. Nov. 19, 1993); Violent Crime Control and Law Enforcement Act of 1993, H.R. 3355, 103d Cong., §2404 (as passed by Senate, Nov. 19, 1993), *reprinted in* 139 CONG. REC. 32,286-394 (Nov. 24, 1993).

²²⁶ See H.R. REP. NO. 103–711, at 197-98 (1994); 140 CONG. REC. 21,568-69 (Aug. 11, 1994); 140 CONG. REC. 23,617-18 (Aug. 21, 1994).

²²⁷ 140 CONG. REC. 26,618 (Aug. 21, 1994); 140 CONG. REC. 24,114-15 (Aug. 25, 1994).

²²⁸ Violent Crime Control and Law Enforcement Act of 1994, § 80001, Pub. L. No. 103–322, 108 Stat. 1796 (codified at 18 U.S.C. § 3553(f)).

(possession), 846 (conspiracy)) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 961 (conspiracy), 963 (importation)) if the following factors were met:

- (1) The defendant does not have more than one criminal history point, as determined under the sentencing guidelines;
- (2) The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) The offense did not result in death or serious bodily injury to any person;
- (4) The defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined by the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in § 848; and
- (5) No later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful or other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has not complied with this requirement.

The Commission subsequently incorporated the statutory safety valve provision into the guidelines at USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), which provides relief from the applicable mandatory minimum penalty for offenders who meet certain criteria as well as a downward adjustment to their guidelines offense level.²²⁹

Further discussion of the interaction of mandatory minimum penalties and the sentencing guidelines follows in Chapter 3.

²²⁹ See USSG App. C amend. 509 (effective Sept. 23, 1994). Defendants sentenced under USSG §2D1.1 and who meet the safety valve subdivision criteria set forth at §5C1.2 receive a two-level downward adjustment to their base offense levels, even if they were not convicted of an offense carrying a mandatory minimum penalty. See USSG §2D1.1(b)(16). For additional discussion of the safety valve and relevant case law, see *infra* Appendix E(B)(3) to this Report.

THE INTERACTION BETWEEN MANDATORY MINIMUM PENALTIES AND THE SENTENCING GUIDELINES

A. INTRODUCTION

The statutory directive requires the Commission to assess the compatibility of mandatory minimum penalties with the federal guideline system established under the Sentencing Reform Act and as modified by the Supreme Court’s decision in *United States v. Booker*.²³⁰ As part of that assessment, this chapter presents an overview of the interaction between mandatory minimum penalties and the sentencing guidelines. First, the chapter provides a history of the Sentencing Reform Act, its directives to the Commission, the operation of the guidelines, and an overview of how the Commission promulgates amendments to the guidelines. Next, the chapter describes how the guidelines incorporate mandatory minimum penalties in formulating sentencing ranges for various offenses. Finally, the chapter compares how mandatory minimum penalties and the guidelines determine sentences.

B. DEVELOPMENT AND OPERATION OF THE GUIDELINES

1. *History of the Sentencing Reform Act*

The Sentencing Reform Act responded to an emerging consensus that the federal sentencing system needed major reform.²³¹ Prior to the Sentencing Reform Act, federal judges possessed almost unlimited authority to fashion an appropriate sentence within a broad statutorily prescribed range and “decided [] the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”²³² Sentences were limited only by statutory minimums and maximums. Because each judge was “left to apply his own notions of the purposes of sentencing,” the federal sentencing system exhibited “an unjustifiably wide range of sentences to offenders convicted of similar crimes.”²³³ Neither party had any meaningful right of appellate review. In addition, the parole system, which applied to only a portion of those

²³⁰ 543 U.S. 220 (2005).

²³¹ See S. REP. NO. 97–307, at 956 (1981) (“glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence); H.R. REP. NO. 98–1017, at 34 (1984) (“The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.”).

²³² See U.S. SENT’G COMM’N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 9 (1991) [hereinafter 1991 COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM].

²³³ S. REP. NO. 97–307, at 955 (1981).

sentenced and which permitted the release of prisoners based on inconsistent ideas regarding the potential for rehabilitation, exacerbated the lack of uniformity.²³⁴

The Sentencing Reform Act, the culmination of lengthy bipartisan efforts, sought to eliminate unwarranted disparity in sentencing and to address the inequalities created by indeterminate sentencing.²³⁵ Congress determined that sentencing should be tailored:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.²³⁶

To this end, the Sentencing Reform Act created the Commission as an independent agency within the judicial branch of the federal government²³⁷ and directed it to promulgate guidelines that were required to be used for sentencing within the prescribed statutory maximum.²³⁸ The statutory purposes of the Commission, among others, are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.²³⁹

²³⁴ 1991 COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM, at 9 (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

²³⁵ See S. REP. NO. 97–307 (1981); H.R. REP. NO. 98–1017 (1984); 28 U.S.C. § 994(k).

²³⁶ See 18 U.S.C. § 3553(a)(2).

²³⁷ Established as “as an independent commission in the Judicial Branch of the United States,” the Commission is comprised of seven voting members (including the Chair) appointed by the President “by and with the advice and consent of the Senate.” The Act provides that “[a]t least three of the [Commission’s] members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States” and no more than four members of the Commission can be members of the same political party. The Attorney General, or his designee, and the Chairman of the United States Parole Commission are designated as *ex officio* non-voting members. See 28 U.S.C. § 991(a).

²³⁸ See 28 U.S.C. §§ 991, 994, and 995(a)(1).

²³⁹ See 28 U.S.C. § 991 (b)(1).

For nearly 20 years, federal judges were required to impose sentences within the applicable guideline range unless the court found the existence of an aggravating or mitigating circumstance not adequately taken into consideration by the Commission in formulating the sentencing guidelines.²⁴⁰ This system changed in 2005, when the Supreme Court held in *United States v. Booker* that the mandatory operation of the guidelines violated the Sixth Amendment right to a jury trial and the associated right to have all “elements” of the offense proved beyond a reasonable doubt.²⁴¹ The Court remedied the constitutional violation by striking two provisions from the Sentencing Reform Act, thereby rendering the guidelines “effectively advisory.”²⁴² The Court reasoned that although an advisory guideline system lacked the mandatory features that Congress enacted, it nevertheless “retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted.”²⁴³ The Court concluded that an advisory guideline system would “continue to move sentencing in Congress’s preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”²⁴⁴

Booker and its progeny explicitly and repeatedly reinforced the continued importance of the guidelines in the sentencing determination.²⁴⁵ District courts are required to properly calculate and consider the guidelines when sentencing.²⁴⁶ “The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors

²⁴⁰ 18 U.S.C. § 3553(b).

²⁴¹ 543 U.S. at 244 (“Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”). The Court did not hold that “mandatory” guidelines are unconstitutional *per se*, but rather that the federal sentencing guidelines were unconstitutional as applied because facts increasing the maximum sentence were found by a judge, not a jury. Accordingly, a guideline system could be mandatory in nature and not violate the Sixth Amendment provided that the system requires that any facts increasing the maximum sentence are either admitted by the defendant or determined by a jury upon proof beyond a reasonable doubt. For a more detailed discussion of *Booker* and its impact on mandatory minimums, see *infra* Appendix E(A)(3).

²⁴² *Id.* at 245 (excising 18 U.S. C. §§ 3553(b)(1) and 3742(e)).

²⁴³ See USSG Ch. 1, Pt. A (Introduction and Authority).

²⁴⁴ 543 U.S. at 264-65.

²⁴⁵ See *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Irizarry v. United States*, 553 U.S. 708 (2008); *Spears v. United States*, 555 U.S. 261 (2009); *Dillon v. United States*, 130 S. Ct. 2683 (2010); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

²⁴⁶ See 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall*, 552 U.S. at 49 (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”).

under 18 U.S.C. § 3553(a).”²⁴⁷ Most circuits agree on the three-step approach reflected in USSG §1B1.1 (Application Instructions), including the consideration of departure provisions in the *Guidelines Manual*, in determining the sentence to be imposed.²⁴⁸

2. *The Sentencing Reform Act’s Requirements*

The Sentencing Reform Act contains several provisions that have governed and guided the Commission’s development of the sentencing guidelines since their inception. The Sentencing Reform Act mandates that the guidelines be “consistent with all pertinent provisions of any Federal statute.”²⁴⁹ Accordingly, the Commission considers the same factors that sentencing courts are required to consider under 18 U.S.C. § 3553(a).²⁵⁰ The Sentencing Reform Act further directs that the guidelines are to take into account, to the degree relevant, certain characteristics of the offense, including “the nature and degree of the harm caused by the offense,” “the community view of the gravity of the offense,” “the public concern generated by the offense,” “the deterrent effect a particular sentence may have on the commission of the offense by others,” and “the current incidence of the offense in the community and in the Nation as a whole.”²⁵¹ The Commission uses these characteristics to measure the relative seriousness of

²⁴⁷ See USSG Ch. 1, Pt. A (citing *Rita*, 551 U.S. at 351).

²⁴⁸ See *United States v. Dixon*, 449 F.3d 194, 204 (1st Cir. 2006) (court must consider “any applicable departures”); *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005) (court must consider “available departure authority”); *United States v. Jackson*, 467 F.3d 834, 838 (3d Cir. 2006) (court’s correct Guideline calculation includes “ruling on Guidelines departures”); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006) (departures “remain an important part of sentencing even after Booker”); *United States v. Tzep-Mejia*, 461 F.3d 522, 525 (5th Cir. 2006) (“Post-*Booker* case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence.” (internal footnote and citation omitted)); *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006) (district court “still required to consider . . . whether a Chapter 5 departure is appropriate”); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006) (“the district court must decide if a traditional departure is appropriate,” and after that must consider a variance (internal quotation omitted)); *United States v. Robertson*, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); *United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005) (stating that “the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered”). *But see United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005) (stating that departures are “obsolete”); *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006) (“[W]e elect to review the district court’s application of the advisory sentencing guidelines only insofar as they do not involve departures. To the extent that a district court has framed its analysis in terms of downward or upward departure, we will treat such so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range.”). *Cf. United States v. Guyton*, 636 F.3d 316, 319 n.2 (7th Cir. 2011) (“In a strictly legal sense, the ‘obsolete’ description was accurate as applied to appellate review of a sentence, but the ‘obsolete’ line of cases should not discourage district courts from taking genuine guidance from all the Guidelines, including their departure provisions, as required by the amended section 1B1.1”).

²⁴⁹ 28 U.S.C. § 994(a) (as amended by the PROTECT Act, § 401, Pub. L. No. 108–21, 117 Stat. 650 (2003)).

²⁵⁰ See 18 U.S.C. § 3553(a).

²⁵¹ 28 U.S.C. § 994(c).

the offense as compared to other offenses and to maintain proportionality throughout the guidelines.²⁵²

The Sentencing Reform Act further instructs the Commission to use past sentencing practices “as a starting point”²⁵³ for creating the initial guidelines, and the Commission continues to use them in ongoing proportionality analyses. However, the Commission is not bound by past practices. The Sentencing Reform Act states that “[t]he Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.”²⁵⁴

The Sentencing Reform Act also instructs the Commission to take into account, to the degree relevant, certain characteristics of the offender, including criminal history,²⁵⁵ while assuring “that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”²⁵⁶ Furthermore, “in recommending a term of imprisonment or length of a term of imprisonment,” the Act requires that the guidelines and policy statements reflect the “general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”²⁵⁷

²⁵² Among other requirements, the Sentencing Reform Act mandates that the Commission “take into account the nature and capacity of the penal, correctional, and other facilities and services available” and formulate the guidelines “to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” 28 U.S.C. § 994(g). The Commission must further “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.” *Id.* § 994(j).

²⁵³ *Id.* § 994(m).

²⁵⁴ *Id.*

²⁵⁵ Over the course of its history, the Commission has ensured that the departure provisions set forth in the *Guidelines Manual* are consistent with the directives in 28 U.S.C. § 994. Section 994 of title 28, United States Code, instructs *the Commission* to assure the guidelines and policy statements reflect the general inappropriateness of considering certain offender characteristics (for example “family ties and responsibilities”) in the guidelines, but 18 U.S.C. § 3553(a) can be read to direct the *sentencing courts* to consider those same characteristics. Accordingly, judges often determine that the guidelines have not sufficiently addressed offender characteristics and impose a sentence outside the guidelines. The Commission recommends that Congress clarify the relationship between these two statutory provisions, specifically as they relate to certain offender characteristics in 28 U.S.C. § 994 and the courts’ consideration of those same factors under 18 U.S.C. § 3553(a).

²⁵⁶ *Id.* § 994(d).

²⁵⁷ *Id.* § 994(e); *see also id.* § 994(k) (requiring “that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”). *See also* *Tapia v. United States*, 131 S. Ct. 2382 (2011) (holding that the Sentencing Reform Act precludes a sentencing court from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation).

3. *Operation of the Sentencing Guidelines*

In promulgating the initial set of guidelines, the Commission started with the premise that a rational and just sentencing policy should treat similar offenders who commit similar offenses equally.²⁵⁸ The Commission designed the guidelines to take into account both the seriousness of the offense, including relevant offense characteristics, and important information about the offender, such as the offender's prior criminal record and role in the offense. Using this information, the guidelines prescribe proportional individualized sentences within a sentencing table consisting of 43 offense levels and six criminal history categories.

The offense level is determined based upon the elements of the offense committed by the defendant, the particular harms associated with the defendant's crime, and any other aggravating or mitigating factors associated with the particular offense. The offense level increases based upon the severity of the offense committed, and the number of identified harms associated with the commission of the offense.

In determining which base offense level, specific offense characteristics, adjustments, cross references among guidelines, or other special instructions apply, a court must consider all "relevant conduct." Relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."²⁵⁹ Relevant conduct also includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."²⁶⁰ In addition, "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior,"²⁶¹ relevant conduct includes "all acts and omissions [of the defendant or others in furtherance of the jointly undertaken criminal activity] that were part of the same course of conduct or common scheme or plan as the offense of conviction."²⁶² In this manner, the guidelines implement a "modified real offense system."²⁶³

Each guideline in Chapter Two of the *Guidelines Manual* contains a base offense level, which is the starting point for measuring the seriousness of each particular offense. More serious

²⁵⁸ 28 U.S.C. § 994(f) directs the Commission, in promulgating guidelines, to pay "particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted disparities."

²⁵⁹ See USSG §1B1.3(a)(1)(A) (Relevant Conduct (Factors that Determine the Guideline Range)).

²⁶⁰ See USSG §1B1.3(a)(1)(B).

²⁶¹ See USSG §3D1.2(d) (Procedure for Determining Offense Level on Multiple Counts).

²⁶² See USSG §1B1.3(a)(2).

²⁶³ 1991 COMMISSION REPORT at iii.

types of crime have higher base offense levels; for example, trespass has a base offense level of 4,²⁶⁴ while kidnapping has a base offense level of 32.²⁶⁵

Most guidelines in Chapter Two include a number of specific offense characteristics that increase or decrease the base offense level. For example, in drug trafficking cases, the base offense level is increased if the offense involves violence or a firearm, among other things.²⁶⁶ In contrast, the base offense level is decreased in drug trafficking cases if the defendant meets the safety valve subdivision criteria.²⁶⁷ Additionally, a defendant who qualifies for a mitigating role adjustment may receive an offense level reduction in some circumstances.²⁶⁸

Finally, a defendant's offense level also may increase or decrease depending on whether any adjustments in Chapter Three apply.²⁶⁹ Chapter Three contains adjustments generally applicable across all offense types. Categories of adjustments include: victim-related adjustments, the offender's role in the offense, and obstruction of justice. For example, if the offender knew that the victim was unusually vulnerable due to age or physical or mental condition, the offense level is increased by two levels.²⁷⁰ The offense level is also increased by two levels if the offender obstructed justice.²⁷¹ However, if the offender was a minimal participant in the offense, the offense level is decreased by four levels.²⁷² Chapter Three also includes rules for determining the guideline range when the defendant is convicted of multiple counts and when a downward adjustment for the acceptance of responsibility applies.

Calculation of the guideline sentence also requires a determination of the defendant's criminal history.²⁷³ Chapter Four contains the rules that assign offenders to one of six criminal history categories, with Criminal History Category I for offenders with the least serious prior criminal records (including first-time offenders) and Criminal History Category VI for offenders with the most extensive prior criminal records. An offender's criminal history category is

²⁶⁴ See USSG §2B2.3(a) (Trespass).

²⁶⁵ See USSG §2A4.1(a) (Kidnapping, Abduction, Unlawful Restraint).

²⁶⁶ See USSG §2D1.1(Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

²⁶⁷ *Id.*

²⁶⁸ See, e.g., USSG §2D1.1(a)(5), (b)(15).

²⁶⁹ See generally USSG Ch. 3 (Adjustments).

²⁷⁰ See USSG §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

²⁷¹ See USSG §3C1.1 (Obstruction or Impeding the Administration of Justice).

²⁷² See USSG §3B1.2(a) (Mitigating Role).

²⁷³ See generally USSG Ch. 4 (Criminal History and Criminal Livelihood).

calculated by scoring prior sentences,²⁷⁴ according to the rules in USSG §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

A prior sentence of imprisonment²⁷⁵ exceeding one year and one month receives 3 points²⁷⁶ to the criminal history score if the sentence was “imposed within fifteen years of the defendant’s commencement of the instant offense” or “resulted in the defendant being incarcerated during any part of such fifteen-year period.”²⁷⁷ A prior sentence of imprisonment of at least sixty days receives 2 points²⁷⁸ and any other prior sentence not otherwise counted receives 1 point,²⁷⁹ if “imposed within ten years of the defendant’s commencement of the instant offense.”²⁸⁰ “Any prior sentence not within the time periods specified above is not counted.”²⁸¹ The guidelines also increase the criminal history points by 2 points if the “defendant committed the instant offense while under a criminal justice sentence.”²⁸²

The guidelines include instructions for counting multiple prior sentences. Prior sentences are counted separately if imposed for offenses that were separated by an intervening arrest. Prior sentences not separated by an intervening arrest and resulting from offenses contained in the same charging instrument or imposed on the same day are counted as a single sentence. However, an offender’s criminal history score increases by 1 additional point for such a prior sentence if a “crime of violence”²⁸³ was involved.²⁸⁴

²⁷⁴ The term “prior sentence” means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense. See USSG §4A1.2(a)(1).

²⁷⁵ The term “sentence of imprisonment” means a sentence of incarceration and refers to the maximum sentence imposed. See USSG §4A1.2(b)(1).

²⁷⁶ See USSG §4A1.1(a).

²⁷⁷ See USSG §4A1.2(e)(1).

²⁷⁸ See USSG §4A1.1(b).

²⁷⁹ See USSG §4A1.1(c).

²⁸⁰ See USSG §4A1.2(e)(2).

²⁸¹ See USSG §4A1.2(e)(3).

²⁸² See USSG §4A1.1(d). Prior to November 1, 2010, the guidelines also added either 1 or 2 “recency” points to the criminal history score “if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under [§4A1.1] subsection (a) or (b) or while in imprisonment or escape status on such a sentence.” The Commission eliminated recency points from the criminal history score calculation, in part, because its research indicated that consideration of recency only minimally improved the predictive ability of the criminal history score. See USSG, App. C, amend. 742.

²⁸³ See USSG §§4A1.2(p), 4B1.2(a) for the definition of “crime of violence.”

²⁸⁴ See USSG §4A1.1(e). This section limits to 3 the number of additional points that may be added for such sentences.

The guidelines also instruct that sentences for prior felony offenses are always counted toward the criminal history score, if imposed within the prescribed time limits. Sentences for misdemeanors and petty offenses may also be counted, unless excluded by the guideline rules. For example, certain enumerated misdemeanor or petty offenses (*e.g.*, careless or reckless driving and leaving the scene of an accident) are counted only under specified circumstances.²⁸⁵ Certain other enumerated misdemeanor or petty offenses (*e.g.*, fish and game violations and hitchhiking) are never counted.²⁸⁶ Likewise, sentences for offenses committed by an offender prior to the age of eighteen and military sentences are counted under specified circumstances.²⁸⁷ By contrast, foreign sentences, tribal court sentences, and expunged convictions are never counted toward the criminal history score.²⁸⁸

Chapter Four also contains a special provision at USSG §4B1.1 (Career Offenders), which implements the directive in the Sentencing Reform Act (28 U.S.C. § 994(h)) that requires the Commission to provide a sentence “at or near the maximum term authorized” for certain categories of violent and drug trafficking offenders with two or more prior offenses. Other provisions apply to offenders who are subject to a statutorily enhanced sentence under 18 U.S.C. § 924(e),²⁸⁹ and to certain sex offenders.²⁹⁰

Once the offense level and criminal history are calculated, the applicable sentencing range is determined by use of the sentencing table.²⁹¹ As noted above, the sentencing table contains 43 offense levels (located on the vertical axis) and six criminal history categories (located on the horizontal axis), for a total of 258 cells. Each cell prescribes a sentencing range, expressed in months of imprisonment. The sentencing ranges partially overlap so that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Moreover, having this number of levels and cells enables proportional

²⁸⁵ See USSG §4A1.2(c)(1). “Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense.” The subsection then lists 13 specific types of offenses.

²⁸⁶ See USSG §4A1.2(c)(2) for a complete list.

²⁸⁷ See USSG §4A1.2(d), (g).

²⁸⁸ See USSG §4A1.2(h), (i), (j). Because the criminal history score is largely based on the length of prior sentences, rather than the nature of the prior offenses, offenders with different types of prior convictions may fall within the same criminal history category. For example, an offender with a prior conviction for burglary who received a 2 year sentence and has multiple prior tribal convictions has 3 criminal history points. See USSG §4A1.1(a). An offender with a prior conviction for careless driving placed on probation for 2 years, who commits a new offense while on probation also has 3 criminal history points: 1 point for the probationary sentence, *see* USSG §4A1.1(a), and 2 additional points for committing a new offense while on probation, *see* USSG §4A1.1(d). Both of these offenders would fall within Criminal History Category II. The guidelines provide for an upward or downward departure to account for the inadequacy of a criminal history category. See USSG §4A1.3.

²⁸⁹ See USSG §4B1.4 (Armed Career Criminals).

²⁹⁰ See USSG §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

²⁹¹ See USSG Ch. 5, Pt. A (Sentencing Table).

sentence increases. (Generally, a change of six levels roughly doubles the guideline sentence). By statute, the maximum of any sentence range cannot exceed the minimum by more than the greater of 25 percent or six months.²⁹² Consistent with the “25 percent rule,” the Commission chose to use 43 levels to “permit courts to exercise the greatest permissible range of sentencing discretion.”²⁹³ Thus, the guidelines provide a “system of finely calibrated sentences.”²⁹⁴

Given the difficulty of establishing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision, the guidelines provide for departures from the sentencing range to account for aggravating or mitigating offense or offender characteristics of a kind, or to a degree, not adequately taken into account by the Commission in formulating the guidelines.²⁹⁵ The Commission has explained that it intends for courts “to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”²⁹⁶ Thus, when the circumstances of a particular case make that case “atypical,” the court may depart from the guideline range.²⁹⁷ The guidelines provide several, non-exhaustive, factors that may warrant a departure,²⁹⁸ as well as several factors that may not serve as grounds for departure.²⁹⁹ The departure framework, which exists separately from the court’s authority to vary from the guidelines after *Booker*, is designed to permit the imposition of “an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing.”³⁰⁰

Thus, after *Booker*, the sentencing court must engage in a three-step process to determine the appropriate sentence in a particular case, considering: (1) the properly calculated guideline range; (2) any grounds for departure from the guideline range; and then (3) the factors under section 3553(a).³⁰¹

²⁹² See 28 U.S.C. § 994(b)(2).

²⁹³ See USSG Ch. 1, Pt. A at 11.

²⁹⁴ 1991 Commission Report at iii.

²⁹⁵ See USSG Ch. 1, Pt. A at 6-7; USSG §5K2.0 (Grounds for Departure (Policy Statement)), comment. (backg’d).

²⁹⁶ See USSG Ch. 1, Pt. A at 6.

²⁹⁷ *Id.*

²⁹⁸ See USSG §§4A1.3 (Departures Based on Inadequacy of Criminal History Category); 5K1.1; 5K3.1 (Early Disposition Programs); see also USSG Ch. 1, Pt. A at 6 (providing that, aside from enumerated prohibited factors, “the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case”).

²⁹⁹ See USSG Ch. 1, Pt. A at 6; see also USSG §§5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), 5K2.12 (Coercion and Duress).

³⁰⁰ See USSG §5K2.0, comment. (backg’d); USSG §1B1.1.

³⁰¹ See *Rita*, 551 U.S. at 351.

4. *Amending the Guidelines*

The Sentencing Reform Act contemplated that guideline development would be an ongoing process that would evolve over time as continuing research, experience, analysis, and new criminal statutes warranted modifications and revisions to the guidelines.³⁰² To that end, the Act directs the Commission to “periodically . . . review and revise, in consideration of comments and data coming to its attention, the guidelines”³⁰³ As of November 2010, the Commission had promulgated 747 amendments to the sentencing guidelines and policy related statements.³⁰⁴

The Sentencing Reform Act establishes a process by which the Commission promulgates amendments to the federal sentencing guidelines and policy statements. In particular, the Act requires the Commission to comply with the notice and comment provisions of the Administrative Procedure Act at section 553 of title 5, United States Code,³⁰⁵ and the Commission has adopted administrative Rules of Practice and Procedure that adhere to these statutory procedural requirements and guide the guideline amendment cycle.³⁰⁶

Consistent with these procedural requirements, before promulgating a guideline amendment, the Commission “consult[s] with authorities on, and individuals and institutional representatives of, various aspects of the Federal criminal justice system,”³⁰⁷ by conducting public hearings, publishing proposed amendments for comment in the *Federal Register*, consulting with advisory groups, and considering public comment and informal input. As required by the Sentencing Reform Act, the Commission consults with the United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders. During its consideration of proposed amendments, the Commission studies relevant data, reports, and other information compiled by the Commission staff (which may

³⁰² See USSG Ch. 1, Pt. A at 12.

³⁰³ 28 U.S.C. § 994(o).

³⁰⁴ See USSG App. C.

³⁰⁵ 28 U.S.C. § 994(x).

³⁰⁶ See, e.g., Commission Rules of Practice and Procedure (2007) [hereinafter Commission Rules], Rule 2.2– Voting Rules for Action by the Commission (requiring the affirmative vote of at least four members at a public meeting to promulgate guidelines, policy statements, official commentary, and amendments thereto); Rule 3.2– Public Meetings (stating that, to the extent practicable, the Commission shall issue a public notice of any public meeting); Rule 3.4– Public Hearings (allowing for public hearings “on any matter involving the promulgation of sentencing guidelines or any other matter affecting the Commission’s business”); Rule 4.1– Promulgation of Amendments (setting forth the amendment process pursuant to 28 U.S.C. § 994(p)); Rule 4.4– *Federal Register* Notice of Proposed Amendments (stating that “[a] vote to publish a proposed amendment to a guideline, policy statement, or official commentary in the *Federal Register* shall be deemed to be a request for public comment”); Rule 5.2– Notice of Priorities (requiring the Commission to “publish annually in the *Federal Register*, and make available to the public, a notice of the tentative priorities for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary”).

³⁰⁷ 28 U.S.C. § 994(o).

include sentencing data, case-law analyses, literature reviews, surveys of state laws, and other relevant information).

The amendment process typically begins in the summer, when the Commission publishes for comment a notice of proposed policy priorities, followed by the publication of final policy priorities in the fall. Typically in December or January, the Commission formally requests comment on proposed amendments and issues for comment, usually with a 60-day comment period. In addition to soliciting written public comment, the Commission conducts at least one public hearing, usually in February or March, regarding proposed amendments. After the close of the public comment period, the Commission refines the proposed amendments in light of comments and testimony it receives. Promulgation of guidelines, policy statements, official commentary, and amendments thereto requires the affirmative vote of at least four members of the Commission at a public meeting.³⁰⁸ The vote to promulgate proposed amendments typically is held at a public meeting in April. Through this administrative process, the Commission considers the various substantive factors set forth throughout the Sentencing Reform Act.

The guideline amendment process culminates with the submission of promulgated amendments to Congress for its review. The Sentencing Reform Act authorizes the Commission, at or after the beginning of a new session of Congress, but not later than the first day of May of each year, to submit to Congress amendments to the guidelines, which must include a “statement of reasons therefor.”³⁰⁹ Amendments to the guidelines become effective on a date specified by the Commission, which may not be earlier than 180 days after submission to Congress or later than the first day of November in the year in which the amendments were submitted.³¹⁰ During the pendency of the amendments, Congress may modify or reject submitted amendments. If Congress does not act, the amendments take effect as submitted.³¹¹

In addition to its power to disapprove guideline amendments, Congress retains the ability to influence federal sentencing policy by enacting directives to the Commission. These directives may be general or specific. When Congress enacts such a provision, the Commission is obligated to implement the directive in a manner consistent with the legislation. As the Supreme Court stated in *United States v. LaBonte*, “Congress has delegated to the Commission

³⁰⁸ 28 U.S.C. § 994(a).

³⁰⁹ *Id.* § 994(p). Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission endeavors to include amendments to policy statements and commentary in any submission of guideline amendments to Congress. Commission Rules, Rule 4.1–Promulgation of Amendments.

³¹⁰ 28 U.S.C. § 994(p).

³¹¹ *Id.* The Sentencing Reform Act also authorized the Commission to decide whether amendments that reduce “the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses” should be applied retroactively. *See* 28 U.S.C. § 994(u). *See also* *Dillon v. United States*, 130 S. Ct. 2683 (2010) (holding that *Booker* did not apply to proceedings under 18 U.S.C. § 3582(c)(2) and that USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) is binding on courts reducing sentences under that provision.).

significant discretion in formulating guidelines Broad as that discretion may be, however, it must bow to the specific directives of Congress.”³¹²

In responding to directives, the Commission follows the same procedure outlined above for other amendments, unless the directive provides for an alternative procedure (*i.e.*, “emergency amendment authority”). Nevertheless, using the reasoning of the Supreme Court in *Kimbrough*,³¹³ courts are more closely examining sentencing guidelines developed in response to “congressional directives”³¹⁴ and using policy disagreements with the underlying rationale for the guideline as a basis for imposing a sentence below the guidelines range. The Supreme Court based its holding in *Kimbrough* in part on the assertion that in setting the crack cocaine guidelines, the Commission abandoned what the Court perceived as its characteristic institutional role.³¹⁵

Some courts have read *Kimbrough* and *Spears* to have established a “new paradigm” in which district courts are permitted “to disagree categorically with [congressional] directives in providing an individual sentence.”³¹⁶ They read *Kimbrough* to instruct “sentencing courts to give *less* deference to guidelines that are not the product of the Commission acting in ‘its characteristic institutional role,’ in which it typically implements guidelines only after taking into account ‘empirical data and national experience.’”³¹⁷ Other circuits disagree.³¹⁸ Thus the circuits are divided on the question whether guidelines promulgated in response to a

³¹² 520 U.S. 751, 757 (1997) (quotation omitted).

³¹³ 552 U.S. 85 (2007).

³¹⁴ The Sentencing Reform Act contained a number of congressional directives to the Commission about how it should formulate and structure the federal sentencing guidelines. Since 1984, Congress has directed the Commission to act in the areas of sentencing well over 100 times.

³¹⁵ *Kimbrough*, 552 U.S. at 89. In *Spears v. United States*, 555 U.S. 261 (2009) (per curiam), the Court (in a 5-4 *per curiam* opinion) held that district courts may categorically disagree with the guidelines, at least with respect to the drug guidelines for crack cocaine offenses. Further explaining its holding in *Kimbrough*, the Court stated “[t]hat was indeed the point of *Kimbrough*: a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.” *Id.* at 264. *Spears* clarified “that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.” *Id.* at 265-66.

³¹⁶ *United States v. Reyes-Hernandez*, 624 F.3d 405, 417-418 (7th Cir. 2010) (“Congressional ‘directives’ to the Sentencing Commission are unlike statutes in that they are not equally binding on sentencing courts”).

³¹⁷ *Id.* at 418. *See also* *United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) (“[T]he fast-track departure scheme does not ‘exemplify the [Sentencing] Commission’s exercise of its characteristic institutional role.’ [] In other words, the Commission has ‘not take [n] account of empirical data and national experience’ in formulating them. [] Thus, guidelines and policy statements embodying these judgments deserve less deference than the sentencing guidelines normally attract.”) (citations omitted).

³¹⁸ *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 149-150 (3d Cir. 2009) (collecting cases and rejecting the approach of the Fifth, Ninth, and Eleventh Circuits, which have concluded that district courts may not disagree with congressional policy, specifically with respect to varying due to perceived fast-track disparity, and stating that “the attempt to distinguish fast-track programs from the sentencing guidance provided in *Kimbrough*, and constrain a district court’s sentencing discretion solely on the basis of a congressional policy argument, is unpersuasive.”).

congressional directive to the Commission are entitled to less deference than guidelines promulgated pursuant to what the Supreme Court has described as the Commission’s “characteristic institutional role.”³¹⁹

5. *Constitutionality of Mandatory Minimum Penalties*

The Supreme Court’s decisions have drawn a distinction between the “elements of a crime,” which “must be charged in an indictment and proved to a jury beyond a reasonable doubt,” and “sentencing factors,” which “can be proved to a judge at sentencing by a preponderance of the evidence.”³²⁰ Congress may prescribe sentencing factors that guide or confine a judge’s discretion in sentencing an offender within the range prescribed by statute, but “judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury [or admitted by the defendant].”³²¹

For some offenses, a mandatory minimum penalty may apply because it is the only specified penalty for the defendant’s offense of conviction. For example, convictions for the offenses of aggravated identity theft and receipt of child pornography always carry a mandatory minimum penalty (two and five years of imprisonment, respectively).³²² In those circumstances, the facts that trigger the mandatory minimum penalty are the same facts that constitute the crime. Accordingly, each fact must be alleged in the indictment and proven to a jury beyond a reasonable doubt.³²³

In other circumstances, the facts that trigger the mandatory minimum penalty may also increase the statutory maximum sentence, thereby implicating the Supreme Court’s decision in *Apprendi v. New Jersey*.³²⁴ The Court held in *Apprendi* that the Sixth Amendment requires that

³¹⁹ The Commission promulgates all guidelines amendments, whether in response to a congressional directive or on its own initiative, in accordance with requirements contained in the Sentencing Reform Act, 28 U.S.C. §§ 991–995. Accordingly, the Commission considers, among other factors, “comments and data coming to its attention,” circumstances which mitigate or aggravate the seriousness of the offense, the nature and degree of the harm caused by the offense, the community view of the gravity of the offense, the public concern generated by the offense, and how often the offense occurs. 28 U.S.C. § 994. Furthermore, the Commission “consults with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system,” including the Judicial Conference of the United States Courts, the Department of Justice, representatives of the Federal Public Defenders, probation officers, and the Commission’s advisory groups, and follows the notice and comment procedural requirements set forth at section 553 of title 5, United States Code. 28 U.S.C. §§ 994(o), (x).

³²⁰ *United States v. O’Brien*, 130 S. Ct. 2169, 2174 (2010).

³²¹ *Id.* at 2175–76. For a more detailed discussion of the case law concerning judicially-determined sentencing factors, see *infra* Appendix E(A)(1) of this Report.

³²² See 18 U.S.C. §§ 1028A (aggravated identity theft); 2252A(a)(2) & (b)(1) (receipt of child pornography).

³²³ See *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (“An indictment must set forth each element of the crime that it charges.”); *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

³²⁴ 530 U.S. 466 (2000).

“[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”³²⁵ For example, drug trafficking offenses committed in violation of 21 U.S.C. § 841(b)(1)(C) have no mandatory minimum penalty and a statutory maximum penalty of 20 years of imprisonment.³²⁶ The type and quantity of drugs involved in the offense, however, can trigger a mandatory minimum penalty of five or ten years of imprisonment, while at the same time increasing the statutory maximum penalty to 40 years or life imprisonment.³²⁷ Courts have uniformly held that the type and quantity of drugs must be charged in the indictment and proven to a jury beyond a reasonable doubt when the defendant receives a sentence that is higher than the otherwise applicable statutory maximum penalty.³²⁸ However, the circuit courts of appeals disagree as to whether those facts must be alleged in the indictment and proven to a jury beyond a reasonable doubt when they trigger a mandatory minimum penalty, yet the offender receives a sentence that is still *within* the otherwise applicable statutory maximum penalty.³²⁹

Facts requiring the imposition of a mandatory minimum penalty within the sentencing range otherwise available to the court are not necessarily subject to the Constitution’s indictment, proof, and jury requirements. The Supreme Court explained in *Harris v. United States* that:

[t]hose facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury’s verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings.³³⁰

³²⁵ *Id.* at 490.

³²⁶ *See* 21 U.S.C. § 841(b)(1)(C).

³²⁷ *See* 21 U.S.C. § 841(b)(1)(A) & (b)(1)(B).

³²⁸ *See, e.g.,* *United States v. Promise*, 255 F.3d 150, 156-157 (4th Cir. 2001) (en banc) (“Accordingly, *Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury finding of a specific threshold quantity, the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense, *i.e.*, charged in the indictment and proved to the jury beyond a reasonable doubt.”) (collecting cases).

³²⁹ *Compare, e.g.,* *United States v. Gonzales*, 420 F.3d 111, 129 (2d Cir. 2005) (“The *Apprendi* rule applies to the resolution of any fact that would substitute an increased sentencing range for the one otherwise applicable to the case. Because mandatory minimums operate in tandem with increased maximums in § 841(b)(1)(A) and –(b)(1)(B) to create sentencing ranges that raise the limit of the possible federal sentence, drug quantity must be deemed an element for all purposes relevant to the application of these increased ranges.” (citation and quotation marks omitted)), *with* *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003) (“*Apprendi* said that any fact extending the defendant’s sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of the aggravating crime – and thus the domain of the jury – by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury’s verdict has authorized the judge to impose the minimum with or without the finding. . . . Thus, where a defendant is made subject to a higher range of punishment under §§ 841(b)(1)(A) and (B) but is nonetheless sentenced within the confines of § 841(b)(1)(C), his rights under *Apprendi* are not violated.”).

³³⁰ 536 U.S. 545, 567 (2002).

The Court held in *Harris* that the seven-year mandatory minimum penalty for “brandishing” a firearm in violation of 18 U.S.C. § 924(c) need not be charged in the indictment nor proven to a jury beyond a reasonable doubt. Although the fact that the firearm was “brandished” increases the mandatory minimum penalty from five years to seven years, the Court concluded, it is a sentencing factor because it merely confines the court’s discretion within the otherwise applicable statutory maximum penalty.³³¹

Nonetheless, even facts that may trigger mandatory minimum penalties without increasing the statutory maximum may fall within the Constitution’s indictment, proof, and jury protections as a matter of legislative intent. The Supreme Court recently explained in *United States v. O’Brien* that, subject to constitutional limitations, “whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress.”³³² When Congress is not explicit in its characterization, “courts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor.”³³³ *O’Brien* held that Congress intended the finding whether the offense involved a “machinegun,” triggering a 30-year mandatory minimum penalty, to be an element of the offense, not a sentencing factor.³³⁴

Finally, the fact of a prior conviction may trigger a mandatory minimum penalty, regardless of its effect on the statutory maximum penalty, without implicating the Constitution’s indictment, proof, and jury protections. The Supreme Court has held that the fact of a prior conviction may be found by the judge at sentencing even if it increases the statutory maximum sentence.³³⁵ The Court has described the fact of a prior conviction as a “narrow exception” to its general rule that any fact that increases the prescribed maximum penalty must be alleged in the indictment and proven to a jury beyond a reasonable doubt.³³⁶ Accordingly, where the

³³¹ See *id.* at 568. The Supreme Court has not revisited *Harris*’s Sixth Amendment holding after *Blakely v. Washington*, 542 U.S. 296 (2004) and *Booker*, although some federal courts have noted *Harris*’s apparent tension with those later decisions. See *United States v. Jones*, 418 F.3d 726, 732 (7th Cir. 2005) (observing that “there may be some tension between *Booker* and *Harris*”); *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) (“We agree that *Harris* is difficult to reconcile with the Supreme Court’s recent Sixth Amendment jurisprudence, but *Harris* has not been overruled.”). Nonetheless, the circuit courts of appeals have uniformly continued to follow *Harris*, concluding that the decision has not yet been overruled by the Supreme Court. See, e.g., *United States v. Thompson*, 515 F.3d 556, 565 (6th Cir. 2008) (collecting cases). Circuit courts also hold that *Blakely* and *Booker* have no application to mandatory minimum sentencing provisions. See, e.g., *United States v. Harris*, 447 F.3d 1300, 1307 (10th Cir. 2006) (“*Booker* . . . does not apply to statutory minimum sentences.”); *United States v. Duncan*, 413 F.3d 680, 683 (7th Cir. 2005) (“Put simply, *Booker* and *Blakely* do not affect the imposition of statutory minimum sentences.”).

³³² *O’Brien*, 130 S. Ct. at 2175. See *infra* Appendix E, at E-5 of this Report.

³³³ See *id.*

³³⁴ See *id.* at 2180. In so holding, the Court reaffirmed its pre-*Apprendi* decision in *Castillo v. United States*, 530 U.S. 120 (2000), and utilized five-factors articulated in *Castillo* for assessing congressional intent: (1) language and structure; (2) tradition, (3) risk of unfairness, (4) severity of the sentence; and (5) legislative history. See *O’Brien*, 130 S. Ct. at 2175, 2180. See *infra* Appendix E, at E-5.

³³⁵ See *Almendarez-Torres*, 523 U.S. at 239.

³³⁶ See *Apprendi*, 530 U.S. at 489-90.

defendant's recidivism or criminal history triggers a mandatory minimum penalty, the prior conviction may be found by the sentencing judge by a preponderance of the evidence.³³⁷

C. INCORPORATION OF MANDATORY MINIMUM PENALTIES INTO THE GUIDELINES

Congress charged the Commission with promulgating guidelines that are “consistent with all pertinent provisions” of federal law³³⁸ and with providing sentencing ranges that are “consistent with all pertinent provisions of title 18, United States Code.”³³⁹ To that end, the Commission has incorporated mandatory minimum penalties into the guidelines since their inception, and has continued to incorporate new mandatory minimum penalties as enacted by Congress.³⁴⁰

The Commission generally has established guideline ranges that are slightly above the mandatory minimum penalty for offenders convicted of offenses carrying a mandatory minimum penalty, but its methods of incorporating mandatory minimum penalties into the guidelines have varied over time, with the benefit of the Commission's continuing research, experience, and analysis.³⁴¹ The Commission historically has achieved this policy by setting a base offense level for Criminal History Category I offenders that corresponds to the first guidelines range on the sentencing table with a minimum guideline range in excess of the mandatory minimum.

³³⁷ See, e.g., *United States v. Smith*, 390 F.3d 661, 666 (9th Cir. 2004) (concluding that prior convictions used to enhance a defendant's sentence pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e), need not be charged in the indictment or found by a jury); *United States v. Mata*, 491 F.3d 237, 245 (5th Cir. 2007) (rejecting the defendant's argument that 21 U.S.C. §§ 841 and 851 are unconstitutional because they do not require the factual finding of a prior conviction that increases the statutory maximum penalty to be found by a jury beyond a reasonable doubt). Section 851 prescribes statutory procedural protections, beyond what the Constitution requires, for defendants in drug trafficking cases whose sentences are enhanced based on prior convictions. See 21 U.S.C. § 851; cf. *United States v. Espinal*, 634 F.3d 655, 664-65 n.5 (2d Cir. 2011) (comparing the Constitutional limitations placed on the enhancement of sentences using prior convictions with the protections afforded by section 851).

³³⁸ 28 U.S.C. § 994(a).

³³⁹ 28 U.S.C. § 994(b).

³⁴⁰ Incorporating mandatory minimum penalties into the guidelines posed a “substantial challenge” to the drafting of initial sentencing guidelines. “[D]rafting of guidelines for offenses having a mandatory minimum sentence requires a determination as to the intended ‘heartland’ covered by the mandatory minimum statute.” “If the heartland . . . is viewed as applying to the more culpable defendants, and the guidelines are drafted in accord with this view, the question arises as to how the guidelines should address less culpable defendants. If lower guidelines are drafted to cover defendants with lesser roles, guidelines technically will be incompatible with the mandatory minimum sentences that literally apply to such conduct.” “If, on the other hand, the guidelines are drafted so that the guideline range associated with the mandatory minimum sentence is set for the least culpable first offenders who could be prosecuted under the statute, the concern of proportionality can only be met by substantially escalating the penalties for more culpable defendants. . . .” 1991 COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM at 29.

³⁴¹ See USSG Ch. 1, Pt. A at 2. (“The Commission . . . views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress.”); *id.* at 12. (“[The Commission's] mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, as more is learned about what motivates and controls criminal behavior.”).

Therefore, the base offense level, before any enhancements, adjustments, or consideration of criminal history, produces a guideline range that is above the applicable mandatory minimum penalty.

This general policy is most apparent in the guideline applicable to drug offenses, §2D1.1. The statutes applicable to drug trafficking offenses carry mandatory minimum penalties, usually five or 10 years in length, based on the type and quantity of drugs involved in the offense. Similarly, the Drug Quantity Table at §2D1.1(c) establishes base offense levels for drug trafficking offenders using the quantity and type of drugs involved in the offense. The Commission developed the Drug Quantity Table to ensure that the quantities triggering a mandatory minimum penalty carry a base offense level equal to the first range on the sentencing table that exceeds the mandatory minimum (*i.e.*, levels 26 and 32, respectively, for the commonly applied five- and ten-year mandatory minimums). For example, trafficking in at least 500 grams of powder cocaine carries a five-year mandatory minimum pursuant to 21 U.S.C. § 841(b)(1)(B), and the guidelines assign a base offense level of 26, yielding a guideline range just above the mandatory minimum for offenders in Criminal History Category I of 63 to 78 months. For quantities that are above or below the amounts that trigger the mandatory minimum penalty, the Drug Quantity Table extrapolates upward and downward from the mandatory minimum thresholds to set guidelines sentencing ranges for all drug quantities.

The Commission set the base offense levels at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or otherwise cooperate with authorities.³⁴² The ranges therefore fulfill the Commission's statutory mandate to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence that would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance"³⁴³ Setting base offense levels at or just above the mandatory minimum penalty also fulfills the Commission's statutory mandate to consider "the community view of the gravity of the offense,"³⁴⁴ in that mandatory minimum penalties reflect Congress's expression of the community view of the gravity of the offense.

In 2007, the Commission amended the Drug Quantity Table for offenses involving crack cocaine so that base offense levels 24 and 30, rather than 26 and 32, corresponded with the five and 10-year mandatory minimum penalties.³⁴⁵ For offenders in Criminal History Category I, those base offense levels produced ranges with low ends that were below the mandatory minimum term of imprisonment: 51 to 63 months at level 24, corresponding to the five-year

³⁴² See U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 148 (1995).

³⁴³ 28 U.S.C. § 994(n).

³⁴⁴ See 28 U.S.C. § 994(c)(4).

³⁴⁵ See USSG App. C, amend. 706 (effective Nov. 1, 2007) & amend. 711 (effective Nov. 1, 2007). The Commission amended the Drug Quantity Table for crack cocaine offenses as "an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor complete solution to those problems." USSG App. C., Amendment 711.

mandatory minimum, and 97 to 121 months at level 30, corresponding to the ten-year mandatory minimum following this amendment. The Commission observed that the lower base offense levels did not appear to affect crack cocaine offenders' guilty plea and cooperation rates—the rates were the same before and after the 2007 amendment.³⁴⁶ The Commission has subsequently moved the levels corresponding to the crack cocaine mandatory minimum penalties back to 26 and 32, in light of the Fair Sentencing Act of 2010's changes to the mandatory minimum drug quantity thresholds.³⁴⁷

As Congress has enacted new mandatory minimum penalties, the Commission has drawn on its experience with particular offenses and related guidelines to incorporate the new penalties. For example, in the PROTECT Act, Congress established a new mandatory minimum of five years of imprisonment for existing child pornography trafficking and receipt offenses committed in violation of 18 U.S.C. §§ 2252 and 2252A.³⁴⁸ In light of the new mandatory minimum penalty, the Commission established a base offense level of 22 for those offenses, even though it produced a guideline range entirely below the mandatory minimum penalty for offenders in Criminal History Category I. The Commission modified its general approach for this mandatory minimum penalty because experience and data showed that several existing enhancements (*e.g.*, use of a computer, material involving children under 12 years of age, number of images) in the applicable guideline, §2G2.2, apply in almost every case.³⁴⁹ Thus, the Commission set the base offense level at 22 with knowledge that the Chapter Two calculations would lead to a range slightly above the mandatory minimum penalty for nearly all offenders thereby maintaining a consistent approach for determining sentencing ranges.³⁵⁰

Some commonly applied mandatory minimum penalties require consecutive terms of imprisonment in addition to the sentence imposed on an underlying offense. To ensure the guidelines' consistency with federal law, the Commission has incorporated those penalties by specifying that the guideline sentence for that count is the minimum term required by the statute. For example, under 18 U.S.C. § 924(c)(1), an offender is subject to consecutive mandatory minimum terms of imprisonment varying from five years to life for conduct involving a firearm during and in relation to a crime of violence or drug trafficking crime. USSG §2K2.4(b) provides that for an offender convicted of violating section 924(c), "the guideline sentence [for

³⁴⁶ In the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine offenders was 93.1%. In the two fiscal years after the 2007 amendment took effect, the plea rates for such offenders were 95.2% and 94.0%, respectively. In addition, the substantial assistance rate for crack cocaine offenders was 27.8% in the fiscal year before the 2007 amendment took effect and 25.3% and 25.6% in the two fiscal years after the 2007 amendment took effect.

³⁴⁷ In 2010, Congress enacted the Fair Sentencing Act, which reduced the ratio between crack and powder cocaine from 100-to-1 to 18-to-1. The Commission's emergency amendment implementing the Fair Sentencing Act "conform[ed] the guideline penalty structure for crack cocaine offense to the approach followed for other drugs, *i.e.*, the base offense levels for crack cocaine are set on the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32." Commission, *Supplement to the 2010 Guidelines Manual* 43 (2010).

³⁴⁸ See PROTECT Act, § 103.

³⁴⁹ USSG App. C., amend. 665 (effective Nov. 1, 2004).

³⁵⁰ See *id.*

that count] is the minimum term of imprisonment required by statute.”³⁵¹ Guidelines applicable to other offenses carrying a consecutive mandatory penalty, such as aggravated failure to register as a sex offender³⁵² and aggravated identity theft³⁵³ operate similarly.³⁵⁴

For some offenses carrying a mandatory minimum penalty the Commission does not reference those offenses to any particular guideline in Appendix A of the *Guidelines Manual*, often because the mandatory minimum penalty is too infrequently applied to warrant a specific guideline.³⁵⁵ In such cases, and to ensure the guidelines’ consistency with federal law, the Commission has promulgated guideline provisions to ensure that the guideline range at least reaches any applicable mandatory minimum penalty. USSG §5G1.1 provides that “[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.”³⁵⁶ Moreover, the Commission has promulgated guidelines to ensure that no portion of an offender’s guideline range falls below an applicable mandatory minimum penalty. Thus, where some but not all of the guideline range falls below the mandatory minimum penalty, the mandatory minimum penalty becomes the bottom of the guideline range.³⁵⁷

As discussed in Chapter 2, *supra*, the guidelines also incorporate the two methods for relief from an applicable mandatory minimum: substantial assistance and the safety valve. USSG §5K1.1, consistent with the requirements of the Commission’s organic statute,³⁵⁸ authorizes a departure from the guideline range if the offender has provided substantial assistance to law enforcement, just as 18 U.S.C. § 3553(e) authorizes a sentence below a statutory mandatory minimum for substantial assistance. The complementary provisions operate to give the offender the full benefit of substantial assistance cooperation. For defendants who qualify for relief from the mandatory minimum penalty pursuant to the statutory safety valve, 18 U.S.C. § 3553(f), the guideline at §5C1.2 directs the court to “impose a sentence in accordance

³⁵¹ USSG §2K2.4(b) (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).

³⁵² 18 U.S.C. § 2250(c).

³⁵³ 18 U.S.C. § 1028A.

³⁵⁴ See USSG §§2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) & 2B1.6 (Aggravated Identity Theft).

³⁵⁵ See, e.g., 2 U.S.C. § 390, 12 U.S.C. § 617, 18 U.S.C. § 1122.

³⁵⁶ USSG §5G1.1(b) (Sentencing on a Single Count of Conviction).

³⁵⁷ See USSG §5G1.1(c)(2) (“In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . is not less than any statutorily required minimum sentence.”).

³⁵⁸ See 28 U.S.C. § 994(n) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

with the applicable guidelines without regard to any statutory minimum sentence.”³⁵⁹ USSG §2D1.1 also provides for a two-level decrease if the defendant meets the safety valve subdivision criteria listed at §5C1.2.³⁶⁰

D. COMPARING THE GUIDELINES AND MANDATORY MINIMUM PENALTIES

The guidelines and mandatory minimum penalties both determine sentences by referencing certain facts in order to measure the severity of the offense and the culpability of the offender. Often, the guidelines and mandatory minimum penalties consider the same facts to be aggravating circumstances that warrant lengthier sentences, so that similar conduct produces higher penalties under both. For the most common offense types, these facts include the type and quantity of a controlled substance, the use of a firearm in connection with a violent crime or drug trafficking offense, and an offender’s criminal history. In this regard, the guidelines and mandatory minimum penalties are broadly consistent with each other.

There are significant structural differences, however, in *how* the guidelines and mandatory minimum penalties use these aggravating facts to determine the appropriate sentence. The guidelines employ a modified real offense approach that considers each aggravating fact in conjunction with other relevant offense- and offender-specific facts to produce a sentencing range. The guidelines are designed to be flexible and therefore assign varying weight to aggravating and mitigating factors in the context of the offense and the guidelines as a whole.

Mandatory minimum penalties, by contrast, rely on the presence of a narrow set of facts, (or even just a single fact), to establish minimum sentences that may be much longer than they otherwise would be without the presence of those facts. The application of a mandatory minimum depends solely on whether the statutorily enumerated factors are proven or agreed to, without regard to other aggravating or mitigating facts. The structural differences between the guidelines and mandatory minimum penalties result in different outcomes in terms of both uniformity and proportionality.

In comparing the guidelines to mandatory minimum penalties, it is useful to keep in mind that the guideline sentencing table is structured so that a two-level increase to the offense level represents a 25 percent increase to the otherwise applicable guideline range. A four-level increase therefore represents a 50 percent increase to the otherwise applicable guideline range, and a six-level increase roughly doubles the otherwise applicable guideline range.

One illustration of mandatory minimum penalties and the guidelines enhancing sentences based on similar aggravating facts is the treatment of offenders who illegally possess firearms. An offender who possesses a firearm after having received three convictions of a violent felony or a serious drug offense is subject to a mandatory minimum penalty of 15 years of

³⁵⁹ See USSG §5C1.2(a). For offenders whose mandatory minimums were at least five years in length, the new offense level cannot be lower than 17. See USSG §5C1.2(b).

³⁶⁰ See USSG §2D1.1(b)(16).

imprisonment, pursuant to the Armed Career Criminal Act (ACCA).³⁶¹ Similarly, the applicable guideline, §2K2.1, assigns a base offense level of 20 if the offender had one prior felony conviction of either a crime of violence or a controlled substance offense. Section 2K2.1 assigns a base offense level of 24 if the offender had two prior such convictions, representing a 50 percent increase in the otherwise applicable guideline range. The guideline does not provide any additional offense level enhancements for a third such prior conviction.³⁶² Even assuming that an offender with three such prior convictions is in the highest available criminal history category (VI), a base offense level of 24 yields a guideline range of 100 to 125 months – well below the 15-year mandatory minimum penalty. The guidelines nonetheless account for the 15-year mandatory minimum penalty at §4B1.4 (Armed Career Criminal), which establishes increased offense levels and criminal history categories for offenders who qualify as armed career criminals under ACCA.

The guidelines also provide for incremental sentence increases based on other aggravating facts that the mandatory minimum penalty does not consider. In addition to enhancements for prior convictions, the guidelines provide enhancements for felon-in-possession offenses if the firearm possessed was particularly dangerous (*e.g.*, a machinegun, a firearm equipped with a silencer, or a short-barrel shotgun), was stolen, had an obliterated serial number, or was a destructive device. The guidelines provide further enhancements, ranging from two- to 10-levels, depending on the number of firearms involved in the offense.³⁶³ These additional aggravating facts are highly relevant to determining the sentence under the guidelines, but they are not material to the application of the mandatory minimum penalty.

By drawing a broader range of distinctions among offenders, the guidelines' flexibility increases the likelihood that similar offenders will receive similar sentences and that dissimilar offenders will receive different sentences. The guidelines measure offense severity using a variety of facts and, as a result, draw more precise distinctions among offenders. Mandatory minimum penalties are unable to draw these fine distinctions, potentially increasing the likelihood that dissimilar offenders will receive similar sentences because they apply broadly to cases that, aside from a few facts, may otherwise involve very different offenders.

These differences are apparent in drug trafficking cases, where both the guidelines and the applicable mandatory minimum penalties rely on drug type and quantity to determine the sentence. Unless an offender meets all of the criteria for the statutory safety valve,³⁶⁴ the five- and 10-year mandatory minimum penalties established at 21 U.S.C. § 841(b) may apply to all offenses that involve a particular drug type and quantity, without regard to other aggravating or mitigating circumstances.³⁶⁵ The guidelines, however, use multiple offense- and offender-

³⁶¹ See 18 U.S.C. § 924(e)(1).

³⁶² See USSG §2K2.1(a)(2), (a)(4) (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

³⁶³ See generally USSG §2K2.1(a) & (b).

³⁶⁴ For a discussion of the statutory safety valve, see *supra* Chapter 2.

³⁶⁵ See 21 U.S.C. §§ 841(b)(1)(A) – (B).

specific characteristics in addition to drug type and quantity to determine the sentencing range, including whether the offense involved death or bodily injury, whether the offender had an aggravating or mitigating role in the offense; whether the offense involved a dangerous weapon; whether the offender has accepted responsibility; and the seriousness of the offender's criminal history.³⁶⁶

Furthermore, the application of section 841(b) turns primarily on two quantity thresholds for each drug type, corresponding to the statute's five- and 10-year mandatory minimum penalties.³⁶⁷ The guidelines use the type and quantity of drugs involved in the offense to determine the base offense level according to the Drug Quantity Table at §2D1.1(c), which uses 17 different quantity thresholds.³⁶⁸ Thus, for example, in an offense involving 495 grams of powder cocaine, the guidelines assign a base offense level of 24, which for an offender in Criminal History Category I yields a guideline range of 51 to 63 months. At 500 grams, the base offense level increases to 26, yielding an incrementally higher guideline range of 63 to 78 months. The guidelines' incremental approach recognizes that an offender whose offense involved 500 grams is only marginally more culpable than an offender whose offense involved 495 grams. However, under the applicable mandatory minimum penalty, 21 U.S.C. § 841(b), offenses involving 495 grams of powder cocaine do not carry a mandatory minimum penalty, while offenses involving at least 500 grams of powder cocaine carry a five-year mandatory minimum penalty.³⁶⁹ Thus, the mandatory minimum penalty prescribes divergent minimum sentences for offenders who, but for five grams of powder cocaine, are similarly situated.³⁷⁰

The structural differences between the guidelines and mandatory minimum penalties also result in different outcomes with respect to the degree to which a particular fact increases an offender's sentence. For example, 21 U.S.C. § 841 establishes enhanced mandatory minimum penalties if an offender commits a drug trafficking offense in violation of section 841(a) after having previously been convicted of a "felony drug offense."³⁷¹ Having only one prior felony drug offense conviction doubles the mandatory minimum penalty: the otherwise applicable five-year mandatory minimum penalty becomes a 10-year mandatory minimum penalty, and the 10-

³⁶⁶ See USSG §2D1.1(b); USSG Ch. 3, Pt. B (Role in the Offense); USSG §3E1.1 (Acceptance of Responsibility); USSG Ch. 4, Pt. A (Criminal History).

³⁶⁷ See 21 U.S.C. § 841(b)(1)(A)-(B).

³⁶⁸ See USSG §2D1.1(a) & (c). The Commission's method for calculating the quantity of a drug for purposes of the guidelines sometimes differs from the statutes. See Appendix E(A)(2) of this Report.

³⁶⁹ See 21 U.S.C. § 841(b)(1)(B)(ii).

³⁷⁰ The 1991 COMMISSION REPORT referred to this effect as a sentencing "cliff." See 1991 COMMISSION REPORT at 30-31.

³⁷¹ See 21 U.S.C. §841(b)(1)(A), (b)(1)(B). "The term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44).

year mandatory minimum penalty becomes a 20-year mandatory minimum penalty.³⁷² The drug trafficking guideline, by contrast, does not contain an enhancement for a single prior felony drug offense conviction, though such a conviction may incrementally increase the guideline range by producing a higher criminal history score.³⁷³ At no point on the sentencing table, however, does having only one prior conviction double the otherwise applicable guideline range.

The mandatory minimum penalties established at 18 U.S.C. § 924(c) further illustrate the structural differences between the guidelines and mandatory minimums penalties. Section 924(c) establishes mandatory minimum penalties for conduct involving a firearm in violent felonies and drug trafficking offenses. These mandatory minimum penalties require five years of imprisonment for possessing, using, or carrying a firearm during and in relation to a crime of violence or drug trafficking crime; seven years of imprisonment if a firearm was brandished; and ten years of imprisonment if a firearm was discharged. The penalties increase to 10 years of imprisonment if the firearm was a short-barreled rifle, a short-barreled shotgun, or a semiautomatic assault weapon; and to 30 years of imprisonment if the firearm was a machinegun, a destructive device, or was equipped with a silencer or muffler.³⁷⁴ The mandatory minimum penalties provided by section 924(c) must be imposed consecutively to each other and to any term of imprisonment imposed for the underlying offense.³⁷⁵

Several guidelines provide for offense level enhancements if a firearm is involved in a violent or drug trafficking offense. Unlike section 924(c), the length of the enhancement under the guidelines increases or decreases in proportion to the severity of the underlying offense (as represented by the total offense level) and the offender's criminal history. For example, §2B2.1 provides a base offense level of 17 for burglary of a residence, with a two-level enhancement if the offense involved the possession of a dangerous weapon (including a firearm).³⁷⁶ Similarly, §2D1.1 provides for a two-level enhancement in drug trafficking offenses involving a dangerous weapon (including a firearm).³⁷⁷ By contrast, §2B3.1 establishes a base offense level of 20 for robbery offenses, with a seven-level enhancement if a firearm was discharged, a six-level

³⁷² See 21 U.S.C. §841(b)(1)(A), (b)(1)(B).

³⁷³ See USSG §4A1.1. A prior felony drug offense conviction will increase the offender's criminal history score if it meets the recency, age, and other requirements of Chapter Four, Part A of the *Guidelines Manual*. If the offender has two or more prior felony convictions of either a crime of violence or a controlled substance offense, he or she may qualify as a career offender pursuant to §4B1.1 (Career Offender), which may significantly increase the guideline range.

³⁷⁴ See 18 U.S.C. §§ 924(c)(1)(A) – (B).

³⁷⁵ See 18 U.S.C. § 924(c)(1)(D)(ii) (“Notwithstanding any other provision of law . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.”).

³⁷⁶ USSG §2B2.1(a)(1), (b)(4) (Burglary of a Residence or a Structure Other than a Residence).

³⁷⁷ USSG §2D1.1(b)(1).

enhancement if a firearm was otherwise used, and a five-level enhancement if a firearm was brandished or possessed.³⁷⁸

The structural differences between mandatory minimum penalties and the guidelines are particularly striking in the case of “stacking” penalties for multiple violations of section 924(c). A second or subsequent violation of section 924(c) carries a mandatory minimum penalty of 25 years of imprisonment, or life if the firearm involved was a machinegun, a destructive device, or was equipped with a silencer or muffler.³⁷⁹ These additional penalties must be imposed consecutively to the sentence for the underlying offense and consecutively to the other section 924(c) penalties, so that an offender convicted of two or more section 924(c) counts faces an especially severe penalty. By contrast, because the guidelines treat the use of a firearm as an enhancement to the underlying offense, the guidelines grouping rules generally will apply so that the offender receives no, or only incremental, sentence increases for using a firearm on multiple occasions.³⁸⁰ Thus, any increases to the offender’s sentence for conviction of multiple counts result primarily from the commission of additional underlying offense (*e.g.*, the second offense increased the total of amount of loss, involved additional quantities of drugs, or was otherwise more serious), and not from the additional use of the firearm itself—the single fact triggering the stacking of penalties. In sum, mandatory minimum penalties structurally are unable to draw the fine distinctions among offenders and offenses that can be made under the guideline system.

³⁷⁸ USSG §2B3.1(a) & (b)(2) (Robbery).

³⁷⁹ 18 U.S.C. § 924(c)(1)(C). For a more detailed discussion of the case law concerning stacking mandatory minimum penalties under section 924(c), *see infra* Appendix E(B)(1) of this Report.

³⁸⁰ *See* USSG Ch. 3, Pt. D. (Multiple Counts).

CHANGES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, MANDATORY MINIMUM PENALTIES, AND THE FEDERAL PRISON POPULATION

A. INTRODUCTION

This chapter addresses the requirement in the statutory directive to assess the impact of mandatory minimum penalties on the federal prison population. Such an assessment requires consideration, as set forth in Part C, of how mandatory minimum penalties themselves have changed. Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system, as described in Part B, that also have had an impact on the size of the federal prison population. Those include expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. As described in Part D, the changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.

B. SYSTEMIC CHANGES TO THE FEDERAL CRIMINAL JUSTICE SYSTEM

1. *Increased Federalization of Criminal Law*

Federalization of criminal law refers to the transformation of “traditional state and local criminal offenses into federal crimes.”³⁸¹ Starting in the late 1960s, an increased emphasis on law and order in national politics contributed to the enactment of a “steady stream of [federal] criminal statutes.”³⁸² “[C]oncern[s] with organized crime, drugs, street violence and other social ills precipitated a particularly significant rise in federal legislation tending to criminalize activity involving more local conduct, conduct previously left to state regulation.”³⁸³

³⁸¹ Susan A. Ehrich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825 (2000); see Michael A. Simon, *Prosecutorial Discretion and Prosecutorial Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 906 n.8 (2000) (“The term ‘federalization’ usually describes the legislative process of enacting federal criminal laws that cover conduct that is already criminal under state law.”) (citing Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1030 n.2 (1995) (discussing “federalization” as term of art)).

³⁸² Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 726 (2002) (internal citations omitted). Accord Simon, *supra* note 382, at 906 (Law and order became a volatile campaign issue in the late 1960s.).

³⁸³ Task Force on Federalization of Crim. Law, A.B.A., *The Federalization of Criminal Law* 7 (1998) [hereinafter the ABA Report].

While the trend toward federalization of criminal law existed in 1991, “[a]ll signs indicate that the federalization trend [has been] growing, not slowing”³⁸⁴ since that time. The continued increased federalization of criminal law has contributed to the increasing size of the Federal prison population.

In the period from 1992 through 1994, Congress created federal criminal statutes penalizing failure to pay child support,³⁸⁵ carjacking,³⁸⁶ and domestic violence,³⁸⁷ and expanded the Hobbs Act to include robbery.³⁸⁸ In 1996, Congress added laws punishing drug-induced rape³⁸⁹ and church arsons.³⁹⁰ In 1998, Congress enacted new laws punishing sexual abuse of children,³⁹¹ identity theft,³⁹² telemarketing fraud,³⁹³ and theft of cellular phone services.³⁹⁴ Many of these federal laws overlap with one another, and cover ground already addressed by state law, including violent crimes.³⁹⁵ They also provided for concurrent jurisdiction with state courts,

³⁸⁴ ABA Report at 11.

³⁸⁵ See Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. § 228 (Supp. IV 1998).

³⁸⁶ See Anti-Car Theft Act of 1992, 18 U.S.C. § 2119 (1994 & Supp. IV 1998).

³⁸⁷ See Violence Against Women Act, 18 U.S.C. § 2261 (1994 & Supp. IV 1998).

³⁸⁸ See Hobbs Act, 18 U.S.C. § 1951 (1994).

³⁸⁹ See Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104–305, 110 Stat. 3807 (codified in scattered sections of title 21, United States Code).

³⁹⁰ See Church Arson Prevention Act of 1996, Pub. L. No. 104–155, 110 Stat. 1392 (codified at 18 U.S.C. § 247, 42 U.S.C. § 10602 (Supp. IV 1998)).

³⁹¹ See Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105–314, 112 Stat. 2974 (codified at 18 U.S.C. § 2241 (Supp. IV 1998)).

³⁹² See Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105–318, 112 Stat. 3007 (codified at 18 U.S.C. § 1028).

³⁹³ See Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105–184, 112 Stat. 520 (codified in scattered sections of title 18, United States Code).

³⁹⁴ See Wireless Telephone Protection Act, Pub. L. No. 105–172, 112 Stat. 53 (1998) (codified at 18 U.S.C. § 1029 (Supp. IV 1998)).

³⁹⁵ See Eric Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 21-23 (discussing possible causes of federalization of crime); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 43 (1996) (discussing federalization in 1980s and 1990s). For example, in 1994, 18 U.S.C. § 924(i) provided the death penalty for murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime. Though Congress resurrected the federal death penalty in 1988, see 21 U.S.C. §§ 848(e)(1)(A)–(B) (1988), use of capital punishment at the federal level traditionally was reserved for offenses that occur on federal lands (or on the high seas), murders of a federal official, and killings involving espionage, hijacking, or kidnapping across state-lines. See Rory Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999). Congress has since broadened the federal death penalty to cover deaths occurring during other types of offenses, including offenses involving aircraft and motor vehicles, terrorist attacks and other violence against railroad carriers and mass

rather than exclusive federal jurisdiction.³⁹⁶ This congressional activity prompted then Chief Justice Rehnquist to assert that:

[t]he trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system . . . Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems.³⁹⁷

The trend toward federalization of criminal law did not abate with the turn of the century. The “number of criminal offenses in the United States Code increased from 3,000 in the early 1980s to 4,000 by 2000 to over 4,450 by 2008.”³⁹⁸ From 2000 through 2007, Congress enacted an average of 56.5 crimes per year.³⁹⁹ This “number [of criminal statutes] does not take into account the thousands of criminal offenses dispersed throughout federal regulations”⁴⁰⁰ created by federal agencies and departments, of which there are so many that “the Congressional Research Service itself admitted that it was unable to even count all of the offenses,” but estimates that the regulatory criminal offenses number in the “tens of thousands.”⁴⁰¹

Congressional action alone, however, is not the only contributing factor to the increased federalization of criminal law. Prosecutorial charging decisions have also factored into the trend. For example, in 1991, the Department of Justice announced Project Triggerlock, an initiative with the “stated goal [of] reduc[ing] violent crime by imposing severe sentences on unlawful gun possessors.”⁴⁰² The initiative relied primarily on the enforcement of the federal felon-in-

transportation systems, bank robbery, and carjacking, among others. *See, e.g.*, 18 U.S.C. §§ 34, 1992(b), 2113(e), 2119(3).

³⁹⁶ Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 762 (1996); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1312 (1997).

³⁹⁷ CHIEF JUSTICE WILLIAM H. REHNQUIST, FED. JUDICIARY, THE 1998-YEAR END REPORT OF THE FEDERAL JUDICIARY (1998), available at https://www.uscourts.gov/News/TheThirdBranch/99-01-01/The_1998_Year-End_Report_of_the_Federal_Judiciary.aspx.

³⁹⁸ *Overcriminalization: An Explosion of Federal Criminal Law*, Heritage Foundation Fact Sheet No. 86 (Apr. 27, 2011).

³⁹⁹ John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Memo No. 26 at 1 (June 16, 2008).

⁴⁰⁰ *Id.* at 4.

⁴⁰¹ *Overcriminalization: An Explosion of Federal Criminal Law*, Heritage Foundation Fact Sheet No. 86 (Apr. 27, 2011).

⁴⁰² David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1440-41 (2011) (internal citations omitted). *See also* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR U.S. ATT'YS, *United States Attorneys' Bulletin*, Vol. 40, No. 8, at 248 (Aug. 1992), available at

possession statute.⁴⁰³ “The systematic involvement of the federal government in prosecuting gun cases that were the result of local police arrests and that would have been otherwise prosecuted in state court, is considered by many to be ‘[t]he most important change in federal-local interaction during the 1990s.’”⁴⁰⁴ The Department of Justice has undertaken several other similar initiatives in recent years.⁴⁰⁵

2. *Changes In the Size and Composition of the Federal Criminal Docket*

Changes in both the size and composition of the federal criminal docket⁴⁰⁶ also have contributed to the increasing federal prison population. The size of the federal criminal docket has changed significantly in the last 20 years. The total number of federal cases has almost tripled from 29,011 in fiscal year 1990⁴⁰⁷ to 83,946 in fiscal year 2010.⁴⁰⁸ Similarly, the number of federal offenders convicted of violating a statute carrying a mandatory minimum penalty has more than tripled since fiscal year 1990, from 6,685 cases to 19,896 in fiscal year 2010.⁴⁰⁹

The composition of the federal criminal docket has also changed. In fiscal year 1990, cases involving drug offenses made up 44.5 percent of the docket.⁴¹⁰ Fraud offenses constituted another 10.5 percent of the docket, followed by firearms (7.5%), larceny (7.4%), and

http://www.justice.gov/usao/eousa/foia_reading_room/usab4008.pdf (“This initiative targets repeat offenders who use or carry guns . . . and put[s] chronic offenders behind bars under stiff federal mandatory sentences.”).

⁴⁰³ 18 U.S.C. § 922(g).

⁴⁰⁴ Patton, *supra* note 403, at 1441 (citing Daniel Richman, *The Past, Present and Future of Violent Crime Federalization*, 34 CRIME & JUST. 377, 397 (2006)).

⁴⁰⁵ See, e.g., U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR U.S. ATT’YS, *Project Safe Neighborhoods – An Overview of the Strategy*, United States Attorneys’ Bulletin, Vol. 50, No. 1 at 1 (Jan. 2002), available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5001.pdf (“Project Safe Neighborhoods is a comprehensive, strategic approach to reducing gun violence in America.”); Press Release, Justice Program Shows Success in Crime-Ridden Areas (July 15, 1999), available at <http://www.ojp.usdoj.gov/archives/pressreleases/1999/eows99151.htm> (“Operation Weed and Seed . . . is a multi-agency strategy, including partners from law enforcement, health, education and social services, that ‘weeds out’ violent crime, gang activity, drug use, and drug trafficking in targeted neighborhoods and then ‘seeds’ the designated area by restoring these neighborhoods through social and economic revitalization.”).

⁴⁰⁶ The federal criminal docket referred to throughout this report consists of felonies, which are punishable by more than one year of imprisonment, and Class A misdemeanors, which are punishable by not more than one year’s imprisonment. See 18 U.S.C. § 3559(a). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See §1B1.9 (Class B or C Misdemeanors and Infractions).

⁴⁰⁷ See 1991 COMMISSION REPORT at 51 (Table 4).

⁴⁰⁸ U.S. SENT’G COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 1. By comparison, the size of the population has increased from 248,709,873, to 308,745,538 during the same time period. See <http://www.census.gov/main/www/cen1990.html>, reporting census data as of April 1, 1990 and <http://2010.census.gov/2010census/data/>, reporting census data as of April 1, 2010.

⁴⁰⁹ Cf. 1991 COMMISSION REPORT at 51 (Table 4) and Table D-1 (Mandatory Minimum Status of Cases in Circuit and District (Fiscal Year 2010)) in Appendix D of this report.

⁴¹⁰ U.S. SENT’G COMM’N, ANNUAL REPORT (1991) at 52 (Figure E).

immigration (7.0%).⁴¹¹ Combined, these types of offenses accounted for 76.9 percent of the federal criminal docket.

In fiscal year 2010, cases involving immigration, drugs, firearms, or fraud made up the vast majority of the federal docket, accounting for more than 80 percent of all cases reported to the Commission.⁴¹² The portion of the annual caseload attributable to each type of offense, however, has changed significantly. Immigration cases were the most common federal crime in fiscal year 2010,⁴¹³ accounting for 34.3 percent of the federal criminal docket. Drug offenses constituted another 28.9 percent of the docket, followed by fraud (9.7%) and firearms (9.6%) offenses.⁴¹⁴

The percentage of all federal cases involving a conviction for violating a statute carrying a mandatory minimum penalty has remained relatively constant during the last 20 years. Convictions carrying a mandatory minimum penalty accounted for 26.6 percent in fiscal year 1991 compared to 27.2 percent in fiscal year 2010. *See* Figure 4-1.⁴¹⁵ The percentage of federal offenders subject to a mandatory minimum penalty, however, has declined from 20.5 percent in fiscal year 1991 to 14.5 percent in fiscal year 2010. This decline is largely attributable to the enactment in 1994 of the “safety valve” at 18 U.S.C. § 3553(f),⁴¹⁶ which, as discussed in Chapter 2, allows the court to sentence certain drug trafficking offenders below otherwise applicable mandatory minimum penalties.⁴¹⁷

⁴¹¹ *Id.*

⁴¹² Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Table 3.

⁴¹³ *Id.*

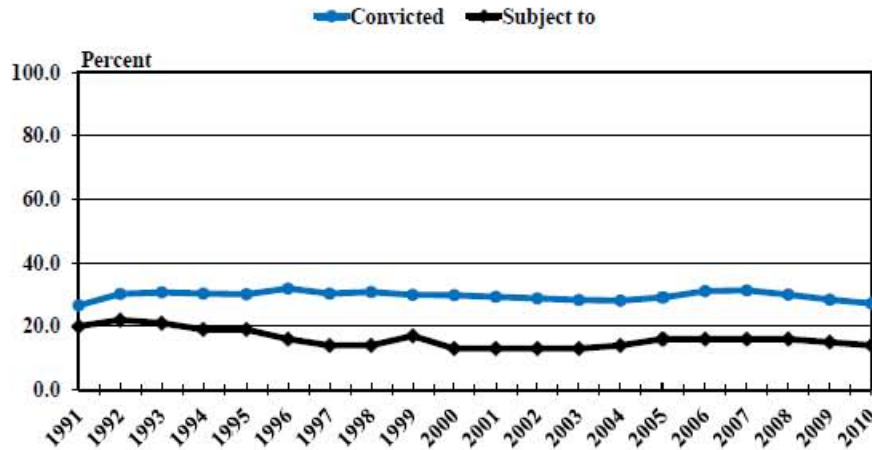
⁴¹⁴ Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Figure A.

⁴¹⁵ The figures in this chapter were created from the dataset discussed in Chapter 7, *infra*. The percentages reflected in the figures may differ slightly from percentages based upon numbers reported in the Commission’s Sourcebooks for the referenced fiscal years. The possible discrepancy is the result of cases having been excluded from analyses in this Report as a result of missing documentation.

⁴¹⁶ The rates of relief attributable to substantial assistance have remained relatively constant over time.

⁴¹⁷ The impact of the “safety valve” is discussed in Chapter 8, *infra*.

Figure 4-1
Percentage of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
and Subject to a Mandatory Minimum Penalty at Sentencing
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91 – USSCFY10.

Although immigration offenses constitute a large percentage of the federal caseload, only a small percentage of immigration offenders are convicted of offenses carrying a mandatory minimum penalty.⁴¹⁸ Thus, their inclusion masks the increased use of mandatory minimum penalties for the remaining federal criminal docket over the same time period.

In fiscal year 1991, drug offenses constituted 44.5 percent of the overall federal criminal docket⁴¹⁹ compared to 28.9 percent in fiscal year 2010.⁴²⁰ As already noted, immigration offenses now constitute the largest percentage of the federal criminal docket, 34.4 percent in fiscal year 2010,⁴²¹ compared to only 7.0 percent in fiscal year 1991.⁴²² When immigration offenses are excluded from the analysis, the percentage of offenders convicted of violating a statute carrying a mandatory minimum penalty has increased over time, from 27.8 percent in fiscal year 1991 to 39.9 percent in fiscal year 2010. *See* Figure 4-2.

⁴¹⁸ In fiscal year 2010, 0.6 percent of immigration cases involved mandatory minimum sentencing provisions. *See* Table D-2 (Mandatory Minimum Status in Each Primary Offense Category (Fiscal Year 2010)) in Appendix D of this Report.

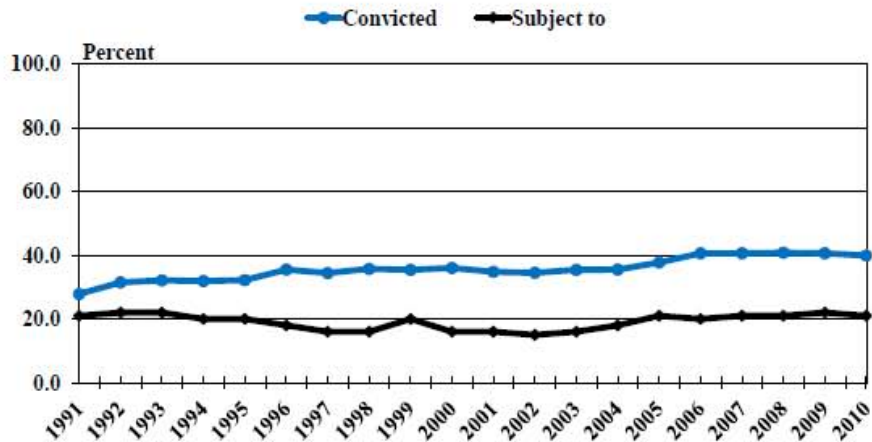
⁴¹⁹ Commission 1991 Datafile OPAFY91.

⁴²⁰ *See* U.S. SENT’G COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure A.

⁴²¹ *Id.*

⁴²² U.S. SENT’G COMM’N, ANNUAL REPORT (1991) at 50.

Figure 4-2
Percentage of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
and Subject to a Mandatory Minimum Penalty at Sentencing
Immigration Cases Excluded
Fiscal Years 1991 - 2010



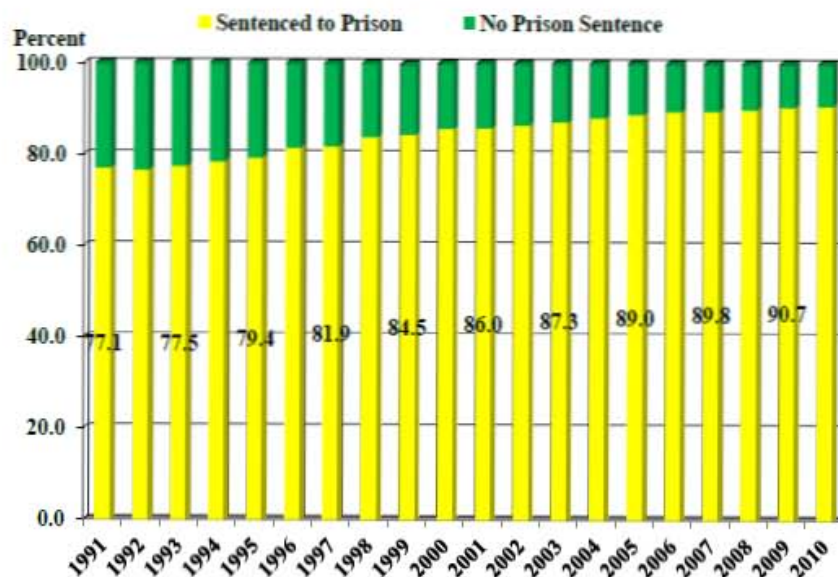
SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91 – USSCFY10.

When immigration offenses are excluded from the analysis, the percentage of offenders subject to a mandatory minimum penalty decreased from 20.5 percent in fiscal year 1990 to 15 percent in fiscal year 2003, before gradually increasing to 21.2 percent in fiscal year 2010.

3. *Increased Imposition of Sentences of Imprisonment*

The increased use of sentences of imprisonment over the last 20 years has also affected the size of the federal prison population. As illustrated in Figure 4-3, in fiscal year 1991, 77.1 percent of sentences imposed included a term of imprisonment. In fiscal year 2009, 90.7 percent of sentences imposed included a term of imprisonment, which represents an increase of 13.6 percent.

Figure 4-3
Imposition of Term of Imprisonment
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission 1991 through 2010 Datafile, USSCFY1991-USSCFY2010.

In cases in which a term of imprisonment is imposed, the average sentence imposed has decreased from 62 months of imprisonment in fiscal year 1991 to 54 months of imprisonment in fiscal year 2010.⁴²³ See Figure 4-4. The nine-month decline in the average sentence of imprisonment imposed has not resulted in a decrease in the federal prison population, however, because the size of the federal docket has tripled over the same time period, and the proportion of offenders sentenced to prison has increased.

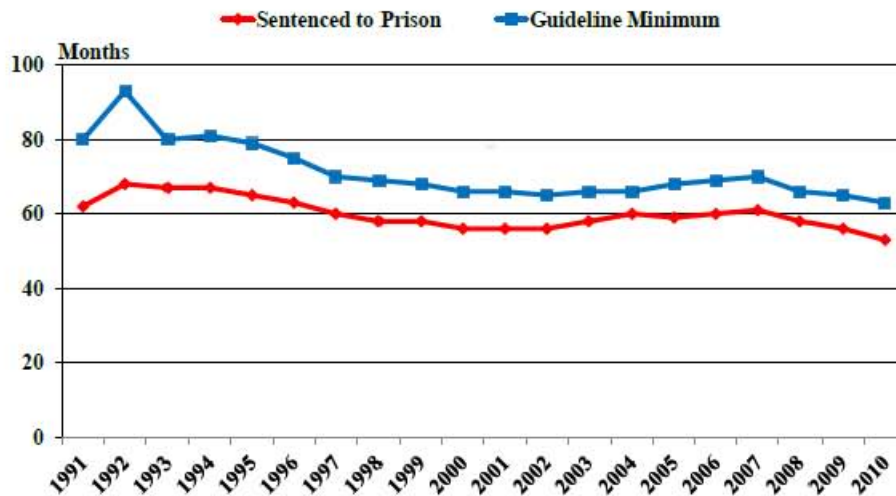
Figure 4-4 also shows the relationship over time between the average term of imprisonment imposed and the average minimum of the guideline range for offenders sentenced to a term of imprisonment. There is a fairly consistent relationship over time between the average term of imprisonment imposed and the minimum of the guideline range, which is often referred to as the “presumptive sentence.”⁴²⁴ This ongoing trend shows how changes in offense severity and offender culpability, as measured by the guidelines, affect sentencing decisions over time and demonstrates that the guidelines continue to have a strong gravitational pull on federal sentencing practices. Presumptive sentences increase or decrease for a variety of reasons,

⁴²³ These figures are the average sentences for cases in which a sentence of imprisonment was imposed. Cases in which no sentence of imprisonment was imposed are not reflected in these average sentences. Note that the average sentences reported herein differ from those reported in the Commission’s Sourcebook for the referenced fiscal years because cases lacking certain documentation were excluded from the analyses conducted for this Report. See *infra* Chapter 7(B).

⁴²⁴ For a more detailed discussion of this relationship, see U.S. SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, 72-73 (Mar. 2006) [hereinafter COMMISSION 2006 BOOKER REPORT].

including guideline amendments,⁴²⁵ statutory changes, and prosecutorial charging decisions. For example, as discussed above, immigration offenses now account for the largest portion of the federal caseload. Immigration offenses received an average sentence of 18 months of imprisonment in fiscal year 2010, which is less than the average of 54 months of imprisonment for the overall criminal caseload. Accordingly, the increase in the portion of the federal caseload comprised of immigration offenses has contributed to the decrease in average sentence length shown in Figure 4-4.⁴²⁶

Figure 4-4
Average Sentence When Offender Sentenced to Prison and Guideline Minimum
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission 1991 through 2010 Datafile, USSCFY1991-USSCFY2010.

C. CHANGES IN MANDATORY MINIMUM PENALTIES

At the same time that systemic changes to the federal criminal justice system described in Part B were occurring, so too were changes occurring in mandatory minimum penalties.

1. *Expansion of Mandatory Minimum Penalties*

A proliferation of mandatory minimum penalties has occurred over the past 20 years. Since 1991, the number of mandatory minimum penalties has more than doubled, from 98⁴²⁷ to

⁴²⁵ Congress has issued to the Commission at least 85 specific and general directives regarding the guidelines in 45 different Acts since 1991. All but two of those 45 Acts resulted in amendments to the guidelines that increased the applicable guideline sentencing ranges. See USSG App. B (2010).

⁴²⁶ See U.S. SENT'G COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure E.

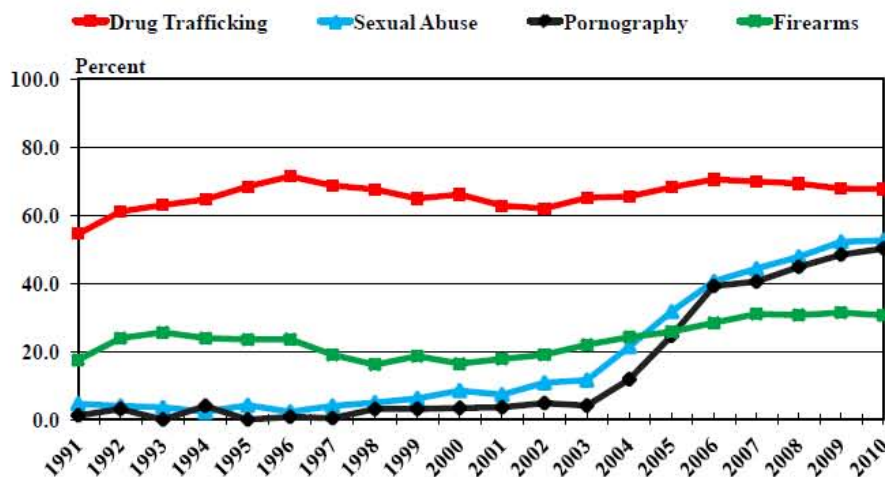
⁴²⁷ See 1991 COMMISSION REPORT, Appendix A.

195 today. Table A-1 in Appendix A of this report lists those statutory provisions carrying mandatory minimum penalties.⁴²⁸

2. Changes in Types of Offenses Subject to Mandatory Minimums

New types of offenses have become subject to mandatory minimum penalties. See Figure 4-5. For example, in fiscal year 1991, the percentage of child pornography offenders convicted of violating a statute carrying a mandatory minimum penalty was 2.8 percent.⁴²⁹ By fiscal year 2010, six years after the enactment of mandatory minimum penalties for certain child pornography offenses,⁴³⁰ more than half (50.1%) of child pornography offenders were convicted of violating a statute carrying a mandatory minimum penalty. Similarly, in fiscal year 1991, the percentage of sexual abuse offenders convicted of violating a statute carrying a mandatory minimum penalty was 3.8 percent. By fiscal year 2010, 52.5 percent of sexual abuse offenders were convicted of an offense carrying a mandatory minimum penalty. See Figure 4-5.

Figure 4-5
Offenders in Select Offense Types Convicted of an Offense
Carrying a Mandatory Minimum Penalty
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91 – USSCFY10.

Although Congress has broadened the types of offenses that carry mandatory minimum penalties, drug trafficking and firearms offenses continue to make up the greatest portion of

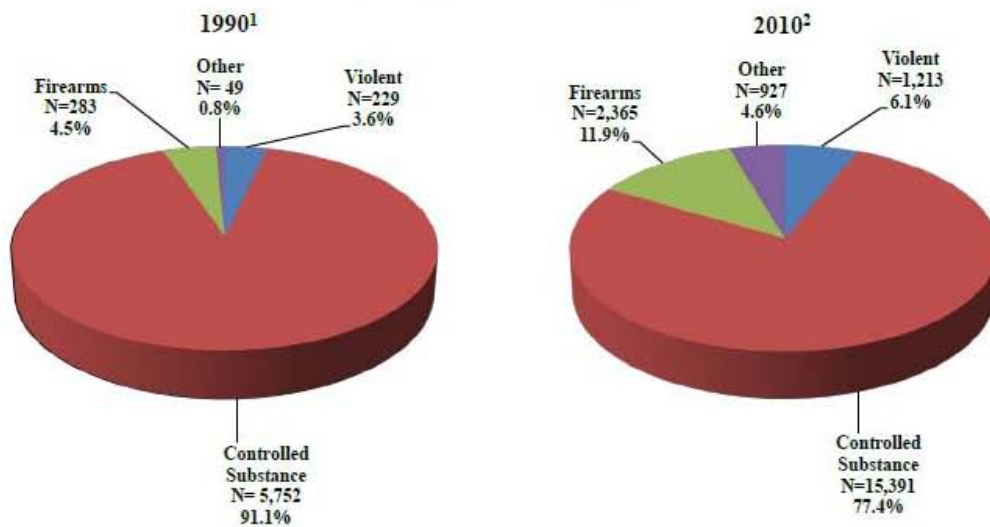
⁴²⁸ See Table A-1 in Appendix A of this Report.

⁴²⁹ In fiscal year 1991, only two of the 95 pornography cases involved a conviction for violating a statute carrying a mandatory minimum penalty. Both cases were convictions for violating 18 U.S.C. § 2252, which carries a mandatory minimum penalty of five years of imprisonment.

⁴³⁰ In 2003, Congress enacted the PROTECT Act, which created mandatory minimum penalties for trafficking in and receipt of child pornography, among other offenses.

convictions carrying mandatory minimum penalties.⁴³¹ In fiscal year 1990, 91.1 percent of defendants convicted of violating a statute carrying a mandatory minimum penalty were convicted of a drug trafficking offense, and 4.5 percent were convicted of a firearms offense.⁴³² See Figure 4-6. In fiscal year 2010, 77.2 percent (n=15,356) of defendants convicted of violating a statute carrying a mandatory minimum penalty were convicted of a drug trafficking offense, and 11.9 percent (n=2,365) were convicted of a firearms offense.⁴³³ In fiscal year 1990, 3.6 percent of defendants convicted of violating a statute carrying a mandatory minimum penalty were convicted of a violent offense⁴³⁴ compared to 6.1 percent in fiscal year 2010.⁴³⁵

Figure 4-6
Primary Offense of Conviction for Offenders Convicted of an Offense
Carrying a Mandatory Minimum Penalty
Fiscal Years 1990 and 2010



¹ See 1991 Mandatory Minimum Report, at page 51.

² SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

Similar trends are observed when examining sentencing data by statute of conviction. The *1991 Commission Report* found that four statutes covering drug trafficking and firearms

⁴³¹ See Table D-3 (Number of Convictions and Mean Sentence for Mandatory Minimum Statutes (Fiscal Year 2010)) in Appendix D of this Report.

⁴³² 1991 COMMISSION REPORT at 51 (Table 4).

⁴³³ See Table D-2 in Appendix D of this Report.

⁴³⁴ A violent offense was defined as “homicide, kidnapping, sex offenses, robbery, assault, and burglary/breaking and entering” in the 1991 COMMISSION REPORT at 51, n. 3.

⁴³⁵ See Table D-2 in Appendix D of this Report. In order to draw accurate comparisons to the findings in the *1991 Commission Report*, violent offenses are defined as murder, kidnapping/hostage taking, sexual abuse, pornography, assault, robbery, and burglary/breaking and entering for purposes of this chapter.

offenses⁴³⁶ constituted the overwhelming majority (94.3%) of all convictions of violating statutes carrying a mandatory minimum penalty during the period from 1984 through August 1990.⁴³⁷ Today the same four statutes still constitute the majority of such convictions, but they constitute a smaller majority (71.6%)⁴³⁸ as other newer statutes carrying mandatory minimum penalties, such as child pornography and aggravated identity theft statutes, are used with increased frequency.

Table 4-1 lists the five statutes carrying mandatory minimum penalties most frequently used in fiscal year 2010. Two subsections of 21 U.S.C. § 841 and one subsection of 18 U.S.C. § 924⁴³⁹ remain in the top five most frequently used statutes of conviction carrying a mandatory minimum penalty. There are, however, two notable differences in the five most common statutes. First, the most frequently reported conviction of an offense carrying a mandatory minimum penalty in fiscal year 2010 was 21 U.S.C. § 846 (Attempt and Conspiracy [to Commit a Drug Trafficking Offense]).⁴⁴⁰ Violations of section 846 accounted for almost one third (32.8%) of the convictions of statutes carrying a mandatory minimum penalty. By contrast, in 1991, the Commission reported no convictions under that statute.⁴⁴¹ Second, 18 U.S.C. § 1028A, the aggravated identity theft statute that was enacted in 2004,⁴⁴² was added to the list of most frequently used statutes carrying a mandatory minimum penalty in fiscal year 2010.

⁴³⁶ 21 U.S.C. §§ 841, 844, 960, 18 U.S.C. § 924(c).

⁴³⁷ 1991 COMMISSION REPORT at 39-40 (Table 1).

⁴³⁸ See Table D-3 in Appendix D of this Report.

⁴³⁹ The 1991 *Commission Report* did not report separate percentages for the subsections of these statutes because the Commission did not code subsections of each statute separately at that time. As a result, this report does not provide a comparison between the top five statutes carrying mandatory minimum penalties as noted in the 1991 *Commission Report* and the top five statutes carrying mandatory minimum penalties most frequently reported in fiscal year 2010.

⁴⁴⁰ The statutory penalties for violating 21 U.S.C. § 846 are the “same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” 21 U.S.C. § 846.

⁴⁴¹ See 1991 COMMISSION REPORT at 39-40. Section 846 convictions were not punishable by a mandatory minimum term of imprisonment until enactment of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

⁴⁴² Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004).

Table 4-1
Number of Convictions for Most Frequently Used Statutes
Carrying Mandatory Minimum Penalties⁴⁴³
FY 2010

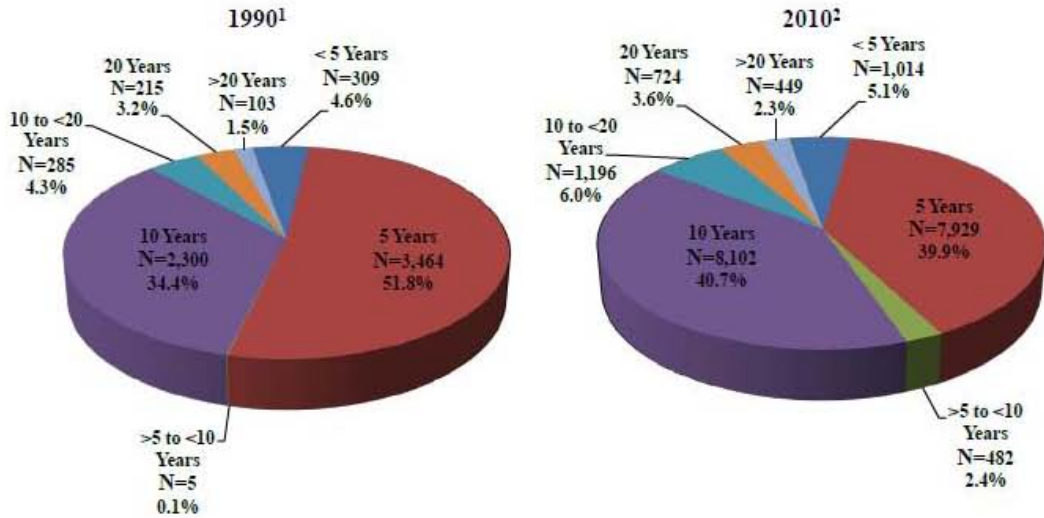
<i>STATUTE</i>	<i>TOTAL NUMBER OF COUNTS OF CONVICTION</i>	<i>PERCENTAGE OF COUNTS OF CONVICTION</i>
Total	28,261	100.0
21 USC § 846	9,258	32.8
21 USC § 841(b)(1)(B)	3,203	11.3
21 USC § 841(b)(1)(A)	2,685	9.5
18 USC § 924(c)(1)(A)(i)	1,547	5.5
18 USC § 1028A(a)(1)	1,008	3.6

3. *Increases in the Severity of Penalties for Mandatory Minimum Offenses*

Since fiscal year 1990, not only has there been an increased reliance on statutes carrying mandatory minimum penalties (excluding immigration offenses), but defendants now are convicted of violating statutes that carry longer mandatory minimum penalties. *See* Figure 4-7. In fiscal year 1990, slightly more than half (51.8%) of offenders convicted of an offense carrying a mandatory minimum penalty were convicted for violating a statute carrying a mandatory minimum penalty of five years of imprisonment. That percentage declined to 39.9 percent in fiscal year 2010. In contrast, the percentage of offenders convicted of violating a statute carrying a mandatory minimum penalty of ten years of imprisonment increased from 34.4 percent to 40.7 percent between fiscal years 1990 and 2010. There also has been a slight increase in the percentage of offenders convicted of violating a statute carrying a mandatory minimum penalty greater than ten years of imprisonment, from 9.0 percent in fiscal year 1990 to 11.9 percent in fiscal year in 2010.

⁴⁴³ For additional information concerning convictions for violating statutes carrying mandatory minimum penalties, *see* Table D-3 and Table D-4 (Specific Guideline Applied and Average Sentence by Guideline for Each Mandatory Minimum Statute (Fiscal Year 2010)) in Appendix D of this Report.

Figure 4-7
Length of Mandatory Minimum Penalty for Offenders Convicted of an Offense
Carrying a Mandatory Minimum Penalty
Fiscal Years 1990 and 2010



¹ See 1991 Commission Report, at page 49.

² SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

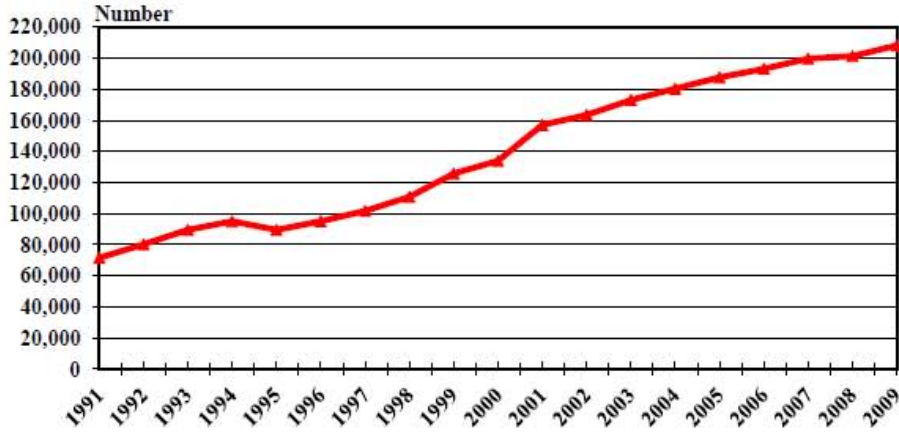
D. CHANGES IN THE SIZE AND COMPOSITION OF THE FEDERAL PRISON POPULATION

The changes to the federal criminal justice system discussed in Parts B and C, *supra*, have had a significant impact on the federal prison population. The number of inmates housed by the Federal Bureau of Prisons (BOP) has almost tripled from 71,608 on December 31, 1991,⁴⁴⁴ to 208,188 on December 31, 2009.⁴⁴⁵ See Figure 4-8.

⁴⁴⁴ Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin, 1 (1995).

⁴⁴⁵ Heather C. West, et al., *Prisoners in 2009*, Bureau of Justice Statistics Bulletin, 2 (2010).

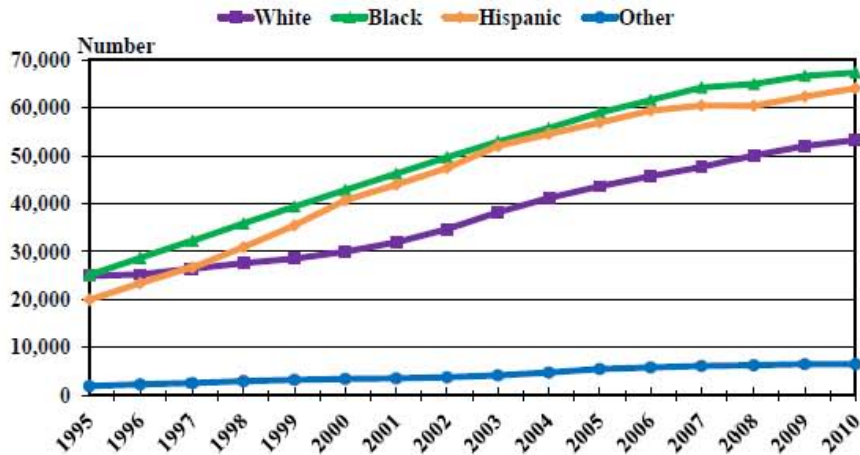
Figure 4-8
Number of Offenders in Prison on December 31
1991 - 2009



SOURCE: Allen J. Beck and Darrell K. Gilliard, *Prisoners in 1994*, *Bureau of Justice Statistics Bulletin*, 1 (1995), Allen J. Beck and Paige M. Harrison, *Prisoners in 2000*, *Bureau of Justice Statistics Bulletin*, 1 (2001), and Heather C. West, William J. Sabol, and Sarah J. Greenman, *Prisoners in 2009*, *Bureau of Justice Statistics Bulletin*, 2 (2010).

The racial composition of the federal prison population has changed over time. See Figure 4-9. In 1995, Black inmates (n=25,106) outnumbered other racial groups in the federal prison population, followed by White (n=19,913), Hispanic (n=19,913), and Other Race offenders (n=1,895). By 1997, however, the number of Hispanic inmates (n=26,681) exceeded the number of White inmates (n=26,388), but Black inmates continue to outnumber all other racial groups.

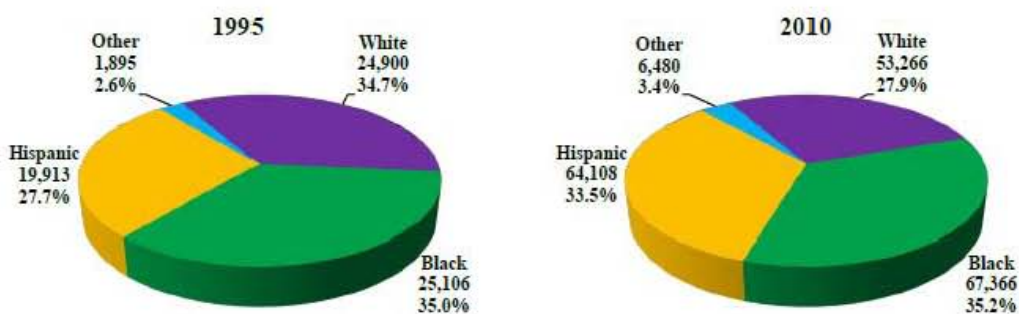
Figure 4-9
Number of Offenders in Prison on September 30
by Race of Offender
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The proportion of Black inmates in the federal prison population has, however, remained relatively constant. As shown in Figure 4-10, Black inmates constituted 35.0 percent of the prison population in 1995 and 35.2 percent in 2010.⁴⁴⁶ The proportion of Other Race offenders has also remained relatively constant (2.6% in 1995 and 3.4% in 2010). By contrast, the proportion of Hispanic inmates increased from 27.7 percent in 1995 to 33.5 percent in 2010, coupled with a corresponding decrease in the proportion of White inmates during that period (from 34.7% in 1995 to 27.9% in 2010).

Figure 4-10
Percentage of Offenders in Prison on September 30
by Race of Offender
1995 and 2010

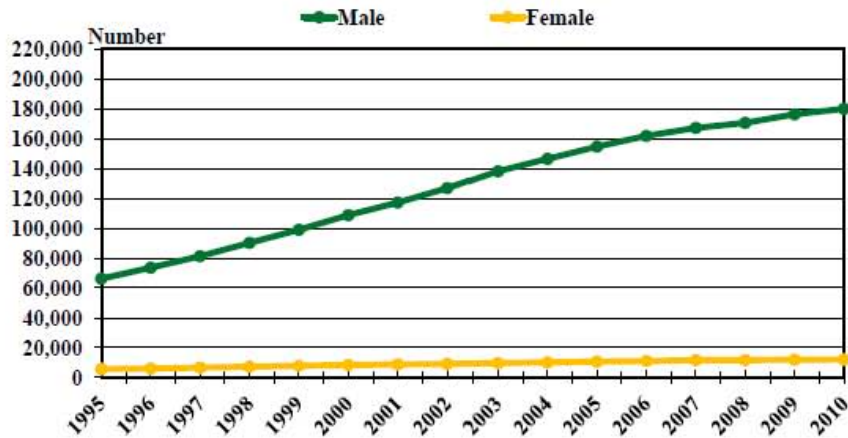


SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Throughout this period, the overwhelming majority of inmates in the federal prison population each year were male with 66,237 male inmates in 1995 and 179,967 male inmates in 2010. See Figure 4-11.

⁴⁴⁶ The Commission received information from the BOP on the start and release date for each offender in prison from October 1, 1990, through September 30, 2010. Commission data files were combined with a BOP data file to determine how many offenders were in prison, what percentage of prisoners were convicted of violating a statute containing a mandatory minimum penalty, and what percentage of prisoners were subject to a mandatory minimum penalty at sentencing. The Commission used September 30, 1995, as the relevant date from which to draw the prison population comparisons presented throughout this report because of data limitations prior to that date. The Commission can only identify offenders convicted of violating a statute carrying a mandatory minimum penalty who were sentenced after nationwide implementation of the federal sentencing guidelines in January 1989, and for whom the Commission received the necessary sentencing documentation from the sentencing court to perform this analysis. Therefore, this analysis cannot account for offenders in BOP custody who were convicted of violating a statute carrying a mandatory minimum and sentenced prior to January 1989. For example, only 27.8% of offenders in the custody of BOP as of September 30, 1991, were sentenced after January 1989. Therefore, an analysis of the offenders in BOP custody as of that date could not account for the remaining 72.2% of offenders in the BOP custody at that time. As of September 30, 1995, 71.8% of offenders in BOP custody were sentenced after January 1989, and that figure increased to 90.5% as of September 30, 2009.

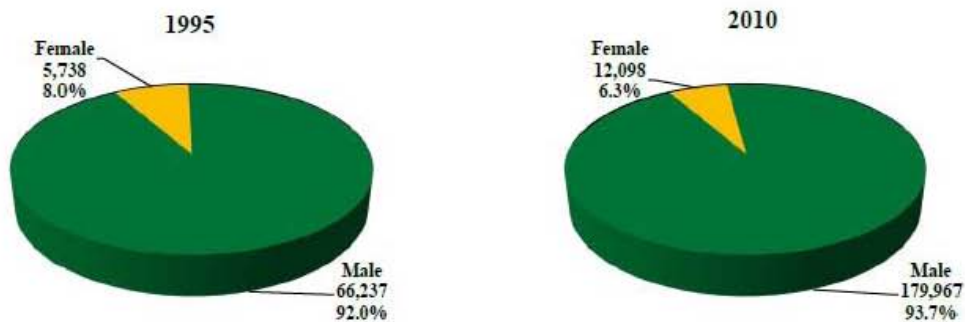
Figure 4-11
Number of Offenders in Prison on September 30
by Gender of Offender
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

As shown in Figure 4-12, the proportion of male inmates in the federal prison population has remained relatively constant over time. In 1995, male inmates constituted 92.0 percent in 1995, increasing slightly to 93.7 percent in 2010. *See* Figure 4-12.

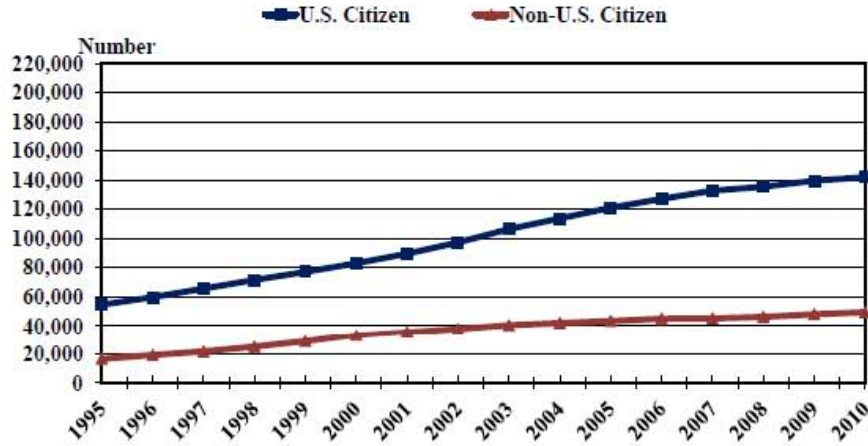
Figure 4-12
Percentage of Offenders in Prison on September 30
by Gender of Offender
1995 and 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

In 1995, United States citizen inmates (n=54,716) outnumbered non-citizen inmates (n=16,533). *See* Figure 4-13. The number of United States citizen and non-citizen inmates has increased annually. Nevertheless, United States citizen inmates continue to outnumber non-citizen inmates.

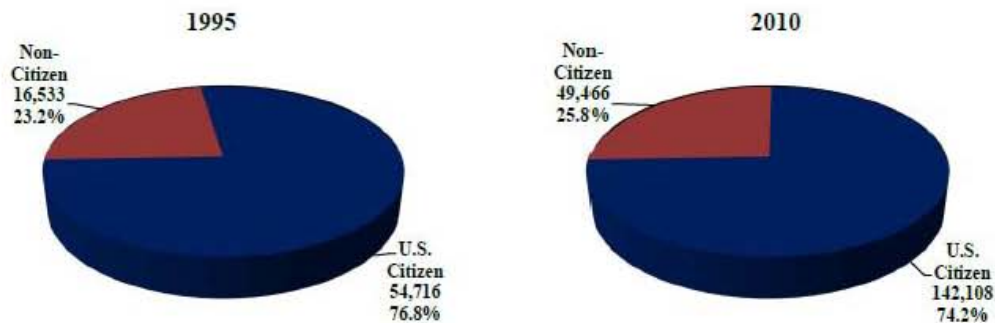
Figure 4-13
Number of Offenders in Prison on September 30
by Citizenship of Offender
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The proportion of United States citizen inmates in the federal prison population has also remained stable over time, notwithstanding the change in the composition of the federal docket noted in Part A, *supra*.⁴⁴⁷ As shown in Figure 4-14, in 1995 more than three quarters of inmates (76.8%) in the federal prison population were United States citizens. By 2010, that percentage decreased only slightly to 74.2 percent. See Figure 4-14.

Figure 4-14
Percentage of Offenders in Prison on September 30
by Citizenship of Offender
1995 - 2010

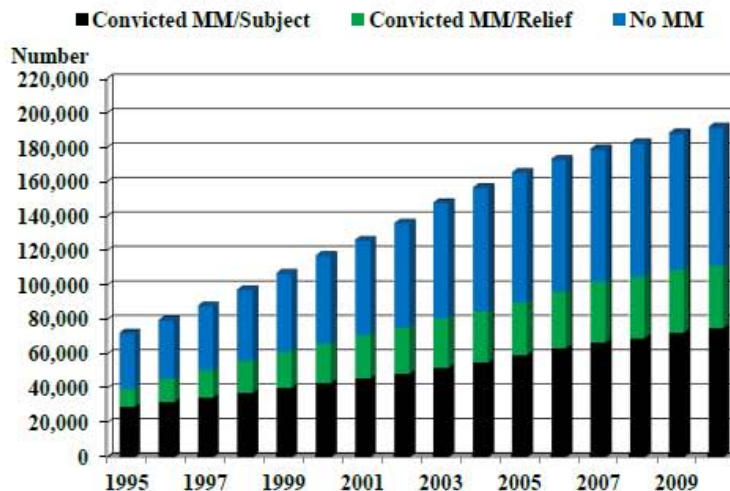


SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

⁴⁴⁷ Immigration cases were the most common federal crime in fiscal year 2010.

Combined Commission and BOP data demonstrate that an increasing number of inmates in the federal prison population were convicted of violating statutes carrying mandatory minimum penalties.⁴⁴⁸ As of September 30, 1995,⁴⁴⁹ combined Commission and BOP data identify 40,104 offenders in BOP custody who were convicted of violating a statute carrying a mandatory minimum penalty. *See* Figure 4-15. As of September 30, 2010, combined Commission and BOP data identify 111,545 offenders in BOP custody who were convicted of an offense carrying a mandatory minimum penalty, a 178.1 percent increase. Similarly, the number of offenders in BOP custody who were subject to a mandatory minimum penalty at sentencing increased from 29,603 as of September 30, 1995, to 75,579 as of September 30, 2010, an increase of 155.3 percent.⁴⁵⁰

Figure 4-15
Number of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing
Fiscal Years 1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The increase in the federal prison population, however, is not solely attributable to mandatory minimum penalties. Figure 4-15 demonstrates that the number of offenders in BOP

⁴⁴⁸ Commission data files were combined with a BOP data file to determine how many offenders were in prison, what percentage of prisoners who were convicted of violating a statute containing a mandatory minimum penalty, and what percentage of prisoners were subject to a mandatory minimum penalty at sentencing. The Commission received information from the BOP on the start and release date for each offender in prison from October 1, 1990, through September 30, 2010. These offenders were then matched with the Commission’s information on these offenders.

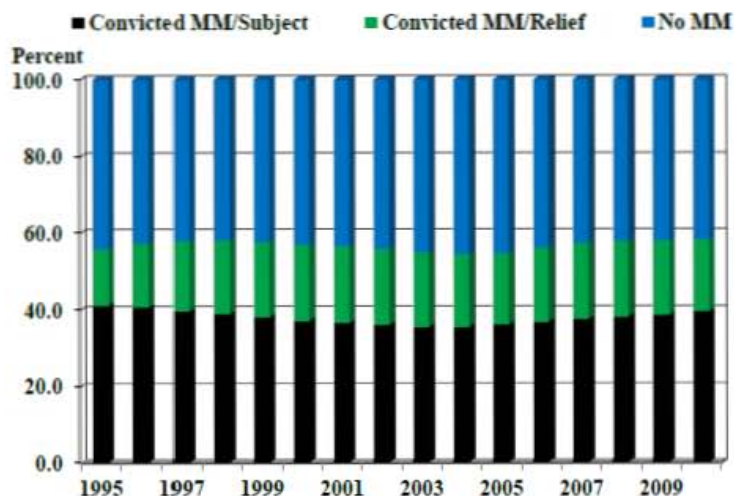
⁴⁴⁹ *See supra* note 447 for the reason the Commission used September 30, 1995, as the relevant date from which to draw this comparison because of data limitations prior to that date.

⁴⁵⁰ For a discussion of the demographic composition of offenders convicted of violating a statute carrying a mandatory minimum penalty and offenders who were subject to a mandatory minimum penalty at sentencing, *see infra* Chapter 7.

custody who were convicted of violating a statute with no mandatory minimum penalty also increased significantly since 1995. The number of offenders in BOP custody who were convicted of violating a statute with no mandatory minimum penalty increased from 31,868 as of September 30, 1995, to 80,303 as of September 30, 2010, an increase of 152.0 percent.

Because the number of offenders in the federal prison population who were convicted of violating statutes with and without mandatory minimum penalties both increased at similar rates, the percentage of offenders in the custody of BOP who were convicted of violating a statute carrying a mandatory minimum penalty has varied little. *See* Figure 4-16. Offenders convicted of violating statutes carrying mandatory minimum penalties increased slightly from 55.7 percent as of September 30, 1995, to 58.1 percent as of September 30, 2010, an increase of 4.3 percent, but the proportion of offenders in the custody of BOP who were subject to a mandatory minimum penalty decreased similarly. The percentage of offenders in BOP custody subject to a mandatory minimum penalty at sentencing decreased from 41.1 percent as of September 30, 1995, to 39.4 percent as of September 30, 2010, a decrease of 4.1 percent.

Figure 4-16
Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty, and Subject to a Mandatory Minimum Penalty at Sentencing
Fiscal Years 1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The resulting increase in the size of the federal prison population has caused other changes to the federal prison system. The number of federal prisons has increased from 72⁴⁵¹ to

⁴⁵¹ See Federal Bureau of Prisons, *State of the Bureau* (1991), available at <http://www.bop.gov/news/PDFs/sob91.pdf>. These facilities included any Federal Correctional Complex, Federal Correctional Institution, Federal Detention Center, Federal Medical Center, Federal Prison Camp, Intensive Confinement Center, Metropolitan Correctional Center, and U.S. Penitentiary.

116.⁴⁵² The federal prison appropriations have increased from \$1.36 billion for fiscal year 1991⁴⁵³ to \$6.09 billion for fiscal year 2010.⁴⁵⁴

Notwithstanding the increases in number of facilities and budget, the BOP is currently operating at 35 percent over its rated capacity.⁴⁵⁵ “Crowding is of special concern at higher security facilities with 50 percent crowding at high security facilities and 39 percent at medium security facilities. This severe crowding has resulted in double and triple bunking inmates.”⁴⁵⁶ This overcrowding is expected to continue because, although BOP releases about 61,000 inmates per year, it receives approximately 67,000 new inmates annually.⁴⁵⁷

Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system, including expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. The changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.

⁴⁵² See Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 9 (Mar. 17, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Hearing_Transcript.pdf. As the federal prison population grew, the BOP’s main response for accommodating the increased prison population was to build or acquire more prison facilities. BOP is currently pursuing alternative measures to reduce overcrowding. See Prepared Statement of Harley G. Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 3–4 (Mar. 17, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Testimony_BOP_Lappin.pdf.

⁴⁵³ Pub L. No. 101–515, 104 Stat. 2101, 2114 (1990).

⁴⁵⁴ Pub L. No. 111–117, 123 Stat. 3034, 3129 (2009).

⁴⁵⁵ See Prepared Statement of Harley G. Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 2 (Mar. 17, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Testimony_BOP_Lappin.pdf.

⁴⁵⁶ Id. at 2-3. Accord Fiscal Year 2011 Appropriations: Hearing Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations (Mar. 18, 2010) (statement of Harley G. Lappin, Dir. of the Fed. Bureau of Prisons (“Crowding is of special concern at higher security facilities including penitentiaries (operating at 52 percent over capacity) and medium security institutions (operating at 46 percent over capacity.)”)); Housing D.C. Code Felons Far Away From Home: Effects on Crime, Recidivism and Reentry: Hearing Before the Subcomm. on Federal Workforce, Postal Service and the District of Columbia of the H. Oversight and Government Reform Comm. 111th Cong. 17 (May 5, 2010) (Testimony of Harley Lappin, Director, Bureau of Prisons (“The Bureau of Prisons is operating at 37 percent over rated the capacity system wide, with high security institutions operating at 51 percent over capacity and medium security institutions operating at 46 percent over capacity.”)).

⁴⁵⁷ See Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 9 (Mar. 17, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Hearing_Transcript.pdf.

POLICY VIEWS ABOUT MANDATORY MINIMUM PENALTIES

A. INTRODUCTION

This chapter presents an overview of the policy views of stakeholders in the federal criminal justice system about mandatory minimum penalties.⁴⁵⁸ This chapter first presents a discussion of the policy views favoring mandatory minimum penalties, followed by a discussion of policy views disfavoring mandatory minimum penalties.

B. POLICY VIEWS IN FAVOR OF MANDATORY MINIMUM PENALTIES

1. *Promotion of Uniformity in Sentencing and Avoidance of Unwarranted Disparity*

Some view mandatory minimum penalties as promoting uniformity and reducing unwarranted disparities because such penalties require courts to impose similar sentences for similar offenses.⁴⁵⁹ For example, according to Dr. David B. Mulhausen of the Heritage Foundation, “[i]f judges tend to impose sentences at the minimum required by the mandatory statutes, then similar offenders convicted of the same offense should receive the same sentences.”⁴⁶⁰ Indeed, Congress enacted many mandatory minimum penalties, together with the then-mandatory guidelines system, as part of its effort in the 1980s to narrow judicial sentencing discretion and curb what it viewed as unduly disparate and lenient sentences.⁴⁶¹

According to some, the importance of mandatory minimum penalties in ensuring uniformity has increased after *Booker*. The Department of Justice has observed that sentencing

⁴⁵⁸ See Chapter 1 for a discussion of the methodology the Commission used to obtain the views of various stakeholders regarding mandatory minimum penalties. By presenting an overview of contemporary perspectives on mandatory minimum penalties, this chapter complements the discussion in Chapter 2 of the historical development of mandatory minimum penalties and the various views of stakeholders over time regarding their efficacy.

⁴⁵⁹ See Prepared Statement of Sally Quillian Yates, U.S. Attorney, Northern District of Georgia, to the Commission, at 8 (May 27, 2010) (on behalf of the U.S. Department of Justice); Prepared Statement of David Hiller, National Vice President, National Fraternal Order of Police, to the Commission, at 4 (May 27, 2010).

⁴⁶⁰ Prepared Statement of David B. Mulhausen, Senior Policy Analyst, Heritage Foundation, to the Commission, at 10 (May 27, 2010); see Stanley Sporkin & Asa Hutchinson, Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1295 (1999) (statement of Rep. Hutchinson) (“[Y]ou have to have a sentencing pattern that has uniformity across it, that sends the right signals . . .”).

⁴⁶¹ See Yates, *supra* note 459, at 8; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (recounting the history of the Federal indeterminate sentencing system and the legislative history of the Sentencing Reform Act); see also William Austin & Thomas A. Williams, III, *A Survey of Judges’ Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. & CRIMINOLOGY 306 (1977) (finding judges imposed different sentences under pre-guidelines sentencing system based upon identical case information); Judge Marvin E. Frankel, *Lawlessness in Sentencing*, 41 CINN. L. REV. 1 (1972) (discussing problems with the pre-guidelines sentencing system, especially the wide-range of discretion granted sentencing judges that the author argued resulted in disparate sentences).

disparities have increased under the advisory guidelines system because for “offenses for which there are no mandatory minimums, sentencing decisions have become largely unconstrained as a matter of law.”⁴⁶² According to the Department of Justice, “this has led to greater variation in sentencing,” which “in turn undermines the goals of sentencing to treat like offenders alike, eliminate unwarranted disparities in sentencing, and promote deterrence through predictability in sentence.”⁴⁶³ After *Booker*, some prosecutors have charged offenses carrying mandatory minimum penalties in order to narrow the sentencing court’s discretion.⁴⁶⁴ One judge testified that, even if mandatory minimum penalties presented problems under the pre-*Booker* sentencing scheme, they now serve to ensure needed sentencing uniformity.⁴⁶⁵

2. *Protection of the Public through Certainty in Punishment, Deterrence, and Incapacitation*

Another policy rationale in favor of mandatory minimum penalties is that they protect the public. For example, the Department of Justice believes that, working hand-in-hand with the advisory guideline system, “mandatory minimum statutes remain important to promote the goals of sentencing and public safety.”⁴⁶⁶ Indeed, law enforcement officials have historically urged the enactment of mandatory minimum penalties.⁴⁶⁷

⁴⁶² Yates, *supra* note 459, at 7. In 2003, the last full fiscal year before the Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which held that a sentence imposed under Washington State guidelines violated Sixth Amendment right to jury trial, 69.4% of all sentences were within the applicable guideline range, 22.2% were government-sponsored below range sentences, 7.5% were non-government-sponsored below range sentences, and 0.8% were above the guideline range sentences. See U.S. SENT’G COMM’N, ANNUAL REPORT 37 (2003). In 2010, five years after the Supreme Court’s *Booker* decision, 55.0% of all sentences were within the applicable guideline range, 25.4% were government sponsored below range sentences, 17.8% were non-government sponsored below range sentences, and 1.8% were above range sentences. See U.S. SENT’G COMM’N, ANNUAL REPORT 33 (2010); see also U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS (March 2010).

⁴⁶³ Yates, *supra* note 459, at 7; see also 155 CONG. REC. S10,704 (daily ed. Oct. 22, 2009) (statement of Sen. Specter) (“Since [*Booker*], sentencing judges have wide discretion to impose sentences on criminal defendants unless mandatory minimum sentences are applicable [Without mandatory minimums], there will be no certainty of punishment nor effective deterrence for serious [] crimes.”).

⁴⁶⁴ See Testimony of Patrick J. Fitzgerald, U.S. Attorney, Northern District of Illinois, to the Commission, at 252 (Sept. 2009) (“[A] prosecutor is far less willing to forego charging a mandatory minimum sentence when prior experience shows that the defendant will ultimately be sentenced to a mere fraction of what the guidelines range is.”).

⁴⁶⁵ See Testimony of Judge Dennis W. Shedd, U.S. Court of Appeals for the Fourth Circuit, to the Commission, at 27 (Feb. 2009) (“I do understand how people saw mandatory minimums as a problem for the guideline sentencing scheme as it existed pre-*Booker*. I’m not sure it’s a problem now. I think it may be one way to get some uniform sentencing in some dire cases I think maybe the world has flipped on mandatory minimums.”).

⁴⁶⁶ Yates, *supra* note 459, at 8.

⁴⁶⁷ See, e.g., U.S. Department of Justice, *Attorney General’s Task Force on Violent Crime: Final Report* 30 (Aug. 17, 1981) (recommending “legislation to require a mandatory sentence for those convicted of the use of a firearm in the commission of a federal felony . . . [that is] severe enough to have the necessary deterrent force.”); *Armed Career Criminal Act of 1983: Hearing on S. 52 Before S. Comm. on the Judiciary*, 98th Cong. 22 (1983) (statement of William Cahalan, Prosecuting Attorney, Wayne County, Michigan) (“I’m particularly impressed with the

According to those who hold this view, mandatory minimum penalties deter crime by imposing certain, predictable, and generally severe punishment.⁴⁶⁸ Because mandatory minimum penalties require a certain term of incarceration, they are viewed as “an effective means of alerting would-be offenders to the consequences of certain illegal conduct.”⁴⁶⁹ According to the Department of Justice, sentencing reforms in the 1980s, including the enactment and enhancement of many mandatory minimum penalties, helped reduce crime rates.⁴⁷⁰ Some prosecutors and police officers report that the certainty of punishment provided by mandatory minimum penalties is “critical” to law enforcement efforts.⁴⁷¹ Furthermore, some scholars believe that the severity of mandatory minimum penalties increases their deterrent effect by raising the “cost” of committing crime to would-be offenders.⁴⁷²

In addition to their deterrent effect, some policymakers assert that mandatory minimum penalties reduce crime by incapacitating criminals and protecting the public from their potential future offenses.⁴⁷³ For example, law enforcement officers have reported to the Commission that

mandatory minimum sentence . . . because I think that puts real teeth in [the proposed law.]”); *Comprehensive Drug Penalty Act: Hearing on H.R. 3272, H.R. 3299, and H.R. 3725, Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 155 (1983) (statement of Jeffrey Hochman, Special Counsel, Fort Lauderdale Police Department) (“I am glad to see that the Federal Government . . . realiz[es] that the only thing that people that [traffic in drugs] understand is . . . minimum mandatory jail sentences, which in Florida . . . are pretty tough these days.”).

⁴⁶⁸ See, e.g., Hiller, *supra* note 459, at 3 (“The effectiveness of deterrence is difficult to quantify, but the establishment of specific and hopefully harsh penalties for serious crimes is to deter individuals from engaging in these crimes in the future, leading – in theory – to a reduction in crime.”); Sporkin & Hutchinson, *supra* note 460, at 1286 (statement of Rep. Hutchinson) (“[A] five-year mandatory minimum for someone who has 5.1 grams of crack cocaine [has] a positive impact on the deterrence of crime and that is good for society”); Charles R. Tittle & Alan R. Rowe, *Certainty of Arrest and Crime Rates: A Further Test of the Deterrence Hypothesis*, 52 SOC. FORCES 455 (June 1974) (finding that certainty of imprisonment deters the commission of offenses); Greg Pogarsky, *Identifying “Deterrable” Offenders: Implications for Research on Deterrence*, 19 JUST. Q. 431, 445 (2002) (“[T]he present study found that among deterrable offenders, sanction severity provided a greater deterrent than sanction certainty.”); David McDowall, Colin Loftin, & Brian Wiersema, *A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes*, 83 J. CRIM. L. & CRIMINOLOGY 378, 379 (1992) (suggesting mandatory sentencing enhancements for firearms deterred homicides but had an inconclusive effect on assaults and robberies); Donald E. Lewis, *The General Deterrent Effect of Longer Sentences*, 26 BRIT. J. CRIMINOLOGY 47, 60 (1986) (finding evidence of deterrent effect from longer sentences).

⁴⁶⁹ Robert S. Mueller, III, *Mandatory Minimum Sentencing*, 4 FED. SENT’G REP. 230, 230 (1992).

⁴⁷⁰ See Yates, *supra* note 459, at 5-6 (noting that the “experience of law enforcement reinforces this research [showing that sentencing and correction policies reduced crime] and shows that there are tangible benefits to law enforcement and public safety from mandatory sentencing laws”).

⁴⁷¹ See *id.* at 8; Hiller, *supra* note 460, at 155; see also Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL’Y. 13, 37-38 (2011) (finding strong evidence that certainty of punishment has a large deterrent effect); Tittle & Rowe, *supra* note 468, at 455.

⁴⁷² See Mulhausen, *supra* note 460, at 9-10 (“Incentives matter; Raising the costs of crime will deter a significant number of crimes and protect potential victims.”); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968) (“The cost to each offender would be greater the longer the prison sentence, since both foregone earnings and foregone consumption are positively related to the length of sentences.”).

⁴⁷³ *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Rep. Forbes); Mueller, *supra* note 469, at 230 (“Furthermore, the imposition of prescribed minimum prison terms enhances public safety by

incapacitation through mandatory minimum penalties has reduced methamphetamine- and firearm-related crime.⁴⁷⁴ Chief Maxwell Jackson of Harrisville, Utah, who testified before the Commission on behalf of the nation’s rural law enforcement officers, explained that federal charges in rural communities are brought only against the “worst of the worst” drug offenders and the mandatory minimum penalties “remove these most extreme offenders from society for long periods of time.”⁴⁷⁵

3. Retribution

Some view mandatory minimum penalties as an important means of expressing society’s disdain for an offense. Congressman Asa Hutchinson argued that the “strongest justification” for mandatory minimum penalties is that they give society the “means of expressing its outrage toward certain offenses that are so harmful to the public.”⁴⁷⁶ Dr. Mulhausen similarly testified that some mandatory minimum penalties can be justified solely by reference to retributive goals: “While utilitarian principles of deterrence and incapacitation can add additional support, some crimes are so heinous that legislatures have a moral responsibility to establish sentencing floors that do not involve probation or fines.”⁴⁷⁷

incapacitating dangerous offenders for substantial periods, thus preventing numerous instances of death, injury, and loss of property.”); *see also* Sporkin & Hutchinson, *supra* note 460, at 1283 (statement of Rep. Hutchinson) (“[M]andatory minimum penalties appear to be effective. Violent crime has declined seven years in a row. Murder is down thirty-one percent since 1991. Robbery is down thirty-two percent. . . . [M]andatory minimum sentences and tough penalties has [sic] had the effect of a lower crime rate in the United States.”); Joan Petersilia & Peter W. Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, RAND Corp. (Oct. 1977) (demonstrating that the mandatory incarceration of offenders to minimum prison terms of various durations prevent additional crimes committed by the offenders); Shlomo Shinnar & Reuel Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 LAW & SOC’Y REV. 581 (1975) (suggesting violent crime can be significantly reduced by mandatory incarceration due to the incapacitation of offenders).

⁴⁷⁴ *See* Prepared Statement of Maxwell Jackson, Chief of Police, Harrisville, Utah, to the Commission, at 2 (May 27, 2010); Hiller, *supra* note 459, at 4; *see also* *Testimony Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. at 3 (July 1999) (statement of Peter Reuter & Susan Everingham, RAND Drug Policy Research Center) (suggesting that mandatory minimum penalties applied only to high-level drug dealers might be more cost-effective than conventional enforcement).

⁴⁷⁵ Jackson, *supra* note 474, at 2; *see* Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, & James Chiesa, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers’ Money*, RAND Drug Research Policy Center, at 77 (1997) (noting that federal law enforcement is better at targeting high-level drug dealers, while local law enforcement is better able to respond to problems caused by street-level dealers).

⁴⁷⁶ Sporkin & Hutchinson, *supra* note 460, at 1282 (Statement of Rep. Hutchinson) (“It is fundamentally appropriate for the people, through their elected representatives, to express outrage toward certain conduct that is harmful to the public generally.”); *see also* Mueller, *supra* note 469, at 230 (“[Mandatory minimum penalties] are important as expressions of Congressional concerns and, ultimately, as benchmarks for the base offense levels specified by the Commission in the guidelines.”). Mr. Hutchinson recently testified before the Commission that he has “no problem with the concept of mandatory minimums. [F]or the Congress of the United States . . . to express outrage at a particular societal problem through a mandatory minimum, I think can be appropriate.” *Testimony of Asa Hutchinson to the Commission*, at 170 (June 1, 2011).

⁴⁷⁷ Mulhausen, *supra* note 460, at 9 (noting also that “mandatory minimum sentences that establish long incarceration or death sentences for very serious and violent crimes can be justified based solely on the doctrine of

4. *Effective Law Enforcement Tool that Induces Pleas and Cooperation*

Many in the law enforcement community view mandatory minimum penalties as an important investigative tool. The threat of a mandatory minimum penalty gives law enforcement leverage over defendants, who may be encouraged to cooperate in exchange for lesser charges or safety valve and substantial-assistance benefits.⁴⁷⁸ Commissioner Raymond Kelly of the New York Police Department testified that the potential application of more severe penalties in federal court “has convinced a number of suspects to give up information.”⁴⁷⁹ Similarly, the Department of Justice views mandatory minimum penalties as an “essential” and “critical tool” in obtaining “cooperation from members of violent street gangs and drug distribution networks.”⁴⁸⁰

5. *Assistance to State and Local Law Enforcement*

Another justification for federal mandatory minimum penalties relates to the relationship between state and federal law enforcement. Then-Assistant Attorney General Mueller stated that because of the substantial concurrent state and federal jurisdiction in many drug and firearm cases, if “a state sentence for one of these crimes is inappropriately low, the existence of a substantially higher, federal mandatory minimum ensures a sentence that protects the public.”⁴⁸¹ In their testimony to the Commission, Commissioner Kelly and Chief Jackson made the related

just deserts”); see also The Constitution Project, *Principles for Design and Reform of Sentencing Systems: A Background Report* 26 (May 13, 2010) (“[T]here are indisputably some offenses, such as forcible rape or premeditated murder, for which, by any standard, the minimum legally allowable punishment should include a term of imprisonment.”), available at <http://www.constitutionproject.org/pdf/34.pdf>.

⁴⁷⁸ See Stephanos Bibas, *Plea-Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2485 (2004) (“In exchange for substantially assisting the investigation or prosecution of others, defendants may earn sentences far lower than the [Sentencing] Guidelines and even mandatory minima would otherwise provide.”); Fitzgerald, *supra* note 464, at 248 (“Mandatory minimum sentences have been a very effective tool in prosecuting particularly violent offenders. The threat of a mandatory minimum sentence has caused many persons charged with these offenses to become cooperative witnesses, often testifying against persons with greater responsibility in the drug or gang organization.”); John C. Jeffries, Jr., & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1119-21 (1995) (concluding that “onerous mandatory minimum sentences,” along with the sentencing guidelines, “has produced far more cooperation and accomplice testimony in organized crime cases than occurred in the pre-Guidelines era . . . especially when [the cases] involve murder or large amounts of narcotics.”); see also *Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 31 (2005) (statement of Christopher A. Wray, Assistant Attorney General) (“Cooperation agreements are an essential component of law enforcement and are necessary to penetrate criminal organizations and to obtain convictions in court.”).

⁴⁷⁹ Prepared Statement of Raymond W. Kelly, Commissioner, New York Police Department, to the Commission, at 4 (July 10, 2009).

⁴⁸⁰ Yates, *supra* note 459, at 9; See also Fitzgerald, *supra* note 464, at 248.

⁴⁸¹ Mueller, *supra* note 469, at 230.

point that the prospect of being convicted of a federal statute carrying a mandatory minimum penalty induces defendants to plead to state charges.⁴⁸²

C. POLICY VIEWS AGAINST MANDATORY MINIMUM PENALTIES

1. *Contribution to Excessive Uniformity and Unwarranted Disparity*

One of the policy views advanced against mandatory minimum penalties is that they result in excessive uniformity by requiring similar sentences for dissimilar offenders. For example, “one of the [principal] flaws of mandatory minimums is that they apply one-size-fits-all sentences to defendants who are not equally culpable.”⁴⁸³ As one scholar explained:

Ensuring equal treatment of offenders who fall within the terms of a mandatory minimum prevents an important sort of unfairness – unwarranted disparities in the punishment of similarly situated offenders. But when the offenders subject to a mandatory minimum are *not* similarly situated, the elimination of disparity creates a form of unfairness that often is even more troubling – *excessive uniformity*.⁴⁸⁴

In the American Bar Association’s view, “[t]reating unlike offenders identically is as much a blow to rational sentencing policy as is treating similar offenders differently.”⁴⁸⁵

Many believe that mandatory minimum penalties result in arbitrary and disparate sentences because they rely on certain specified triggering facts to the exclusion of all others.⁴⁸⁶

⁴⁸² Kelly, *supra* note 479, at 4; Jackson, *supra* note 473, at 2; *see also Armed Career Criminal Act of 1983, supra* note 468, at 26 (statement of William Cahalan, Prosecuting Attorney, Wayne County, Michigan.) (“[B]ut if there was the thought that they were going over to the Federal system and face a mandatory 15 years, that would be an inducement to plead guilty in our [state] system.”).

⁴⁸³ Prepared Statement of Jay Rorty, American Civil Liberties Union, to the Commission at 5 (May 27, 2010); *see* 149 Cong. Rec. H 3072 (daily ed. Apr. 10, 2003) (statement of Rep. Kilpatrick) (“I am not a proponent of mandatory minimums . . . [t]here should not be a one-size-fits-all sentencing structure when judges are determining incarceration of a human being.”).

⁴⁸⁴ Prepared Statement of Steven J. Schulhofer, NYU School of Law, to the Commission at 10 (May 27, 2010); Rorty, *supra* note 483, at 5.

⁴⁸⁵ Prepared Statement of James E. Felman, American Bar Association, to the Commission, at 10 (May 27, 2010); *see also* Bureau of Justice Assistance, U.S. Department of Justice, *National Assessment of Structured Sentencing* 127 (1996) (“It is clear from the experiences of many States that the increased use of mandatory minimum penalties is interfering with achievement of the dual goals of reducing disparity and controlling correctional population growth.”).

⁴⁸⁶ Testimony of Chief Judge Robert J. Conrad, Jr., U.S. District Court for the Western District of North Carolina, to the Commission, at 129 (Feb. 11, 2009) (“Statutory mandatory minimum punishments and the guidelines written to implement them achieve the goals of uniformity at the cost of sometimes unjust sentences. This is so because the most common mandatory minimums are triggered solely by drug type and quantity and/or criminal history. Such a myopic focus excludes other important sentencing factors normally taken into view by the guidelines and deemed relevant by the Commission, such as role in the offense, use of violence, and use of special skill.”). *See also* Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. QUANT. CRIMINOLOGY 155 (2009) (finding that

“[W]henever a mandatory minimum penalty based on a single fact requires a sentence above the otherwise applicable guideline range, or limits a judge’s use of that range, or prevents a departure or variance in a case warranting a below-range sentence, unwarranted disparity has been created.”⁴⁸⁷ For example, so-called “sentencing cliffs” occur when an offender’s “conduct just barely brings him within the terms of the mandatory minimum.”⁴⁸⁸ In such a case, the offender is subject to a significantly higher sentence than an offender whose conduct fell just outside the scope of the mandatory minimum penalty, even though his or her conduct was only marginally different.⁴⁸⁹ For example, a defendant convicted of trafficking 100 grams of heroin would be subject to the five-year mandatory minimum penalty while one who sold only 99 grams of the drug would not, meaning that these defendants are subject to substantially different sentences despite nearly identical conduct.⁴⁹⁰

A majority of judges believe that mandatory minimum penalties contribute to sentencing disparity. In a 2010 Commission survey of United States District Judges on a range of sentencing issues, 52 percent of judges ranked mandatory minimum penalties among the top three factors contributing to sentencing disparity.⁴⁹¹ In contrast, 78 percent believed that the sentencing guidelines have reduced unwarranted sentencing disparities among similarly situated defendants.⁴⁹²

overreliance on drug quantity, without adequate adjustments for offender culpability, results in excessive uniformity where major, mid-level, and minor offenders receive similar sentences).

⁴⁸⁷ Prepared Statement of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, to the Commission, at 25 (May 27, 2010).

⁴⁸⁸ Schulhofer, *supra* note 484, at 9-10; See Steven A. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993).

⁴⁸⁹ See Prepared Statement of Erik Luna, Cato Institute, to the Commission at 2 (May 27, 2010) (describing sentencing cliffs as the by-product of “seemingly trivial lines that carry huge consequences” in statutes with mandatory minimum penalties); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194-95 (1993) (noting that mandatory minimum penalties create “cliff effects” because they do not “provide for graduated increases in sentence severity” and instead provide for “sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record”).

⁴⁹⁰ Schulhofer, *supra* note 484, at 9-10; Prepared Statement of Steven Saltzburg, George Washington University School of Law, to the Commission, at 6 (May 27, 2010). A person convicted of a drug trafficking offense that involved 100 grams or more of a mixture containing heroin is subject to a penalty of not less than five years and not more than 40 years imprisonment. See 21 U.S.C. § 841(b)(1)(B). If the offense involved 99 grams or less of the same heroin mixture, the person is subject to a penalty of not more than 20 years imprisonment. See 21 U.S.C. § 841(b)(1)(C).

⁴⁹¹ U.S. SENT’G COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 tbl. 16 (June 2010) [hereinafter 2010 Survey Results].

⁴⁹² *Id.* at tbl. 17.

2. *Excessive Severity and Disproportionality*

Many view current federal mandatory minimum penalties as producing sentences that are excessively harsh relative to the gravity of the offense committed, in part because “all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime.”⁴⁹³ According to the Judicial Conference of the United States, mandatory minimum penalties end up sweeping broadly because

a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator The ramification for this less culpable offender can be quite stark, as such an offender will often be serving a sentence that is greatly disproportionate to his or her conduct.⁴⁹⁴

One scholar explains that many sentences seem disproportionate to the offense because “Congress did not link the minimum [sentence] to its picture of the least serious version of an offense,” but rather to “an especially serious offender, and chooses as the ‘minimum’ [a] sentence that it considers appropriate for him. As a result, Congress sets ‘minimum’ sentences that are far too severe.”⁴⁹⁵

Some critics, including the late Chief Justice William H. Rehnquist, cite Congress’s political concerns as a reason why mandatory minimum statutes are excessively severe.⁴⁹⁶

⁴⁹³ Saltzburg, *supra* note 490, at 5; *See Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 42 (2009) (statement of Chief Judge Julie E. Carnes, U.S. District Court for the Northern District of Georgia, on behalf of the Judicial Conference of the United States) (although there may be some offenses “that are so unambiguous or heinous in nature that no examination of any fact other than the commission of the crime itself” is required to determine the appropriate sentence, “[m]ost criminal conduct . . . does not lend itself to such narrow scrutiny”); Felman, *supra* note 485, at 8.

⁴⁹⁴ Carnes, *supra* note 493, at 38 (arguing that mandatory minimum penalties also produce unfair and irrational sentences that undermine public confidence in the judicial system and waste public resources by incarcerating offenders for longer than necessary); *see* Bibas, *supra* note 478, at 2487 (“All too often . . . sentencing guidelines and statutes act as sledgehammers rather than scalpels. This is particularly true of statutory minima and maxima, which are packaged in large, discrete chunks.”); *see also* The Constitution Project, *supra* note 477, at 36 (“[O]nce a mandatory minimum sentence has been enacted for a crime type, repeated increases in the minimum sentence for the same crime are even more problematic than increases in statutory maximum sentences since mandatory sentences necessarily affect all defendants convicted of an offense, while increases in statutory maximum sentences need have no impact on any particular defendant.”).

⁴⁹⁵ Schulhofer, *supra* note 484, at 11. *See also* Prepared Statement of Julie Stewart, President, Families Against Mandatory Minimums, to the Commission, at 1-2 (May 27, 2010); Nachmanoff, *supra* note 487, at 2 (concluding that mandatory minimum statutes require excessive sentences for “tens of thousands of less serious offenders who are not dangerous”); Testimony of C. Warren Maxwell, Deputy Chief U.S. Probation Officer, District of Connecticut, to the Commission, at 187 (July 9, 2009) (“Sentencing length in mandatory minimums seems to have been chosen arbitrarily without much regard to research in what is most effective in deterring crime and reducing recidivism.”).

⁴⁹⁶ *See* William H. Rehnquist, Chief Justice of the United States, *Luncheon Address* (June 18, 1993), in Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 287 (1993)

Some scholars argue that mandatory minimum penalties produce disproportionately high sentences even for offenders not subject to such penalties “because all [federal offenders] are subject to guidelines that have been set to incorporate the mandatory minimums.”⁴⁹⁷ These observers believe increasingly severe mandatory minimum penalties have “impelled the [Commission] to increase many sentences to maintain some consistency in the Guidelines” and have caused higher sentences “virtually across the board.”⁴⁹⁸ For example, some believe that the linkage between the drug guidelines and mandatory minimum penalties “maintains proportionality only with mandatory punishment levels that are overly severe—in effect spreading the disproportionality inherent in mandatory minimums to every offender at every quantity level.”⁴⁹⁹ In the Commission’s 2010 survey of judges, 58 percent of the respondents were in favor of de-linking the guidelines from the mandatory minimum penalties, 22 percent were against doing so, and 19 percent had no opinion.⁵⁰⁰

The Department of Justice has stated that “there are real and significant excesses in terms of the imprisonment meted out for some offenders under existing mandatory sentencing laws, especially for some non-violent offenders.”⁵⁰¹ The Department of Justice explained that “[m]andatory minimum sentencing statutes in the federal system now apply to a significant array of serious crimes; and they also, by and large, mandate very severe imprisonment terms.”⁵⁰²

(“Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’”). See also Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 24 (2010) (“[F]ederal lawmakers have explicitly used phrases like ‘tough on crime’ in their support for mandatory minimums, with some of the most notorious sentencing laws originating from symbolic politics.”); Testimony of Chief Judge Vaughn R. Walker, U.S. District Court for the Northern District of California, to the Commission, at 43 (May 28, 2009) (“The minimum mandatories in drug cases, child pornography cases, and so forth were enacted in reaction to a perceived political need at the time. Over time . . . the political need diminishes.”); Sporkin & Hutchinson, *supra* note 460, at 1286 (statement of Judge Sporkin) (“Mandatory minimum sentencing was clearly an effort to be tough on crime. Congress was frustrated. They wanted to get rid of the drug scourge and Congress thought that putting violators of the drug laws in jail for long terms would cure the problem.”).

⁴⁹⁷ Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 3 (1994).

⁴⁹⁸ Felman, *supra* note 485, at 9.

⁴⁹⁹ Rorty, *supra* note 483, at 5-6.

⁵⁰⁰ See 2010 SURVEY RESULTS, *supra* note 491, at tbl. 3.

⁵⁰¹ Yates, *supra* note 459, at 6-7. In the Sentencing Project’s *Downscaling Prisons: Lessons from Four States* (2010), Judith Greene and Marc Mauer recount the rise in the prison populations of New York, Michigan, and New Jersey resulting in part from the institution of mandatory minimum penalties for drug offenses, including low-level offenders. For example, in 1973, New York Governor Nelson Rockefeller supported legislation imposing a fifteen-year mandatory minimum penalty for the sale of two ounces or possession of four ounces of a narcotic drug. Enactment of the “Rockefeller Drug Laws” increased the proportion of drug offenders in the state’s prison population from 11% to 34%. *Id.* at 6. The report also recounts recent sentencing reforms, including the reduction or elimination of mandatory minimum penalties, in New York, Michigan, New Jersey, and Kansas, that reduced those states’ prison expenditures. *Id.* at 60.

⁵⁰² Yates, *supra* note 459, at 6.

This, in turn, has produced exponential growth in the federal prison population since the 1980s, and the federal Bureau of Prison's overcapacity "has real and detrimental consequences for the safety of prisoners and guards, effective prisoner reentry, and ultimately, public safety."⁵⁰³ For this reason, the Department of Justice suggests "some reforms of existing mandatory minimum sentencing statutes are needed . . . to eliminate excess severity in current statutory sentencing laws and to help address the unsustainable growth in the federal prison population."⁵⁰⁴

Many judges also believe mandatory minimum penalties are too severe overall, with about 62 percent of judges responding to the 2010 Commission survey stating that such penalties across all offenses were "too high."⁵⁰⁵ The judges' opinions were more nuanced, however, with regard to specific offenses. More than 50 percent of judges surveyed believed that the mandatory minimum penalties were appropriate in drug trafficking offenses involving heroin (55%), powder cocaine (52%), and methamphetamine (53%), while most of the surveyed judges described the penalties for crack cocaine (76%) and marijuana (54%) offenses as "too high."⁵⁰⁶ In firearms cases, approximately 60 percent of judges who responded in the 2010 Commission survey believed that the mandatory minimum sentences were appropriate for firearm offenders convicted of 18 U.S.C. § 924(c) and (e). Two percent stated that those sentences were too low, while approximately 40 percent responded that they were too high.⁵⁰⁷ With regard to child pornography offenses, most judges felt that the applicable mandatory minimum penalties were appropriate for production and distribution offenses (67% and 57%, respectively), with far fewer responding that these penalties were too high (37% and 23%, respectively). In contrast, 71 percent of respondents stated that the mandatory minimum penalty for *receipt* of child pornography was too high, with only 26 percent believing it to be appropriate. For all other child exploitation offenses, 68 percent of respondents believed the sentences were appropriate, 26 percent believed they were too high, and 6 percent believed they were too low.⁵⁰⁸

⁵⁰³ *Id.* at 7; see Pew Center on the States, *One in 100: Behind Bars in America* 5, 11 (Feb. 2008) ("With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258. With the number of adults [in the United States] just shy of 230 million, the actual incarceration rate is 1 in every 99.1 adults."); Sporkin & Hutchinson, *supra* note 460, at 1286 (statement of Judge Sporkin) ("[I]t's a terrible thing that we're doing with mandatory minimums. . . . [W]e're putting more people in prisons, we're building more prisons, it's costing us tremendous amounts of money.").

⁵⁰⁴ Yates, *supra* note 459, at 8, 9-10.

⁵⁰⁵ See 2010 SURVEY RESULTS, *supra* note 491, at tbl. 1.

⁵⁰⁶ *Id.* Note that this survey was conducted prior to enactment of the Fair Sentencing Act of 2010, Pub. L. 111-220, which among other things increased the quantity of crack cocaine required to trigger the 5-year and 10-year mandatory minimum penalties from 5 and 50 to 28 and 280 grams, respectively. Chapter 8 of this Report reviews current sentencing data about offenders convicted of drug offense statutes carrying mandatory minimum penalties.

⁵⁰⁷ *Id.* Chapter 9 of this Report reviews current sentencing data about offenders convicted of firearms offense statutes carrying mandatory minimum penalties.

⁵⁰⁸ *Id.* Chapter 10 of this Report reviews current sentencing data about offenders convicted of sex offense statutes carrying mandatory minimum penalties.

3. Lack of Individualized Sentencing

Critics often argue that mandatory minimum penalties conflict with the goal of individualized sentencing.⁵⁰⁹ For instance, the Judicial Conference has long urged Congress “to reconsider the wisdom”⁵¹⁰ of mandatory minimum penalties because they “block judges from considering the individual circumstances of particular cases.”⁵¹¹ Because mandatory minimum penalties may prevent a judge from considering all (or even most) of the pertinent facts and circumstances of the case (such as offender characteristics⁵¹²), the resulting sentence may be unfair or irrational.⁵¹³ Likewise, the American Bar Association has also called for the repeal of federal mandatory minimum penalties after concluding that they are “inconsistent with the notion of individualized sentencing within a guided discretion regime.”⁵¹⁴ Moreover, there is significant agreement with the Judicial Conference and the ABA among judges, lawmakers, practitioners, scholars, and advocacy groups.⁵¹⁵

⁵⁰⁹ See Justice Kennedy Commission, American Bar Association, *Reports with Recommendations to the ABA House of Delegates 27* (August 2004) available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf; See also Chief Judge Walker, *supra* note 495, at 42 (“[T]he minimum mandatory sentences of course are troubling for all of us in many cases because they don’t necessarily adequately reflect the tremendous variations in the particular facts and circumstances of the case.”).

⁵¹⁰ See Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States 16* (1990), available at <http://www.uscourts.gov/judconf/90-Mar.pdf>.

⁵¹¹ *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 43 (2007) (statement of Judge Paul G. Cassell on behalf of the Judicial Conference of the United States).

⁵¹² Saltzburg, *supra* note 490, at 5.

⁵¹³ Judge Carnes, *supra* note 493, at 38 (arguing that mandatory penalties also produce unfair and irrational sentences that undermine public confidence in the judicial system and waste public resources by incarcerating offenders for longer than necessary).

⁵¹⁴ Justice Kennedy Commission, *supra* note 509, at 26-27.

⁵¹⁵ See, e.g., Letter from Sen. Patrick J. Leahy, Chairman, Senate Judiciary Committee, to Judge William K. Sessions, Chair, U.S. Sentencing Commission (Aug. 30, 2010), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100825/SenLeahy_2011PolicyPriorities.pdf (“I am concerned that the creation of mandatory minimum penalties too often ties the hands of judges and prosecutors and can result in unjust sentences. I also worry that mandatory minimum penalties undermine the integrity and consistency of the sentencing guidelines system.”); *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 38 (2009) (statement of Grover G. Norquist, President, Americans for Tax Reform) (“The benefits, if any, of mandatory minimum sentences do not justify the burden to taxpayers. Illegal drug use rates are relatively stable, not shrinking. It appears that mandatory minimums have become sort of a poor man’s Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself.”); 150 CONG. REC. H4809 (daily ed. June 23, 2004) (statement of Rep. Scott) (speaking in opposition to the mandatory minimums penalties created in the Identity Theft Penalty Enhancement Act in 2004, on grounds that that “[b]y adding mandatory minimum sentences and denying probation and concurrent sentences, the bill imposes unnecessary and unproductive restrictions on the ability of the

4. *Transfer of Sentencing Discretion from Judges to Prosecutors*

Mandatory minimum penalties are often viewed as effectively transferring discretion from judges to prosecutors.⁵¹⁶ This transfer of discretion is of concern to some because it both constrains judges' discretion and "shift[s] that discretion to prosecutors, who do not have the incentive, training, or even the appropriate information to properly consider a defendant's mitigating circumstances at the initial charging stage of a case."⁵¹⁷

According to a report of the Constitution Project Sentencing Initiative, co-chaired by former Attorney General Edwin Meese III and Professor Philip B. Heymann, this transfer of sentencing discretion through prosecutorial charging and plea bargaining effectively undercuts the objective of reducing disparity.⁵¹⁸ Others have strongly concurred with this view: "Mandatory minimums effectively transfer sentencing authority from trial judges to federal

Sentencing Commission and judges, in individual cases, to assure a rational and just system of sentencing as a whole and for individuals").

⁵¹⁶ See, e.g., Justice Kennedy Commission, *supra* note 509 (recommending repeal of mandatory minimum sentences because "they tend to shift sentencing discretion away from courts to prosecutors"). See also Jeffrey T. Ulmer, Megan C. Kurlychek, & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIM. & DELINQ. 427, 451 (2007) ("Our findings support the long-suspected notion that mandatory minimums are not mandatory at all but simply substitute prosecutorial discretion for judicial discretion."); Angela Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power. . . . In federal and state jurisdictions governed by sentencing guidelines, these decisions often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence."); see also David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. LAW & ECON. 591, 622 (Oct. 2005) ("[P]rosecutors generally have the discretion to prosecute a defendant for a lesser charge than the initial arrest charge, and the use of such discretion can have dramatic effects on sentencing with respect to mandatory sentencing laws.").

⁵¹⁷ Felman, *supra* note 485, at 12-13; see also Testimony of Judge Gerald Bard Tjoflat, U.S. Court of Appeals for the Eleventh Circuit, to the Commission, at 29 (Feb. 10, 2009) ("One of the problems with mandatory minimums is the prosecutor becomes the sentencer in many cases."); Testimony of Judge Jay C. Zainey, U.S. District Court for the Eastern District of Louisiana, to the Commission, at 29-30 (Nov. 19, 2009) ("[I]t should not be the ultimate responsibility or power of the government to let, to allow us or to enable us to go below the statutory minimum."); Sporkin & Hutchinson, *supra* note 460, at 1286 (statement of Judge Sporkin) ("And yet we're giving that twenty-five or thirty-year-old [Assistant United States Attorney] more discretion than you're giving a fifty-five-year-old judge who's had a lot of jobs and has been through the system and thoroughly vetted."); *Mandatory Minimum Sentences – Are They Being Imposed and Who is Receiving Them?: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 4 (1993) (statement of Henry R. Wray, Director of Administration of Justice Issues, U.S. Government Accounting Office) ("[The General Accounting Office identified] several [Department of Justice] district charging policies and practices that influenced decisions whether to pursue mandatory minimum convictions against certain categories of defendants."); Paul Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 58 (2000) ("It seems likely that use of [firearm sentencing enhancements] as bargaining chips is a major reason for circumvention [of the specified mandatory minimum penalty]."); Judge Cassell, *supra* note 510, at 152; Nachmanoff, *supra* note 487, at 12.

⁵¹⁸ The Constitution Project, *supra* note 477, at 27 ("[T]he existence of mandatory minimum sentences tied to conviction of particular offenses permits manipulation of sentences through differential prosecutorial charging and plea bargaining policies . . . [that] undercuts the objective of reducing disparity.").

prosecutors, who may pre-set punishment through creative investigative and charging practices, producing troubling punishment differentials among offenders with similar culpability.”⁵¹⁹ This shift in discretion is especially problematic, according to some, because prosecutorial decisions are made outside of public view and in an “uncertain and inconsistent” manner.”⁵²⁰ Justice Anthony Kennedy has observed that even though a prosecutor may act in good faith, the “trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.”⁵²¹ In the Commission’s 2010 survey of judges, 66 percent of respondents ranked charging decisions among the top three factors contributing to sentencing disparities.⁵²²

Moreover, some argue that mandatory minimum penalties can also be used to coerce defendants to plead guilty and waive constitutional rights: “Under this system, defendants who choose not to capitulate and go to trial are ultimately sentenced not only for their misconduct, but for declining to plead guilty on the prosecutor’s terms.”⁵²³ Finally, some believe that the threat of mandatory minimum penalties might cause offenders to give false information,⁵²⁴ to plead guilty to charges of which they may actually be innocent,⁵²⁵ or to forfeit a strong defense.⁵²⁶

⁵¹⁹ Luna, *supra* note 489, at 4; *see also id.* at 4-5 (noting that “Prosecutors are influenced by ordinary human motivations that may at times cause a loss of perspective . . . [potentially] leading to the misapplication of mandatory minimums. . . . A sentencing judge is the one neutral actor in the courtroom who benefits from neither harsh punishment nor lenient treatment.”).

⁵²⁰ Felman, *supra* note 485, at 11-12; *see also Mandatory Minimum Sentences – Are They Being Imposed and Who is Receiving Them?*, *supra* note 517 (“Prosecutors consider many factors in making charging decisions. On the basis of the information in the case files, [the General Accounting Office was] unable to determine for individual cases why a mandatory minimum charge was dropped, reduced, or never brought.”); *National Assessment of Structured Sentencing*, *supra* note 485, at 100 (“By radically constricting judicial discretion, mandatory minimum penalties severely constrain the sentencing process and move the locus of disparity to the charging stage, where it is less visible.”).

⁵²¹ Justice Anthony M. Kennedy, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

⁵²² *See* 2010 SURVEY RESULTS, *supra* note 491, at tbl. 16.

⁵²³ Nachmanoff, *supra* note 487, at 12; *see Rorty*, *supra* note 483, at 2 (“Then prosecutors used that threat [of mandatory minimum penalties] to force defendants to bargain away their constitutional rights to request bail, remain silent, move to suppress illegally acquired evidence, discover the evidence against them, and receive a trial by jury – all as the price for not being exposed to the higher minimum.”); Luna, *supra* note 489, at 2 (suggesting such practices impose a “trial tax” on defendants who exercise their constitutional right to a jury trial).

⁵²⁴ *See* Nachmanoff, *supra* note 487, at 13 (“The problem with mandatory minimums is that they have a coercive effect. . . . This extraordinary pressure can result in false cooperation and guilty pleas by innocent people.”); Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 931 (1999) (“[F]ormer [Assistant United States Attorneys] . . . readily admit that, in some instances, they simply could not determine if the cooperator had told the truth.”); Prepared Statement of Thomas W. Hillier, II, Constitution Project, to the Commission, at 6-7 (May 27, 2010) (explaining that mandatory minimum penalties “create a powerful incentive for informants and cooperators to provide exaggerated or false information [to prosecutors] . . . [that] is not subjected to the crucible of trial”).

⁵²⁵ Nachmanoff, *supra* note 487, at 13.

5. *Ineffectiveness as a Deterrent or as a Law Enforcement Tool to Induce Pleas and Cooperation*

Some scholars counter the claims made by proponents of mandatory minimum penalties that these penalties serve as an effective deterrent to crime.⁵²⁷ They note that the research conducted by social scientists and public policy analysts has found little evidence to support the argument that mandatory minimums prevent crime.⁵²⁸ In fact, many assert it is an increase in the *certainty* of punishment through the prosecution of more offenders that is the more cost-effective deterrent compared to the *severity* of punishment that mandatory minimum penalties or longer sentences provide.⁵²⁹

⁵²⁶ Prepared Statement of Cynthia Hujar Orr, National Association of Criminal Defense Lawyers, to the Commission, at 8 (May 27, 2010) (“The risk of being sentenced under mandatory minimums effectively precludes defendants from exercising their Sixth Amendment right to a trial. . . . [E]ven if a defendant has minimal culpability or a strong defense, faced with a mandatory minimum sentence of ten years or more, a defendant will almost always forego his right to a trial.”).

⁵²⁷ Some research, in fact, questions the effectiveness of deterrence on crime prevention. See e.g., Dieter Dolling, Horst Entorf, Dieter Hermann, & Thomas Rupp, *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL’Y RES. 201, 216 (2009) (finding a only a slight relationship between punishment and crime deterrence); Gary Kleck, Brion Sever, Spencer Li, & Marc Gertz, *The Missing Link in General Deterrence Research*, 43 CRIMINOLOGY 623, 653-655 (2005) (implying that a weak relationship exists between general deterrence and the certainty, severity or swiftness of punishment); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010) (surveying extensively the history and scholarly literature on criminal deterrence and concluding that the perceived severity and certainty of punishment do not appear to be an effective deterrent to crime); National Institute of Justice, U.S. Department of Justice, *Relations between Increases in Certainty, Severity, and Celerity of Punishment for Drug Crimes and Reduction of Crime, Drug Crime, and the Effects of Drug Abuse* 46 (1993) (“Research on the effects of increased certainty, severity, and/or celerity of punishment upon levels of crime is inconclusive.”).

⁵²⁸ Durlauf & Nagin, *supra* note 471, at 37-38 (finding relatively little reliable evidence that severity of punishment results in a substantial deterrent effect, while strong evidence indicates that certainty of punishment has a large deterrent effect and concluding that lengthy prison sentences, particularly mandatory minimum sentences, are difficult to justify on a deterrence-based, crime-prevention basis); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST 143, 187 (2003) (“We could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence.”).

⁵²⁹ Valerie Wright, The Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (2010) (“Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits.”); *Testimony Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 2 (July 1999) (statement of Peter Reuter & Susan Everingham, RAND Drug Policy Research Center) (“[Our] principal finding is that spending [a fixed sum of] money on bringing more dealers to justice is superior in terms of the consequent reduction in cocaine consumption . . . [than sentencing fewer dealers to mandatory minimum sentences.]”); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, & P.O. Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* 45-48, 51-52 (1999) (finding that certainty of punishment has a greater deterrent effect than did severity of punishment and noting little evidence exists suggesting mandatory penalties exert a deterrent effect). Some researchers, however, argue that a balanced approach of both certainty and severity may achieve the best overall result of crime deterrence. Silvia M. Mendes, *Certainty, Severity, and Their Relative Deterrent Effects: Questioning the Implications of the Role in Criminal Deterrence Policy*, 32 POL. STUD. J. 59, 70 (2004) (concluding that neither certainty nor severity should be more important than the other and the best overall result for deterrence policy is produced by a balancing of both components). See also Harold G. Grasmick & George J. Bryjak, *The*

Some also dispute the claims that mandatory minimum penalties are a useful law enforcement tool for the investigation and prosecution of criminals by inducing pleas and cooperation. The American Bar Association has raised a threshold question of whether inducing cooperation is a legitimate sentencing goal.⁵³⁰ Beyond that threshold question, many observe that the exchange of reduced sentences for information results in “inverted sentencing,” in which offenders with valuable information – kingpins, organizers, and other highly culpable defendants – can avoid mandatory minimum penalties through charge-bargaining and substantial assistance motions while low-level offenders cannot because they lack such valuable information.⁵³¹ Others have also argued that mandatory minimum penalties are inefficient investigative tools.⁵³²

Some further believe that mandatory minimum penalties cause a “cooperation backlash” that occurs “when sentencing practices are viewed as overly severe” and “many citizens become reluctant to assist the law enforcement effort.”⁵³³ Thus, while mandatory minimum penalties can increase cooperation by offenders who face those punishments, they “can chill the willingness of citizens to cooperate with law enforcement at the early stages of investigation and arrest.”⁵³⁴ One witness viewed mandatory minimum penalties as superfluous because many defendants will assist authorities in exchange for a less severe sentence, regardless of whether a mandatory minimum penalty applies.⁵³⁵

Deterrent Effect of Perceived Severity of Punishment, 59 SOC. FORCES 471, 486 (finding that severity of punishment has a deterrent effect when coupled with the certainty of punishment).

⁵³⁰ Felman, *supra* note 485, at 13 (“[T]he ABA rejects the very premise that the inducement of cooperation is a legitimate aim of sentencing policy.”).

⁵³¹ Orr, *supra* note 526, at 3; Schulhofer, *supra* note 484, at 16; Felman, *supra* note 485, at 10; Schulhofer, *supra* note 488, at 211-12; *See also* Bibas, *supra* note 478, at 2491 (“Many offenders, however, have no information to trade. They may have committed their crimes alone, may be too low-level to know much of value, or may be innocent. Moreover, even if defendants have information, their codefendants may preempt them by trading information first. The race to cooperate leaves some behind, and this effect may correlate poorly with offenders’ culpability”).

⁵³² Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 129-30 (2003) (“Unfortunately, of all the ways prosecutors can control sentences, the mandatory minimum statutes force them to use the least efficient mechanism. Cooperation requires many prosecutorial and investigative resources. Unlike a dropping a count in the indictment, cooperation requires meetings with both prosecutors and agents. If cooperation is successful, the information gained often gives rise to a new investigation. While it is desirable to prosecute new cases, it is not at all clear that the best way to allocate investigative resources is to order them according to how sentences should be imposed in already-prosecuted cases.”).

⁵³³ Schulhofer, *supra* note 484, at 16; *See* Nachmanoff, *supra* note 487, at 6-7 (“Extreme federal punishments are not necessary to deter, and create destructive community backlash . . .”).

⁵³⁴ Schulhofer, *supra* note 484, at 17.

⁵³⁵ *See* Testimony of Julia L. O’Connell, Federal Public Defender, Northern & Eastern Oklahoma, to the Commission, at 182 (Nov. 19, 2009) (“[A] defendant who is facing a term of imprisonment, if that person wants to reduce their term of imprisonment and feels comfortable cooperating, they are going to do so, no matter how small the potential sentence is.”).

6. Interference with State Law Enforcement

Some view federal mandatory minimum penalties as indicative of the “over-federalization” of criminal justice policy and as upsetting the proper allocation of responsibility between the states and federal government.⁵³⁶ The late Chief Justice Rehnquist noted that mandatory minimum penalties “fueled the trend toward federalizing crimes” because law enforcement elects to pursue charges in federal rather than state courts because of the severe mandatory minimum penalties available under federal law.⁵³⁷ Professor Erik Luna testified that

⁵³⁶ See Chapter Four of this Report for a discussion about the increase in the number of federal criminal laws since the 1980s. See also Task Force on Federalization of Criminal Law, American Bar Association, *The Federalization of Criminal Law* 5 (1998) (“Congressional activity making essentially local conduct a federal crime has accelerated greatly, notably in areas in which existing state law already criminalizes the same conduct. This troubling federalization trend has contributed to a patchwork of federal crimes often lacking a principled basis.”); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523-24 (2011) (“Over the last several decades, federal criminal law has mushroomed beyond recognition. . . . Many of these laws are written in sweepingly broad terms, overlap with one another, and cover ground already addressed by state law, including violent crimes.”); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 826 (2000) (“Without doubt, criminal conduct ought to be prosecuted, but, while this increasing federalization of crime might bring votes to politicians at election time, the rush to make federal every social affront is at the expense of our constitutional division of governmental authority and of the justice system.”).

A related phenomena sometimes used interchangeably with “over-federalization” is “over-criminalization,” which generally means the expansion of federal and state criminal law to punish types of conduct not traditionally criminalized. A wide-range of observers has expressed concern over those related trends. See, e.g., Brian W. Walsh & Tiffany M. Joslyn, The Heritage Foundation and the National Association of Criminal Defense Lawyers, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in the Federal Law* 6-10 (2010) (discussing the erosion of the *mens rea* requirement under federal law); John Hasnas, Washington Legal Foundation, *Mens Rea Requirement: A Critical Casualty of Overcriminalization* 1 (2008) (“Traditionally, the criminal law required a showing of *mens rea* (which is Latin for a guilty mind) . . . [which] renders the criminal law a very poor mechanism for economic regulation. . . . Unfortunately, at an ever-accelerating rate over the course of the 20th and 21st centuries, federal and state governments have elected to employ the criminal law as a means of achieving regulatory ends.”); William R. Maurer & David Malmstrom, Federalist Society, *The Explosion of the Criminal Law and Its Cost to Individuals, Economic Opportunity, and Society* 4 (2010) (“Today’s legislatures use the criminal code not just to prevent or punish wrongdoing, but to regulate a wide range of personal, economic, and social conduct.”); and Kimberly Humphrey, American Civil Liberties Union, *Criminal Codes Gone Wild* (Oct. 20, 2010) (“Overcriminalization describes the trend in our justice system of attaching criminal penalties to conduct that should not be categorized as criminal.”), available at <http://www.aclu.org/blog/drug-law-reform-racial-justice/criminal-codes-gone-wild>.

⁵³⁷ Rehnquist, *supra* note 496, at 286; cf. 149 CONG. REC. H. 3067 (daily ed. Apr. 10, 2003) (statement of Rep. Scott) (“The [proposed] bill [the PROTECT Act] adds a 5-year mandatory minimum for first offense crimes that are Federal crimes only because a person crosses State lines, such as when an 18-year-old and a 17-year-old conspire to cross state lines from Washington, D.C., to Virginia to have consensual sex . . . [but if they] cross from Virginia to Washington, D.C., to have sex, it would not be a child sex offense, and that is because consensual sex outside of marriage is not a crime in Washington, D.C., while it is in Virginia.”). See also Testimony of Jacqueline Johnson, First Assistant Federal Public Defender, Northern District of Ohio, to the Commission, at 328-29 (Sept. 10, 2009) (“In Ohio, the average time served for possessing a weapon in the state system under disability is 1.15 months. . . . [My] client . . . has a Criminal History Category of IV. . . . He has two misdemeanors for which he received two points, one conviction for public gambling, three convictions for driving while under suspension . . . and then he has one conviction for drug trafficking, which he received no time in prison at the state level. . . . If he were to proceed to trial and be convicted of [§ 924(c)], he’s looking at a guideline range of 51 to 63 months [with a mandatory minimum sentence of 60 months].”).

federal mandatory minimum penalties can “overwhelm” state and local choice on criminal justice issues, thereby “effectively and powerfully nullifying state and local judgments.”⁵³⁸ He further testified that he was concerned “that law enforcement considers vast sentencing differentials between state and federal systems as some type of unmitigated good, essentially treating the states as the junior varsity.”⁵³⁹

7. *Impact Across Demographic Groups*

Some express concerns that mandatory minimum penalties unfairly impact racial minorities and the economically disadvantaged.⁵⁴⁰ This may be attributed in part to the fact that the most frequently applied mandatory minimum penalties are for drug offenses, which according to some disproportionately impacts certain racial or ethnic groups.⁵⁴¹ While acknowledging that this disproportionate impact may be more a function of law enforcement priorities rather than sentencing policy, some assert that mandatory minimum penalties nevertheless are being applied most frequently to a population that is not necessarily representative of all persons violating such laws.⁵⁴² They argue that this perceived uneven

⁵³⁸ Luna, *supra* note 489, at 7.

⁵³⁹ Testimony of Erik Luna, Cato Institute, to the Commission, at 271 (May 27, 2010); *See also* Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730 (2002) (“Ironically, federal reforms that were intended to combat sentencing disparities likely exacerbated disparities between state and federal sentences. . . . Thus, federal mandatory minimum penalties exceed state maximum penalties for some offenses in some states.”).

⁵⁴⁰ *See* 1991 COMMISSION REPORT, at 51. Justice Kennedy Commission, *supra* note 509, at 27 (finding that that mandatory minimum penalties disproportionately affect racial minorities); Brennan Center For Justice, *Racial Disparities in Federal Prosecutions* (2010) (recounting instances of racial disparities in federal prosecutions and making recommendations to eliminate the same), *available at* http://www.brennancenter.org/page/-/Justice/ProsecutorialDiscretion_report.pdf?nocdn=1; David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285, 311 (2001) (concluding that in spite of explicit statements in the federal sentencing guidelines, “large differences in the length of sentence exist on the basis of race, gender, education, income, and citizenship.”).

⁵⁴¹ Prepared Statement of Marc Mauer, Executive Director, Sentencing Project, to the Commission, at 7 (May 27, 2010). *See also* Bureau of Justice Assistance, *supra* note 485, at 89 (“Collectively, results of all the studies in this chapter suggest that the USSC guidelines have reduced disparity but that more research is needed to better understand the overall impact on sentencing disparity reduction. The extent of racial disparity in the use of incarceration has worsened under the mandatory minimum-driven drug guidelines, with dramatically increased penalties for which African-Americans are disproportionately arrested and convicted.”); Prepared Statement of Laurie L. Levenson, Professor, Loyola Law School, to the Commission, at 5 (May 27, 2010) (“[M]andatory minimum sentences have created two systems of justice --- one for white defendants and another for inmates of color. . . . More than 71% of the inmates in federal prison are inmates of color . . . [and sentenced for federal drug offenses] which, not coincidentally, are the crimes most affected by mandatory minimum sentences.”); Orr, *supra* note 526, at 5 (“Mandatory minimums are primarily imposed for drug offenses and statistics demonstrate that people of color are disproportionately prosecuted for drug offenses. These two facts create an environment ripe for racial disparity in mandatory minimum sentencing.”).

⁵⁴² Mauer, *supra* note 541, at 7. *See also* Ngozi Caleb Kamalu, Margery Coulson-Clark, & Nkechi Margaret Kamalu, *Racial Disparities in Sentencing: Implications for the Criminal Justice System and the African American Community*, 4 AFR. J. OF CRIMINOLOGY & JUST. STUD. 1 (2010) (reviewing literature on racial disparities in sentencing and noting the impact of the penal system on the African American community); Johnson, *supra* note

application creates perceptions of unfairness that undermine the public's acceptance of the criminal justice system.⁵⁴³

Some also view legally relevant factors, such as criminal history and prosecutorial discretion in charging decisions or plea agreements, as contributors to the demographically disparate impact of mandatory minimum penalties. Studies show that racial minorities are more likely than whites to have a prior record, which may result from disproportionate processing by the criminal justice system.⁵⁴⁴ Research likewise indicates that offenders in certain racial groups may be less likely to get the benefit of prosecutorial discretion in charging decisions or plea agreements.⁵⁴⁵

Some have also expressed the view that disparate results may occur based on an individual's socio-economic status. For example, one public policy group that has conducted several studies on the impact of the criminal justice system on discrete communities observed a disproportionate impact of the justice system on economically-disadvantaged defendants.⁵⁴⁶

535, at 328 (“I have a case now where ATF agents and local police were conducting surveillance at a gun show in a semi-rural community [in Ohio] where few African-Americans live. They observed a black woman and a black man buy two guns and simply assumed that one or both of them were straw purchasers or convicted felons.”).

⁵⁴³ Justice Kennedy Commission, *supra* note 509, at 52 (“It is nonetheless true that there is a perception among substantial numbers of minorities that the criminal justice system is discriminatory, and the perception frequently is based upon reality. That perception itself may lead to crime, disrespect for the law, and even a willingness to nullify or subvert the law. Accordingly, we must recognize how racial disparities may undermine confidence in our criminal justice system and its ability to prevent crime.”).

⁵⁴⁴ See Mauer, *supra* note 541, at 8; MARC MAUER, RACE TO INCARCERATE 126–40 (2006) (describing disparities in incarceration rates, explaining that those disparities are the product of myriad criminal justice policies, and concluding that the “sentencing policies of recent years, whether motivated by a desire to ‘get tough’ or to reduce disparities, have in fact unfairly affected low-income people and minorities.”). See also Office of Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians In the Criminal Justice System* 28 (2010) (“[D]ata from Hawai‘i’s Attorney General show that Native Hawaiians are arrested at a greater frequency than Hawai‘i’s other ethnic groups, often second only to Whites in specific offense categories.”); Vincent Schiraldi & Jason Ziedenberg, Justice Policy Institute, *Race and Incarceration in Maryland* (2003) (finding that racial and ethnic minorities in Maryland are overrepresented in the states incarcerated population).

⁵⁴⁵ Nachmanoff, *supra* note 487, at 10 (“Most troubling, because it largely reflects a discretionary choice by prosecutors, are differences in the rate different groups receive an enhancement under § 924(c) *instead* of the less severe two-level gun bump under the guidelines. [In FY2008], about 35% of black defendants [received a § 924(c) enhancement] but only 26% of white defendants received the § 924(c) [enhancement].”); Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 417 (2010) (finding that black and Hispanic offenders are less likely to have their initial charges reduced in weapons offenses); Cassia Spohn, John Gruhl, & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 183 (1987) (finding evidence that black and Hispanic offenders are less likely to have felony charges against them dropped compared to white or female offenders in Los Angeles, CA).

⁵⁴⁶ Justice Policy Institute, *A Capitol Concern: The Disproportionate Impact of the Justice System on Low-Income Communities in D.C.*, at 4-5 (July 2010) (finding that communities of color and low-income are disproportionately represented in D.C.’s criminal justice system), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/10-07_exs_capitolconcern_ac-ps-rd-dc.pdf. See also Tracy Nobiling, Cassia Spohn, and Miriam DeLone, *A Tale of Two Counties: Unemployment and Sentence Severity*, 15 JUST. Q. 459, 479-484 (1998) (finding

D. CONCLUSION

Mandatory minimum penalties have long drawn the attention of various stakeholders in federal criminal justice policy, and these stakeholders have taken a range of policy positions supporting and opposing mandatory minimum sentencing provisions. In particular, disagreements concerning mandatory minimum penalties center on their ability to establish appropriate sentences, their ability to reduce unwarranted sentencing disparities, and their efficacy as investigative and resource-preserving tools.

evidence that a defendant's employment status has an effect on sentence severity and/or the decision to incarcerate); Justice Policy Institute, *The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties*, at 16 (2007) ("Prisons in the U.S. are disproportionately populated by individuals who were living in poverty prior to their imprisonment."), available at http://www.justicepolicy.org/images/upload/07-12_REP_Vortex_AC-DP.pdf.

THE USE OF MANDATORY MINIMUM PENALTIES IN SELECTED DISTRICTS

A. INTRODUCTION

This chapter summarizes the results of the Commission staff visits to 13 judicial districts during the period from June through August, 2011. In each of the districts, Commission staff conducted interviews with designated representatives of the United States Attorney [hereinafter prosecutors] and Federal Public Defender (FPD), as well as with the private defense bar member designated as the district's Criminal Justice Act (CJA) panel representative.⁵⁴⁷ The district interviews were undertaken to aid the Commission in responding to those provisions of the statutory directive requiring "an assessment of the effect of mandatory minimum sentencing provisions under Federal law on the goal of eliminating unwarranted sentencing disparity and other goals of sentencing," and "a description of the interaction between mandatory minimum sentencing provisions under Federal law and plea agreements."

The chapter provides a summary of the responses about general practices in each district concerning charging decisions, plea negotiations, and substantial assistance practices. Next, the chapter describes differences in those practices identified by offense type. Finally, the chapter summarizes the respondents' answers to questions about how the actual practices in each district provide support for policy views about mandatory minimum penalties.

B. METHODOLOGY

The Commission selected the 13 districts using criteria informed by the data presented in this report.⁵⁴⁸ The districts selected varied in geographic location, the size of the criminal docket, the types of cases sentenced in the district, and the percentage of the criminal docket involving convictions of offenses carrying mandatory minimum penalties. The selection criteria ensured that each district visited had sufficient relevant experience with the use of mandatory minimum penalties to inform the Commission's study of the topic.

In general, each interview was conducted by a two-member team of Commission staff. The respondents were permitted to designate the persons to be interviewed.⁵⁴⁹ The respondents

⁵⁴⁷ The FPD and CJA representatives will be collectively referred to hereinafter as defense attorneys.

⁵⁴⁸ The districts chosen for the interviews were neither randomly selected, nor meant to be representative of the federal system with regard to mandatory minimum penalties. The districts were identified because of their differences in the application of mandatory minimum penalties. Therefore, the results summarized in this chapter are not necessarily representative of sentencing practices nationwide.

⁵⁴⁹ The respondents designated to meet with Commission staff varied by district. Commission staff met with the United States Attorney and designated members of the United States Attorney's senior management in some districts. In others, the United States Attorney did not participate in the interviews, but instead designated one or more members of senior management to meet with Commission staff. Similarly, the FPD personally participated in

were informed of the general topics to be discussed but were not given the specific questions to be asked. The structured interview lasted approximately two hours and consisted of questions appropriate to the respondent's practice as either a prosecutor or defense attorney.⁵⁵⁰ The Commission asked specific questions about practices for charging decisions, plea negotiations, and substantial assistance, in addition to questions about whether any of these practices had changed following *Booker*. Respondents were given an opportunity to state general views regarding the use of mandatory minimum penalties in the federal criminal justice system. All respondents were assured of confidentiality and anonymity at the outset of the interview. As a result, no individual respondents or districts are identified in this report. This interview process was similar to the process used by the Commission in 1990 and 1991 when compiling information used in the 1991 Commission Report.

C. OVERVIEW OF THE USE OF OFFENSES CARRYING MANDATORY MINIMUM PENALTIES

The overwhelming majority of the prosecutors interviewed opined that mandatory minimum penalties are effective law enforcement tools because they encourage guilty pleas and cooperation.⁵⁵¹ Many also believed that long sentences triggered by mandatory minimum penalties are a significant benefit to law enforcement because they incapacitate dangerous offenders. Other reasons cited by some prosecutors to explain why mandatory minimum penalties are effective law enforcement tools include deterrence, safety of the community, and the elimination of sentencing disparity.

The majority of the defense attorneys disputed the value of mandatory minimum penalties as a law enforcement tool. Some said that mandatory minimum penalties do not effectuate rational sentencing policy because they undermine the judicial function and shift too much power from the judge to the prosecutor. Others believed that mandatory minimum penalties create disparity in sentencing because of differences in prosecutorial charging decisions. A few thought that mandatory minimum penalties might lead to guilty pleas and cooperation. Others acknowledged that mandatory minimum penalties might have value because they incapacitate certain offenders.

Prosecutors were divided in their opinion on whether specific mandatory minimum penalties were too harsh. In some districts, prosecutors did not identify any mandatory minimum penalties as too harsh. In several others, prosecutors expressed opinions about the harshness of the enhanced penalties for prior felony drug convictions available under 21 U.S.C. § 851. In one district, prosecutors identified drug penalties as harsh for certain low-level offenders involved in a large scale conspiracy. Some prosecutors mentioned multiple section 924(c) counts and one mentioned child pornography, particularly the offense carrying a 30-year mandatory minimum

the interviews in some districts, either alone or in conjunction with other attorneys from the office. In others, one or more supervisory attorneys served as the FPD's designee.

⁵⁵⁰ The Commission developed two sets of questions: one for prosecutors and one for defense attorneys. The questionnaires are provided in Appendix F of this Report.

⁵⁵¹ A few prosecutors suggested the need for additional mandatory minimum penalties for certain types of offenses. Others advised that mandatory minimum penalties are not necessary for all offenses.

penalty⁵⁵² as perhaps too severe.⁵⁵³ By contrast, the majority of defense attorneys thought that all mandatory minimum penalties are too harsh. When they identified specific statutes, they were typically the same statutes identified by the prosecutors. Many also listed ACCA⁵⁵⁴ as particularly harsh.

Notwithstanding their general contrary perceptions about mandatory minimum penalties, prosecutors and defense attorneys in each district provided very similar accounts of the practices followed in their district.

1. *Charging Decisions*

A fairly consistent theme emerged during the interviews of prosecutors about the overall role of mandatory minimum penalties in charging decisions. The ability to charge an offense carrying a mandatory minimum penalty appears to be a threshold consideration in determining whether to exercise federal jurisdiction over certain types of criminal cases. Prosecutors in four of the 13 districts told the Commission that mandatory minimum penalties play a “significant role” in charging decisions. Prosecutors in five other districts related that they charge the “most serious, readily provable offense,” which is defined as the offense “that generates[s] the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.”⁵⁵⁵ Prosecutors in the remaining four districts asserted that although the evidence drives their charging decisions, they file charges carrying a mandatory minimum penalty whenever applicable. All agreed that *Booker* had caused few, if any, changes to the charging practices in their districts.

For the most part, defense attorneys in each of the 13 districts concurred with the overall view that prosecutors charge an offense carrying a mandatory minimum penalty if available. The defense attorneys in each district also did not see any change in charging decisions following *Booker*. In some districts, defense attorneys noted that some changes resulted from a change in the United State Attorney. In five districts, however, the defense attorneys related that offenses carrying a mandatory minimum penalty were not charged consistently. Some noted that the inconsistencies in application arose from decisions made by individual prosecutors; others noted variations in charging practices within different divisions located in the same district. In

⁵⁵² The particular statute was not identified during the interview. Buying or selling, or otherwise transferring, children for the purpose of participating in the production of child pornography under 18 U.S.C. § 2251A(a) & (b) is subject to a mandatory minimum penalty of 30 years; there is also a mandatory minimum penalty of 30 years for traveling across state lines with the intent to have sex with a child under 12 years of age or for crossing state lines and having sex with a child between the ages of 12 and 16 under certain aggravating circumstances under 18 U.S.C. § 2241(c).

⁵⁵³ As discussed in Part D of this Chapter, prosecutors may also express these views in practice through their charging decisions and in plea negotiations.

⁵⁵⁴ 18 U.S.C. § 924(e).

⁵⁵⁵ See Memorandum from John Ashcroft, Attorney General, to all Federal Prosecutors dated September 22, 2003, regarding Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

only one district where such inconsistencies in application were noted by defense attorneys did the prosecutors also suggest that individual prosecutors might vary in their charging practices.

Notwithstanding the consistent theme concerning the role played by mandatory minimum penalties in charging decisions, different factors apparently play a role in charging decisions for different types of offenses. Those factors will be discussed in Part D of this Chapter discussing each offense type.

2. *Plea Negotiations*

Respondents were asked whether dismissing a count carrying a mandatory minimum penalty, or charge bargaining, was part of their practice in negotiating guilty pleas. Most of the prosecutors interviewed related that charge bargaining was the exception, rather than the rule, in their district. Typically, the decision to dismiss a charge carrying a mandatory minimum penalty was tied to the quality of the evidence underlying that count rather than to any deal negotiated by the parties. Some prosecutors did identify notable exceptions to this general practice: cooperation agreements, requests by other agencies involved in an investigation, and plea agreements with peripheral players in drug conspiracies. However, those exceptions were described as rare. In most of the districts, prosecutors related that the policy against charge bargaining was applied consistently office-wide.

Prosecutors in several districts noted possible variations in charge bargaining practices as a result of decisions made by individual prosecutors. In one of those districts, prosecutors related that charges carrying a mandatory minimum penalty might be dismissed if that penalty was not appropriate for the offender or if the offender made some concessions as part of the plea negotiations. In that district, the practice appears to be tied more closely to the individual case considerations, rather than a general policy.

Notwithstanding the general prohibition against charge bargaining in most districts, exceptions for particular offense types were noted. For example, prosecutors reported wide variations in the practices surrounding the filing of section 851 notices seeking enhanced mandatory minimum penalties.⁵⁵⁶ Likewise, prosecutors reported variations in plea negotiation practices relating to violations of 18 U.S.C. § 924(c).⁵⁵⁷ Those differing practices will be discussed in further detail in Part D of this Chapter.

In most districts, defense attorneys also viewed charge bargaining as the exception, rather than the rule. Most also concurred that the policy was enforced office-wide. In the rare instances when an offense carrying a mandatory minimum penalty was dropped as part of plea negotiations, the defense attorneys believed that individual discretion exerted by the prosecutor

⁵⁵⁶ The relevant statutes penalizing drug trafficking provide increased mandatory minimum penalties for offenders with one or more prior felony drug convictions. *See* 21 U.S.C. §§ 841, 960. These enhanced penalties are not automatically triggered, however. Prosecutors must file a notice seeking the enhanced penalties under 21 U.S.C. § 851 and comply with other requirements set forth in that section. *See infra*, Chapter 8, for further discussion of section 851.

⁵⁵⁷ *See infra*, Chapter 9, for a more detailed discussion of section 924(c).

handling the case may have been one of the factors contributing to that decision. Lack of evidence was identified as another factor.

In one district where the prosecutors discussed individual case factors as playing a part in the consideration whether to charge bargain, the defense attorneys believed that such plea agreements resulted when the offender made concessions to the government. Defense attorneys also reported different experiences relating to charge bargaining practices for violations of 18 U.S.C. § 924(c) and the filing of section 851 notices.⁵⁵⁸ One other notable exception mentioned by defense attorneys in another district involved the dismissal of immigration charges carrying a mandatory minimum penalty in exchange for a plea to another less serious immigration offense.

Respondents also were asked whether appeal waivers were routinely included in written plea agreements. In the majority of districts, prosecutors advised that an appeal waiver was a standard provision in the plea agreement and CJA representatives agreed. Many FPD representatives advised that they would only accept such a provision if the government provides their client with a particular concession, such as dismissal of a charge or a stipulation to certain guideline issues. In one district, the practice varied depending on the judge handling the case.

3. *Binding Plea Agreements – Fed. R. Crim. P. 11(c)(1)(C)*

Prosecutors in seven of the 13 districts reported the use of binding plea agreements in their districts. In four of the seven, prosecutors reported that the use of such agreements had increased after *Booker*. One prosecutor explained that the practice changed to bring more “certainty to the process.” Another suggested that the parties negotiated these types of plea agreements to avoid protracted sentencing hearings and to reach a sentence amenable to both sides. Conversely, one prosecutor suggested that the practice evolved because defendants wanted to avoid increased severity.

In only one of these four districts did the defense attorneys agree with prosecutors that *Booker* was the driving force for the increased use of binding plea agreements. Defense attorneys expressed differing views about the reason for the change. In one district, defense attorneys reported “occasional” use of such agreements and no changes after *Booker*. In another, the FPD expressed the view that the judges in the district were the driving force behind the practice because they wanted to avoid complicated sentencing hearings and appeals. The CJA representative in that district suggested that the use of binding plea agreements increased after *Booker* because the decision “took away the certainty that prosecutors liked.” Finally, in one of these four districts, representatives from the FPD agreed that such agreements were used in the district but did not attribute any change in the practice to *Booker*. The CJA representative in that district asserted that such agreements were rarely used in the district and that *Booker* had not changed the practice.

In the remaining three districts where prosecutors reported use of binding plea agreements, they reported no change in the practice resulting from *Booker*. In one district, prosecutors reported using binding plea agreements for certain types of cases, before and after

⁵⁵⁸ As noted above, this will be further discussed in Part D, *infra*.

Booker. Defense attorneys in this district generally agreed with this characterization of the practice. In another, prosecutors reported increased use of binding plea agreements but attributed the change to preferences expressed by judges in the district. The FPD agreed that the change was driven by preferences expressed by the judges in their district, but the CJA representative attributed the change to *Booker*, asserting that prosecutors were concerned the judges might be unduly lenient. Finally, in one district, prosecutors reported using binding plea agreements “judiciously” to “create a floor for the judge” because “they worried about the judge going below what is recommended.” Defense attorneys in this district agreed that binding plea agreements were being used with increased frequency in the district. They viewed the new United States Attorney, and not *Booker*, as the reason for this change.

Six other districts reported that binding plea agreements were rarely used in the district and that *Booker* caused no change to the practice in those districts.

4. *Substantial Assistance*

In all of the 13 districts, prosecutors reported that offenders who provided substantial assistance to the government typically did so after pleading to all pending charges carrying a mandatory minimum penalty. This practice was consistent with the charging and plea negotiation policies already discussed. A few prosecutors reported that, in rare instances, they might dismiss mandatory minimum penalty counts in return for the offender providing substantial assistance to the government early in the case. Prosecutors from several other districts also noted that they might refrain from filing a superseding indictment to add additional charges carrying mandatory minimum penalties for offenders who had agreed to cooperate with the government.

Once an offender provides substantial assistance, in ten of the 13 districts the prosecutors always make a recommendation to the court concerning the extent of the reduction warranted. Prosecutors in some districts set forth that recommendation in writing, often under seal, while others made the recommendations orally at the sentencing hearing. In two districts, the prosecutors make no recommendations concerning the extent of the reduction; rather they simply describe the cooperation. In one other district, the prosecutors’ practice varies depending on the sentencing judge; for certain judges, the prosecutors recommend the extent of the reduction and for others, they simply describe the cooperation.

Prosecutors express their recommendation on the extent of the sentencing reduction in one of two ways. In five districts, prosecutors express the reduction as a percentage below the minimum of the applicable guideline range. In three others, prosecutors express the reduction as a certain number of levels below the final offense level. In two others, prosecutors use both methods, depending on the sentencing judge’s preference. Finally, in one district, the prosecutors have moved away from the practice of expressing the extent of the reduction as a percentage below the minimum of the applicable guideline range, instead recommending a specific sentence.

In all districts where the prosecutors make a recommendation, the extent of the recommended reduction was tied to the level of cooperation provided. Although the individual

United States Attorney's offices tried to make uniform recommendations for cases in their district, there appears to be no nationwide Department of Justice practice concerning the extent of the reduction that should be recommended for any particular type of cooperation. For example, in one district, wearing a wire or providing testimony at trial warranted a recommended reduction of up to 50 percent below the applicable guideline range, while in another district, similar cooperation warranted no more than a 30 percent recommended reduction.

The defense attorneys' views of the substantial assistance practice in their districts were similar to that of the prosecutors. All agreed that charge bargaining was rare. All agreed that the government expressed recommendations, and all agreed about the manner in which such recommendations were expressed. The defense attorneys also concurred that the extent of the reduction was tied to the level of cooperation provided.

The only area in which prosecutors and defense attorneys differed in their answers was when questioned about whether the court followed the prosecutors' recommendation on the extent of the sentence reduction. In only two of the districts visited did prosecutors and defense attorneys agree that the sentencing judges usually sentenced in accordance with the government's recommendation. In two other districts where the prosecutors thought that the court usually followed their recommendation, either the FPD or the CJA representative agreed with that statement but not both.

In the remainder of the districts where the government made recommendations to the court, the perceptions of the rate at which those recommendations were followed differed. In fact, not only did the FPD and the CJA representatives rarely agree with the government on this point, they also disagreed with one another. If the prosecutor thought that the court rarely followed the recommendation, the defense attorney either thought that the court usually followed the recommendation or sometimes followed the recommendation. The Commission received a variety of answers on this point. Some indicated that the court frequently gave a greater sentence reduction than recommended by the prosecutor; others asserted that the court gave less. According to some, the practice varied by individual judges; others asserted that the practice varied depending on the type of crime committed by the cooperator.

D. SPECIFIC OFFENSE TYPES CARRYING MANDATORY MINIMUM PENALTIES

As noted above, prosecutors and defense attorneys provided a similar overall view of the charging decisions, plea negotiation, and substantial assistance practices in their districts. They also provided similar descriptions of the exceptions to the general rules noted for particular offenses types. The interviews did, however, reveal wide differences in these practices between the districts interviewed.

1. Drug Offenses

In all 13 of the districts visited, prosecutors and defense attorneys agreed that drug quantity controlled the decision whether to charge a drug offense carrying a mandatory minimum penalty. Some defense attorneys expressed the view that law enforcement officers purposely structured investigations so as to arrive at drug amounts triggering mandatory minimum

penalties. One prosecutor agreed that it is possible to “manipulate” a case in that manner. In one district, prosecutors expressed a preference for prosecuting only those drug offenses with amounts triggering a ten-year mandatory minimum penalty. In the remaining districts, no such preference was voiced. In three of the 13 districts, prosecutors noted that they might charge a drug offense that did not carry a mandatory minimum penalty if a weapon was involved in the offense. One of those districts further noted that the offender’s criminal history, a request by a law enforcement agency, or a specific federal initiative (such as Operation Weed and Seed) might also serve as the impetus for charging the crime in federal court, even in the absence of a quantity triggering a mandatory minimum penalty.

The 13 districts had widely disparate practices surrounding the filing of notices under 21 U.S.C. § 851 for offenders with prior felony drug convictions. In nine districts, prosecutors related that they did not file the notice automatically in every applicable case. In each of those districts, the prosecutors advised that they delayed filing the notice while engaging in plea negotiations. In eight of the districts, defense attorneys agreed that the prosecutors did not automatically file the section 851 notice. In many of these districts, defense attorneys described the delay in filing as a “threat” to “coerce” a plea. In one of these districts, however, the defense attorneys did not agree that the filing of the notice was delayed during plea negotiations. They expressed the view that prosecutors in that district filed the section 851 notice in the overwhelming majority of cases eligible for enhanced penalties.

Prosecutors in the districts where section 851 notices are not automatically filed also mentioned various other reasons that might cause them to refrain from filing the notices. Some prosecutors noted that the nature of the prior criminal history might impact the decision whether to seek enhanced penalties. For example, if the offender’s prior conviction was very old or if there was only one qualifying prior conviction, prosecutors might refrain from seeking enhanced penalties. Some prosecutors also mentioned the nature of the prior conviction, suggesting that even though the prior may qualify as a felony drug conviction under the applicable statute, prosecutors do not view all qualifying priors as equally serious. Likewise, prosecutors might decide not to seek a life sentence for having two or more qualifying priors, but rather file a section 851 notice using only one qualifying prior conviction.

Some prosecutors noted that the notice might not be filed if they encountered difficulties in securing documentation to prove the prior conviction. The timing of a plea was also noted as a factor. The longer an offender waited to enter a guilty plea, the more likely the prosecutors were to file the notice. Others suggested that the notice might not be filed if the offender had agreed to cooperate.

In two districts, prosecutors advised that they filed the notice triggering the enhanced penalties in every applicable case and did not withdraw the notice under any circumstances. The defense attorneys in those districts concurred in that description of the prosecutors’ section 851 practices.

In another district, prosecutors suggested that office policy required section 851 notices be filed in every applicable case, absent supervisory approval. These prosecutors noted, however, that the timing of the filing was left to discretion of the individual prosecutor handling

the case. These prosecutors also related that they might withdraw the section 851 notice if the offender agreed to provide substantial assistance. For example, in cases where the offender was eligible for a life sentence under section 851, the prosecutor might withdraw the notice triggering the life sentence, and instead file a notice that doubled the applicable mandatory minimum penalty, in return for a guilty plea and substantial assistance. In this district, the FPD was of the opinion that the prosecutors rarely failed to file applicable section 851 notices. The CJA representative thought the practice varied more widely, depending upon the individual prosecutor handling the case.

In contrast to those districts in which section 851 notices are always filed, in one district, the prosecutors advised that they rarely filed the notices. The prosecutors in this district described the enhanced penalties as a “hammer for the worst offenders,” but otherwise too harsh for low-level drug offenders. Prosecutors did advise, however, that section 851 notices would be filed in any case where the offender insisted on going to trial. Defense attorneys agreed that the prosecutors filed section 851 notices infrequently, although the FPD asserted that the possibility of filing was often used to negotiate a guilty plea.

Any decision not to seek the enhanced penalties based upon any of the aforementioned factors was a matter of prosecutorial discretion, exercised in no consistent manner. In some districts, the practices varied from division to division. In others, the identity of the individual prosecutor handling the matters was central to the decision.

2. *Firearms Offenses – 18 U.S.C. § 924(c) Violations*

The Commission’s interviews also revealed divergent practices relating to the filing of charges under 18 U.S.C. § 924(c), involving the use of a firearm during a crime of violence or drug trafficking felony.⁵⁵⁹ In the majority of districts, prosecutors always charge a single violation of this statute, when provable, and rarely dismiss the charge once it is filed. This was generally consistent with the charging and plea negotiation practices described in each district. In one district, however, prosecutors advised that they always file the charge when the underlying offense is a crime of violence, but often refrain from immediately filing the charge if the underlying offense is a drug trafficking crime. In another, defense attorneys suggested that some prosecutors might be amenable to dismissing a section 924(c) count in a drug case, and account for the firearm through the dangerous weapon enhancement in §2D1.1.

The charging practices in each district concerning multiple violations of section 924(c) were notably different from the overall charging practices discussed above. Likewise, districts varied from one another in the practices concerning filing of multiple section 924(c) violations. In most districts, the prosecutors generally charged multiple section 924(c) violations in violent offenses. Some noted that they file multiple section 924(c) violations in drug cases when a particular offender possessed a firearm on separate occasions. Prosecutors in one district said that the decision depends on the type of case, noting domestic terrorism cases as a type of

⁵⁵⁹ This offense carries a consecutive penalty of at least five years; second and subsequent violations are subject to a 25-year consecutive penalty. *See infra*, Chapter 9.

offense always warranting the filing of multiple charges. Prosecutors in another district advised that supervisor approval was required to charge more than two section 924(c) violations.

By contrast, in two districts prosecutors advised that they rarely charge multiple violations. In one of those districts, prosecutors described the second 924(c) count as a “nuclear hammer.” Defense attorneys in these districts concurred with this description of the practice concerning multiple section 924(c) violations.

Defense attorneys in most districts generally agreed that the charging practices for multiple section 924(c) violations were somewhat different than the districts’ general charging practices. Many noted that the decision not to charge multiple counts immediately was often tied to plea negotiations. Some noted that it varied by division and prosecutor.

The charge bargaining practices for multiple section 924(c) counts were inconsistent. Prosecutors in some districts would dismiss all but one section 924(c) count in exchange for a guilty plea. Others require a plea to at least two section 924(c) counts. In another, prosecutors require offenders that they consider especially violent to plead to at least three counts. Not only did the practices differ among districts, but the respondents interviewed also noted that the practice sometimes varied within districts, either by division or by individual prosecutor.

3. *Child Pornography Offenses – Possession vs. Receipt*

In most of the districts visited, prosecutors report that they typically charged, when applicable, receipt of child pornography,⁵⁶⁰ which carries a mandatory minimum penalty, instead of possession of child pornography,⁵⁶¹ which does not. Nevertheless, the Commission’s interviews identified some inconsistencies in charging practices and plea negotiations relating to child pornography.

In a few districts, if an offender offers to plead guilty to a child pornography possession charge early in the case, receipt charges will be either dismissed or never filed. In at least one other district, if an offender successfully passes a polygraph examination establishing that he had taken no additional steps beyond viewing child pornography (*i.e.*, he had not touched a child), that offender would be permitted to plead to possession of child pornography. In yet another, prosecutors agree to enter into a binding plea agreement allowing the offender to plead guilty to a possession charge and requiring a specific sentence, if the forensic examination of the offender’s computer would be considerably delayed if the case were to go to trial. Some defense attorneys perceived that these charging practices and plea negotiations varied by division and even by individual prosecutor.

⁵⁶⁰ 18 U.S.C. §§ 2252(a) (1)–(3), 2252A(a)(2).

⁵⁶¹ 18 U.S.C. §§ 2252(a)(4), 2252A(a)(5).

4. *Aggravated Identity Theft – 18 U.S.C. § 1028A Violations*

In approximately half of the 13 districts, violations of section 1028A⁵⁶² were “the exception to the general rule that the prosecutors charged the most serious, readily provable offense.” In those districts, prosecutors offered various explanations for their charging practices. Some thought the offense was more difficult to prove than other types of fraud offenses. Others used the charge only in identity theft cases involving aggravating factors. By contrast, others only filed the charge in cases involving small loss amounts, in order to ensure a prison sentence. Prosecutors in most districts rarely charged multiple counts of section 1028A violations. In instances where multiple counts were charged, prosecutors expressed a willingness to dismiss second or subsequent counts in exchange for a guilty plea.

E. MANDATORY MINIMUM PENALTIES IN PRACTICE

During the interviews, the Commission asked a series of questions designed to obtain information about whether the practices in the districts concerning mandatory minimum penalties provided support for any of the policy arguments discussed in Chapter 5 of this report. This section presents the opinions expressed by respondents during the interviews.

1. *Defendants’ Prior Knowledge about Mandatory Minimum Penalties*

The Commission asked defense attorneys whether their clients were aware of mandatory minimum penalties.⁵⁶³ Most defense attorneys categorically stated that their clients had no knowledge of the possible mandatory minimum penalties applicable to their crime prior to its commission. One defense attorney noted that the occasional client in an urban area might have some awareness of mandatory minimum penalties, and another mentioned possible awareness of crack cocaine penalties. Others described their clients’ awareness of penalties as infrequent. Only recidivist offenders with previous experience in federal court were identified as a category of offenders who might be aware of mandatory minimum penalties. One defense attorney also described the public’s general lack of knowledge about these penalties.

2. *Incentive to Plead Guilty*

The Commission asked prosecutors and defense attorneys to identify the best incentive that the government could offer an offender to induce a guilty plea. Most prosecutors did not identify the mandatory minimum penalty as the best incentive to induce a plea. Rather, the

⁵⁶² This offense carries a consecutive two-year penalty. *See infra*, Chapter 11.

⁵⁶³ The precise question asked was “How often are your clients aware of the mandatory minimum penalties applicable to their criminal conduct before their apprehension or other contact with the criminal justice system?” *See* Appendix F of this Report. Prosecutors were not asked this question. Nonetheless, prosecutors in at least four districts seemed to think that offenders are aware of mandatory minimum penalties before the commission of an offense. For example, one prosecutor said that a marijuana offender would grow only 98 plants, instead of 100, to avoid the mandatory minimum penalty. Another suggested that charging a 924(c) count would result in drug organizations refraining from having firearms in the proximity of drugs.

strength of the evidence or a sentence reduction were the two incentives most frequently identified by prosecutors.

The defense attorneys agreed that the strength of the evidence and a sentence reduction were among the best incentives offered by the government to induce a guilty plea. Some also noted that avoiding the application of a mandatory minimum penalty (such as section 924(c), section 851, or receipt of child pornography) also provided offenders with a strong incentive to plead guilty.

3. *Trial Rates Driven by Mandatory Minimum Penalties*

The Commission asked defense attorneys whether some clients chose to go to trial because of charges carrying mandatory minimum penalties. The overwhelming majority said that this was the case, particularly for offenders who are not eligible for safety valve relief or who were exposed to heightened mandatory minimum penalties.⁵⁶⁴

4. *Impact on Willingness to Provide Substantial Assistance*

The Commission asked prosecutors and defense attorneys whether being charged with a mandatory minimum penalty influenced an offender's willingness to cooperate. The majority of prosecutors thought that being charged with a mandatory minimum penalty did influence an offender's willingness to cooperate. Although most agreed that the guidelines also had some influence, only a few thought that the guidelines had the same impact as a mandatory minimum penalty for inducing an offender to provide substantial assistance to the government.

The FPD representatives disagreed about the impact of mandatory minimum penalties on their clients' willingness to provide substantial assistance. Most thought that other factors drove the decision and those factors varied for each individual client. Most also thought that a mandatory minimum penalty and the guidelines factored equally into their clients' decision to provide substantial assistance to the government.

Most of the CJA representatives thought that being charged with a mandatory minimum penalty had an influence on their clients' willingness to cooperate. Most also agreed that a mandatory minimum penalty and the guidelines factored equally into their clients' decision to provide substantial assistance. Many also related that other factors also drove the decision and that the weight of any particular factor varied by client.

⁵⁶⁴ Defense attorneys were asked: "Do some defendants choose to go to trial because of charges carrying mandatory minimum penalties when they would otherwise have pleaded guilty if a charge not carrying a mandatory minimum had been brought?" See Appendix F of this Report. Although not asked this specific question, prosecutors in some districts agreed that they tried cases involving heightened mandatory minimum penalties more often.

5. *False Testimony by Cooperators*

The Commission asked prosecutors and defense attorneys whether they had any personal experience with cooperators providing testimony later found to be false by the court. In 11 of the 13 districts, prosecutors were unable to identify any instance where a cooperator's testimony was found to be false.⁵⁶⁵ In two districts, prosecutors identified one instance each where this had occurred. Prosecutors attribute the rarity of such an event to the level of corroboration required when a cooperator testifies.

Prosecutors in three districts identified one instance each where they refused to file a substantial assistance motion on behalf of a cooperating witness who had testified at trial.⁵⁶⁶ In each of the three instances the prosecutors thought that the offender lied under oath, either by recanting or contradicting earlier statements. Most prosecutors advised that they often did not call a cooperating witness at trial because they thought the cooperating witness was not being completely truthful.⁵⁶⁷

No defense attorney identified an instance where their own client offered testimony at trial later found to be false by the court.⁵⁶⁸ Although defense attorneys sometimes believed that cooperators had offered false testimony against their clients, only one cited an actual case where the court determined that a cooperator's testimony was not credible. Another cited an instance where the client was acquitted but mentioned that the cooperator still received substantial assistance relief pursuant to §5K1.1. Most defense attorneys related instances where their clients' proffered testimony was not accepted because the government attorneys were not convinced that it was truthful.

6. *Safety Valve*

The Commission inquired about prosecutors' and defense attorneys' views on whether the safety valve was working as intended in their district. Most prosecutors thought that the safety valve worked well. Some did express negative views, however. Prosecutors in one

⁵⁶⁵ Prosecutors were asked the following: "Critics of mandatory minimum penalties suggest that they lead to false testimony by cooperators seeking relief from those penalties. Have you had any experiences with cooperators offering testimony later found to be false? If so, please describe that experience." See Appendix F of this Report.

⁵⁶⁶ Prosecutors were asked the following: "Have you ever declined to file a substantial assistance motion because you determined that the cooperator testified falsely?" See Appendix F of this Report.

⁵⁶⁷ Prosecutors were asked the following: "Have you ever declined to use testimony offered by a cooperator because you had concerns about the veracity of the testimony being offered?" See Appendix F of this Report.

⁵⁶⁸ Defense attorneys were asked three questions about possible false testimony: 1) "Critics of mandatory minimum penalties suggest that they lead to false testimony by cooperators seeking relief from those penalties. Have you had any clients who cooperated with the government and provided testimony that was later found to be false? If so, please describe that experience"; 2) "Have you ever represented a client for whom the government declined to file a substantial assistance motion because it determined that your client testified falsely? If so, please describe that experience"; and 3) "Have you ever represented a client who offered to testify as a cooperating witness, and the government has refused to accept that offer? If so, please describe that experience." See Appendix F of this Report.

district described the safety valve as the “worst thing ever” because it took away offenders’ incentive to cooperate. In another, prosecutors described a “huge flaw” in the operation of the safety valve: some offenders eligible for enhanced penalties qualified for safety valve because their prior convictions were too old to be scored under the guidelines’ criminal history rules. In various districts, prosecutors identified disputes over whether an offender had “truthfully provided to the Government all information and evidence”⁵⁶⁹ about the offense, referred to as the fifth prong of the safety valve. A few prosecutors expressed reservations that low-level offenders with a minor criminal history were sometimes excluded because of their criminal history; others thought the bright line rules regarding criminal history were appropriate.

For the most part, defense attorneys thought that the safety valve worked well for qualifying offenders. In fact, one defense attorney described it as a “godsend.” Many agreed with prosecutors that the parties frequently litigated the fifth prong and they expressed dissatisfaction that some prosecutors treat the truthful disclosure requirement as a lesser form of substantial assistance. Most defense attorneys view this statutory requirement as less onerous and report that some, but not all, prosecutors share this view.

Disqualification due to criminal history issues was the primary area of concern noted by defense attorneys. Most opined that the safety valve could be improved by expanding it to include at least one additional criminal history category. Defense attorneys echoed concerns expressed by some prosecutors about low-level offenders with a minor criminal history sometimes being ineligible for relief under the safety valve because of their criminal history. A number of defense attorneys suggested that the safety valve should not be limited to drug crimes and should be expanded to include different types of crimes.

⁵⁶⁹ 18 U.S.C. § 3553(f)(5).

STATISTICAL OVERVIEW OF MANDATORY MINIMUM PENALTIES

A. INTRODUCTION

The statutory directive requires the Commission to provide a detailed empirical research study of the effect of mandatory minimum penalties under Federal law. As part of that study, this chapter provides a statistical overview of the application of mandatory minimum penalties for all offenses. First, this chapter provides a description of the methodology used for the analyses in this report. Second, this chapter presents general comparisons between offenders in the overall federal population, offenders convicted of an offense under a statute carrying a mandatory minimum penalty, offenders who obtained relief from application of a mandatory minimum penalty, and offenders who remained subject to a mandatory minimum penalty at the time of sentencing. Third, this chapter presents data about sentencing outcomes involving the application of mandatory minimum penalties. Discussion of the four types of offenses carrying mandatory minimum penalties are presented in Chapters 8 through 11 of this report.

The statutory directive also directs the Commission to provide an assessment of the impact of mandatory minimum sentencing provisions on the federal prison population. Part E of this chapter provides an overall assessment of the prison impact of statutes carrying mandatory minimum penalties, while the prison impact of specific types of offenses carrying mandatory minimum penalties are discussed in Chapters 8 through 11 of this report. Finally, this chapter sets forth findings with respect to the overall application of mandatory minimum penalties.

B. METHODOLOGY

The majority of data analyzed in this report is taken from the Commission's fiscal year 2010 data file.⁵⁷⁰ In fiscal year 2010, the Commission received sentencing information on 83,946 individual offenders.⁵⁷¹ The Commission received sufficient documentation for analysis in 72,878 cases.⁵⁷² These 72,878 cases were used in the analysis. In addition, the Commission, despite the lack of full documentation, included another 254 cases in which the sole statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which the only statute of conviction was

⁵⁷⁰ Some of the analyses in this report also use the Commission's data files from fiscal years 1991 through 2009. The same methodology applied to selecting cases for analysis in all years.

⁵⁷¹ Sentencing courts are required to send five sentencing documents to the Commission, *see supra* note 5.

⁵⁷² The Commission excluded 11,068 cases because those cases lacked the complete documentation needed for all the analyses performed. In 8,148 of those cases, the majority of which were immigration cases from border districts, the court waived the presentence investigation report. As a result, those cases lacked the documentation needed for the analysis, including guideline application and demographic information. The Commission excluded other cases in which the statement of reasons form and the presentence investigation report contained conflicting information concerning guideline application because the Commission could not ascertain how the Chapter 2 guideline was applied. Finally, the Commission excluded other cases lacking documentation concerning the statutes of conviction because the Commission could not determine whether those cases involved a conviction of an offense carrying a mandatory minimum penalty.

18 U.S.C. § 1028A,⁵⁷³ bringing the total number of cases used in the analysis to 73,239 (which is 87.2% of all cases reported to the Commission in fiscal year 2010). Because the analysis for this report was limited to these cases, the numbers reported in this report differ from those reported in the Commission's 2010 *Sourcebook of Federal Sentencing Statistics*, which involves a larger dataset.

For the analyses discussed in this report, an offender was considered to have been convicted of an offense carrying a mandatory minimum penalty if any statute of conviction in the case contained a provision requiring imposition of a minimum term of imprisonment. This determination was made regardless of whether the offender was ultimately sentenced without regard to the mandatory minimum penalty through operation of the statutory safety valve provision or through a substantial assistance motion made by the government. In fiscal year 2010, 27.2 percent of all cases (19,896 of 73,239 cases) involved a conviction of an offense carrying a mandatory minimum penalty.

The Commission also obtained court documentation on the reduction of sentences for substantial assistance to the government after sentencing pursuant to Federal Rule of Criminal Procedure 35(b).⁵⁷⁴ In fiscal year 2010, the Commission received information on 2,006 offenders who received relief under Rule 35(b) from application of a mandatory minimum penalty. These 2,006 cases were added to the 73,239 cases in which the offender was initially sentenced in fiscal year 2010 for the purpose of the trend analyses presented in this report⁵⁷⁵ about rates at which offenders obtained relief from the imposition of a mandatory term of imprisonment.⁵⁷⁶

⁵⁷³ The respective guideline provisions applicable to those offenses provide that the guideline sentence is the mandatory minimum penalty prescribed in the statute, and further provide that Chapters Three and Four of the *Guidelines Manual* do not apply to the offense. See USSG §§2B1.6 (Aggravated Identity Theft); 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Thus, the Commission can determine the relevant guideline application information in those cases based solely on the statute of conviction.

⁵⁷⁴ Rule 35(b) authorizes the court to reduce a sentence below the applicable mandatory minimum term upon the government's motion when the defendant provides substantial assistance post-sentencing. Because a defendant may be sentenced and subsequently resentenced pursuant to Rule 35(b) in different fiscal years, the Commission maintains a separate data file to collect resentencing data. This data is contained in the Commission's 2010 Resentencing data file.

⁵⁷⁵ See, e.g., Figure 7-9.

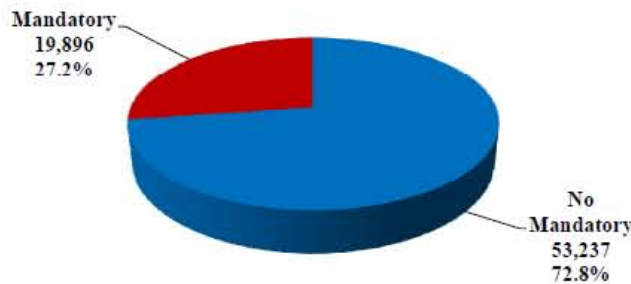
⁵⁷⁶ As noted above, the Commission maintains a separate data file to collect resentencing data because an offender may be sentenced and subsequently resentenced in different fiscal years. The Commission included the offenders who received relief under Rule 35(b) during fiscal year 2010 in the analysis performed for this report to provide more complete information about the number of offenders who received relief from a mandatory minimum penalty by any provisions, whether at the time of sentencing or afterwards. The Commission recognizes that inclusion of these offenders in fiscal year 2010 data may be over or under inclusive of the relief that eventually may be obtained by all offenders sentenced in that fiscal year. The Commission concluded that reporting only on offenders who received relief from a mandatory minimum penalty pursuant to section 3553(e) would under-represent the number of offenders who received such relief, because in some districts, the practice is to file substantial assistance motions after the original sentencing.

The analysis of sentencing trends in this report relies exclusively on Commission data.⁵⁷⁷ Except where otherwise noted, the Commission collected all the data reported in this report.⁵⁷⁸ For the prison impact analysis presented throughout this report, the Commission obtained prisoner data from the BOP to compare to Commission data. By merging the two datasets, the Commission was able to create snapshots of the federal prison population at different points in time.

C. STATISTICAL OVERVIEW

In fiscal year 2010, immigration, drugs, firearms, and fraud offenses accounted for 82.9 percent of the 73,239 cases included in this analysis. More than one-quarter of the cases in which an offender was sentenced in fiscal year 2010 (27.2%, n=19,896) involved a conviction of an offense carrying a mandatory minimum penalty. See Figure 7-1. More than half (53.4, n=10,605) of the 19,896 offenders convicted of an offense carrying a mandatory minimum penalty remained subject to the mandatory minimum penalty at sentencing. See Figure 7-2. This figure represents 14.5 percent of the 73,239 cases included in this analysis.

Figure 7 - 1
Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
Fiscal Year 2010

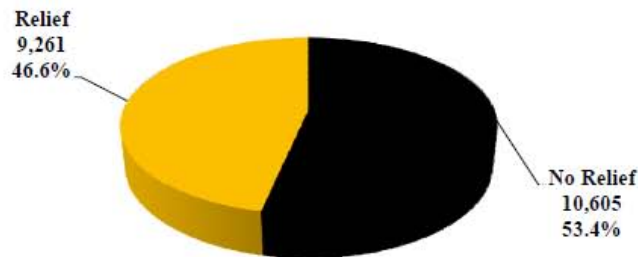


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

⁵⁷⁷ The 1991 Commission Report also included data about sentencing trends which relied on alternative sources of data for much of the trend analysis presented. Those sources included the Federal Probation Sentencing and Supervision Information System of the Administrative Office of the United States Courts and the Federal Judicial Center. The Commission relied on these alternate sources in 1991 because portions of the periods reported preceded the Commission's existence.

⁵⁷⁸ The Commission collects sentencing data based on the offenses for which the offender was actually convicted and the determinations made by the court at sentencing. Accordingly, the Commission cannot determine using available data whether any charged counts were dismissed without a conviction, nor can it readily determine whether the government exercised its discretion *not* to charge an offender with additional offenses that could have been supported by the facts of the case.

Figure 7 - 2
Offenders Relieved of an Offense Carrying a Mandatory Minimum Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

In fiscal year 2010, more than three-quarters (77.4%) of the 19,896 defendants convicted of an offense carrying a mandatory minimum penalty were convicted of a drug trafficking offense, and 11.9 percent were convicted of a firearms offense.⁵⁷⁹ Convictions under just four statutes involving drug trafficking and firearms⁵⁸⁰ accounted for the majority of such convictions (71.6%).⁵⁸¹ Other statutes carrying mandatory minimum sentencing provisions involved child pornography, aggravated identity theft, and violent offenses.

1. *Demographic Characteristics*

Table 7-1 presents the demographic characteristics of all 73,239 offenders included in this analysis. The table also compares this information to the demographic characteristics of the 19,896 offenders convicted of an offense carrying a mandatory minimum penalty and to the 10,605 offenders who remained subject to a mandatory minimum penalty at sentencing.

As shown in Table 7-1, Hispanic offenders are the largest portion of the federal offender population, slightly less than half of all offenders (48.3%, n=35,064). White offenders are the next largest group, at 27.4 percent (n=19,935), followed by Black offenders (20.7%, n=15,041) and Other Race offenders (3.6%, n=2,581).⁵⁸² Slightly more than half of all offenders (55.9%,

⁵⁷⁹ See Table D-2 (Mandatory Minimum Status in Each Primary Offense Category (Fiscal Year 2010)) in Appendix D of this Report.

⁵⁸⁰ 21 U.S.C. §§ 841, 844, 960; 18 U.S.C. § 924(c).

⁵⁸¹ See Table D-3 (Number of Convictions and Mean Sentence for Mandatory Minimum Statutes (Fiscal Year 2010)) in Appendix D.

⁵⁸² The Commission obtains data on the race and ethnicity of the offender from the presentence report. The “Other Race” category includes offenders of Native American, Alaskan Native, and Asian or Pacific Islander origin. In fiscal year 2010, there were 2,581 offenders identified as “Other” race offenders: 1,360 (52.7%) were of Asian/Pacific Islander origin, 1,050 (40.7%) were Native American/Alaskan Native, and 171 (6.6%) were of other origin.

n=40,893) are United States citizens. The great majority of offenders are men (87.9%, n=64,377).

Hispanic offenders also account for the largest group of offenders (38.3%, n=7,601) convicted of an offense carrying a mandatory minimum penalty. Blacks are the next largest group, at 31.5 percent (n=6,261), followed by White offenders (27.4%, n=5,447) and Other Race offenders (2.7%, n=543). United States citizens account for 73.6 percent (n=14,639) of those offenders convicted of an offense carrying a mandatory minimum penalty. More than 90 percent (90.3%, n=17,975) of the offenders were men.

Hispanic offenders also account for the largest group of offenders (45.7%, n=4,237) who are convicted of an offense carrying a mandatory minimum penalty but are relieved of the penalty at sentencing. This is mainly due to the large number of Hispanic offenders who are relieved due to safety valve, which is discussed in more detail later in this chapter. United States citizens account for over 60 percent (63.5%, n=5,897) of offenders who are relieved of a mandatory minimum penalty and males are a large percentage of the same group (86.4%, n=8,032).

As discussed above, some offenders convicted of an offense carrying a mandatory minimum penalty are not subject to such a punishment at sentencing because they have received relief as a result of either substantial assistance or the safety valve. Of all offenders convicted of an offense carrying a mandatory minimum punishment and who remained subject to that penalty at sentencing, 38.5 percent were Black (n=4,076), 31.8 percent were Hispanic (n=3,364), and 27.5 percent (n=2,913) were White. In addition, 82.5 percent (n=8,742) of all such offenders were United States citizens, and 93.8 percent were men (n=9,943).

As seen from this data, although Hispanic offenders comprise the largest proportion of offenders convicted of an offense carrying a mandatory minimum penalty, Black offenders are represented more heavily in both the populations of offenders convicted of an offense carrying a mandatory minimum penalty and offenders subject to a mandatory minimum penalty at sentencing compared to their proportion in the offender population. Similarly, United States citizen offenders and male offenders each constitute a greater proportion of the populations of offenders convicted of an offense carrying a mandatory minimum penalty and those subject to a mandatory minimum penalty than their respective portions of the overall offender population. The Commission's analysis of this data suggests that these outcomes may be associated with the type of offense associated with certain demographic groups. Additional analysis of these differences will be discussed in more detail later in this report in the chapters discussing those offenses.⁵⁸³ These chapters also include additional analysis concerning offenders who obtained relief from the mandatory minimum penalty.

⁵⁸³ See *infra* Chapters 8–11.

**Table 7-1
Demographic Characteristics of Offenders
Fiscal Year 2010**

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	73,239	19,896	9,291	10,605
Race of Offender (Percent)				
White	27.4	27.4	27.3	27.5
Black	20.7	31.5	23.6	38.5
Hispanic	48.3	38.3	45.7	31.8
Other	3.6	2.7	3.4	2.1
Citizenship of Offender (Percent)				
United States Citizen	55.9	73.6	63.5	82.5
Non-Citizen	44.1	26.4	36.5	17.5
Gender of Offender (Percent)				
Male	87.9	90.3	86.4	93.8
Female	12.1	9.7	13.6	6.2

2. *Criminal History*

Table 7-2 provides an overview of the criminal history categories for all offenders, offenders convicted of an offense carrying a mandatory minimum penalty, offenders relieved from a mandatory minimum penalty, and offenders subject to a mandatory minimum penalty at sentencing. As shown in that table, the criminal history of the offenders convicted of an offense carrying a mandatory minimum penalty closely mirrors that of the overall offender population. However, the criminal history of those offenders who remained subject to a mandatory minimum penalty at sentencing has a different composition, with higher percentages of offenders in the more serious criminal history categories. Thus, offenders in Criminal History Category I were more likely to be relieved of the mandatory minimum penalty than offenders in higher criminal history categories, and offenders in higher criminal history categories were less likely to be relieved.

More offenders were assigned to Criminal History Category I than any other criminal history category in all three groups. Those offenders appeared at a slightly higher rate in the population of offenders convicted of an offense carrying a mandatory minimum penalty (49.0%, n=9,702) as compared to the population of all offenders (43.9%, n=32,141). However, the portion of offenders in Criminal History Category I dropped to 31.9 percent (n=3,361) of those

offenders subject to a mandatory minimum penalty at sentencing,⁵⁸⁴ most likely because some Criminal History Category I offenders were drug offenders who obtained relief from application of the mandatory minimum penalty due to the safety valve. By contrast, offenders in Criminal History Category VI, the highest category, represented 14.0 percent (n=2,784) of the population of offenders convicted of an offense carrying a mandatory minimum penalty but 19.1 percent (n=2,013) of the population of offenders subject to a mandatory minimum penalty at sentencing.

**Table 7-2
Criminal History of Offenders
Fiscal Year 2010**

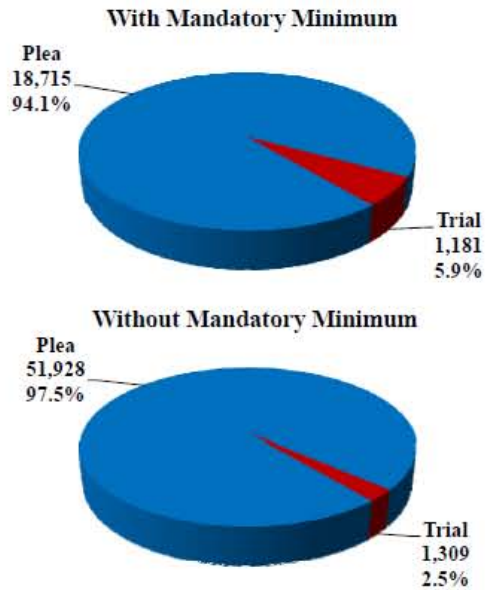
	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	73,239	19,896	9,291	10,605
Criminal History Category (Percent)				
I	43.9	49.0	68.3	31.9
II	12.4	11.2	7.6	14.4
III	16.6	13.5	8.8	17.7
IV	10.5	7.7	4.4	10.6
V	6.1	4.6	2.6	6.3
VI	10.4	14.0	8.3	19.1

3. *Guilty Pleas and Trials*

Offenders convicted of an offense carrying a mandatory minimum penalty plead guilty at a slightly lower rate than offenders who were not convicted of an offense carrying a mandatory minimum penalty. Of the 19,896 offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010, 94.1 percent (n=18,715) pled guilty and 5.9 percent (n=1,181) were convicted after a trial. By comparison, of the offenders convicted of offenses not carrying any mandatory minimum penalty, 97.5 percent (n=51,928) pled guilty and 2.5 percent (n=1,309) were convicted after a trial. *See* Figure 7-3.

⁵⁸⁴ Of these 3,361 offenders in Criminal History Category I who remained subject to a mandatory minimum penalty at the time of sentencing, 56.1% (n=1,885) were drug offenders, 18.3% (n=615) were child pornography offenders, 10.4% (n=350) were firearms offenders convicted of a violation of 18 U.S.C § 924(c), 8.5% (n=286) were identity theft offenders convicted of a violation of 18 U.S.C § 1028A, and 6.7% (n=225) were sexual abuse offenders.

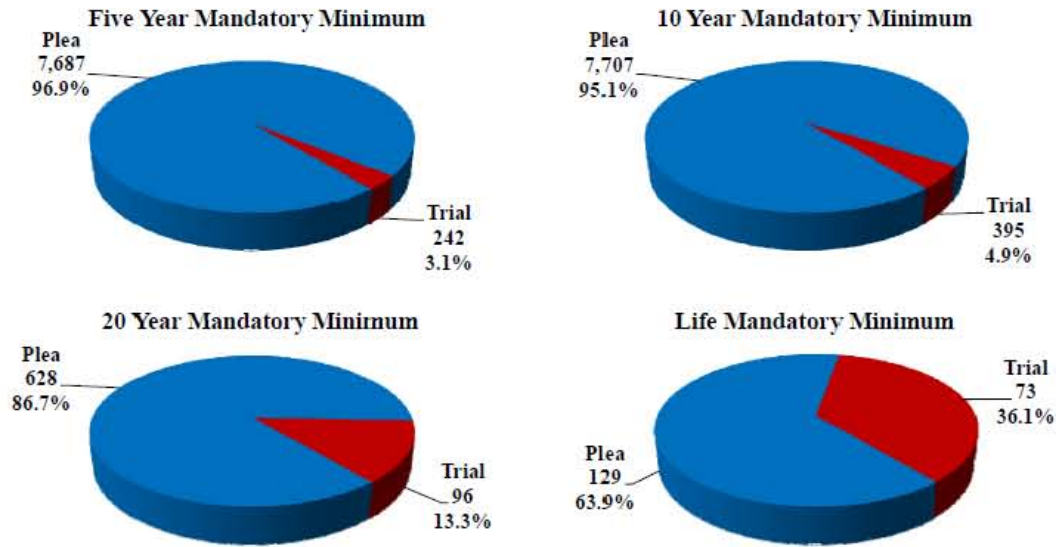
Figure 7-3
Plea and Trial Rates by Mandatory Minimum Status
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

As illustrated in Figure 7-4, there is a diminishing effect on the guilty plea rate as the term of imprisonment required by mandatory minimum sentencing provisions increases. That is, the longer the mandatory minimum penalty an offender faces, the less likely he or she is to plead guilty. In fiscal year 2010, 96.9 percent (n=7,687) of offenders convicted of an offense carrying a five-year mandatory minimum penalty pled guilty. This compares to 95.1 percent (n=7,707) of offenders convicted of an offense carrying a ten-year mandatory minimum penalty, 85.8 percent (n=166) of offenders convicted of an offense carrying a 15-year mandatory minimum penalty, 86.7 percent (n=628) of offenders convicted of an offense carrying a 20-year mandatory minimum penalty, and 63.9 percent (n=129) of offenders convicted of an offense carrying a mandatory minimum penalty of life. See Figure 7-4.

Figure 7-4
Plea and Trial Rates of Offenders by Length of Mandatory Minimum Penalty
Fiscal Year 2010

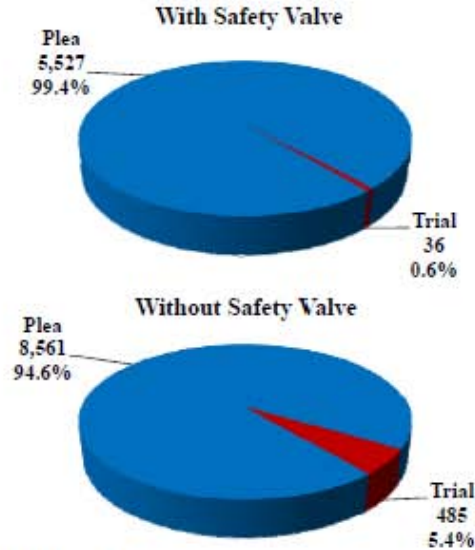


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

Many of the offenders convicted of an offense carrying a five- or ten-year mandatory minimum penalty were eligible to be sentenced without regard to the mandatory minimum penalty by operation of the statutory safety valve.⁵⁸⁵ Offenders who were eligible for safety valve relief pled guilty at a higher rate (99.4%, n=5,527) than those offenders who were not eligible for safety valve relief (94.6%, n=8,561). See Figure 7-5.

⁵⁸⁵ Drug offenders convicted of an offense carrying a 20-year mandatory minimum penalty are generally ineligible for the safety valve because they have a prior felony drug conviction, see 21 U.S.C. §§ 841, 960. In those instances in which a prior felony drug conviction may be too old to be scored under the criminal history rules in Chapter 4 of the *Guidelines Manual*, a drug offender convicted of an offense carrying a 20-year mandatory minimum penalty might qualify for the safety valve.

Figure 7-5
Plea and Trial Rates for Offenders with a Five or Ten Year Mandatory Minimum Penalty
By Safety Valve Status
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 DataFile, USSCFY10

4. *Geographic Variations*

Commission data reveals geographic differences in the rates at which mandatory minimum penalty provisions apply, much of which is related to differences in caseloads around the country.⁵⁸⁶ More than half (55.4%, n=11,015) of the 19,896 cases involving mandatory minimum penalties were brought in the district courts in four circuits. Of the 19,896 cases in fiscal year 2010 that involved a conviction of an offense carrying a mandatory minimum penalty, 3,178 (16.0%) were in the Fifth Circuit, 3,066 (15.4%) were in the Ninth Circuit, 2,401 (12.0%) were in the Fourth Circuit, and 2,370 (11.9%) were from district courts in the Eleventh Circuit. By way of comparison, 61.2 percent of all federal criminal cases in fiscal year 2010 came from the district courts in those four circuits.⁵⁸⁷

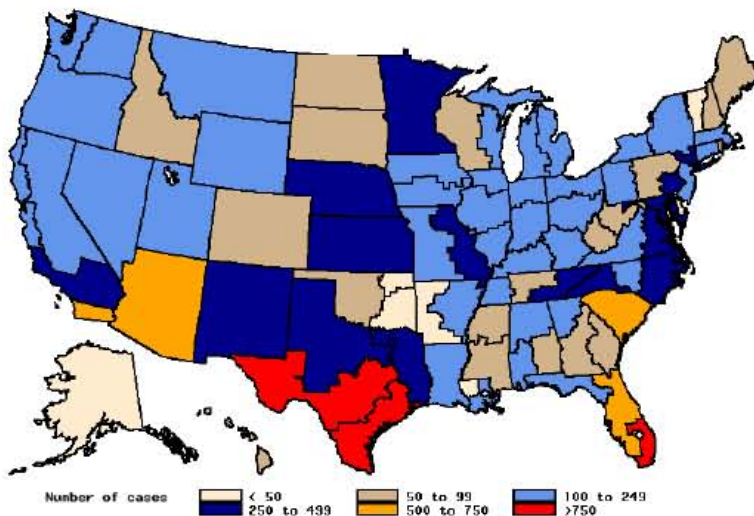
When viewed at the district level, only three districts reported more than 750 cases involving a conviction of an offense carrying a mandatory minimum penalty: Southern Texas (5.7%, n=1,129), Western Texas (5.3%, n=1,061), and Southern Florida (3.9%, n=776). An additional four districts reported at least 500 cases involving a conviction of an offense carrying a mandatory minimum penalty: Southern California (3.6%, n=710), Middle Florida (3.3%, n=649), Arizona (2.7%, n=540), and South Carolina (2.5%, n=502). Thus, those seven districts

⁵⁸⁶ See Table D-1 (Mandatory Minimum Status of Cases in Each Circuit and District (Fiscal Year 2010)) in Appendix D.

⁵⁸⁷ See *id.*

accounted for 27.0 percent (n=5,367) of the 19,896 cases involving a conviction of an offense carrying a mandatory minimum penalty in fiscal year 2010. By way of comparison, 38.1 percent of all federal criminal cases in fiscal year 2010 came from those seven districts. The majority of the 94 districts (69 or 73.4%) reported fewer than 250 cases involving convictions under a statute carrying a mandatory minimum penalty.⁵⁸⁸ See Figure 7-6.

Figure 7-6
Number of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
By District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

Cases involving a conviction of an offense carrying a mandatory minimum penalty comprised varying percentages of the districts' criminal case docket. In ten districts, more than 50 percent of the cases involved convictions of an offense carrying a mandatory minimum penalty. These districts were: Puerto Rico (62.9%, n=491), Southern Indiana (55.8%, n=182), Minnesota (54.3%, n=261), Southern Iowa (54.2%, n=227), Western Virginia (53.7%, n=191), Hawaii (51.9%, n=82), Central Illinois (51.9%, n=191), Eastern Tennessee (51.4%, n=420), Western North Carolina (50.5%, n=251), and Eastern North Carolina (50.1%, n=350).⁵⁸⁹ In contrast, in 12 other districts, less than 20 percent of all cases involved convictions under a statute carrying a mandatory minimum penalty. These districts were: New Mexico (9.1%, n=333), Arizona (11.0%, n=540), Southern Texas (13.7%, n=1,129), Colorado (14.3%, n=72), Northern Mariana Islands (14.8%, n=4), Western Texas (16.1%, n=1,061), Middle Pennsylvania (16.9%, n=82), South Dakota (17.8%, n=71), Utah (17.9%, n=143), Western Arkansas (18.0%, n=46), Western Oklahoma (18.4%, n=52), and Nevada (19.7%, n=116).⁵⁹⁰ See Figure 7-7A.

⁵⁸⁸ See *id.*

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

Much of the variation in rates of application may be attributed to differences in the composition of the caseloads in those districts. For example, in the ten districts applying mandatory minimums at the highest rates, drug and firearms offenses made up a significant portion of these districts' caseload (49.4% of the cases involved drugs and 17.4% involved firearms).⁵⁹¹ In the 12 districts reporting the lowest application rates, more than half of the cases in those courts were immigration offenses (60.5%) and less than one-third were drug or firearms offenses (23.6% and 4.2%, respectively).⁵⁹²

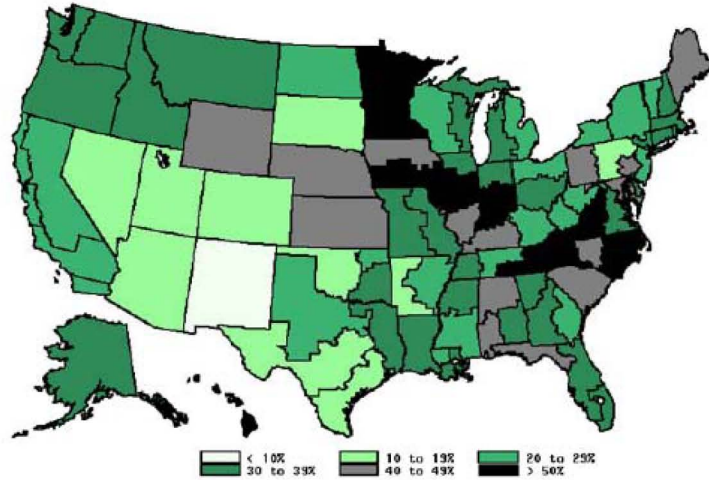
Figure 7-7B illustrates how immigration offenses affect the proportion of cases involving a mandatory minimum penalty in certain districts. Immigration offenses comprise a significant proportion of certain districts' criminal dockets, but the most common immigration offenses rarely carry mandatory minimum penalties.⁵⁹³ Excluding immigration offenses from the analysis can present a better picture of where mandatory minimum penalties are most frequently used.

⁵⁹¹ See Commission, 2010 Datafile, USSCFY10.

⁵⁹² *Id.*

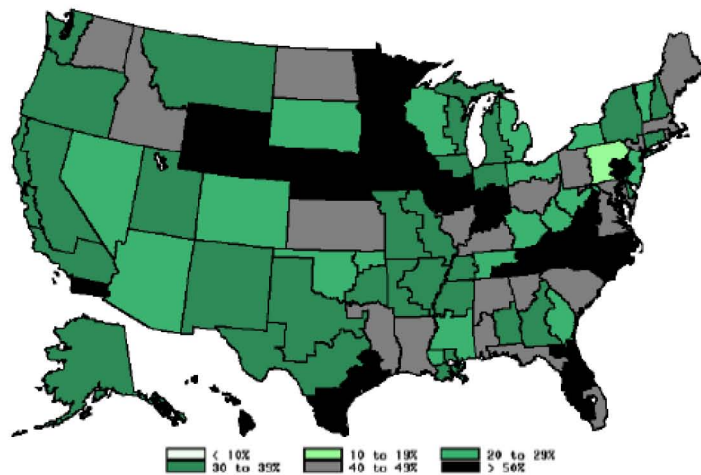
⁵⁹³ For example, in fiscal year 2010, USSG §2L1.2 (Unlawfully Entering or Remaining in the United States) was the primary guideline in 26.6% (n=19,910) of all federal criminal cases, making it the second-most commonly applied primary guideline. See U.S. SENT'G COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at Table 17. Only one, rarely-used statutory offense to which §2L1.2 applies carries a mandatory minimum penalty. See 8 U.S.C. § 1326(b)(3) (establishing ten-year mandatory minimum penalty for illegal reentry of an alien removed on national security grounds); see also Table D-3 (Number of Convictions and Mean Sentence for Mandatory Minimum Statutes) in Appendix D (reporting zero convictions of an offense under section 1326(b)(3) in fiscal year 2010). Immigration offenses referenced to other guidelines carry mandatory minimum penalties, though offenders are less frequently convicted of them than illegal reentry and other immigration offenses. See 8 U.S.C. § 1324(a)(2)(B) (establishing three- and five-year mandatory minimum penalties for bringing in or harboring an alien with the intent or reason to believe that the alien will commit a felony or for the purpose of commercial advantage or financial gain). Only 150 offenders were convicted of an offense under section 1324(a)(2)(B) in fiscal year 2010. Additionally, in fiscal year 2010, a small number (n=86) of immigration offenders also were convicted of committing aggravated identity theft in violation of 18 U.S.C. § 1028A, which carries a two-year mandatory penalty. See *infra* Chapter 11.

Figure 7-7A
Distribution of Offenders Convicted of an Offense Carrying a Mandatory Minimum
Penalty By District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

Figure 7-7B
Distribution of Offenders Convicted of an Offense Carrying a Mandatory Minimum
Penalty By District - Immigration Offenders Excluded
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

Figure 7-7A shows the mandatory minimum distribution⁵⁹⁴ in all cases for districts within the United States. Figure 7-7B shows the same distribution with immigration cases excluded. Notably, many of the border districts demonstrated higher application rates of mandatory

⁵⁹⁴ The percentages shown are the percentages of the overall caseload for each district involving offenders convicted of an offense carrying a mandatory minimum penalty.

minimums in the non-immigration caseload. Nevertheless, geographic variation in application rates is present.

5. *Relief from the Mandatory Minimum Penalty*

In fiscal year 2010, almost half (46.7%, n=9,292) of the offenders convicted of an offense carrying a mandatory minimum penalty were relieved from the application of such a penalty at sentencing because of substantial assistance or the safety valve. *See* Figure 7-8. Rates of relief from the mandatory minimum penalty vary by offense type: 54.4 percent of drug offenders, 4.2 percent of sex offenders, and 15.4 percent of identity theft offenders convicted of an offense carrying a mandatory minimum received relief from the mandatory minimum penalty. Among firearm offenders, 24.3 percent of offenders convicted of an offense under 18 U.S.C. § 924(c) and 17.4 percent of offenders who qualified as armed career criminals pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e), received relief from the mandatory minimum penalty.⁵⁹⁵

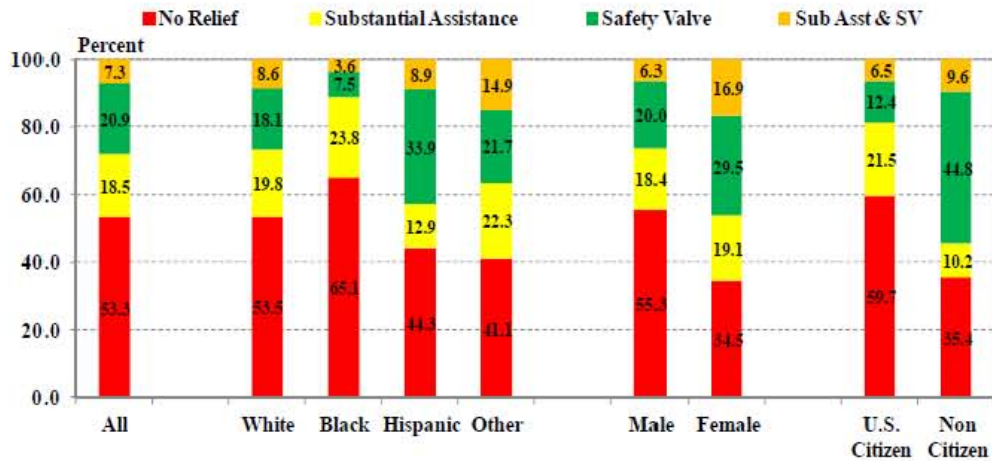
There were demographic differences in the rates of relief for offenders convicted of an offense carrying a mandatory minimum penalty, as Figure 7-8 shows. Black offenders received relief least often, and were therefore subject to the mandatory minimum penalty at the highest rate (65.1%, n=4,076). This is due, in large part, to Black offenders qualifying for relief under the safety valve at the lowest rate of any other racial group (11.1%, n=695). Much of this difference can be attributable to the fact that Black offenders who commit drug offenses often do not qualify for the safety valve either because of their criminal history⁵⁹⁶ or the involvement of a dangerous weapon in connection with the offense.⁵⁹⁷ The converse is true for Other Race offenders who received relief from mandatory minimum penalties most often, and so were subject to such penalties at the lowest rate (41.1%, n=223). These offenders qualified for the safety valve at the highest rate (36.6%, n=199).

⁵⁹⁵ *See infra* Chapters 8–11.

⁵⁹⁶ In fiscal year 2010, 76.1% (n=4,738) of Black offenders who were convicted of an offense carrying a mandatory minimum penalty were in Criminal History Categories II – VI, which would disqualify them from consideration for the safety valve. By contrast, 47.6% (n=2,582) of White offenders, 33.6% (n=2,544) of Hispanic offenders, and 41.8% (n=226) of Other Race offenders were in Criminal History Categories II – VI.

⁵⁹⁷ In fiscal year 2010, 20.4% (n=1,277) of Black offenders convicted of an offense carrying a mandatory minimum penalty were convicted of a firearm offense under 18 U.S.C. § 924(c). This compares to 8.4% (n=458) of White offenders, 6.3% (n=480) of Hispanic offenders, and 12.5% (n=68) of Other Race offenders. In addition, 15.6% (n=952) of Black offenders convicted of an offense carrying a mandatory minimum penalty received an enhancement under USSG §2D1.1(b)(1) for weapon involvement. This compares to 8.7% (n=464) of White offenders, 11.3% (n=845) of Hispanic offenders, and 8.5% (n=45) of Other Race offenders.

Figure 7-8
Percent of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
Who Were Relieved of the Penalty
Fiscal Year 2010

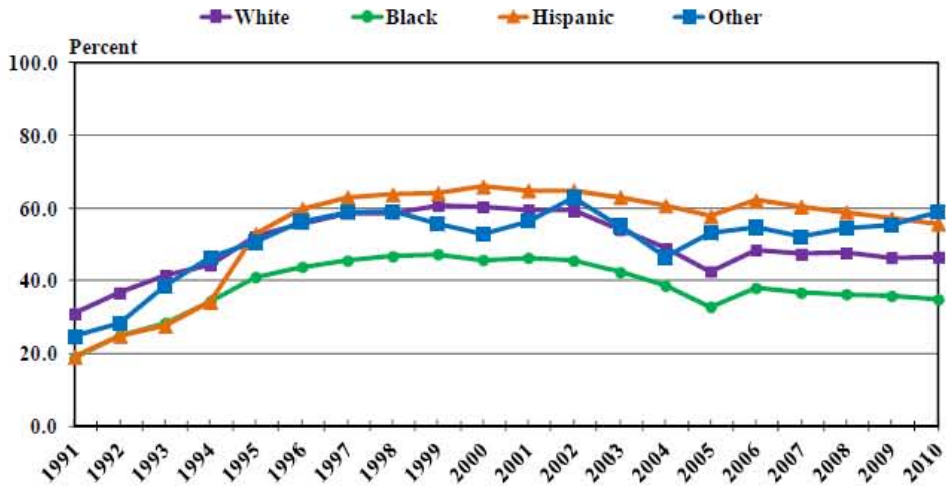


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

In light of the demographic differences noted in fiscal year 2010 between the rates of relief for offenders convicted of an offense carrying a mandatory minimum penalty, the Commission conducted further analysis. The analysis was designed to ascertain how often each demographic group received relief from applicable mandatory minimum penalties, pursuant to either a substantial assistance motion or the safety valve provision, from fiscal year 1991 through fiscal year 2010. As can be seen on Figure 7-9, prior to the enactment of the safety valve (in 1994), Black and Hispanic offenders received relief from the mandatory minimum penalty at comparable rates. For example, in fiscal year 1994, 34.3 percent of Black offenders and 34.2 percent of Hispanic offenders received relief from the mandatory minimum penalty. White offenders received relief in 44.2 percent of cases. However, after enactment of the safety valve provision, the rate at which Hispanic, White, and Other Race offenders obtained relief from a mandatory minimum penalty increased appreciably while the rate for Black offenders did not.

Hispanic offenders received relief from applicable mandatory minimum penalties at the highest rates, with rates of 65.9 percent in fiscal year 2000, 57.7 percent in fiscal year 2005, and 55.7 percent in fiscal year 2010. Other Race offenders had the next highest rates (52.8% in fiscal year 2000, 53.1% in fiscal year 2005 and 58.9% in fiscal year 2010). Black offenders consistently had the lowest rates (45.7% in fiscal year 2000, 32.8 percent in fiscal year 2005, and 34.9% in fiscal year 2010). White offenders received relief at 60.3 percent in fiscal year 2000, 42.5 percent in fiscal year 2005, and 46.5 percent in fiscal year 2010.

Figure 7-9
Relief From Mandatory Minimum Penalty by Race of Offender
Fiscal Years 1991 - 2010

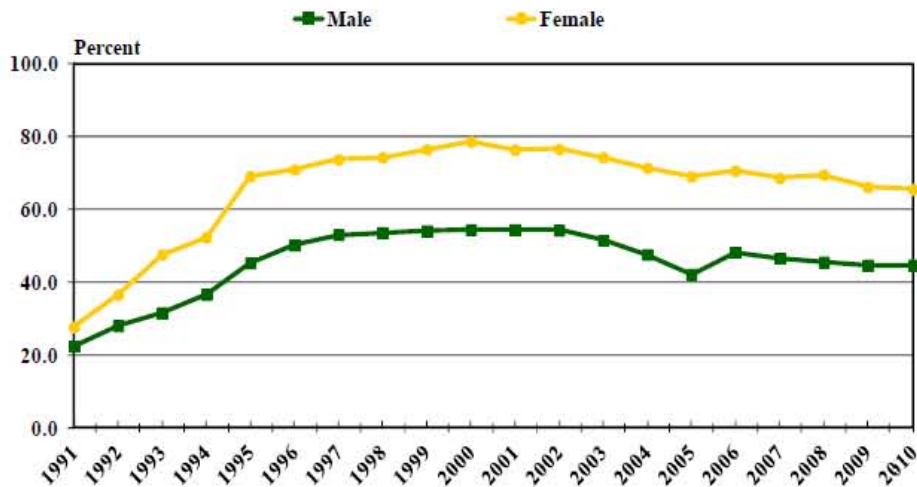


SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91- USSCFY10.

In fiscal year 2010, slightly less than two-thirds of female offenders (65.5%, n=1,259) obtained relief from the mandatory minimum penalty at sentencing compared to less than half of male offenders (44.7%, n=8,032). Not only did female offenders qualify for the safety valve at a higher rate than male offenders (46.4%, n=892 compared to 26.3%, n=4,723), but female offenders also received relief by providing substantial assistance to the government at a higher rate (36.0%, n=692) than male offenders (24.7%, n=4,439). *See* Figure 7-8.

The Commission also examined the trends for relief from the mandatory minimum by gender from fiscal years 1991 through 2010. Female offenders consistently received relief from the mandatory minimum penalty at a higher rate than male offenders, varying from 27.7 percent in fiscal year 1991 to 65.5 percent in 2010, with the highest rate of relief reported in fiscal year 2000 at 78.6 percent. Male offenders had rates of 22.4 percent in fiscal year 1991 to 44.7 percent in fiscal year 2010. The highest rate of relief reported for male offenders was 54.4 percent in fiscal years 2000 and 2001. *See* Figure 7-10.

Figure 7-10
Relief From Mandatory Minimum Penalty by Gender of Offenders
Fiscal Years 1991 - 2010



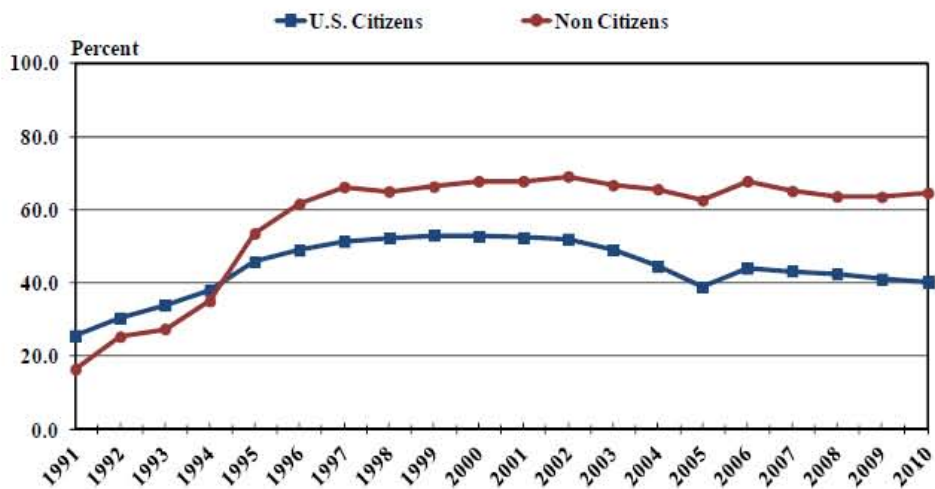
SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91- USSCFY10.

In fiscal year 2010, United States citizen offenders convicted of an offense carrying a mandatory minimum penalty remained subject to the mandatory penalty at sentencing in more than half of the cases (59.7%, n=8,741) because they did not qualify for substantial assistance or safety valve relief. Although United States citizen offenders provided substantial assistance to the government at a higher rate (28.0%, n=4,090) than non-citizen offenders (19.8%, n=1,040), the majority of non-citizen offenders (54.4%, n=2,858) qualified for relief from the mandatory minimum penalty under the safety valve. In contrast, only 18.9 percent (n=2,756) of United States citizen offenders were eligible for relief from the mandatory minimum penalty under the safety valve. *See supra* Figure 7-8.

The Commission observed a similar trend after the advent of the safety valve in 1994. Non-citizen offenders qualified for relief from the mandatory minimum penalty more frequently than United States citizens. *See* Figure 7-11. This is largely because non-citizens often have lower criminal history scores as most do not have prior convictions in the United States. As a result, non-citizens are eligible to receive relief pursuant to the safety valve at higher rates than United States citizens.⁵⁹⁸

⁵⁹⁸ Non-citizen offenders tend to have less substantial criminal histories, when compared to U.S. citizen offenders, because criminal history calculations under Chapter 4 of the *Guidelines Manual* exclude sentences resulting from foreign convictions. *See* USSG §4A1.2(h). Foreign convictions are excluded because of uncertainty regarding whether the offender received adequate due process. Furthermore, it may be uncertain whether the defendant in fact has any such convictions because “[i]t is often difficult to obtain the foreign defendant’s criminal history from the foreign jurisdiction.” *See* Michael Edmond O’Neill et al., *Past as Prologue: Reconciling Recidivism and Culpability*, 73 *FORDHAM L. REV.* 245, 253 n.49 (2004). A court, however, may consider prior foreign convictions in determining the adequacy of the defendant’s criminal history category, *see* USSG §4A1.2(h).

Figure 7-11
Relief From Mandatory Minimum Penalty by Citizenship of Offenders
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91- USSCFY10.

D. SENTENCING OUTCOMES

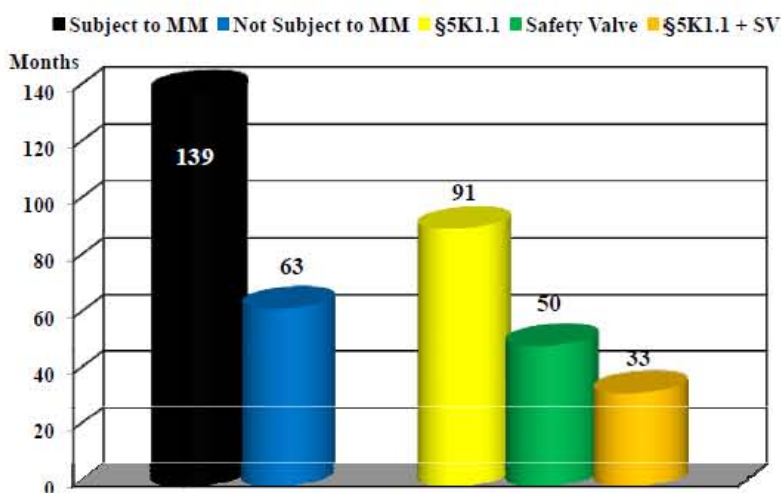
1. Average Sentence Length

In considering the effect of mandatory minimum penalties on sentencing outcomes, the Commission compared the average length of sentences imposed for all offenders, offenders convicted of an offense carrying a mandatory minimum, offenders relieved from application of a mandatory minimum because of substantial assistance and/or the safety valve, and offenders who remained subject to the mandatory minimum at sentencing. In fiscal year 2010, the average sentence length for all offenders was 48 months of imprisonment.⁵⁹⁹ Offenders who were convicted of an offense carrying a mandatory minimum penalty and remained subject to that penalty received an average sentence of 139 months. Offenders who were convicted of an offense carrying a mandatory minimum penalty but received relief from the mandatory penalty because of substantial assistance or the safety valve received an average sentence of 63 months.

⁵⁹⁹ The average sentence lengths reported here are less than those reported in Chapter 4 because the average sentence lengths reported here are for all offenders, regardless of the type of sentence imposed. *See supra* note 423 and accompanying text. Offenders who did not receive a sentence of imprisonment are counted as having received a sentence of zero months of imprisonment. In contrast, the average sentence lengths reported in Chapter 4 are the average sentences only for offenders who received a sentence of imprisonment and, therefore, offenders who did not receive a sentence of imprisonment are excluded from the average sentences reported there. Note that the average sentence lengths reported here also differ from the average sentences reported in the Commission's 2010 Sourcebook because cases lacking certain documentation were excluded from the analyses conducted for this report. *See supra* note 572 and accompanying text (explaining the data methodology used for this report).

The form of statutory relief received by offenders convicted of an offense carrying a mandatory minimum penalty was correlated with the average sentence imposed. Offenders who were relieved from application of a mandatory penalty by providing substantial assistance to the government received longer average sentences, at 91 months, than offenders who received relief under the safety valve provision (average sentence of 50 months). The offenders who qualified for relief under both mechanisms had the lowest average sentences, at 33 months. See Figure 7-12.

Figure 7-12
Average Sentence Length for Offenders Convicted of an Offense
Carrying a Mandatory Minimum Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

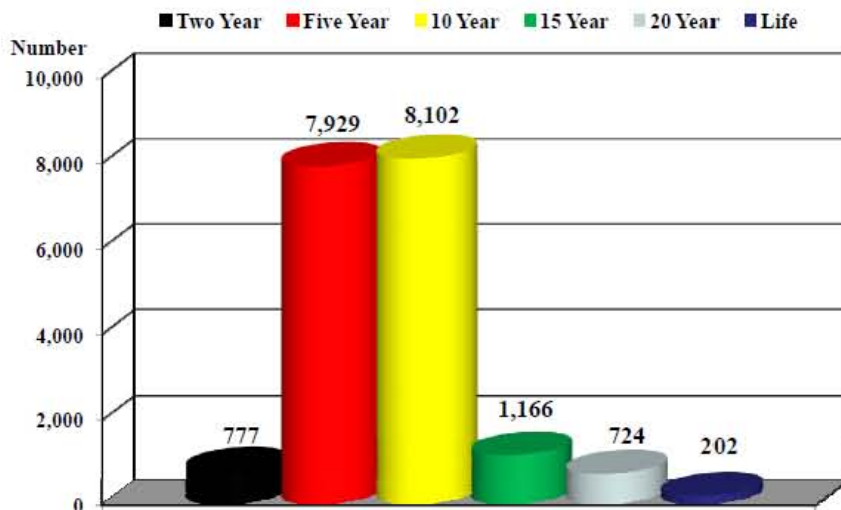
These differences may be attributable to the fact that offenders who qualify for safety valve relief are generally less culpable than other offenders and, therefore, would normally receive lower sentences on average. For example, to qualify for safety valve relief, offenders must not have possessed a dangerous weapon in connection with the offense and must not have received an aggravating role adjustment under the guidelines (for being an organizer, leader, manager, or supervisor in any criminal activity).⁶⁰⁰ Of the offenders who qualified for relief from a mandatory penalty in fiscal year 2010 by providing substantial assistance to the government (n=5,131), 10.9 percent (n=557) were also convicted of a firearms crime, 13.6 percent (n=697) received a sentence enhancement for possessing a weapon, and 9.8 percent (n=503) received an aggravating role adjustment.

To some extent, the average sentences noted above are also attributable to the length of the applicable mandatory minimum penalty involved in the case. Of the 19,896 offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010, 51.2 percent (n=10,194) were convicted of an offense carrying a mandatory minimum penalty of ten years, 15 years, 20 years, or life imprisonment. Less than 40 percent (39.8%, n=7,929) were offenders

⁶⁰⁰ See USSG §§5C1.2, 3B1.1.

convicted of an offense carrying a mandatory minimum penalty of five years of imprisonment. The remaining offenders (8.9%, n=1,773) were convicted of an offense that carried a mandatory minimum penalty of another length. See Figure 7-13.

Figure 7-13
Number of Offenders in Selected Mandatory Minimum Penalty Categories
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

The Commission compared the average length of sentences imposed for offenders by race, citizenship, and gender. Table 7-3 shows the results of that comparison. Among all offenders sentenced in fiscal year 2010, Black offenders received the highest average sentence (76 months). White offenders (49 months) had the second highest, followed by Other Race offenders (45 months) and Hispanic offenders (35 months). The same relationship occurs for offenders who were convicted of a statute carrying a mandatory minimum penalty. Black offenders had an average sentence of 127 months, followed by White offenders (102 months), Other Race offenders (93 months) and Hispanic offenders (87 months). For offenders who were convicted of a statute carrying a mandatory minimum penalty but were relieved of the application of the penalty at sentencing, Black offenders also had the highest average sentence (81 months), followed by Hispanic offenders (59 months), White offenders (57 months) and Other Race offenders (56 months). Finally, for offenders who were subject to a mandatory minimum penalty at sentencing, Black offenders had the highest average sentence (152 months), followed by Other Race offenders (147 months), White offenders (141 months) and Hispanic offenders (123 months).

United States citizens have higher sentences than non-citizens in all four instances (all offenders, offenders convicted of a statute carrying a mandatory minimum penalty, offenders relieved of a mandatory minimum penalty, and offenders subject to a mandatory minimum penalty at sentencing). Male offenders also have higher sentences than female offenders in all four instances.

Table 7-3
Average Sentence by Demographic Characteristics of Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	73,239	19,896	9,291	10,605
Race of Offender (Months)				
White	49	102	57	141
Black	76	127	81	152
Hispanic	35	87	59	123
Other	45	93	56	147
Citizenship of Offender (Months)				
United States Citizen	62	112	68	143
Non-Citizen	30	80	56	125
Gender of Offender (Months)				
Male	51	108	66	142
Female	25	62	45	94

More in-depth analyses of the impact of mandatory minimum penalties on average sentence length are addressed by specific offense type in Chapters 8 through 11 of this report.

2. *Sentences Relative to the Applicable Guideline Range*

The Commission compared the position of the sentence relative to the applicable guideline range for all offenders, offenders convicted of an offense carrying a mandatory minimum, offenders relieved from application of a mandatory minimum because of substantial assistance and/or the safety valve, and offenders who remained subject to the mandatory minimum at sentencing. Table 7-4 compares the position of sentences relative to the guideline range for these offender groups.

As shown in Table 7-4, approximately one-quarter (24.5%, n=2,595) of offenders⁶⁰¹ who remained subject to a mandatory minimum penalty at sentencing received a non-government sponsored departure or variance, a higher rate than for offenders generally and for those offenders convicted of an offense carrying a mandatory minimum penalty. Of offenders who

⁶⁰¹ Of these 2,595 offenders, 32.8% (n=850) were sentenced at the applicable mandatory minimum penalty.

remained subject to the mandatory minimum penalty at sentencing, 37.0 percent (n=3,924) received a sentence at the mandatory minimum penalty. Of offenders who were relieved from the application of the mandatory minimum penalty, no offenders received a sentence at or above the mandatory minimum penalty. More in-depth analyses of the impact of mandatory minimum penalties on sentences relative to the applicable guideline range are addressed by specific offense type in Chapters 8 through 11 of this report.

**Table 7-4
Position Relative to the Guideline Range of Offenders
Fiscal Year 2010**

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	73,239	19,896	9,291	10,605
Sentence Relative to the Guideline Range (Percent)				
Within Range	52.7	45.8	22.6	66.1
Above Range	2.0	1.4	0.3	2.5
Substantial Assistance §5K1.1	12.5	25.8	55.2	0.0
Other Government Sponsored (no §5K1.1)	13.9	7.4	8.0	7.0
Other Below Range	18.9	19.5	13.9	24.5

E. PRISON IMPACT

1. *Introduction*

As of the end of fiscal year 2010, there were 191,757 offenders in BOP custody, of whom 111,460 (58.1%) were convicted of an offense carrying a mandatory minimum penalty. Of the 191,757 offenders in BOP custody, 75,579 (39.4%) were subject to that mandatory minimum penalty at sentencing.

As already noted,⁶⁰² the federal prison population has grown steadily over the past 20 years although the proportion of those offenders convicted under an offense carrying a mandatory minimum penalty has remained relatively stable. Similarly, the proportion of offenders who were subject to a mandatory minimum penalty at sentencing has remained relatively stable. The Commission conducted additional analysis to study the impact of

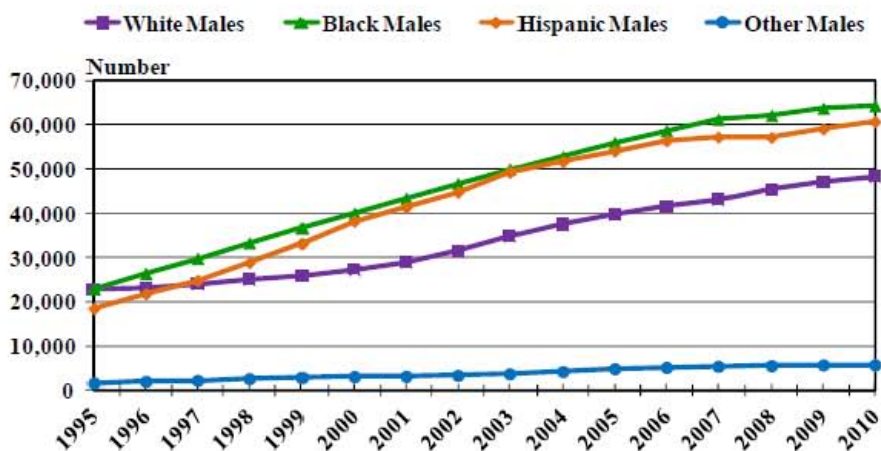
⁶⁰² See *supra* Chapter 4.

mandatory minimum penalties on different demographic groups. This analysis examined male and female offenders separately and then examined the racial groups for each gender in the prison population.

2. Male Offenders

The number of Black male offenders has exceeded the number of any other race in prison for all years studied. At the end of fiscal year 1995, 34.8 percent (n=22,991) of the male federal prison population were Black. White male offenders made up 34.5 percent (n=22,804), Hispanic offenders were 28.1% (n=18,565), and Other Race offenders were 2.6 percent (n=1,728). The number of Black male offenders in the prison population has grown steadily since fiscal year 1995. At the end of fiscal year 2010, there were 64,295 (35.9%) Black male offenders in the federal prison population, compared to 48,325 (27.0%) White male offenders, 60,726 (33.9%) Hispanic male offenders, and 5,810 (3.2%) Other Race male offenders. See Figure 7-14.

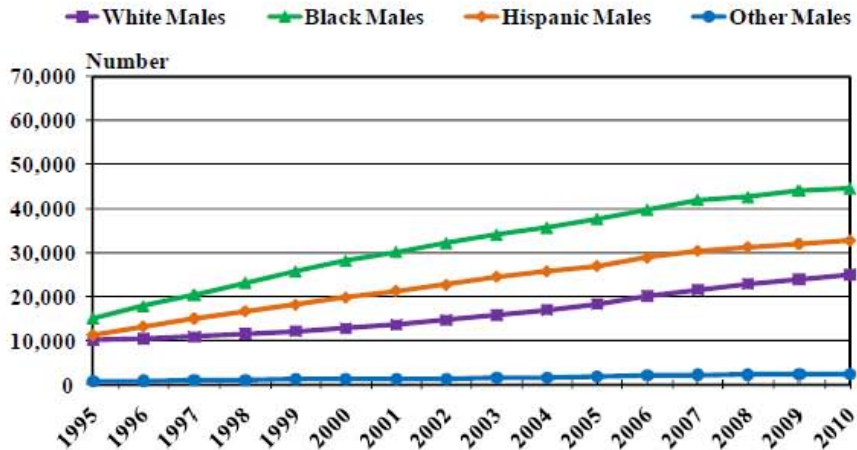
Figure 7-14
Number of Offenders in Prison by Race for Male Offenders
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Similar trends can be seen regarding male offenders in prison convicted of an offense carrying a mandatory minimum penalty. At the end of fiscal year 1995, the number of Black male offenders (n=15,076, 40.7%) convicted of an offense carrying a mandatory minimum penalty exceeded those of any other racial group (White (n=10,063, 27.2%), Hispanic (n=11,255, 30.4%), and Other Race (n=642, 1.7%)). This trend continued through 2010, when the number of Black male offenders convicted of an offense carrying a mandatory minimum penalty grew to 44,587 (42.6%), almost twice the number of White male offenders (n=24,962, 23.9%). See Figure 7-15. At the end of fiscal year 2010, the number of Hispanic male offenders convicted of an offense carrying a mandatory minimum penalty increased to 32,738 (31.3%) and the number of Other Race offenders was 2,337 (2.2%).

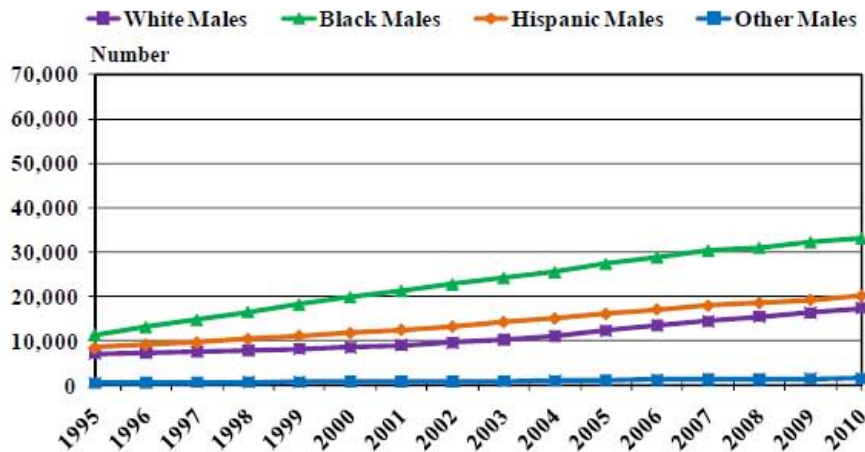
Figure 7-15
Number of Offenders in Prison Convicted of an Offense Carrying
A Mandatory Minimum Penalty
By Race for Male Offenders
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Finally, similar trends can be seen in the federal prison population for male offenders who remained subject to a statute carrying a mandatory minimum penalty at sentencing. For fiscal years 1995 through 2010, the numbers of Black and Hispanic offenders subject to a mandatory minimum penalty at sentencing exceeded the numbers of White and Other Race male offenders. At the end of fiscal year 1995, there were 11,408 (41.5%) Black male offenders, 8,522 (31.0%) Hispanic male offenders, 7,107 (25.8%) White male offenders and 472 (1.7%) Other Race offenders subject to a statute carrying a mandatory minimum penalty. At the end of fiscal year 2010, the number of male offenders in each group had grown to 17,342 (24.0%) White, 33,188 (46.0%) Black, 20,126 (27.9%) Hispanic, and 1,511 (2.1%) Other Race offenders. See Figure 7-16.

Figure 7-16
Number of Offenders in Prison Subject to an Offense Carrying
A Mandatory Minimum Penalty at Sentencing
By Race for Male Offenders
1995 - 2010

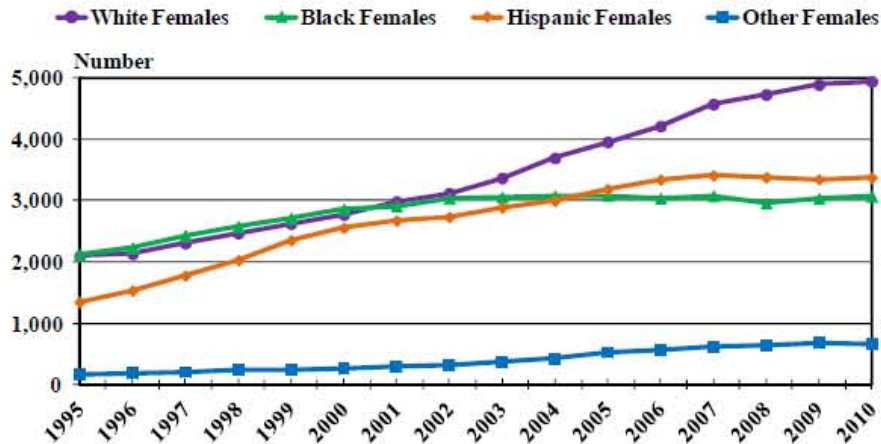


SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

3. *Female Offenders*

The trends in the prison population for female offenders are different than those for male offenders. At the end of fiscal year 1995, Black female offenders outnumbered any other racial group, accounting for 2,115 offenders (36.9% of all female offenders in prison), (compared to White females (n=2,096, 36.6%), Hispanic females (n=1,348, 23.5%); Other Race females (n=167, 2.9%)). However, by 2001, White females again became the largest group of female offenders in the federal prison system, as demonstrated in Figure 7-17. As of fiscal year 2010, the number of White female offenders had grown to 4,939 (41.0%). Hispanic female offenders made up the second largest racial group in the prison population at 3,373 (28.0%), followed by Black female offenders (n=3,069, 25.5%) and Other Race female offenders (n=668, 5.5%). See Figure 7-17.

Figure 7-17
Number of Offenders in Prison by Race for Female Offenders
1995 - 2010

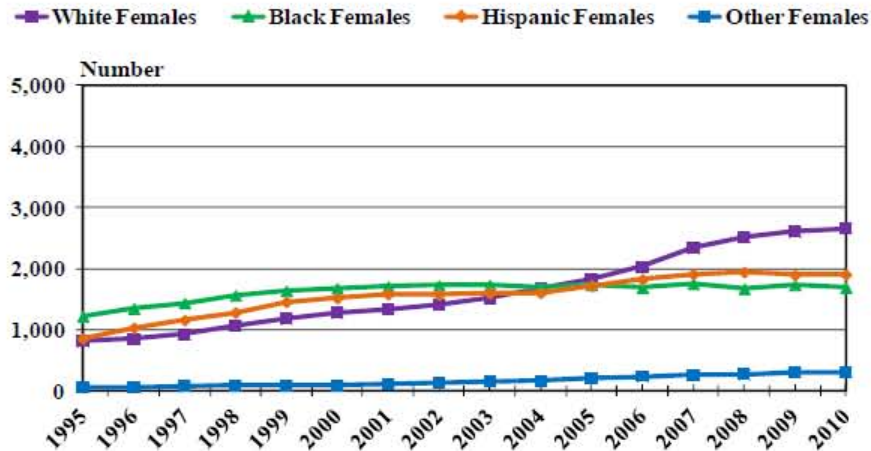


SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Similar trends can be seen with respect to female offenders in prison convicted of an offense carrying a mandatory minimum penalty. At the end of fiscal year 1995, Black (n=1,218, 41.1%) and Hispanic (n=862, 29.1%) female offenders convicted of an offense carrying a mandatory minimum penalty outnumbered both White and (n=813, 27.5%) and Other Race (n=68, 2.3%) female offenders. This trend continued until 2004, when the number of White females convicted of an offense carrying a mandatory minimum penalty first exceeded the number of Hispanic females. The following year, the number of White female offenders (n=1,831, 33.3%) convicted of an offense carrying a mandatory minimum penalty also exceeded the number of similarly situated Black female offenders (n=1,736, 31.6%).⁶⁰³ By the end of fiscal year 2006, the number of Hispanic female offenders convicted of an offense carrying a mandatory minimum penalty surpassed the number of their Black female counterparts. By the end of 2010, there were 2,657 (40.5%) White female offenders in the federal prison population convicted of an offense carrying a mandatory minimum penalty, compared to 1,905 (29.0%) Hispanic, 1,692 (25.8%) Black, and 313 Other Race (4.8%) female offenders convicted of such a statute. See Figure 7-18.

⁶⁰³ The increase in White female offenders is mainly due to their involvement in methamphetamine offenses. Of the 4,939 White female offenders in prison on September 30, 2010, 1,843 (37.3%) were convicted of a methamphetamine offense. By comparison, on September 30, 1995, 276 of the 2,096 (13.2%) of White females in prison were convicted of a methamphetamine offense.

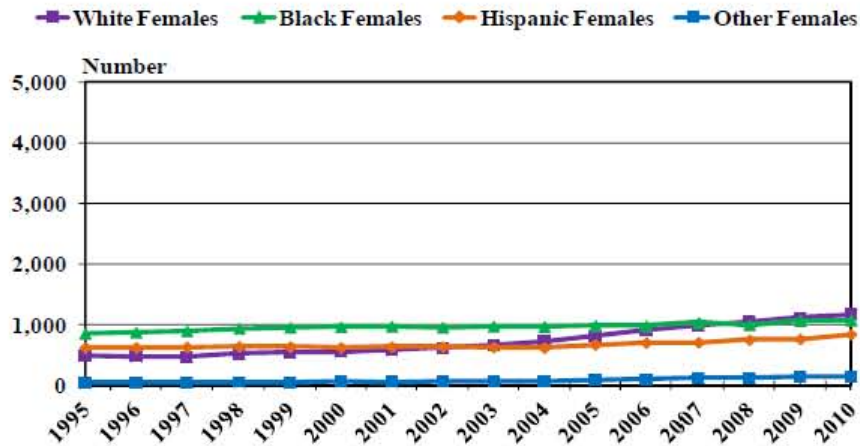
Figure 7-18
Number of Offenders in Prison Convicted of an Offense Carrying
A Mandatory Minimum Penalty
By Race for Female Offenders
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

A slightly different trend was observed for female offenders in each racial group who remained subject to a mandatory minimum penalty at sentencing. At the end of fiscal year 1995, Black (n=854, 42.5%) and Hispanic (n=622, 31.0%) female offenders subject to a statute carrying a mandatory minimum penalty exceeded the number of White (n=489, 24.3%) and Other Race (n=45, 2.2%) female offenders. The Commission observed the same trend through 2003, when the number of White female offenders subject to a statute carrying a mandatory minimum penalty exceeded the number of similarly situated Hispanic female offenders. By the end of 2008, White female offenders subject to a statute carrying a mandatory minimum penalty were the largest racial group of female offenders subject to such a penalty at sentencing. This trend continued through 2010, when there were 1,171 (36.3%) White, 1,074 (33.3%) Black, 842 (26.1%) Hispanic, and 140 (4.4%) Other Race female offenders subject to a statute carrying a mandatory minimum penalty in the federal prison population. See Figure 7-19.

Figure 7-19
Number of Offenders in Prison Subject to an Offense Carrying
A Mandatory Minimum Penalty at Sentencing
By Race for Female Offenders
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

F. SUMMARY

With respect to mandatory minimum penalties generally, the Commission analysis demonstrate the following:

Offenses and Offenders

- More than one-quarter of the 73,239 offenders sentenced in the federal courts in fiscal year 2010 (27.2%, n=19,896) included in this analysis were convicted of an offense carrying a mandatory minimum penalty.
- Over three-quarters (77.4%) of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses.
- Hispanic offenders accounted for the largest group (38.3%) of offenders convicted of an offense carrying a mandatory minimum penalty, followed by Black offenders at 31.5 percent, White offenders at 27.4 percent, and Other Race offenders at 2.7 percent.
- More than 90 percent (90.3%) of the offenders convicted of an offense carrying a mandatory minimum penalty were men.
- United States citizens accounted for 73.6 percent of all offenders convicted of an offense carrying a mandatory minimum penalty.

- Seven out of 94 districts accounted for 27.0 percent (n=5,367) of the 19,896 cases involving a conviction of an offense carrying a mandatory minimum penalty in fiscal year 2010.

Application and Relief

- Offenders convicted of an offense carrying a mandatory minimum penalty pled guilty at a slightly lower rate (94.1%) than offenders who were not convicted of an offense carrying a mandatory minimum penalty (97.5%). Furthermore, offenders facing longer mandatory minimum penalties were less likely to plead guilty.
- Offenders convicted of an offense carrying a mandatory minimum penalty but who were eligible for the statutory safety valve relief pled guilty at a rate (99.4%) higher than for both offenders convicted of an offense not carrying a mandatory minimum penalty (97.5%) and offenders who were not eligible for safety valve relief (94.6%).
- Almost half (46.7%) of offenders convicted of an offense carrying a mandatory minimum penalty were relieved from the application of such a penalty at sentencing because they provided substantial assistance to the government or qualified for the safety valve provision, or both.
 - Black offenders received relief from a mandatory minimum penalty least often (in 34.9% of their cases), compared to White (46.5%), Hispanic (55.7%) and Other Race (58.9%) offenders. Black offenders qualified for relief under the safety valve at the lowest rate of any other racial group (11.1%), compared to White (26.7%), Hispanic (42.8%) and Other Race (36.6%), either because of their criminal history or the involvement of a dangerous weapon in connection with the offense.
 - Prior to the enactment of the safety valve (in fiscal year 1994), Black and Hispanic offenders received relief from the mandatory minimum penalty at comparable rates (34.3% and 34.2%, respectively), although lower than Other Race (46.4%) and White (44.2%) offenders. After enactment of the safety valve provision, the rate at which Hispanic, White, and Other Race offenders obtained relief from a mandatory minimum penalty increased appreciably, while the rate for Black offenders did not.
 - Female offenders obtained relief from a mandatory minimum penalty at sentencing more often than male offenders (65.5% compared to 44.7%). Not only did female offenders qualify for the safety valve at a higher rate than male offenders (46.4% compared to 26.3%), but female offenders also received relief by providing substantial assistance to the government at a higher rate (36.0%) than male offenders (24.7%).
 - Non-citizens received relief from mandatory minimum penalties at sentencing more often than United States citizens (64.6% compared to 40.3%). Although

United States citizen offenders provided substantial assistance to the government at a higher rate (28.0%) than non-citizen offenders (19.8%), the majority of non-citizen offenders (54.4%) qualified for relief from the mandatory minimum penalty under the safety valve, compared to United States citizens at 18.9 percent.

Sentencing

- Only 14.5 percent of all federal offenders were subject to a mandatory minimum penalty at sentencing.
 - Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to a mandatory minimum penalty at sentencing at the highest rate of any racial group, in 65.1 percent of their cases, followed by White (53.5%), Hispanic (44.3%), and Other Race (41.1%).
 - Male offenders convicted of an offense carrying a mandatory minimum penalty remained subject to the mandatory minimum penalty at sentencing more often than female offenders (55.3% compared to 34.5%).
 - United States citizens convicted of an offense carrying a mandatory minimum penalty remained subject to the mandatory minimum penalty at sentencing more often than non-citizens (59.7% compared to 35.4%).
- Receiving relief from an applicable mandatory minimum sentence made a significant difference in the sentence ultimately imposed. Offenders who were convicted of an offense carrying a mandatory minimum penalty and remained subject to that penalty at sentencing received an average sentence of 139 months, compared to 63 months for those offenders who received relief from a mandatory penalty.
 - Offenders who received relief from a mandatory minimum penalty by providing substantial assistance to the government received longer average sentences than offenders who received relief under the safety valve provision.

Prison Impact

- 75,579 (39.4%) of the 191,757 offenders in BOP custody as of September 30, 2010, were subject to a mandatory minimum penalty at sentencing.
- Although the number of offenders in BOP custody who were subject to a mandatory minimum penalty at sentencing has grown steadily over the past 20 years, the proportion of such offenders in BOP custody has remained relatively stable.

MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES

A. INTRODUCTION

This chapter analyzes the application of mandatory minimum penalties in drug offenses. Initially, it provides an overview of the relevant statutes and the applicable guideline provisions. Next, this chapter provides a statistical overview of drug offenses and drug offenders, focusing on drug offenders convicted of an offense carrying a mandatory minimum penalty. Then it provides a statistical overview of drug offenses and drug offenders by drug type, again focusing on drug offenders convicted of an offense carrying a mandatory minimum penalty. Finally, the chapter discusses the Commission’s study of the use of the statutory penalty enhancements for second and subsequent felony drug offenses.

As used in this chapter, the term “drug offenses” refers to offenses covered by Chapter 2, Part D (Offenses involving Drugs and Narco-Terrorism) of the *Guidelines Manual*. The term “drug offender” means a person who committed a drug offense.⁶⁰⁴ In the majority (95.1%, n=22,791) of drug offenses, the applicable guideline is §2D1.1. Additional relevant guidelines include USSG §§2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) (2.5%, n=603), 2D1.5 (Continuing Criminal Enterprise: Attempt or Conspiracy), 2D1.8 (Renting or Managing a Drug Establishment: Attempt or Conspiracy), and 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) (1.0%, n=236).⁶⁰⁵ When specified drug types are discussed individually, a person who commits an offense involving that drug type will be referred to accordingly (*e.g.*, marijuana offender).

⁶⁰⁴ A drug offender may also have a conviction for violating 18 U.S.C. § 924(c), for possession or use of a firearm during the commission of the drug offense. Those offenders are included in the analysis in this chapter and also in Chapter 9 of this Report.

⁶⁰⁵ The other Chapter 2, Part D guidelines are §§2D1.6 (Use of a Communication Facility in Committing Drug Offenses; Attempt or Conspiracy), 2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy), 2D1.9 (Placing or Maintaining Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy), 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy), 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy) (n=6), 2D1.13 (Structuring Chemical Transaction or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy) (n=1), 2D2.1 (Unlawful Possession: Attempt or Conspiracy) (0.8%, n=192), 2D2.2 (Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy) (0.3%, n=77), 2D2.3 (Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs), 2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Scheduled Substances; Attempt or Conspiracy) (n=4), and 2D3.2 (Regulatory Offenses Involving Controlled Substances or Listed Chemicals; Attempt or Conspiracy).

B. DRUG OFFENSES AND RELATED GUIDELINES

The most commonly prosecuted drug offenses carrying mandatory minimum penalties are found at 21 U.S.C. §§ 841 and 960. Section 841 makes it unlawful for any person knowingly or intentionally to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.” Section 960 criminalizes the knowing and intentional importation or exportation of a controlled substance. Controlled substance is defined as “a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of part B of this subchapter,” and includes powder cocaine, crack cocaine,⁶⁰⁶ marijuana, methamphetamine, and heroin, among others.⁶⁰⁷

Sections 841 and 960 have parallel penalty structures that are tied to the quantity and type of controlled substances in the offense. A ten-year mandatory minimum penalty with a maximum term of life imprisonment is triggered by offenses involving the following drug quantities and types, among others:⁶⁰⁸ one kilogram or more of heroin, five kilograms or more of powder cocaine, 280 grams or more of crack cocaine,⁶⁰⁹ 1,000 kilograms or more of marijuana, and 50 grams or more of pure methamphetamine. Offenders convicted under either statute who were previously convicted of a drug felony are subject to a 20-year mandatory minimum penalty, and offenders previously convicted of a two or more prior drug felonies are subject to a mandatory minimum term of life imprisonment.⁶¹⁰

The following quantities and types of drugs, among others,⁶¹¹ trigger a five-year mandatory minimum penalty and a maximum term of 40 years: 100 grams of heroin, 500 grams

⁶⁰⁶ Crack cocaine is referred to as “cocaine base” in the relevant statutes. For a discussion of case law discussing the definition of this term, *see* Appendix E(A)(2) of this Report.

⁶⁰⁷ *See* 21 U.S.C. § 802.

⁶⁰⁸ The other drug quantities and types are: 100 grams of phencyclidine (PCP) or one kilogram or more of a mixture or substance containing a detectable amount of PCP; 10 grams or more of a mixture and substance containing a detectable amount of lysergic acid diethylamide (LSD); 400 grams or more of a mixture or substance containing a detectable amount of N-Phenyl_N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-Phenyl_N-[1-(2-phenylethyl)-4-piperidinyl] propanamide.

⁶⁰⁹ For offenses that occurred prior to August 3, 2010, the date of enactment of the Fair Sentencing Act, 50 grams of crack cocaine triggered the ten-year mandatory minimum penalty. Fiscal year 2010 started on October 1, 2009, and ended September 30, 2010. The majority of the crack cocaine offenders sentenced in fiscal year 2010 were sentenced under the pre-FSA quantities. Thus, some degree of caution should be exercised in drawing conclusions from the crack cocaine data analyzed in this report because sentences for post-FSA offenses will likely be different than sentences for sentences for pre-FSA offenses.

⁶¹⁰ *See* 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A)-(C),(G), & (H). These mandatory minimum penalties became effective on November 1, 1987, for all drug types, except crack cocaine and methamphetamine. *See* Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 (1986) (amending 21 U.S.C. § 841(b)(1)). The mandatory minimum penalties for methamphetamine became effective on November 18, 1988. *See* Pub. L. No. 100-690, § 6470(g)(3), 102 Stat. 4181, 4370 (1988) (amending 21 U.S.C. § 841(b)(1)).

⁶¹¹ The other drug quantities and types are: 10 grams of PCP or 100 grams of a mixture or substance containing a detectable amount of PCP; 1 gram of a mixture and substance containing LSD; 40 grams of a mixture or substance

of powder cocaine, 28 grams of crack cocaine,⁶¹² 100 kilograms of marijuana, and five grams of pure methamphetamine. The mandatory minimum penalty doubles to ten years and the maximum increases to life for offenders with a prior felony drug conviction.⁶¹³ For offenses involving the listed drug types, except marijuana, in smaller quantities than already noted, the maximum term of imprisonment is 20 years and no mandatory minimum penalty applies.⁶¹⁴ For offenses involving less than 50 kilograms of marijuana, the maximum term of imprisonment is five years and no mandatory minimum applies.⁶¹⁵

The penalties for committing other drug offenses criminalized under title 21, United States Code, are tied to the above-referenced penalty structure. For example, attempts or conspiracies to commit any drug offense are subject to the same penalty structure as the substantive offense.⁶¹⁶ Congress also criminalized distributing drugs to persons who are under the age of 21 or who are pregnant, using persons under the age of 18 in drug operations, and distributing drugs in or near schools and other colleges.⁶¹⁷ A person who commits one of those offenses is subject to a mandatory minimum penalty of at least one year of imprisonment, unless a greater mandatory minimum penalty otherwise applies.⁶¹⁸

Offenders who engage in a continuing criminal enterprise⁶¹⁹ must be sentenced to a term of imprisonment of not less than 20 years and up to life imprisonment for the first offense, and not less than 30 years and up to life imprisonment for any second or subsequent offense.⁶²⁰ Any

containing a detectable amount of N-Phenyl_N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams of a mixture or substance containing a detectable amount of any analogue of N-Phenyl_N-[1-(2-phenylethyl)-4-piperidinyl] propanamide.

⁶¹² For offenses that occurred prior to August 3, 2010, the date of enactment of the Fair Sentencing Act of 2010, five grams of crack triggered the five-year mandatory minimum penalty. As previously noted, the majority of the crack offenders sentenced in fiscal year 2010 were sentenced under the pre-FSA quantities. In addition, prior to enactment of the Fair Sentencing Act, simple possession of more than 5 grams of crack cocaine also carried a five-year mandatory minimum penalty.

⁶¹³ See 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2)(A)-(C),(G), and (H). The enhanced mandatory minimum penalties in these statutes do not apply automatically. Specific proceedings to establish the prior conviction are required by statute. See 21 U.S.C. § 851. For additional discussion of these proceedings, see Part I, *infra*.

⁶¹⁴ See 21 U.S.C. § 841(b)(1)(C).

⁶¹⁵ See 21 U.S.C. § 841(b)(1)(D).

⁶¹⁶ See 21 U.S.C. §§ 846, 963.

⁶¹⁷ See 21 U.S.C. §§ 859, 860, and 861.

⁶¹⁸ See 21 U.S.C. §§ 859, 860, and 861; *see also* 21 U.S.C. §§ 841(b)(1), 960(b).

⁶¹⁹ A person is engaged in a continuing criminal enterprise if the person commits any felony violation of offense listed in Chapter 13 of Title 21, United State Code, and such violation is a part of a continuing series of violations “undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management,” and “from which such person obtains substantial income or resources.” 21 U.S.C. § 848(c).

⁶²⁰ See 21 U.S.C. § 848.

administrator, organizer, or leader of the enterprise is subject to a mandatory life term of imprisonment if the offense involved 300 times the quantity of a substance described in section 841(b)(1)(B) or the enterprise received \$10 million in gross receipts during any 12-month period.⁶²¹

The guideline applicable to most drug offenses is §2D1.1, which has five alternate base offense levels. Four of the five apply if the defendant is convicted of a specific statute listed in the guideline and death or serious bodily injury resulted from the offense. The fifth base offense level, which is the most commonly applied, ties the base offense level to the quantity of drugs involved in the offense, starting at offense level 6 and continuing through offense level 38. As discussed more fully in Chapter 3 of this report, quantities of drugs triggering the five-year mandatory minimum are set at base offense level 26 and quantities triggering the ten-year mandatory minimum are set at base offense level 32. The Commission then set the proportional quantities of drugs triggering other offense levels in the Drug Quantity Table.⁶²²

The guideline also includes specific offense characteristics designed to address certain aggravating and mitigating conduct associated with drug offenses. For example, the guideline establishes a 2-level enhancement for possession of a dangerous weapon.⁶²³ The guideline also includes a 2-level reduction for a defendant who meets the safety valve criteria.⁶²⁴

C. STATISTICAL OVERVIEW OF DRUG OFFENSES

Drug offenses have historically represented the largest portion of the federal caseload. In fiscal year 2009, this trend ended when immigration offenses became the most common type of offense reported to the Commission.⁶²⁵ In fiscal year 2010, drug offenses were 28.0 percent of the reported cases, with 23,964 offenders convicted of a drug offense. More than one-quarter (26.0%, n=6,161) of drug offenses involved marijuana, followed by powder cocaine (5,571, n=23.5%), crack cocaine (20.0%, n=4,751), methamphetamine (17.6%, n=4,169), heroin (6.6%, n=1,561) and other drugs (6.4%, n=1,514). *See* Figure 8-1.

⁶²¹ *See* 21 U.S.C. § 848(b).

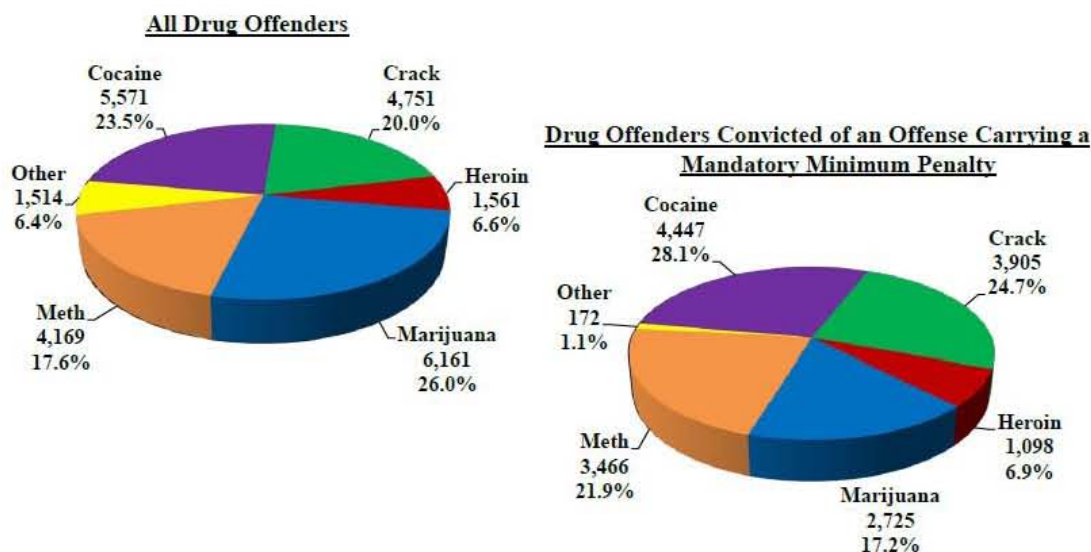
⁶²² The Commission's method for calculating the quantity of a drug for purposes of the guidelines sometimes differs from the statutes. *See* Appendix E(A)(2) of this Report.

⁶²³ *See* §2D1.1(b)(1).

⁶²⁴ *See* §2D1.1(b)(16).

⁶²⁵ In fiscal year 2009, immigration offenses accounted for 32.2 % of the caseload and drug offenses accounted for 30.3% of the caseload.

Figure 8-1
Type of Drug Involved in Drug Offenses
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Approximately two-thirds (66.1%, n=15,831) of the 23,964 drug offenders in fiscal year 2010 were convicted of an offense carrying a mandatory minimum penalty. More than one-quarter (28.1%, n=4,447) of drug offenses carrying a mandatory minimum penalty involved powder cocaine, followed by crack cocaine (24.7%, n=3,905), methamphetamine (21.9%, n=3,466), marijuana (17.2%, n=2,725), heroin (6.9%, n=1,098) and other drugs (1.1%, n=172). See Figure 8-1.

The application of mandatory minimum penalties varies greatly by the type of drug involved in the offense. For example, in fiscal year 2010, a mandatory minimum penalty applied in 83.1 percent (n=3,466) of drug cases involving methamphetamine. In contrast, such a penalty applied in less than 45 percent (n=2,725) of marijuana cases. With respect to other drugs (such as PCP and LSD), such a penalty applied in 11.4 percent (n=172) of cases.

The most frequently reported drug mandatory minimum penalty in fiscal year 2010 was ten years. In fiscal year 2010, almost half of all drug offenders (48.7%, n=7,716) were convicted of an offense carrying a ten-year mandatory minimum penalty. The second most frequently reported drug mandatory minimum penalty was five years (42.4%, n=6,711). Drug offenses involving a conviction of a statute carrying either a mandatory penalty of 20 years (n=692) or one of life (n=153) accounted for a small proportion (5.3%) of all drug offenses involving a conviction of a statute carrying a mandatory minimum penalty.

1. *Demographic Characteristics of Drug Offenders*

Table 8-1 presents information on the demographic characteristics of all drug offenders. This information is then compared to that for drug offenders convicted of an offense carrying a mandatory minimum penalty, drug offenders convicted of an offense carrying a mandatory

minimum penalty and relieved of application of the mandatory minimum penalty, and then to those drug offenders who remained subject to the mandatory minimum at the time of sentencing because they did not qualify for any form of statutory relief. Table 8-2 displays information about offense characteristics and criminal history categories for these groups of offenders.

Table 8-1
Demographic Characteristics of Drug Offenders
Fiscal Year 2010

Demographics	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	23,964	15,831	8,619	7,212
Race of Offender (Percent)				
White	26.2	23.1	27.0	18.4
Black	27.3	30.3	22.0	40.4
Hispanic	43.3	44.0	47.7	39.6
Other	3.1	2.5	3.3	1.5
Citizenship of Offender (Percent)				
United States Citizen	70.4	70.0	61.7	79.9
Non-Citizen	29.6	30.0	38.3	20.1
Gender of Offender (Percent)				
Male	87.4	89.8	86.4	94.0
Female	12.6	10.2	13.6	6.0

Table 8-2
Guideline Sentencing Characteristics, Role in the Offense and
Criminal History of Drug Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	23,964	15,831	8,619	7,212
Characteristics (Percent)				
Weapon Specific Offense Characteristic	11.6	12.8	8.0	18.9
Firearms Mandatory Minimum Applied	4.8	7.2	3.8	11.3
Safety Valve Reduction	36.4	35.1	64.5	0.0
Role in the Offense (Percent)				
Aggravating Role	5.9	7.7	5.1	10.8
Mitigating Role	18.4	16.3	25.5	5.4
Criminal History Category (Percent)				
I	51.5	50.1	70.1	26.1
II	11.6	11.6	7.3	16.8
III	13.9	14.1	8.8	20.6
IV	7.1	7.3	3.9	11.3
V	4.1	4.2	2.4	6.4
VI	11.8	12.6	7.5	18.9

These tables do not reflect the fact that the demographic and offense characteristics of drug offenders vary widely by the type of drug involved in the offense. Therefore, a complete analysis of the impact of mandatory minimums in drug cases involves an examination of the application of these penalties for each major drug type. This chapter will present data by major drug types following this overview.

2. *Guilty Pleas and Trials*

Drug offenders convicted of a statute carrying a mandatory minimum penalty went to trial more than twice as often as drug offenders who were not convicted of an offense carrying a mandatory minimum penalty. Of the 15,831 offenders convicted of a drug statute carrying a mandatory minimum penalty in fiscal year 2010, 95.5 percent (n=15,125) pled guilty while 4.5

percent (n=706) proceeded to trial. By comparison, 98.4 percent (n=7,966) of offenders convicted of a drug statute not carrying a mandatory minimum penalty in fiscal year 2010 pled guilty and 1.6 percent (n=127) proceeded to trial. Drug offenders who were most likely to plead guilty, however, were those offenders eligible for relief from a mandatory minimum by operation of the safety valve (99.6%, n=8,622).

On average, the longer the mandatory minimum an offender faced, the less likely the offender was to plead guilty. In fiscal year 2010, 97.4 percent (n=6,536) of drug offenders convicted of a drug offense carrying a five-year mandatory minimum provision pled guilty. This compared to 95.2 percent (n=7,343) of drug offenders convicted of a drug offense carrying a ten-year mandatory minimum penalty, 87.1 percent (n=603) of drug offenders convicted of a drug offense carrying a 20-year mandatory minimum penalty, and 71.2 percent (n=109) of drug offenders convicted of a drug offense carrying a mandatory minimum penalty of life.

3. *Geographic Variations*

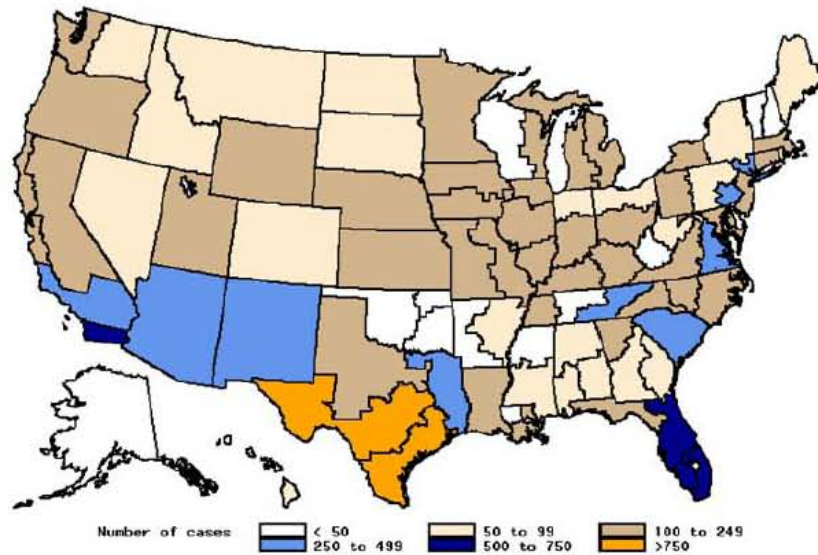
Application of mandatory minimum penalties for drug offenses varied significantly both by circuit and by district, which is largely attributable to differences in the sizes of the relevant caseloads.⁶²⁶ The First Circuit reported the highest percentage (42.8%, n=749) of cases involving a drug mandatory minimum, followed by the D.C. Circuit (34.6%, n=123) and the Eighth Circuit (30.8%, n=1,463). Conversely, in the Tenth Circuit offenders were convicted of a drug offense carrying a mandatory minimum penalty in 13.6 percent (n=888) of cases.

The volume of cases in the 94 judicial districts varied, which had an impact on the percentage of drug cases involving a mandatory minimum penalty.⁶²⁷ Five of the 94 judicial districts reported more than 500 drug cases involving a mandatory minimum penalty: Southern Texas (n=1,074), Western Texas (n=962), Southern California (n=666), Southern Florida (n=536), and Middle Florida (n=504). *See* Figure 8-2.

⁶²⁶ *See* Table D-6 (Mandatory Minimum Status for Drug Offenders in each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁶²⁷ *Id.*

Figure 8-2
Number of Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty by District
Fiscal Year 2010

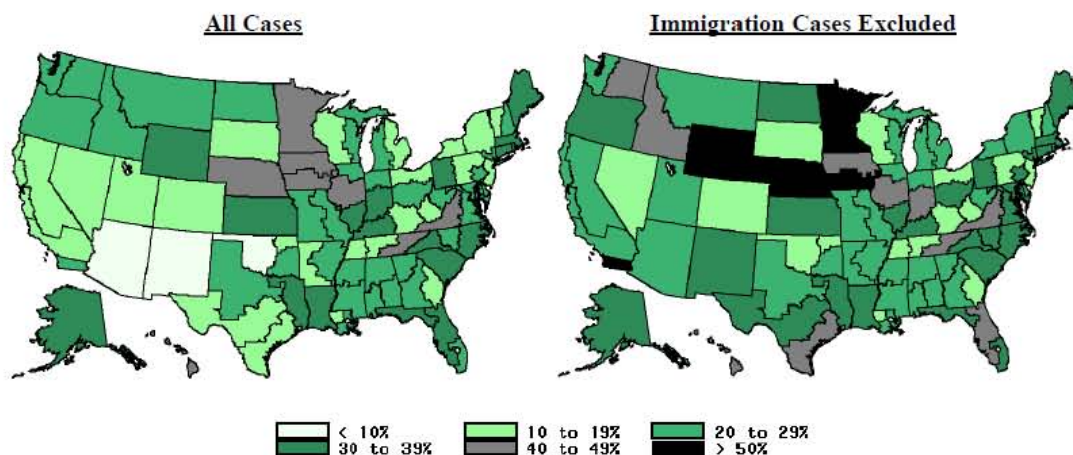


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Districts reporting a high percentage of drug mandatory minimum cases included Puerto Rico (59.5%, n=464), Minnesota (49.7%, n=239), Southern Iowa (47.5%, n=199), Hawaii (44.9%, n=71), and Nebraska (43.1%, n=245). *See* Figure 8-3.⁶²⁸ In contrast, in the District of New Mexico, offenders were convicted of a drug offense carrying a mandatory minimum penalty in 8.3 percent (n=303) of all cases.

⁶²⁸ The figure does not include those judicial districts located in territories of the United States.

Figure 8-3
Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
By District
Fiscal Year 2010

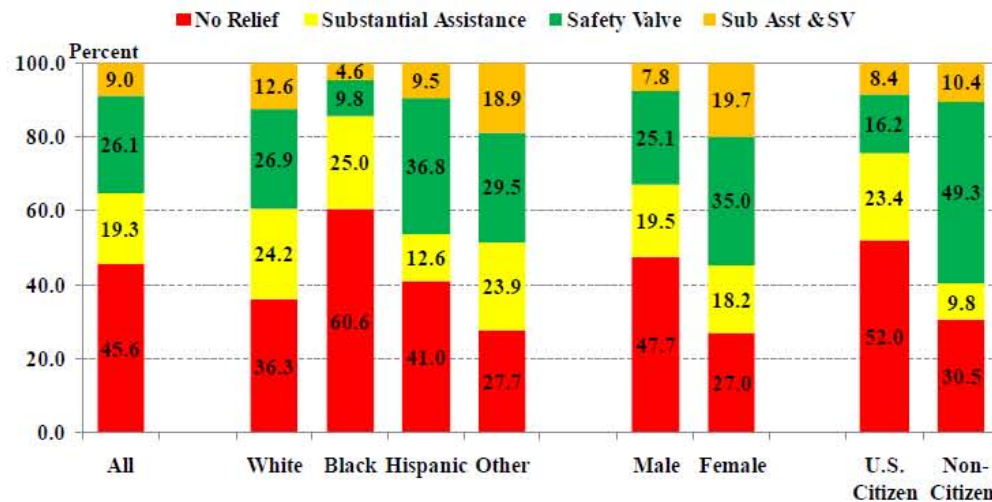


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

4. *Relief from the Mandatory Minimum Penalty*

In fiscal year 2010, more than half (54.4%, n=8,619) of drug offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory minimum penalty. Approximately one quarter (26.1%, n=4,136) of the drug offenders received relief through operation of the safety valve alone. Drug offenders who did not qualify for the safety valve but who provided substantial assistance to the government accounted for 19.3 percent (n=3,062) of all drug offenders convicted of an offense carrying a mandatory minimum penalty. An additional 9.0 percent (n=1,421) of drug offenders received relief from the mandatory minimum penalty by qualifying for application of both the safety valve and substantial assistance provisions. See Figure 8-4.

Figure 8-4
Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum
Penalty Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The rate at which offenders received relief from the mandatory minimum penalty through these provisions varied by race, gender, and citizenship.⁶²⁹ For example, White offenders qualified for some form of relief from a mandatory minimum penalty most often, with 63.7 percent (n=2,328) of all White offenders convicted of an offense carrying such a penalty obtaining relief from the penalty. Black offenders qualified for relief from mandatory minimum penalties least often, in 39.4 percent (n=1,890) of cases in which they were convicted of an offense carrying such a penalty.

Almost three-fourths of all female drug offenders (73.0%, n=1,176) received relief from the mandatory minimum penalty, compared to just over half (52.3%, n=7,443) of male offenders. Non-citizen offenders received relief from the mandatory minimum penalty more often (69.5%, n=3,300) than United States citizens (48.0%, n=5,317). *See* Figure 8-4.

The manner in which relief from a mandatory minimum penalty was obtained also varied by race and citizenship of the offender. Other Race offenders most often received such relief through operation of the safety valve provision, alone or in conjunction with providing substantial assistance (48.4%, n=192). Hispanic offenders convicted of a drug offense carrying a mandatory minimum penalty received safety valve relief in 46.3 percent (n=3,222) of such cases. Conversely, Black offenders qualified for safety valve relief in 14.4 percent (n=692) of such cases, either alone or in conjunction with providing substantial assistance to the government. This difference is largely attributable to the criminal history of Black drug offenders. More than

⁶²⁹ Figure 8-4 (Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty Who Were Relieved of the Penalty) shows the breakdown by categories. For purposes of this discussion, the rates at which offenders received safety valve relief reflect both cases in which such relief was given alone and those in which it was given after the offender's substantial assistance to the government.

75 percent (75.6%, n=3,629) of Black drug offenders convicted of a drug offense carrying a mandatory minimum penalty have a criminal history score of more than one point under the sentencing guidelines, which disqualifies them from application of the safety valve.⁶³⁰ More than half of all female drug offenders (54.7%, n=882) received relief from the mandatory minimum penalty pursuant to operation of the safety valve, compared to approximately one-third (32.9%, n=4,675) of male offenders. *See* Figure 8-4.

Non-citizens most often received relief from a mandatory minimum penalty in drug offenses through operation of the safety valve provision, alone or in conjunction with providing substantial assistance. In 59.7 percent (n=2,835) of all drug offenses carrying such a penalty and in which a non-citizen was the offender, the offender received relief from the mandatory minimum penalty through application of the safety valve. The rate in drug offenses involving a United States citizen was 24.6 percent (n=2,720). Some of this difference may be attributable to the fact that non-citizen offenders tended to have less substantial criminal histories, when compared to United States citizen offenders, because criminal history calculations under Chapter 4 of the *Guidelines Manual* exclude sentences resulting from foreign convictions.⁶³¹

In contrast, United States citizens obtained relief from a mandatory minimum penalty for providing substantial assistance to the government more often than non-citizens offenders. United States citizens received relief from a mandatory minimum penalty by providing substantial assistance, by itself or in conjunction with safety valve relief, in 31.8 percent (n=3,523) of their cases while non-citizens obtained relief in this manner in only 20.2 percent (n=959) of their cases. The differences were less pronounced when the race of the offender was examined.

The rate at which offenders of different races received relief from a mandatory minimum penalty providing substantial assistance to the government, either alone or in conjunction with the safety valve provision, also varied. Other Race offenders received relief from the mandatory minimum penalty most often by providing substantial assistance to the government, in 42.8 percent (n=170) of the cases in which they were the offender. White offenders received relief through this provision in 36.8 percent (n=1,345) of the cases in which they were the offender, followed by Black offenders at 29.6 percent (n=1,421) and Hispanic offenders at 22.1 percent (n=1,541). More than one-third (37.9%, n=612) of female drug offenders received relief from the mandatory minimum penalty by providing substantial assistance compared to 27.3 percent (n=3,871) of male drug offenders. *See* Figure 8-4.

5. *Sentencing Outcomes*

a. Average sentence length

The average sentence for drug offenders convicted of an offense carrying a mandatory minimum varied, and was largely dependant upon the type of drug involved in the offense and

⁶³⁰ *See supra* note 596.

⁶³¹ *See supra* notes 288 and 598.

whether the offender obtained relief from the mandatory minimum penalty. For example, the average sentence for offenders convicted of an offense carrying a mandatory minimum penalty was highest in crack cocaine cases at 118 months,⁶³² whereas the average sentence for such offenders in marijuana cases was less than half of that, at 55 months. The average sentence for drug offenders who remained subject to the mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive some form of statutory relief) was 132 months. In contrast, the average sentence for drug offenders who obtained relief from the mandatory minimum penalty was 61 months.

The form of relief from a mandatory minimum penalty affected the average sentence imposed. Drug offenders who qualified for the safety valve and who also provided the government with substantial assistance had the lowest sentences, at 33 months on average. The average sentence for drug offenders who did not qualify for safety valve relief but who provided substantial assistance to the government was 90 months. Offenders who received relief from a mandatory minimum penalty through application of the safety valve but who did not also provide substantial assistance to the government received an average sentence of 49 months.

b. Position relative to the guideline range

In order to determine whether these differences in sentence length are partially attributable to departures and variances, the Commission examined the sentence imposed on drug offenders relative to the applicable guideline range. This analysis can provide some assessment of the mandatory minimum penalty, to the extent that a departure or variance may reflect the court's concern that the mandatory minimum penalty is too severe. Table 8-3 compares the position of sentences relative to the guideline range among drug offenders, drug offenders convicted of an offense carrying a mandatory minimum penalty, drug offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and drug offenders who remained subject to the mandatory minimum penalty at the time of sentencing because they did not qualify for any form of statutory relief. Approximately one-quarter (24.4%, n=1,756) of drug offenders subject to the mandatory minimum penalty at sentencing received a non-government sponsored below range sentence.

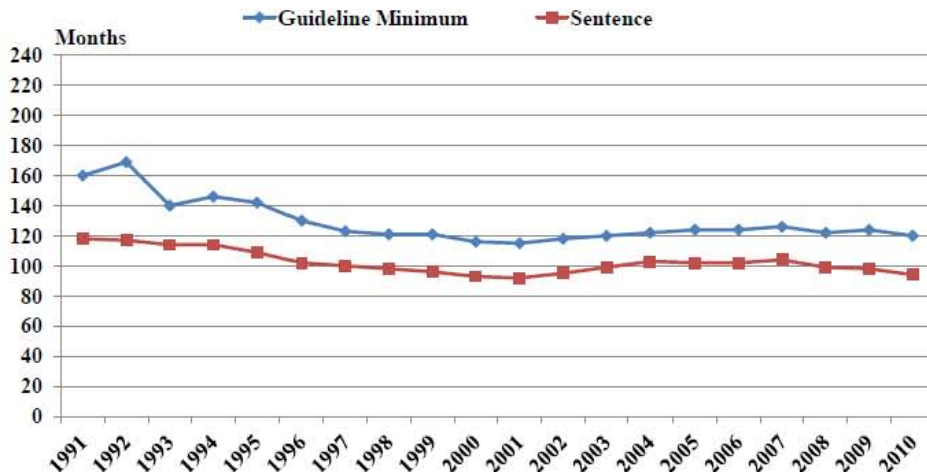
⁶³² It is important to note that the majority of the crack cocaine offenders sentenced in fiscal year 2010 were sentenced prior to August 3, 2010, the date of enactment of the Fair Sentencing Act of 2010.

Table 8-3
Sentence Relative to the Guideline Range of Drug Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	23,964	15,831	8,619	7,212
Sentence Relative to the Guideline Range (Percent)				
Within Range	45.7	43.7	24.2	67.0
Above Range	1.0	0.8	0.3	1.3
Substantial Assistance §5K1.1	23.9	28.3	52.0	0.0
Other Government Sponsored (no §5K1.1)	9.5	8.0	8.6	7.3
Other Below Range	20.0	19.2	14.9	24.4

Figure 8-5 compares the average sentence imposed in drug cases in which offenders were convicted of an offense carrying a mandatory minimum penalty to the bottom of the applicable guideline range for offenders sentenced from fiscal year 1995 to 2010. As can be seen from this figure, the average sentence imposed has remained above five years of imprisonment.

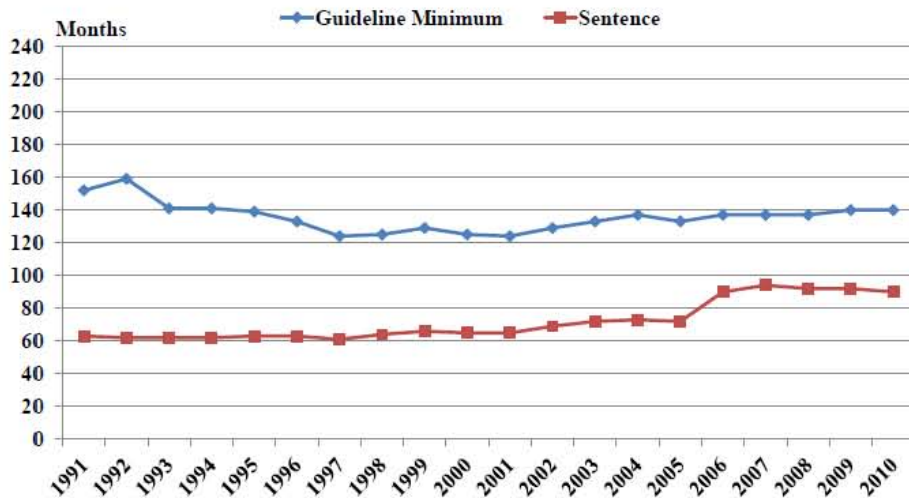
Figure 8-5
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
All Drugs
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission 1991 through 2010 Datafile, USSCFY1991 – USSCFY2010.

Figures 8-6 and 8-7 show the impact on sentences from substantial assistance departures and from other below range sentences.⁶³³ These figures compare the average guideline range minimum to the average sentence imposed.

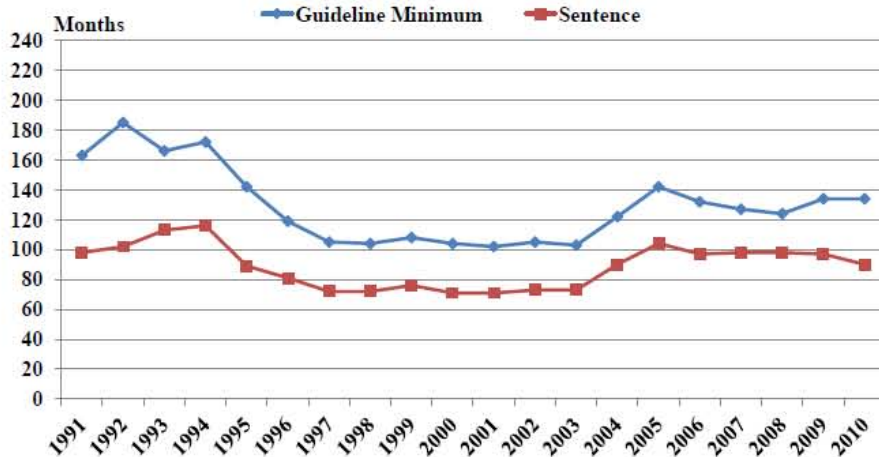
Figure 8-6
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Substantial Assistance
All Drugs
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission 1991 through 2010 Datafile, USSCFY1991 – USSCFY2010.

⁶³³ The term “other below range sentences” includes all non-government sponsored below range sentences, and any non-§5K1.1 government sponsored below range sentences. The Commission refined the methods for distinguishing non-§5K1.1 government-sponsored departures from other downward departures beginning in fiscal year 2003. In order to show trends with data preceding fiscal year 2003, this report does not make the distinction for purposes of the trend analyses. After *Booker*, the Commission further refined its coding procedures regarding sentences outside the guideline range. Post- *Booker* data collection and reporting of out of range sentences includes a larger number of categories. The Post- *Booker* methodology is used for all other sentencing outcomes discussed in this report.

Figure 8-7
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Non-Substantial Assistance Below Range Sentence
All Drugs
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission 1991 through 2010 Datafile, USSCFY1991 – USSCFY2010.

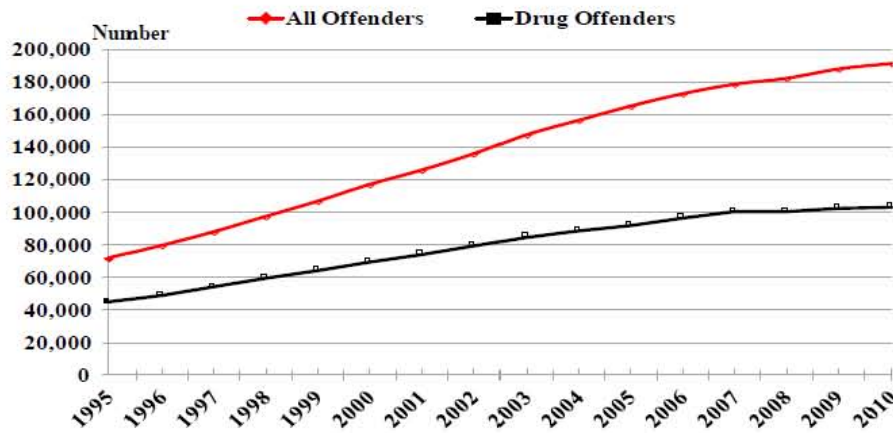
In fiscal year 2010, the average extent of substantial assistance departures in drug offenses was 48.8 percent (67 months) from the minimum of the otherwise applicable guideline range. In fiscal year 2010, the average extent of non-government sponsored below range sentences (*i.e.*, departures and variances combined) in drug offenses that carried a mandatory minimum penalty was 29.8 percent (34 months) from the minimum of the otherwise applicable guideline range.⁶³⁴

6. *Prison Impact*

At the end of fiscal year 2010, slightly more than half (53.8%, n=103,194) of the 191,757 offenders incarcerated in the BOP were drug offenders. *See* Figure 8-8. The proportion of the federal prison population made up of drug offenders has decreased since 1995. In 1995, drug offenders constituted almost two-thirds (62.1%, n=44,637) of the federal prison population. *See* Figure 8-8. This decline in the proportion of drug offenders is likely attributable to changes in the federal docket discussed in Chapter 4, *supra*.

⁶³⁴ The extent of below range sentences varies by circuit. The Second Circuit reported the highest extent of substantial assistance departures in drug offenses at 39.8% (39 months) and the Fourth Circuit reported the lowest at 23.1% (34 months). The Third Circuit reported the highest extent of non-government sponsored below range sentences in drug offenses at 36.0% (46 months) and the Eighth Circuit reported the lowest at 25.5% (28 months).

Figure 8-8
Number of Offenders in Prison on September 30
Drug Offenders
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The proportion of drug offenders in prison convicted of an offense carrying a mandatory minimum penalty has slightly increased over time. For example, in 2010, 84.6 percent (n=87,323 of the 103,194) of drug offenders in federal prison had been convicted of an offense carrying a mandatory minimum penalty, compared to 78.2 percent (n=34,930 of the 44,637) in 1995. In contrast, however, the proportion of drug offenders in federal prison subject to a mandatory minimum penalty at sentencing has remained relatively stable, with 55.9 percent in 1995 (n=24,971) and 52.9 percent in 2010 (n=54,635).⁶³⁵ This is attributable to the operation of the safety valve because substantial assistance rates during this time period have been relatively stable.

7. *Offender Function*

To provide a more complete profile of federal drug offenders, the Commission undertook a special coding and analysis project in 2010. Using a 15 percent sample of drug cases reported to the Commission in fiscal year 2009, the Commission assessed the functions performed by drug offenders as part of the offense.⁶³⁶

Offender function was determined by a review of the offense conduct section of the presentence report. The Commission assessed the most common function an offender performed during an offense, independent of any application of sentencing enhancements and reductions.

⁶³⁵ See Figure D-1 (Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing (1995–2010)) in Appendix D of this Report.

⁶³⁶ The Commission used this methodology for the analysis of offender functions in powder cocaine and crack cases reported in the Commission’s 2007 *Report to the Congress: Cocaine and Federal Sentencing Policy*.

In those cases where an offender performed different functions at different times, the Commission determined the most serious function the offender performed. For purposes of statistical analysis, offender function was assigned based on the most serious function performed by the offender in the drug offense, even if the offender more frequently performed a less serious function. Finally, offenders at higher levels of the drug distribution chain are presumed to be more culpable based on their greater responsibilities and higher levels of authority as compared to other participants in the offense.

The Commission assigned each offender to one of 21 separate function categories based on his or her most serious conduct as described in the Presentence Report and not rejected by the court on the Statement of Reasons form.⁶³⁷ The 21 categories were combined into nine categories to facilitate analysis and presentation of the data.⁶³⁸ Function categories are displayed on the figures in this chapter in decreasing order of culpability from left to right. The categories described below represent a continuum of decreasing culpability:⁶³⁹

- **High-Level Supplier/Importer:** Imports or supplies large quantities of drugs (one kilogram or more); is near the top of the distribution chain; has ownership interest in the drugs; usually supplies drugs to other drug distributors and generally does not deal in retail amounts.
- **Organizer/Leader:** Organizes or leads a drug distribution organization; has the largest share of the profits; possesses the most decision-making authority.
- **Grower/Manufacturer:** Cultivates or manufactures a controlled substance and is the principal owner of the drugs.
- **Wholesaler:** Sells more than retail/user-level quantities (more than one ounce) in a single transaction, purchases two or more ounces in a single transaction, or possesses two ounces or more on a single occasion, or sells any amount to another dealer for resale.
- **Manager/Supervisor:** Takes instruction from higher-level individual and manages a significant portion of drug business or supervises at least one other co-participant but has limited authority.

⁶³⁷ Terms used to describe offender function in this analysis do not necessarily correlate with guideline definitions of similar terms. For example, as seen below, the definition of manager/supervisor used in the coding project to describe offender function does not match the guideline definition of manager or supervisor in USSG §3B1.1 (Aggravating Role). Furthermore, the determination of offender function was made without regard to whether USSG §§3B1.1 and 3B1.2 applied.

⁶³⁸ A complete list of the 21 function categories and definitions appears in Appendix H of this Report.

⁶³⁹ There were also functions deemed “Secondary” and “Miscellaneous” that were identified but will not be discussed in this report. “Secondary” offenders (8.6% of the offenders in the sample) include offenders who were renters, loaders, lookouts, enablers, and users. “Miscellaneous” offenders (1.9%) include offenders who were pilots, captains, bodyguards, chemists, cooks, financiers, and money launderers. See the complete list of functions and definitions in Appendix H for detailed descriptions of these functions.

- Street-Level Dealer: Distributes retail quantities (less than one ounce) directly to users.
- Broker/Steerer: Arranges for drug sales by directing potential buyers to potential sellers.
- Courier: Transports or carries drugs using a vehicle or other equipment.
- Mule: Transports or carries drugs internally or on his or her person.⁶⁴⁰

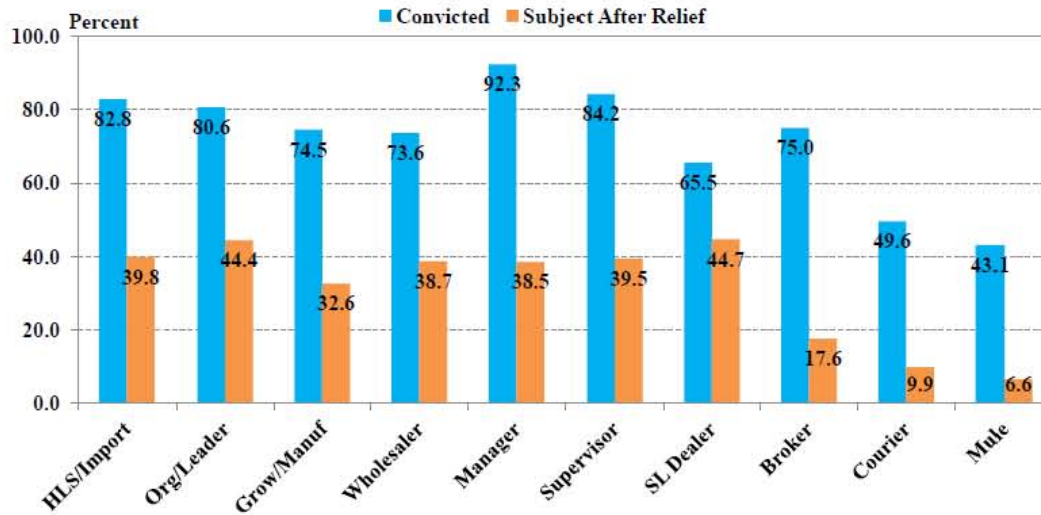
In the cases analyzed, Courier was the most common function, representing 23.0 percent of all offenders, followed by Wholesaler (21.2%), Street-Level Dealer (17.2%), and High-Level Supplier/Importer (10.9%). Manager and Supervisor were the least common functions, with each performed by only 1.1 percent of offenders.⁶⁴¹

The Commission also analyzed the function of those drug offenders convicted of an offense carrying a mandatory minimum penalty. The majority of offenders in nearly every function category were convicted of an offense carrying a mandatory minimum penalty, although higher-level functions tended to be convicted of such statutes at higher rates. Offenders who functioned as Managers were convicted of an offense carrying a mandatory minimum penalty at the highest rate (92.3%), followed by those who functioned as Supervisor (84.2%). Managers and Supervisors, however, as noted above accounted for only 1.1 percent of all drug offenders. Among the more common categories, particularly the categories High-Level Supplier/Importer, Wholesaler, Street-Level Dealer, Courier, and Mule, the rate of conviction of a statute carrying a mandatory minimum penalty decreased with the culpability of the function. Thus, High-Level Supplier/Importer offenders were convicted of an offense carrying a mandatory minimum penalty in 82.8 percent of the cases, while Street-Level Dealer offenders were convicted of such a statute in 65.5 percent of the cases. Only two functions – Courier and Mule – were convicted of an offense carrying a mandatory minimum penalty in less than half of the cases (49.6% and 43.1%, respectively). *See* Figure 8-9.

⁶⁴⁰ As these definitions show, some definitions rely in part on the quantity of drugs involved to determine the offender's most serious function. For example, an offender qualifies as a "wholesaler" by buying or selling a specified quantity of drugs (at least 1 ounce but less than 1 kilogram), or because he or she possessed at least 2 ounces of drugs.

⁶⁴¹ *See* Figure D-2 (Distribution of Offender Function Fiscal Year 2009 Sample Data) in Appendix D of this Report.

Figure 8-9
Percent of Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty
by Offender Function
Fiscal Year 2009 Sample Data

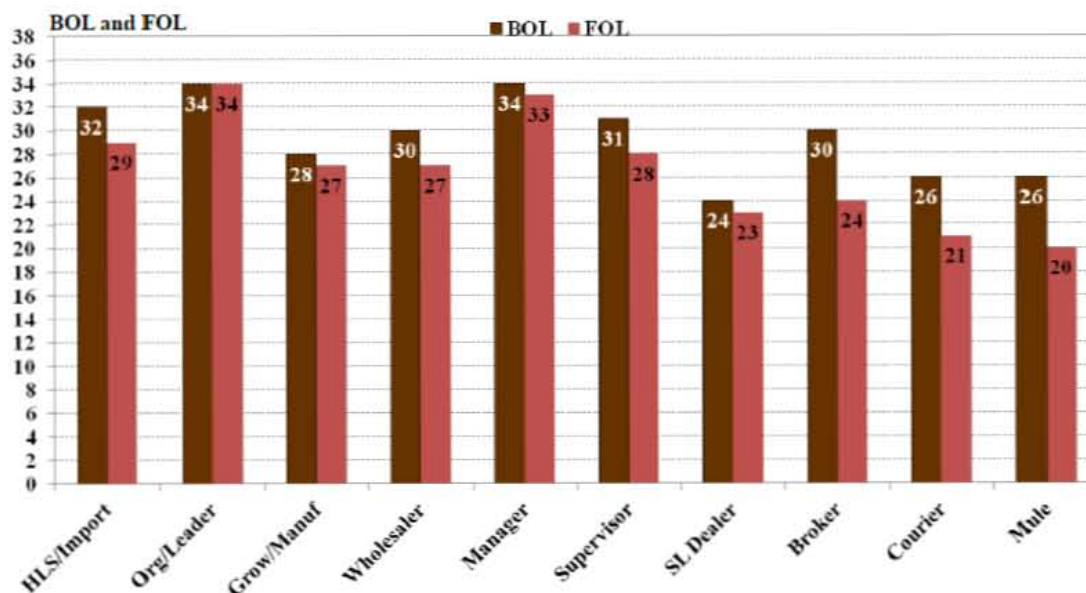


SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

The Commission’s analysis also revealed that the quantity of drugs involved in an offense is not closely related to the offender’s function in the offense.⁶⁴² The Commission analyzed the median base offense level by offender function for the five major drug types. The median base offense level is representative of the quantity of drugs attributable to the offender because the *Guidelines Manual* uses the quantity of drugs involved in the offense to determine the base offense level in a case. There was not a strong correlation between base offense level and level of the offender’s function in the offense. See Figure 8-10.

⁶⁴² For additional discussion regarding the role of drug quantity in mandatory minimum sentencing, see Chapter 12.

Figure 8-10
Median Base Offense and Final Offense Levels by Offender Function
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

As discussed more fully in Chapter 2, the available legislative history suggests that Congress intended to target the mandatory minimum penalties to “major” traffickers (ten-year penalty) and “serious” traffickers (five-year penalty). To do so, Congress established drug quantity thresholds for each major drug type that would trigger those minimum punishments.⁶⁴³ The Commission, in turn, incorporated those thresholds into the base offense levels under the sentencing guidelines. The Commission’s analysis suggests that the mandatory minimum penalties for drug offenses may apply more broadly than Congress may have originally intended. As a result of the quantity of drugs involved in the offense, base offense levels that included or exceeded the five-year mandatory minimum penalty often applied to every function, even those that may not be considered functions typically performed by “major” or “serious” drug traffickers. However, the impact of such penalties on certain offenders who perform lower-level functions is significantly ameliorated by the combined effect of the safety valve and downward guideline adjustments, resulting in final offense levels that are lower than the final offense levels for higher level offenders. See Figure 8-10.

In general, offenders who performed more serious functions were more likely to receive an aggravating role adjustment under the guidelines⁶⁴⁴ than offenders who performed less serious functions.⁶⁴⁵ Organizer/Leader offenders received the aggravating role adjustment in 70.4

⁶⁴³ See *supra* Chapter 2.

⁶⁴⁴ See USSG §3B1.1.

⁶⁴⁵ See Figure D-3 (Percent of All Offenders in Which the Aggravating Role Adjustment Applied and For Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty By Offender Function (Fiscal Year 2009 Sample Data)) in Appendix D of this Report.

percent of the cases, followed next by Managers (53.8%), and Supervisors (36.8%). No offenders who performed the functions of Street-Level Dealer, Broker, or Mule received the aggravating role adjustment. Less than one percent (0.1%) of offenders who performed the function of Courier received the aggravating role adjustment.

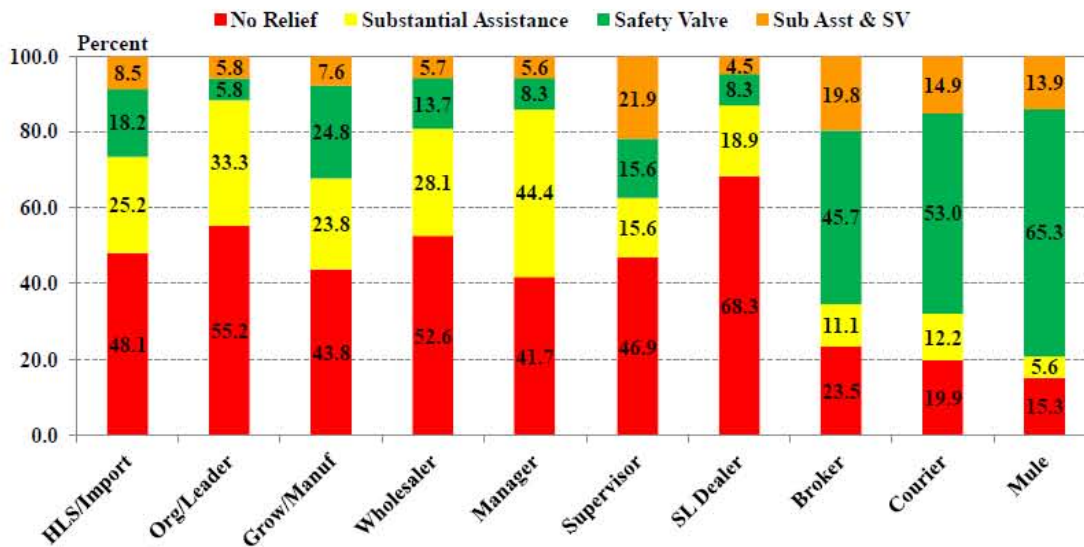
Conversely, offenders who performed less serious function were more likely to receive a mitigating role adjustment under the guidelines⁶⁴⁶ than offenders who performed more serious functions.⁶⁴⁷ Couriers received the mitigating role adjustment in 54.0 percent of the cases, followed next by Mules (47.9%) and Brokers (27.3%). No offenders who performed the functions of Organizer/Leader, Manager, or Supervisor received the mitigating role adjustment.

In addition to analyzing the rate of conviction of a statute carrying a mandatory minimum penalty, the Commission also analyzed the function of those offenders who obtained either type of relief from a mandatory minimum penalty. In general, offenders who performed low-level functions obtained relief from mandatory minimums at a higher rate than offenders who performed high-level functions. No function higher than Street-Level Dealer obtained relief in more than 58.3 percent of the cases (for the Manager function), while every function lower than Street-Level Dealer obtained relief in at least 76.5 percent of the cases (for the Broker function). Courier and Mule offenders obtained relief at the highest rates of any function, at 80.1 percent and 84.7 percent, respectively. Nonetheless, there were some exceptions to this general trend. Most notably, offenders who functioned as High-Level Supplier/Importer obtained relief at a higher rate (51.9%) than offenders who functioned as Wholesaler (47.4%) or Street-Level Dealer (31.7%). *See* Figure 8-11.

⁶⁴⁶ *See* USSG §3B1.2.

⁶⁴⁷ *See*, Figure D-4 (Percent of All Offenders in Which the Mitigating Role Adjustment Applied and For Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty By Offender Function (Fiscal Year 2009 Sample Data)) in Appendix D of this Report.

Figure 8-11
Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum
Penalty Who Were Relieved of the Penalty by Offender Function
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Furthermore, the correlation between function in the offense and relief from mandatory minimum penalties varied depending on the type of relief. Among those offenders who received relief from the mandatory minimum penalty by providing substantial assistance to the government, the Commission’s analysis shows that offenders who performed high-level functions generally obtained relief for substantial assistance at higher rates than offenders who performed low-level functions. The highest rates of relief based on substantial assistance were for Manager (50.0%) and Organizer/Leader (39.1%). The lowest rates of relief based on substantial assistance were for Mule (19.5%), Street-Level Dealer (23.4%), and Courier (27.1%).

With respect to offenders who received relief from a mandatory minimum penalty through the safety valve provision alone, the Commission’s analysis shows that offenders who performed low-level functions were more likely to obtain that type of relief than were offenders who performed high-level functions. No function higher than Street-Level Dealer obtained safety valve relief in more than 24.8 percent of the cases (for the Grower/Manufacturer functions). In fact, offenders who performed as Organizer/Leaders, Street-Level Dealers and Managers received safety valve relief at the lowest rates (5.8%, 8.3%, and 8.3%, respectively). Conversely, every function lower than Street-Level Dealer obtained relief in at least 45.7 percent of the cases and Courier and Mule offenders received safety valve relief at the highest rates (53.0% and 65.3%, respectively).

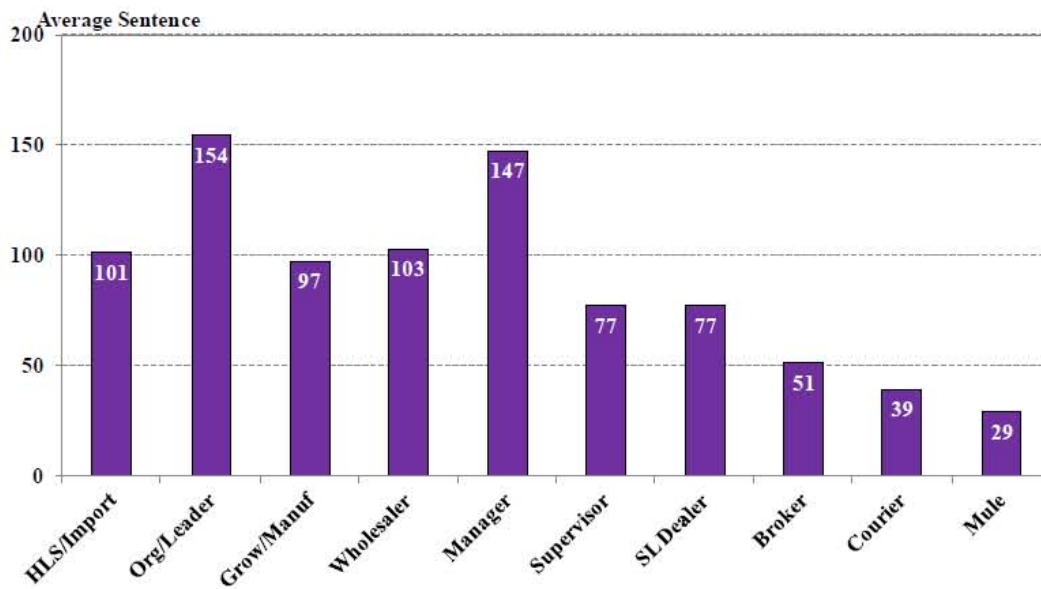
Offenders who performed as Street-Level Dealers remained subject to the mandatory minimum penalty at the highest rate (68.3%) followed by Organizer/Leaders (55.2%) and Wholesalers (52.6%). Offenders who performed low-level functions remained subject to the mandatory minimum penalty at the lowest rates (Mules (15.3%), Couriers (19.9%), and Brokers (23.5%)).

The high rate of safety valve relief for offenders performing lower-level functions in turn has enabled downward adjustments in the guidelines in many cases to differentiate these least serious drug offenders from the more serious drug offenders. For example, offenders convicted of a statute carrying a mandatory minimum penalty acting as Mules and Couriers received a mitigating role adjustment under §3B1.2 in 51.4 percent and 39.8 percent of their cases, respectively. Conversely, offenders convicted of a statute carrying a mandatory minimum penalty acting as Organizer/Leaders, Managers, and Supervisors received an aggravating role adjustment under §3B1.1 in 74.7 percent, 52.8 percent, and 37.5 percent of their cases, respectively. As a result of these and other guideline adjustments, such as the “mitigating role cap” in §2D1.1(a), offenders performing lower-level functions received final offense levels significantly lower than for those offenders performing higher-level functions.⁶⁴⁸ The median final offense levels for Mules (level 20) and Couriers (level 21), for example, were significantly lower than for High-Level Suppliers/Importers (level 29), Organizer/Leaders (level 34), and Managers (level 33) and Supervisors (level 28). *See supra* Figure 8-10.

As a result of the combined effect of the safety valve and applicable guideline adjustments, certain offenders performing lower-level functions received significantly shorter sentences than offenders performing higher-level functions. For example, the average sentences for Mules (29 months) and Couriers (39 months) were significantly shorter than for High Level Suppliers/Importers (101 months), Organizer/Leaders (154 months), Wholesalers (103 months), and Managers (147 months). *See* Figure 8-12.

⁶⁴⁸ *See* Figures D-3 (Percent of All Offenders In Which the Aggravating Role Adjustment Applied and For Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty By Offender Function (Fiscal Year 2009 Sample Data)), and D-4 (Percent of All Offenders In Which the Mitigating Role Adjustment Applied and For Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty By Offender Function (Fiscal Year 2009 Sample Data)) in Appendix D of this Report.

Figure 8-12
Average Sentence by Offender Function
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

D. POWDER COCAINE OFFENSES

Powder cocaine offenses accounted for almost one-quarter of all drug offenses in fiscal year 2010. In fiscal year 2010, 5,571 of the 23,964 drug offenders (23.5%) committed an offense involving powder cocaine. The majority of powder cocaine offenders (79.8%, n=4,447) were convicted of an offense carrying a mandatory minimum penalty. *See* Table 8-4. Less than half of the powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty (38.6%, n=1,718) were subject to the mandatory minimum at sentencing. *See* Table 8-4.

1. Demographic Characteristics of Powder Cocaine Offenders

The race, citizenship, and gender of powder cocaine offenders subject to the mandatory penalty at sentencing were notably different from powder cocaine offenders generally and for those powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty. Table 8-4 presents information on the demographic characteristics of powder cocaine offenders. This information is then compared to that for powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty and then to those powder cocaine offenders who remained subject to the mandatory minimum at the time of sentencing because they did not qualify for any form of statutory relief.

More than half (54.9%, n=3,054) of all powder cocaine offenders were Hispanic. A similar proportion of Hispanic offenders were convicted of an offense carrying a mandatory minimum penalty (58.5%, n=2,595) and remained subject to a mandatory minimum penalty at the time of sentencing (55.2%, n=947).

The sentencing of Black powder cocaine offenders was different. Approximately one quarter of all powder cocaine offenders (26.7%, n=1,486) are Black. Although a comparable proportion of powder cocaine offenders were also convicted of an offense carrying a mandatory minimum penalty (24.5%, n=1,087), the proportion of Black powder cocaine offenders subject to the mandatory minimum at sentencing was higher, at almost one-third (32.4%, n=555). In fact, Black offenders have the highest such rate, while the proportions of all other demographic groups subject to the mandatory minimum decrease relative to their proportion of all powder cocaine cases. The majority of Black powder cocaine offenders (64.7%, n=703) did not qualify for safety valve relief from the mandatory minimum penalty due to their criminal history.⁶⁴⁹

Likewise, criminal history differences between United States citizen and non-citizen powder cocaine offenders likely contribute to the increase in proportion of United States citizen powder cocaine offenders (68.0%, n=1,167) subject to the mandatory minimum penalty at sentencing, and the decrease in proportion of non-citizen powder cocaine offenders (32.0%, n=550) subject to the mandatory minimum penalty at sentencing.

⁶⁴⁹ See Figure D-6 (Race of All Powder Cocaine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty by Criminal History Category (Fiscal Year 2010)) in Appendix D of this Report.

Table 8-4
Demographic Characteristics of Powder Cocaine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	5,571	4,447	2,729	1,718
Race of Offender (Percent)				
White	16.7	15.5	18.2	11.3
Black	26.7	24.5	19.5	32.4
Hispanic	54.9	58.5	60.5	55.2
Other	1.6	1.5	1.8	1.1
Citizenship of Offender (Percent)				
United States Citizen	62.4	58.4	52.4	68.0
Non-U.S. Citizen	37.6	41.6	47.6	32.0
Gender of Offender (Percent)				
Male	90.6	91.7	88.8	96.3
Female	9.4	8.3	11.3	3.7

Finally, female powder cocaine offenders received relief from the mandatory minimum penalty at a higher rate than male powder cocaine offenders. As a result, female powder cocaine offenders represent a small proportion (3.7%, n=64) of the total powder cocaine offenders who remained subject to the mandatory minimum penalty at sentencing. *See* Table 8-4.

Table 8-5 displays information about offense characteristics and criminal history categories for these groups of offenders. Powder cocaine offenders subject to the mandatory minimum penalty at sentencing appear to have higher instances of firearm and other weapons involved in their offense conduct than all powder cocaine offenders. Moreover, powder cocaine offenders who received an aggravating role adjustment were subject to the mandatory minimum penalty at sentencing at a higher rate than powder cocaine offenders who qualified for a mitigating role adjustment. Offenders who possessed a dangerous weapon or who received an aggravating role adjustment did not qualify for safety valve relief from the mandatory minimum penalty.⁶⁵⁰

⁶⁵⁰ *See* USSG §5C1.2.

The criminal histories of powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty closely mirror those of the overall powder cocaine offender population, with around 60 percent of both populations (61.9%, n=2,754 and 59.1%, n=3,293, respectively) of powder cocaine offenders in Criminal History Category I. In contrast, powder cocaine offenders subject to a mandatory minimum penalty at sentencing had a much lower percentage (37.8%, n=650) of offenders in Criminal History Category I.

Table 8-5
Guideline Sentencing Characteristics, Role in the Offense, and
Criminal History of Powder Cocaine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	5,571	4,447	2,729	1,718
Characteristics (Percent)				
Weapon Specific Offense Characteristic	12.0	11.7	7.2	18.8
Firearms Mandatory Minimum Applied	5.4	6.8	3.5	12.0
Safety Valve Reduction	40.0	42.9	69.9	0.0
Role in the Offense (Percent)				
Aggravating Role	8.0	9.6	6.1	15.2
Mitigating Role	18.3	18.3	25.8	6.4
Criminal History Category (Percent)				
I	59.1	61.9	77.1	37.8
II	11.8	11.2	6.5	18.7
III	12.8	12.3	7.2	20.4
IV	5.7	5.2	3.3	8.3
V	2.6	2.3	1.5	3.6
VI	8.0	7.0	4.4	11.2

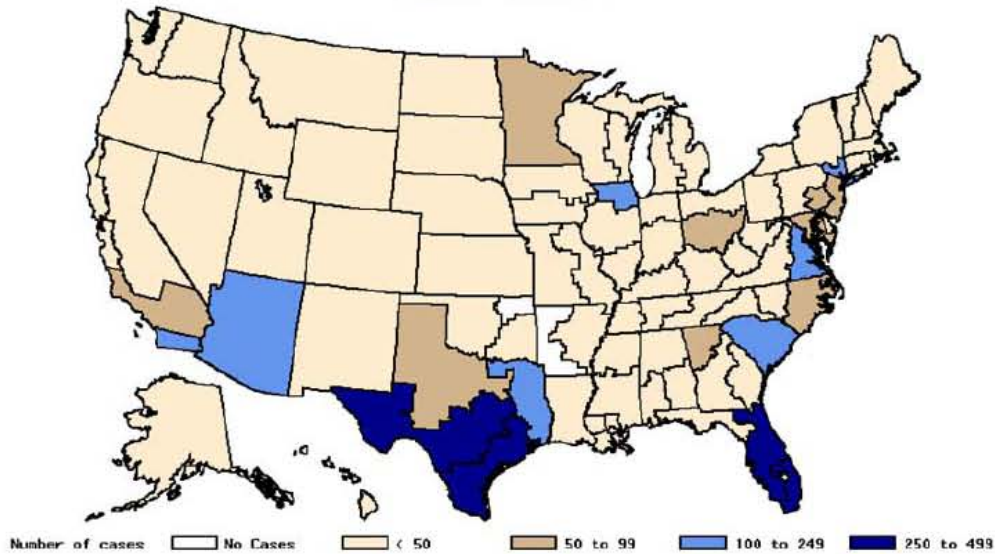
2. *Guilty Pleas and Trials*

Powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty went to trial at a higher rate than powder cocaine offenders who were not convicted of an offense carrying a mandatory minimum penalty. Of the 4,447 offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010, 95.1 percent (n=4,229) pled guilty and 4.9 percent (n=218) proceeded to trial. By comparison, 98.2 percent (n=1,090) of powder cocaine offenders convicted of an offense not carrying a mandatory minimum penalty in fiscal year 2010 pled guilty while 1.8 percent (n=20) of those offenders were convicted after a trial.

3. *Geographic Variations*

As noted in drug cases generally, the 94 judicial districts varied significantly in the number of powder cocaine cases reported to the Commission in fiscal year 2010. As a result, the number of powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty in each district also varied. Thirteen of the 94 judicial districts reported 100 or more powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010: Southern Texas (n=341, 4.1% of the overall caseload in the district), Southern Florida (n=302, 14.0%), Middle Florida (n=273, 16.4%), Western Texas (n=253, 3.8%), Southern California (n=217, 7.2%), Southern New York (n=166, 12.5%), Puerto Rico (n=126, 16.2%), Eastern New York (n=116, 10.6%), Eastern Texas (n=116, 13.9%), Eastern Virginia (n=112, 9.1%), Arizona (n=111, 2.2%), Northern Illinois (n=107, 13.4%), and South Carolina (n=103, 8.4%). Most of these districts are either points of entry into the United States or are located on known distribution routes from such districts. *See* Figure 8-13.

Figure 8-13
Number of Powder Cocaine Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
By District
Fiscal Year 2010



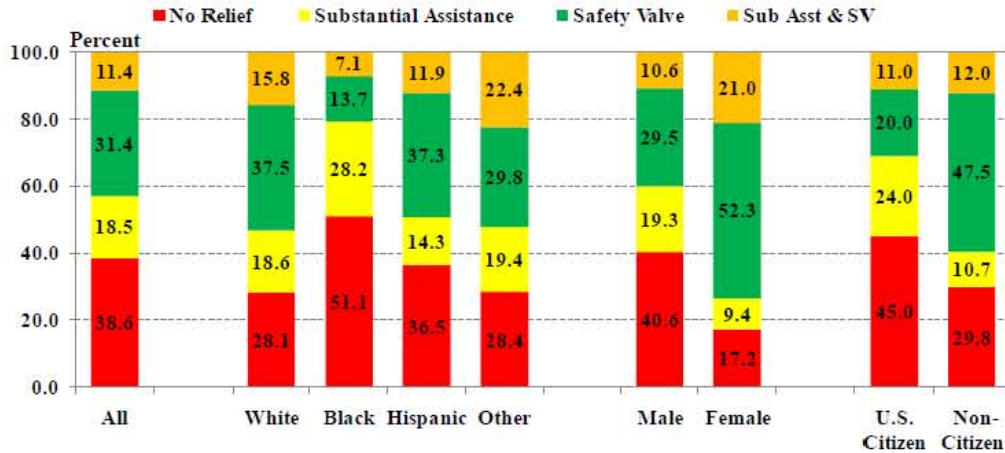
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

As a percentage of the overall caseload, powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty were most common in the District of Maine, where 17.5 percent of the district’s criminal caseload (n=29 of 166 offenders) involved this type of offense, as well as Middle District of Florida (16.4%, n=273 of the 1,660 offenders) and Puerto Rico (16.2%, n=126 of 780 offenders).

4. *Relief from the Mandatory Minimum Penalty*

In fiscal year 2010, almost two-thirds (61.4%, n=2,729) of powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory minimum penalty. Almost half (42.9%, n=1,907) of the powder cocaine offenders received relief through operation of the safety valve. Powder cocaine offenders who did not qualify for the safety valve but who provided substantial assistance to the government also received relief and accounted for 18.5 percent (n=822) of all powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty. A smaller percentage (11.4%, n= 509) of powder cocaine offenders received relief from the mandatory minimum penalty by qualifying for application of both the safety valve and substantial assistance provisions. See Figure 8-14.

Figure 8-14
Percent of Powder Cocaine Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The rate at which offenders received relief from the mandatory minimum through these provisions varied by race, gender and citizenship.⁶⁵¹ For example, White offenders qualified for some form of relief from a mandatory minimum penalty most often, with 71.9 percent (n=496) of all White offenders convicted of an offense carrying such a penalty obtaining relief from the penalty. Black offenders qualified for relief from mandatory minimum penalties least often, in only 48.9 percent (n=532) of cases in which they were convicted of an offense carrying such a penalty. See Figure 8-14.

Almost three quarters of all female powder cocaine offenders (73.3%, n=272) received relief from the mandatory minimum penalty pursuant to operation of the safety valve, compared to slightly less than half (40.1%, n=1,635) of male offenders. See Figure 8-14.

The manner in which relief from a mandatory minimum penalty was obtained also varied by the race and citizenship of the offender. White powder cocaine offenders most often received such relief through operation of the safety valve provision, alone or in conjunction with providing substantial assistance. White offenders received safety valve relief in more than half (53.3%, n=368) of the cases in which a mandatory minimum penalty applied. Conversely, Black offenders qualified for safety valve relief in 20.8 percent (n=226) of the cases, either alone or in conjunction with providing substantial assistance to the government. This difference is largely attributable to the higher criminal history scores of Black offenders. More than half of Black powder cocaine offenders (64.7%, n=703) convicted of a drug offense carrying a mandatory

⁶⁵¹ Figure 8-14 (Percent of Powder Cocaine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty Who are Relieved of the Penalty) shows the breakdown by categories. For purposes of this discussion, the rates at which offenders received safety valve reflect both cases in which such relief was given alone and those in which it was given after the offender's substantial assistance to the government.

minimum penalty have at least two criminal history points under the sentencing guidelines, which disqualifies them for application of the safety valve.

Non-citizens most often received relief from drug mandatory minimum penalties through operation of the safety valve provision, alone or in conjunction with providing substantial assistance. The safety valve applied in 59.5 percent (n=1,100) of powder cocaine cases involving a non-citizen convicted of an offense carrying a mandatory minimum penalty. The rate in such cases involving United States citizens was 31.0 percent (n=806). *See* Figure 8-14.

In contrast, United States citizen powder cocaine offenders obtained relief for rendering substantial assistance to the government more often than non-citizen powder cocaine offenders. United States citizens received relief from a mandatory minimum penalty by providing substantial assistance, by itself or in conjunction with safety valve relief, in 35.0 percent (n=911) of all cases while non-citizens obtained relief in this manner in only 22.7 percent (n=420) of the cases in which they were the offender.

The rate at which offenders of different races received relief from a mandatory minimum by providing substantial assistance to the government, either alone or in conjunction with the safety valve provision, also varied. Other Race offenders received relief from the mandatory minimum penalty most often by providing substantial assistance to the government, in 41.8 percent (n=28) of the cases in which they were the offender. Black offenders received relief through this provision in 35.3 percent (n=383) of the cases in which they were the offender, followed by White offenders at 34.4 percent (n=237) and Hispanic offenders at 26.2 percent (n=680). Slightly less than one-third (30.4%, n=113) of female drug offenders received relief from the mandatory minimum penalty by providing substantial assistance compared to 29.9 percent (n=1,218) of male drug offenders. *See* Figure 8-14.

5. *Sentencing Outcomes*

a. Average sentence length

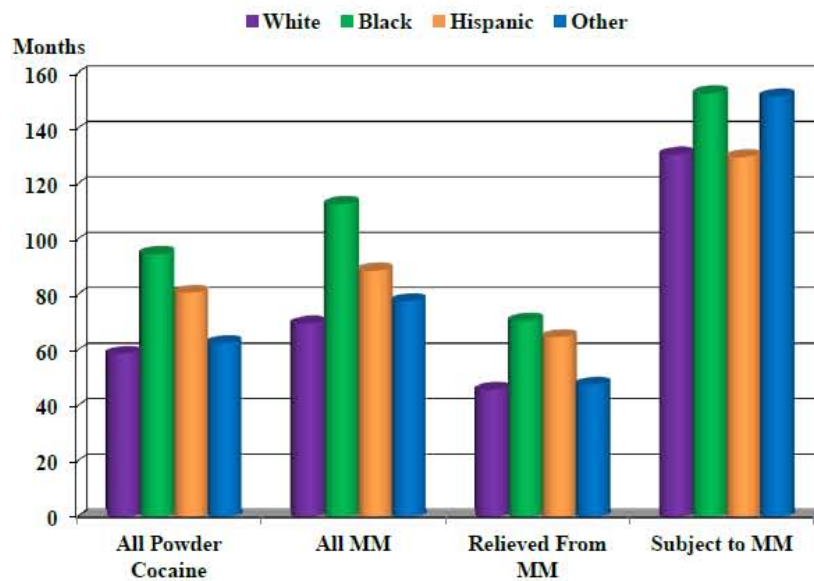
The average sentence for powder cocaine offenders who remained subject to the mandatory minimum penalty (*i.e.*, who did not receive some form of statutory relief) was 138 months, compared to 62 months for those offenders who obtained relief from the mandatory minimum penalty.

The form of relief from a mandatory minimum penalty affected the average sentence imposed. Powder cocaine offenders who qualified for the safety valve and who also provided the government with substantial assistance had the lowest sentences, at 39 months on average. The average sentence for powder cocaine offenders who did not qualify for safety valve relief but who provided substantial assistance to the government was 86 months. Offenders who received relief from the mandatory minimum penalty through application of the safety valve but who did not also provide substantial assistance to the government received an average sentence of 57 months.

The Commission examined average sentences imposed on the overall powder cocaine population, by race, compared to average sentences imposed on powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty. Black powder cocaine offenders received an average sentence of 95 months, which was higher than the average sentence imposed on any other racial group of powder cocaine offenders. White powder cocaine offenders received the shortest average sentences (59 months). Among powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty, Black offenders also received the highest average sentence (113 months), compared to White offenders (70 months), Hispanic Offenders (89 months) and Other Race offenders (78 months).

A similar pattern emerged when comparing average sentences by race for powder cocaine offenders who remained subject to the mandatory minimum penalty at sentencing with those who obtained relief from the mandatory minimum penalty. Black powder cocaine offenders who remained subject to the mandatory minimum penalty had a higher average sentence (153 months) than any other racial group (White offenders (131 months), Hispanic offenders (131 months), and Other Race offenders (152 months)). Black offenders who obtained relief from the mandatory minimum penalty at sentencing also received the highest sentence, on average (71 months), followed by Hispanic offenders (65 months), Other Race offenders (48 months), and White offenders (46 months). *See* Figure 8-15.

Figure 8-15
Average Sentence Length by Race of Powder Cocaine Offenders
Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The higher average sentences for Black powder cocaine offenders in each category may, in part, be attributable to criminal history category differences between Black offenders and those in the other racial groups. For all powder cocaine offenders, powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty, powder cocaine offenders who remained subject to the mandatory minimum penalty, and powder cocaine offenders who

obtained relief from the mandatory minimum, the proportion of offenders at each criminal history category who were Black increased with the criminal history category in contrast to the patterns seen among other races.⁶⁵² For example, 40.9 percent (n=436) of offenders who were subject to the mandatory minimum penalty at sentencing and are in Criminal History Category II or above were Black offenders, which contrasts to 59.1 percent of offenders who were White, Hispanic, and Other Race who were subject to the mandatory minimum penalty at sentencing and are in Criminal History Category II or above.

The difference in average sentences among racial groups also may be attributable to the fact that Black offenders tended to be convicted of statutes carrying longer mandatory minimum penalties than the offenders in the other racial groups and because Black offenders were more likely than offenders in the other racial groups to be ineligible for the safety valve.⁶⁵³

b. Position relative to the guideline range

Table 8-6 compares the position of sentences relative to the guideline range among powder cocaine offenders, powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty, powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and then powder cocaine offenders who remained subject to the mandatory minimum at the time of sentencing because they did not qualify for any form of statutory relief. There were only minimal differences in the position of sentences relative to the guideline range among the first two groups. Powder cocaine offenders who remained subject to the mandatory minimum penalty at the time of sentencing were sentenced within the applicable guideline range in 71.8 percent (n=1,233) of the cases and received non-government sponsored below range sentences in 22.5 percent (n=386) of the cases

⁶⁵² See Figure D-5 (Race of All Powder Cocaine Offenders by Criminal History Category (Fiscal Year 2010)); Figure D-6 (Race of Powder Cocaine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty By Criminal History Category (Fiscal Year 2010)); Figure D-7 (Race of Powder Cocaine Offenders Relieved from a Drug Mandatory Minimum Penalty At Sentencing by Criminal History Category (Fiscal Year 2010)); and Figure D-8 (Race of Powder Cocaine Offenders Subject to a Drug Mandatory Minimum Penalty At Sentencing by Criminal History Category (Fiscal Year 2010)) in Appendix D of this Report.

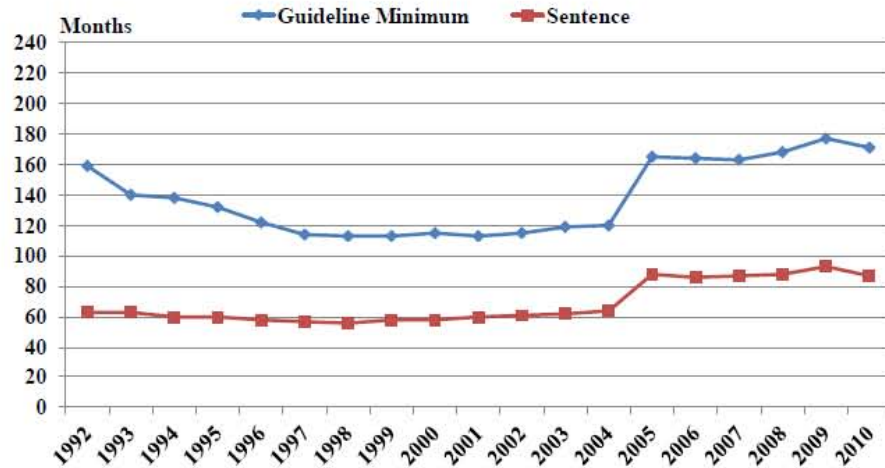
⁶⁵³ See Figure D-13 (Race of Powder Cocaine Offenders by Length of Drug Mandatory Minimum Penalty (Fiscal Year 2010)) in Appendix D of this Report.

Table 8-6
Sentence Relative to the Guideline Range of Powder Cocaine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	5,571	4,447	2,729	1,718
Sentence Relative to the Guideline Range (Percent)				
Within Range	45.8	44.4	27.2	71.8
Above Range	0.6	0.6	0.3	0.9
Substantial Assistance §5K1.1	27.2	29.9	48.8	0.0
Other Government Sponsored (no §5K1.1)	6.6	6.9	8.2	4.8
Other Below Range	19.8	18.2	15.5	22.5

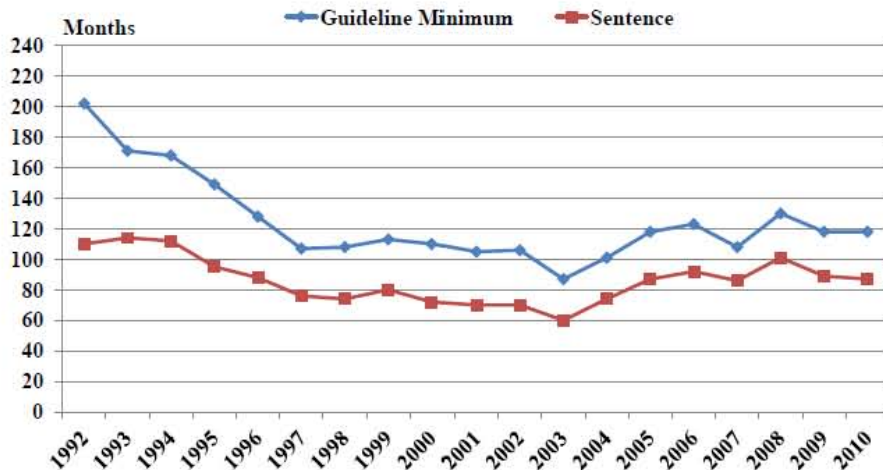
Figures 8-16 and 8-17 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for powder cocaine offenses for offenders sentenced from fiscal year 1995 to 2010. As the figures demonstrate, although the average sentences imposed were below the guideline range in each year, they remained at or above five years.

Figure 8-16
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Substantial Assistance
Powder Cocaine Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992– USSCFY2010.

Figure 8-17
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Non-Substantial Assistance Below Range Sentence
Powder Cocaine Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992– USSCFY2010.

In fiscal year 2010, the average extent of substantial assistance departures in powder cocaine cases was 48.6 percent (66 months) from the bottom of the otherwise applicable guideline range. In fiscal year 2010, the average extent of non-government sponsored below

range sentences (*i.e.*, departures and variances combined) in powder cocaine cases that carried a mandatory minimum penalty was 29.0 percent (31 months) from the minimum of the otherwise applicable guideline range.

6. *Prison Impact*

At the end of fiscal year 2010, 13.4 percent (n=25,767) of the 191,757 offenders in the custody of the BOP were convicted of a powder cocaine offense. Powder cocaine offenders were second only to crack cocaine offenders (n=32,694). This was not always the case. From 1995 through 1998, powder cocaine offenders constituted the largest group of drug offenders in BOP custody. In 1998, the number of crack cocaine offenders surpassed powder cocaine offenders, a trend which continued through 2010.

At the end of fiscal year 2010, 89.9 percent (n=23,157) of the 25,767 powder cocaine offenders in BOP custody were convicted of an offense carrying a mandatory minimum penalty. In 1995, the proportion of powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty was 84.7 percent (n=12,243). The percentage then increased steadily to the current high of 89.9 percent in 2010.⁶⁵⁴

In contrast, the rate at which powder cocaine offenders in the BOP were subject to a mandatory minimum penalty at sentencing has fluctuated somewhat over the years. At the end of fiscal year 2010, approximately half (50.2%, n=12,929) of the powder cocaine offenders in BOP custody were subject to a mandatory minimum penalty at sentencing. This rate has varied from a high of 59.3 percent (n=8,570) in 1995 to a low of 48.9 percent (n=12,304) in 2008.

7. *Offender Function*

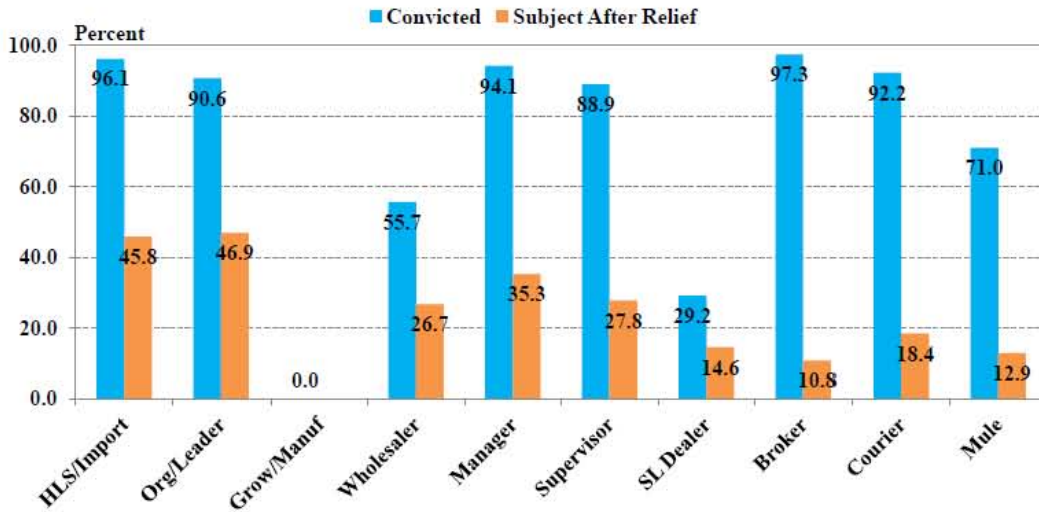
For powder cocaine offenders, the most common functions for offenders were High Level Supplier/Importer (24.1%), Courier (21.1%) and Wholesaler (20.7%). The least common functions were Grower/Manufacturer (0.0%), Manager (2.0%) and Supervisor (2.1%).⁶⁵⁵

In powder cocaine offenses, 29.2 percent of Street-Level Dealer offenders were convicted of an offense carrying a mandatory minimum penalty. In contrast, almost all (96.1%) of High-Level Supplier/Importer offenders were convicted of an offense carrying a mandatory minimum penalty. Wholesaler offenders were convicted of an offense carrying a mandatory minimum penalty at a rate of 55.7 percent, but offenders performing functions lower than Wholesaler, such as Manager, Supervisor, Broker and Courier, all were convicted of statutes carrying mandatory minimum penalties at rates above 85 percent. *See* Figure 8-18.

⁶⁵⁴ *See* Figure D-14 (Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing - Powder Cocaine Offenders (1995-2010)) in Appendix D of this Report.

⁶⁵⁵ *See* Figure D-15 (Distribution of Offender Function by Primary Drug Type - Powder Cocaine Offenders (Fiscal Year 2009 Sample Data)) in Appendix D of this Report.

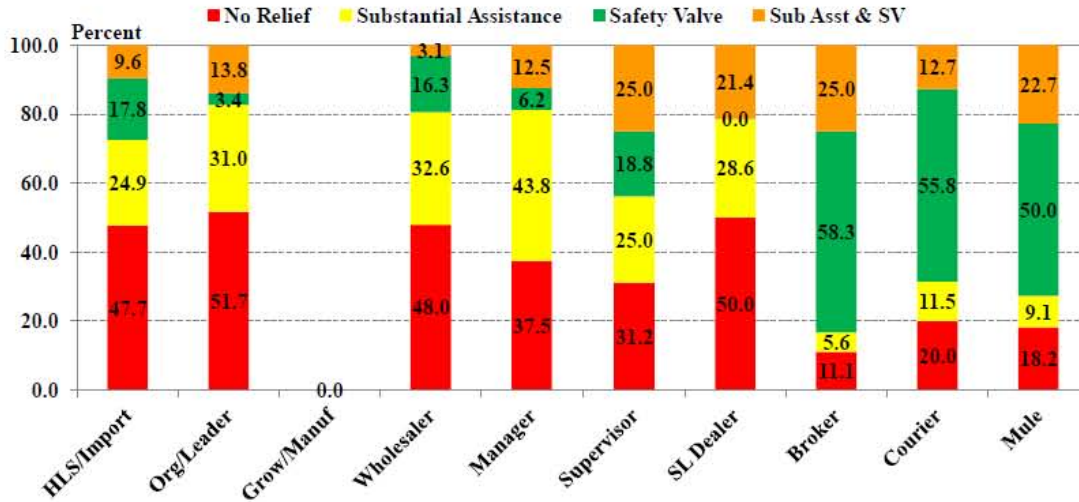
Figure 8-18
Percent of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty and
Subject to a Mandatory Minimum Penalty
By Offender Function and Primary Drug Type
Powder Cocaine Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

As was the case with the overall drug population, offenders who performed high-level functions generally obtained relief for substantial assistance at higher rates than offenders who performed low-level functions. Conversely, offenders who performed low-level functions were more likely to have obtained relief pursuant to the statutory safety valve than offenders who performed high-level functions. *See* Figure 8-19.

Figure 8-19
Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
Who Were Relieved of the Penalty By Offender Function
Powder Cocaine Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

8. Summary

With respect to mandatory minimum penalties for powder cocaine offenders, Commission analyses demonstrate the following:

Offenses and Offenders

- Powder cocaine offenses accounted for almost one-quarter (23.3%, n=5,571) of all drug offenses in fiscal year 2010. The majority of powder cocaine offenders (79.8%, n=4,447) were convicted of an offense carrying a mandatory minimum penalty.
- More than half of all powder cocaine offenders are Hispanic (54.9%). Approximately one quarter (26.7%) are Black, followed by White (16.7%) and Other Race (1.6%) offenders.
- The overwhelming majority of powder cocaine offenders (90.6%) are male.
- United States citizens accounted for 62.4 percent (n=3,475) of powder cocaine offenders.
- Thirteen of the 94 judicial districts reported 100 or more powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010.

- The most common functions for powder cocaine offenders were High Level Supplier/Importer (24.1%), Courier (21.1%), and Wholesaler (20.7%).

Application and Relief

- Of the 4,447 offenders convicted of a powder cocaine offense carrying a mandatory minimum penalty in fiscal year 2010, 95.1 percent (n=4,229) pled guilty and 4.9 percent (n=218) proceeded to trial. By comparison, 98.2 percent (n=1,090) of powder cocaine offenders convicted of an offense not carrying a mandatory minimum penalty in fiscal year 2010 pled guilty while 1.8 percent (n=20) of those offenders proceeded to trial.
- In fiscal year 2010, almost two-thirds (61.4%, n=2,729) of powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory minimum penalty.
 - White offenders qualified for some form of relief from a mandatory minimum penalty most often, in 71.9 percent of their offenses carrying such a penalty, followed by Other Race (71.6%) and Hispanic (63.5%) offenders. Black offenders qualified for relief from mandatory minimum penalties least often, in 48.9 percent of the cases in which they were convicted of an offense carrying such a penalty.
 - Black offenders received substantial assistance relief alone from a mandatory minimum penalty most often, in 28.2 percent of their offenses carrying such a penalty, followed by Other Race (19.4%) and White (18.6%) offenders. Hispanic offenders received relief from mandatory minimum penalties through substantial assistance the least often, in 14.3 percent of their cases.
 - White offenders received safety valve relief alone most often, in 37.5 percent of their cases, followed by Hispanic (37.3%) and Other Race (29.8%) offenders. Black offenders received relief from mandatory minimum penalties through the safety valve the least often, in 13.7 percent of their cases.
 - Other Race offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief most often, in 22.4 percent of their cases, followed by White (15.8%), Hispanic (11.9%) and Black (7.1%) offenders
 - Female powder cocaine offenders received relief from the mandatory minimum penalty at a higher rate (82.7%) than male powder cocaine offenders (59.4%).
 - Male offenders received substantial assistance relief alone from a mandatory minimum penalty more often, in 19.3 percent of their cases, compared to female offenders (9.4%).

- Female offenders received safety valve relief alone more often, in 52.3 percent of their cases, compared to male offenders (29.5%).
 - Female offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often in 21.0 percent of their cases, compared to 10.6 percent of cases involving male offenders.
 - Non-citizen powder cocaine offenders received relief from the mandatory minimum penalty at a higher rate (70.2%) than United States citizen powder cocaine offenders (55.0%).
 - United States citizen powder cocaine offenders received substantial assistance relief alone from a mandatory minimum penalty more often in 24.0 percent of their cases, compared to non-citizen offenders (10.7%).
 - Non-citizen offenders received safety valve relief alone more often, in 47.5 percent of their cases, compared to United States citizens (20.0%).
 - Non-citizen offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often, in 12.0 percent of their cases, compared to 11.0 percent of cases involving United States citizens.
- Less than half (44.4%) of all powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range.
 - More than one-third (36.8%) of powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty received a government sponsored below range sentence.
 - Powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty received a non-government sponsored below range sentence in 18.2 percent of the cases.
- In fiscal year 2010, the average extent of substantial assistance departures in powder cocaine cases was 48.6 percent (66 months) from the bottom of the otherwise applicable guideline range.
- In fiscal year 2010, the average extent of non-government sponsored below range sentences in powder cocaine cases that carried a mandatory minimum penalty was 29.0 percent (31 months) from the bottom of the otherwise applicable guideline range.

Sentencing

- In fiscal year 2010, 38.6 percent of powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which powder cocaine offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 51.1 percent of their offenses carrying such a penalty, followed by Hispanic (36.5%) and Other Race (28.4%) offenders. White offenders were subject to the mandatory minimum penalty at sentencing the least often, in 28.1 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (40.6% of their cases, compared to 17.2% of cases involving female offenders).
 - United States citizens were subject to the mandatory minimum penalty at sentencing more often than non-citizens offenders (45.0% of their cases, compared to 29.8% of cases involving non-citizen offenders).
- The average sentence for powder cocaine offenders who were subject to the mandatory minimum penalty (*i.e.*, who did not receive some form of statutory relief) was 138 months. The average sentence for those offenders who obtained relief from the mandatory minimum penalty was 62 months.
- Black powder cocaine offenders who remained subject to the mandatory minimum penalty had a higher average sentence (153 months) than any other racial group (White offenders (131 months), Hispanic offenders (131 months), and Other Race offenders (152 months)).
- The higher average sentence for Black powder cocaine offenders is attributable, in part, to criminal history category differences between Black offenders and those in the other racial groups.
 - The proportion of offenders at each criminal history category who were Black increased with the criminal history category in contrast to the patterns seen among other races.
 - More than three-quarters of Black powder cocaine offenders (78.6%, n=436) who remained subject to a mandatory minimum penalty had at least two criminal history points under the sentencing guidelines, which disqualified them for application of the safety valve

- o Black offenders tend to be convicted of statutes carrying longer mandatory minimum penalties than the offenders in the other racial groups.

Prison Impact

- At the end of fiscal year 2010, 13.4 percent of the offenders in the custody of the Bureau of Prisons were convicted of a powder cocaine offense.

E. CRACK COCAINE OFFENSES

Crack cocaine offenses accounted for approximately one-fifth of all drug offenses in fiscal year 2010. That year, 4,751 of the 23,964 drug offenders (19.8%) were convicted of an offense involving crack cocaine.⁶⁵⁶ The overwhelming majority of those crack cocaine offenders (82.2%, n=3,905) were convicted of an offense carrying a mandatory minimum penalty. Crack cocaine and methamphetamine cases (83.2%) had the highest rates of offenders convicted of an offense carrying a mandatory minimum penalty.⁶⁵⁷

1. *Demographic Characteristics of Crack Cocaine Offenders*

Table 8-7 presents information on the demographic characteristics of crack cocaine offenders. The overwhelming majority of crack cocaine offenders convicted of an offense carrying a mandatory minimum were male (92.7%, n=3,620)⁶⁵⁸ and were United States citizens (97.2%, n=3,796).⁶⁵⁹ More than three-quarters (78.6%, n=3,728) of all crack cocaine offenders were Black. Black offenders constituted a similar proportion (78.5%, n=3,059) of those crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty. The proportion of Black crack cocaine offenders subject to a mandatory minimum penalty at the time of sentencing (78.7%, n=1,961) was comparable to their proportion in the overall crack cocaine offender population and the population of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty.

⁶⁵⁶ Fiscal year 2010 started on October 1, 2009, and ended September 30, 2010. The majority of the crack offenders sentenced in fiscal year 2010 were sentenced prior to August 3, 2010, the date of enactment of the Fair Sentencing Act of 2010. Some degree of caution should be exercised in drawing conclusions from the crack cocaine data analyzed in this report because it is not yet clear how the Fair Sentencing Act of 2010 will impact sentences for crack cocaine offenses.

⁶⁵⁷ See Table D-7 (Mandatory Minimum Status and Average Sentence by Drug Type for Drug Offenders (Fiscal Year 2010)) in Appendix D of this Report.

⁶⁵⁸ See Table D-10 (Gender of Offenders and Average Sentence by Drug Type for Offenders Sentenced under Mandatory Minimum (Fiscal Year 2010)) in Appendix D of this Report.

⁶⁵⁹ See Table D-12 (Citizenship of Offender and Average Sentence by Drug Type for Offenders Sentenced under Mandatory Minimum (Fiscal Year 2010)) in Appendix D of this Report.

Table 8-7
Demographic Characteristics of Crack Cocaine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	4,751	3,905	1,407	2,498
Race of Offender (Percent)				
White	7.3	6.4	10.0	4.4
Black	78.6	78.5	78.1	78.7
Hispanic	13.0	14.1	10.2	16.3
Other	1.1	1.0	1.7	0.6
Citizenship of Offender (Percent)				
United States Citizen	97.3	97.2	96.5	97.6
Non-U.S. Citizen	2.7	2.8	3.5	2.4
Gender of Offender (Percent)				
Male	91.5	92.7	87.6	95.6
Female	8.5	7.3	12.4	4.4

Table 8-8 displays information about offense characteristics and criminal history category for all crack cocaine offenders, for those crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty, crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and for those offenders who remained subject to the mandatory minimum because they did not obtain either safety valve or substantial assistance relief.

Table 8-8
Guideline Sentencing Characteristics, Role in the Offense, and
Criminal History of Crack Cocaine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	4,751	3,905	1,407	2,498
Characteristics (Percent)				
Weapon Specific Offense Characteristic	18.6	18.8	13.7	21.8
Firearms Mandatory Minimum Applied	9.1	11.0	8.6	12.4
Safety Valve Reduction	11.3	11.6	32.3	0.0
Role in the Offense (Percent)				
Aggravating Role	5.6	6.2	5.9	6.4
Mitigating Role	4.0	3.5	7.0	1.5
Criminal History Category (Percent)				
I	22.2	22.8	37.3	14.6
II	11.7	11.4	9.2	12.6
III	18.2	18.0	14.8	19.8
IV	11.7	12.0	8.8	13.8
V	8.0	7.9	6.3	8.9
VI	28.3	27.8	23.6	30.2

2. *Guilty Pleas and Trials*

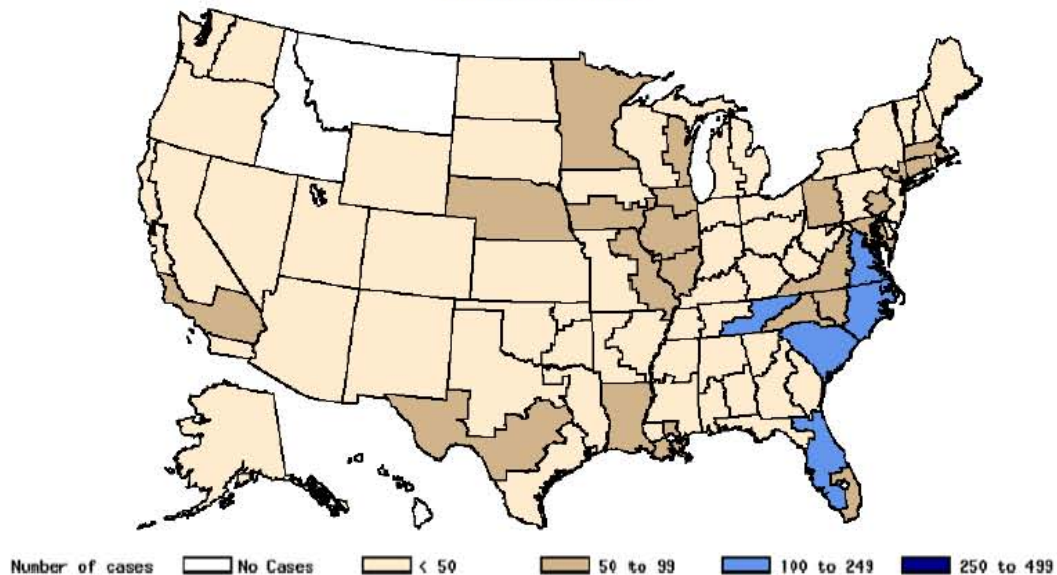
Crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty went to trial at about the same rate as other drug offenders convicted of an offense carrying such a penalty. In fiscal year 2010, 94.6 percent (n=3,695) of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty pled guilty while 5.4 percent (n=210) proceeded to trial. By comparison, 98.2 percent (n=823) of crack cocaine offenders convicted of a drug offense not carrying a mandatory minimum penalty in fiscal year 2010 pled guilty.

3. *Geographic Variations*

The 94 judicial districts varied significantly in the number of crack cocaine cases reported to the Commission in fiscal year 2010. As a result, the number of crack cocaine offenders in each district convicted of an offense carrying a mandatory minimum penalty also varied.

Six districts reported 100 or more crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010: Puerto Rico (n=269, 34.5% of the total caseload in the district), South Carolina (n=220, 18.1%), Eastern North Carolina (n=138, 19.8%), Eastern Virginia (n=135, 10.9%), Middle Florida (n=114, 6.9%), and Eastern Tennessee (n=108, 13.2%). *See* Figure 8-20. This finding was consistent with historical trends noted by the Commission.⁶⁶⁰ Six districts reported no cases involving crack cocaine.⁶⁶¹ As a percentage of the overall caseload, crack cocaine cases involving offenders convicted of an offense carrying a mandatory minimum were most common in Puerto Rico, where 34.5 percent of the criminal caseload (n=269) involved crack cocaine cases, as well as Central Illinois (25.0%, n=92) and Western Pennsylvania (20.4%, n=89).

Figure 8-20
Number of Crack Cocaine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
By District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

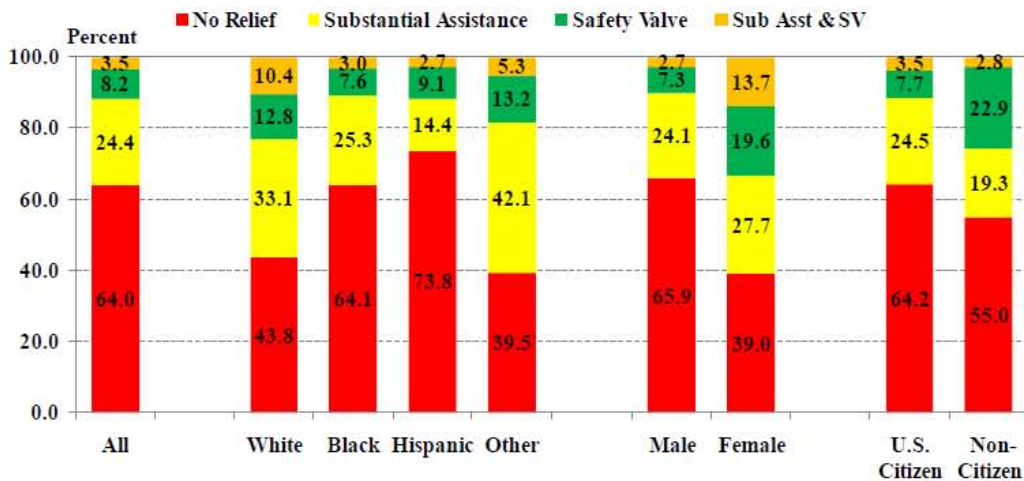
⁶⁶⁰ For example, four of these six districts (Eastern Virginia, Eastern North Carolina, South Carolina, and Middle Florida) are in the top five districts for the largest number of offenders granted retroactive application of the amendments made to the guidelines pursuant to the Fair Sentencing Act. *See* U.S. Sentencing Commission Preliminary Crack Cocaine Retroactivity Data Report (June, 2011) at 4, *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Crack_Cocaine_Amendment/20110216_US_SC_Crack_Cocaine_Retroactivity_Data_Report.pdf.

⁶⁶¹ These districts were the Virgin Islands, Guam, Hawaii, Idaho, Montana, and the Northern Mariana Islands.

4. Relief from the Mandatory Minimum Penalty

Crack cocaine offenders were subject to the mandatory minimum penalty at the time of sentencing at a higher rate (64.0%) than drug offenders overall (45.6%). Compare Figure 8-21 with Figure 8-4. The principal reason for this difference is that crack cocaine offenders receive relief from mandatory minimum penalty provisions pursuant to the safety valve less often than other drug offenders. Only 11.7 percent (n=455) of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty obtained relief through the operation of the safety valve, as compared to 35.1 percent (n=5,557) of drug offenders overall.

Figure 8-21
Percent of Crack Cocaine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

This difference is primarily due to the fact that crack cocaine offenders are often ineligible for this relief. Only 22.8 percent (n=889) of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty have a criminal history of no more than one point, which is one of the requirements for application of the safety valve provision. See Table 8-8. Crack cocaine offenders are the only group of drug offenders for whom Criminal History Category I (zero to one criminal history point) is *not* the most common criminal history category. Crack cocaine offenders have the highest criminal history scores, on average, of any group of drug offenders. More than one-quarter (27.8%, n=1,087) of crack cocaine offenders are in Criminal History Category VI, the highest proportion of any drug type.⁶⁶² Additionally, some crack cocaine offenders who are not disqualified from the safety valve based on their criminal history were ineligible as a result of the involvement of a dangerous weapon in the offense. See Table 8-8.

⁶⁶² For more complete information concerning the application of safety valve by drug type, see Table D-8 (Application of Safety Valve and Average Sentence by Drug Type for Offenders Sentenced under Mandatory Minimum (Fiscal Year 2010)) in Appendix D of this Report.

Approximately one-quarter (24.4%, n=952) of crack cocaine offenders received relief from a mandatory minimum penalty by providing substantial assistance to the government. This compares to 28.3 percent of drug offenders overall. A small percentage (3.5%, n=136) of crack cocaine offenders received relief from the mandatory minimum penalty by qualifying for both safety valve and substantial assistance. *See* Figure 8-21.

5. *Sentencing Outcomes*

a. Average sentence length

The average sentence for crack cocaine offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 139 months, compared to 80 months for crack cocaine offenders who obtained relief from the mandatory minimum penalty.

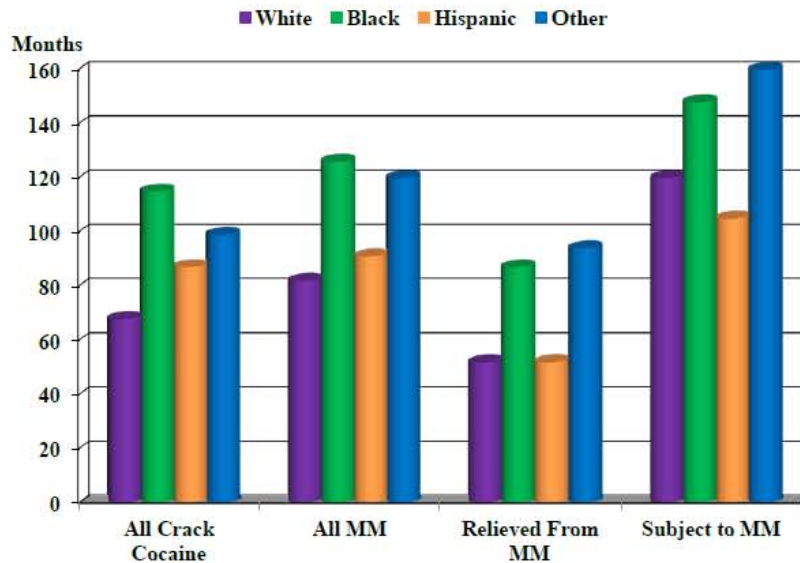
As was the case with the overall drug mandatory minimum population, the different forms of relief received by crack cocaine offenders impacted the applicable average sentence. Crack cocaine offenders who qualified for the safety valve and also provided the government with substantial assistance had the lowest average sentence at 25 months. The average sentence for crack cocaine offenders who did not qualify for safety valve relief, but provided substantial assistance to the government was 101 months. This average sentence was slightly higher than the average sentence of 90 months for all drug offenders who provided substantial assistance.

The average sentence imposed on crack cocaine offenders who only received relief from a mandatory minimum penalty through application of the safety valve provision was 42 months. This average sentence was the second lowest average sentence for all drug offenders who received safety valve relief (marijuana offenders was the lowest, at 32 months).⁶⁶³

The Commission examined average sentences imposed on the overall crack cocaine population, by race, compared to average sentences imposed on crack cocaine offenders convicted of an offense of carrying a mandatory minimum penalty. Black crack cocaine offenders received an average sentence of 115 months, which was higher than the average sentence imposed on any other racial group in the overall crack cocaine population. *See* Figure 8-22. White crack cocaine offenders received the lowest average sentences (68 months). *See* Figure 8-22. Black offenders convicted of an offense carrying a mandatory minimum penalty also received the highest average sentence (126 months), compared to White offenders (82 months), Hispanic Offenders (91 months), and Other Race offenders (120 months).

⁶⁶³ This is likely attributable to the Commission's 2007 crack cocaine amendment, which lowered the base offense levels for crack cocaine offenses by two levels. Accordingly, crack cocaine offenders with a drug quantity triggering the five-year mandatory minimum penalty had a base offense level 24. By contrast, all other drug offenders with a drug quantity triggering the five-year mandatory minimum penalty had a base offense level 26.

Figure 8-22
Average Sentence Length by Race of Crack Cocaine Offenders
Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

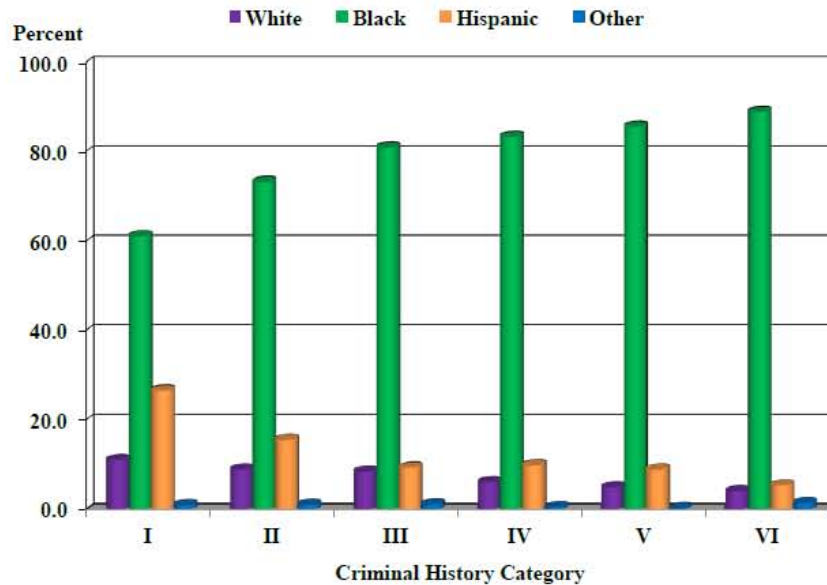
A slightly different pattern emerged when comparing average sentences by race for crack cocaine offenders who remained subject to the mandatory minimum penalty with those who obtained relief from the mandatory minimum penalty. Black offenders still had a higher average sentence than either White or Hispanic offenders, but Other Race offenders received the highest sentences, on average, in both of these categories. *See* Figure 8-22. However, given the relatively small number of Other Race crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty (n=38), no meaningful conclusions may be drawn from these average sentences because they are likely driven by a small number of offenders with more serious criminal history categories.⁶⁶⁴

The higher average sentences for Black crack cocaine offenders in each category may, in part, be attributable to criminal history category differences between Black offenders and those in the other racial groups. Figures 8-23 through 8-26 present a comparison, by race, of criminal history categories for all crack cocaine offenders, crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty, crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and crack cocaine offenders who remained subject to the mandatory minimum penalty. For each of these groups, the proportion of offenders at each criminal history category who were

⁶⁶⁴ This conclusion is borne out by the data presented in Figures 8-24 and 8-26. The highest proportion of Other Race offenders for crack offenders subject to or relieved from the mandatory minimum penalty were in Criminal History Category VI. *See* Figures 8-24 (Race of Crack Cocaine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty by Criminal History Category (Fiscal Year 2010)) and 8-26 (Race of Crack Cocaine Offenders Subject to a Drug Mandatory Minimum Penalty at Sentencing by Criminal History Category (Fiscal Year 2010)).

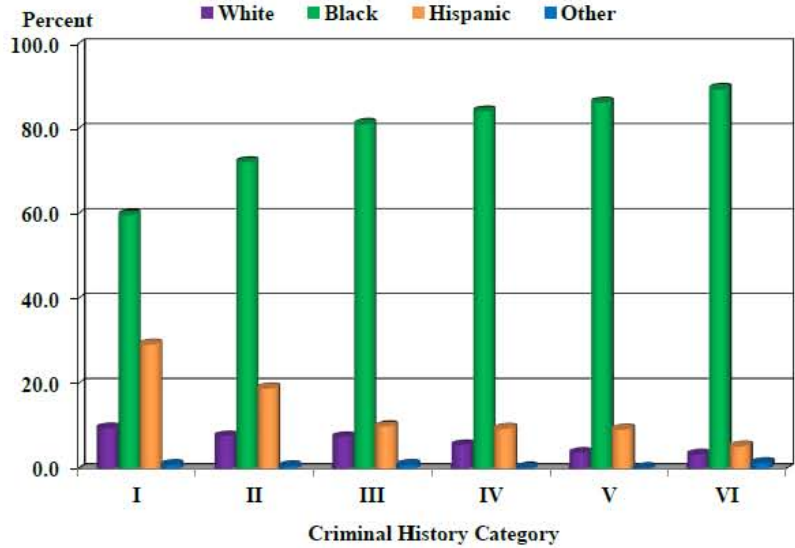
Black increased with the criminal history category. For each of these groups, the proportion of Black offenders in Category Criminal History III and higher was greater than the proportion of Black offenders for that population. See Figures 8-23 through 8-26. For example, Black offenders constituted 78.5 percent (n=3,059) of the population of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty. In contrast, at Criminal History Category III, Black offenders constituted 81.3 percent (n=571) of the crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty in that criminal history category. The proportion of Black offenders at each higher criminal history continued to increase: Criminal History Category IV (84.3%, n=396), Criminal History Category V (86.4%, n=267), and Criminal History Category VI (89.6%, n=971).

Figure 8-23
Race of Crack Cocaine Offenders by Criminal History Category
Fiscal Year 2010



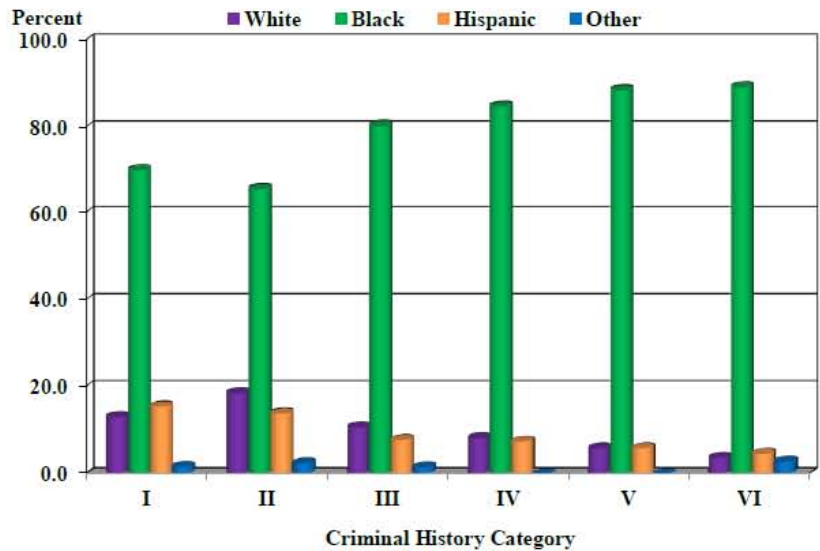
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 8-24
Race of Crack Cocaine Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
By Criminal History Category
Fiscal Year 2010



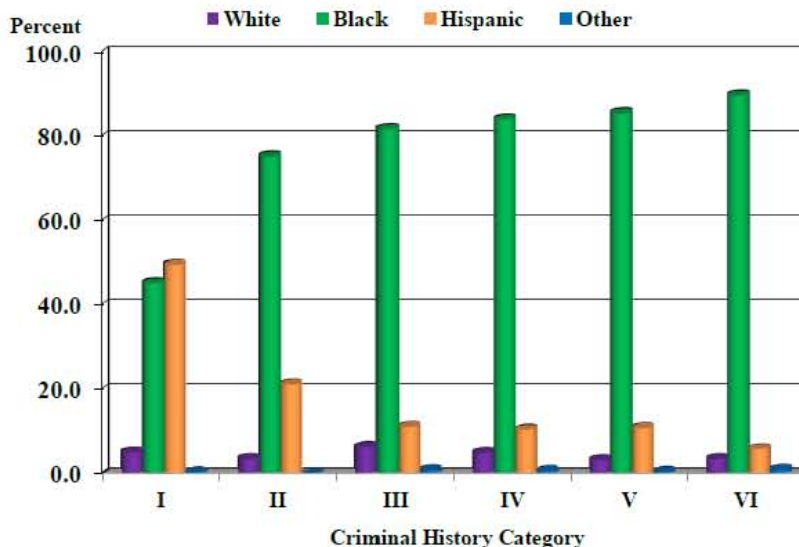
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 8-25
Race of Crack Cocaine Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 8-26
Race of Crack Cocaine Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
By Criminal History Category
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

b. Position relative to the guideline range

Table 8-9 compares the position of sentences relative to the guideline range among crack cocaine offenders, crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty, crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and crack cocaine offenders who remained subject to the mandatory minimum penalty at the time of sentencing because they did not qualify for any form of statutory relief. Slightly less than half (42.1%, n=1,644) of all crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range. Approximately one-third (32.9%, n=1,285) of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty received government sponsored below range sentences. Crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty received a non-government sponsored below range sentence in 23.9 percent (n=935) of the cases. This is the highest rate of such sentences reported for any drug type.⁶⁶⁵ Only 1.0 percent (n=41) of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty were

⁶⁶⁵ This result may in part be attributable to the Supreme Court's holding in *Kimbrough v. United States*, 552 U.S. 85 (2007), that that a sentencing court may vary from the guidelines' treatment of crack cocaine on policy grounds. This finding as it relates to crack offenses is consistent with opinions expressed by the district court judges in the survey conducted by the Commission in 2010, in which 76% of judges surveyed expressed the view that crack cocaine mandatory minimum sentences were too high. See Commission, *2010 Judges' Survey*. The survey predated the enactment of the Fair Sentencing Act of 2010, so the views expressed in that survey related to the crack cocaine mandatory minimum penalties that existed before its enactment.

sentenced above the applicable guideline range, although this was also the highest rate of above-range sentences reported for any drug type.

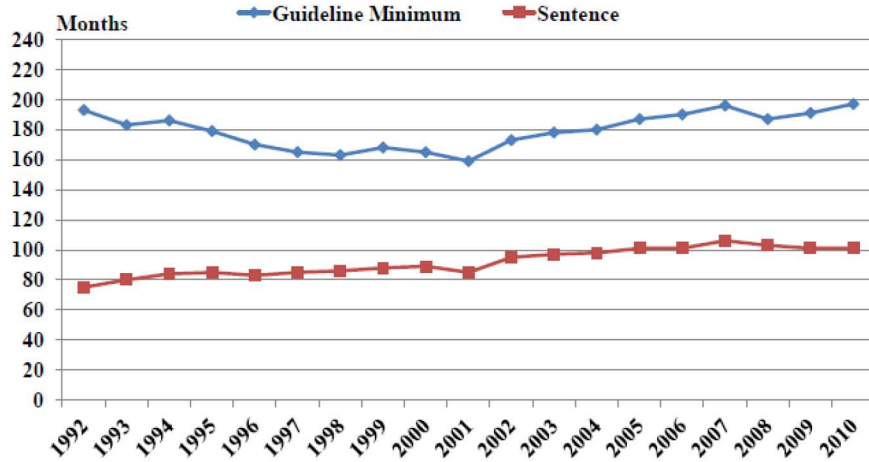
Crack cocaine offenders who remained subject to the mandatory minimum penalty at the time of sentencing received a non-government sponsored below range sentence in 30.3 percent (n=758) of the cases. This is the highest rate of such sentences reported for any drug type. Crack cocaine offenders who remained subject to the mandatory minimum penalty at the time of sentencing were sentenced above the applicable guideline range in 1.5 percent (n=37) of the cases, a rate second only to marijuana offenses.

Table 8-9
Sentence Relative to the Guideline Range of Crack Cocaine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	4,751	3,905	1,407	2,498
Sentence Relative to the Guideline Range (Percent)				
Within Range	41.0	42.1	8.9	60.8
Above Range	1.0	1.0	0.3	1.5
Substantial Assistance §5K1.1	25.3	27.9	77.3	0.0
Other Government Sponsored (no §5K1.1)	5.8	5.0	0.9	7.4
Other Below Range	26.8	23.9	12.6	30.3

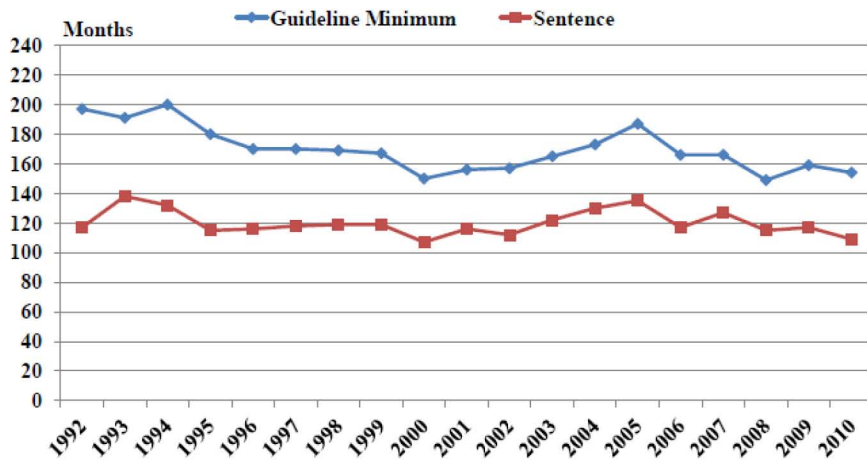
Figures 8-27 and 8-28 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for crack cocaine offenses for offenders sentenced from fiscal year 1992 to 2010. As the figures demonstrate, although the average sentences imposed were below the guideline range in each year, they remained above five years.

Figure 8-27
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Substantial Assistance
Crack Cocaine Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992– USSCFY2010.

Figure 8-28
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Non-Substantial Assistance Below Range Sentence
Crack Cocaine Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992 – USSCFY2010.

In fiscal year 2010, the average extent of substantial assistance departures in crack cocaine cases was 49.7 percent (87 months) from the bottom of the otherwise applicable guideline range. In fiscal year 2010, the average extent of non-government sponsored below

range sentences (*i.e.*, departures and variances combined) in crack cocaine cases was 30.3 percent (45 months) from the bottom of the otherwise applicable guideline range.

6. *Prison Impact*

At the end of fiscal year 2010, 32,694 of the 191,757 offenders (17.0%) in the custody of the BOP were crack cocaine offenders. At the end of 1995, there were 9,970 crack cocaine offenders in BOP custody. By 1998, this number increased to 17,687, which was more than the number of powder cocaine offenders (n=17,324).

The percentage of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty has also increased slightly from 85.6 percent (n=8,532) in 1995 to a high of 89.9 percent (n=29,379) in 2010. Likewise, the percentage of crack cocaine offenders in BOP custody subject to the mandatory minimum penalty at sentencing has also increased slightly from 60.1% (n=5,994) to 65.2% (n=21,305) in fiscal year 2010.⁶⁶⁶

7. *Offender Function*

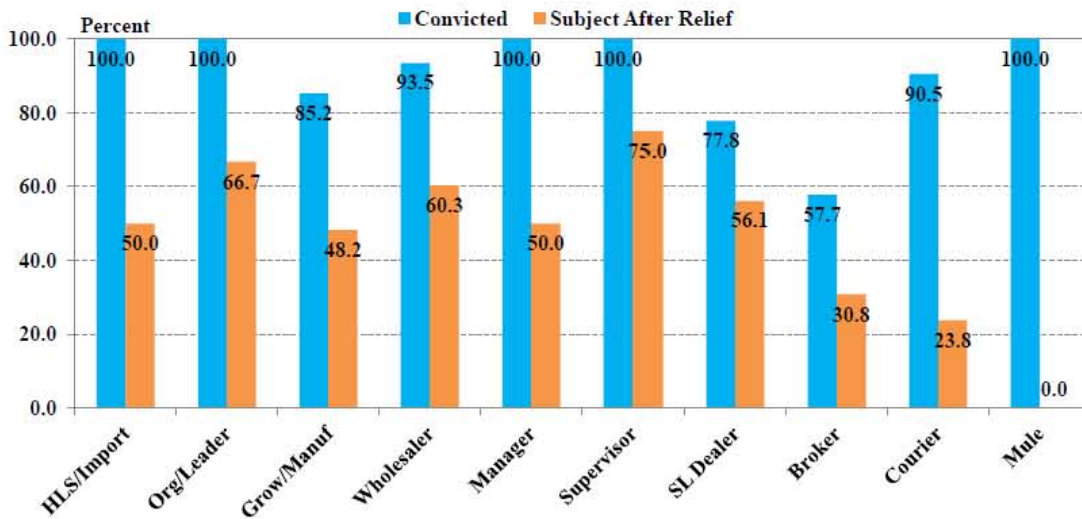
For crack cocaine offenders, the most common functions for offenders were Street-Level Dealer (47.0%) and Wholesaler (27.9%). The least common functions were Mule (0.2%), Supervisor (0.5%), High Level Supplier/Importer (0.5%), and Manager (0.7%).⁶⁶⁷

Over three-quarters (77.8%) of Street-Level Dealer offenders were convicted of an offense carrying a mandatory minimum penalty. Wholesaler offenders were convicted of an offense carrying a mandatory minimum penalty at a rate of 93.5 percent in crack cocaine cases. High-Level Supplier/Importer, Organizer/Leader, Manager, Supervisor, and Mule offenders were convicted of statutes carrying a mandatory minimum penalty in all cases. *See* Figure 8-29.

⁶⁶⁶ *See* Figure D-21 (Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing - Crack Cocaine Offenders (1995–2010)) in Appendix D of this Report.

⁶⁶⁷ *See* Figure D-22 (Distribution of Offender Function by Primary Drug Type - Crack Cocaine Offenders (Fiscal Year 2009 Sample Data)) in Appendix D of this Report.

Figure 8-29
Percent of Offenders Convicted of a Drug Mandatory Minimum Penalty and
Subject to a Mandatory Minimum Penalty After Relief
By Offender Function and Primary Drug Type
Crack Cocaine Offenders
Fiscal Year 2009 Sample Data

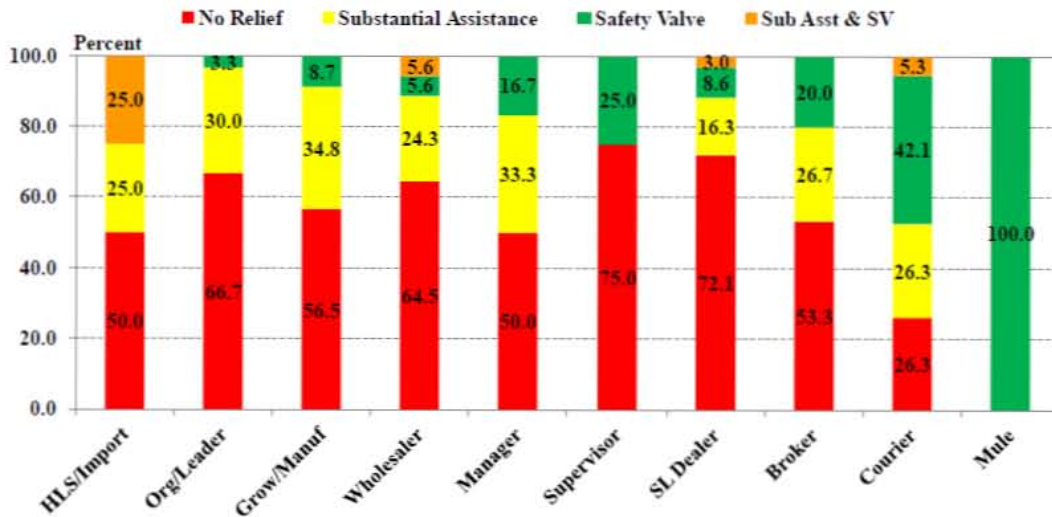


SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

In addition to analyzing the rate of conviction of a statute carrying a mandatory minimum penalty, the Commission also analyzed the rate at which crack cocaine offenders obtained relief from a mandatory minimum penalty by function. Figure 8-29 also shows the results of that analysis. For crack cocaine offenders with the most common functions, more than half were subject to the mandatory minimum penalty at sentencing (Street-Level Dealer (56.1%) and Wholesaler (60.3%)). Mules and Couriers were subject to the mandatory minimum penalty at sentencing at the lowest rates (0.0% and 23.8%, respectively).

Offenders who performed high-level functions generally obtained relief for substantial assistance at higher rates than offenders who performed low-level functions. Conversely, offenders who performed low-level functions were more likely to have obtained relief pursuant to the statutory safety valve than offenders who performed high-level functions. *See* Figure 8-30.

Figure 8-30
Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
Who Were Relieved of the Penalty By Offender Function
Crack Cocaine Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

8. Summary

With respect to mandatory minimum penalties for crack cocaine offenders, Commission analyses demonstrate the following:

Offenses and Offenders

- The majority of crack cocaine offenders sentenced in fiscal year 2010 were sentenced prior to August 3, 2010, the date of enactment of the Fair Sentencing Act of 2010. Some degree of caution should be exercised in drawing conclusions from the crack cocaine data analyzed in this report because it is not yet clear how the Fair Sentencing Act of 2010 will impact sentences for crack cocaine offenses.
- Crack cocaine offenses accounted for approximately one-fifth (19.8%, n= 4,751) of all drug offenses in fiscal year 2010. The majority of crack cocaine offenders (82.2%, n=3,905) were convicted of an offense carrying a mandatory minimum penalty.
- Most crack cocaine offenders are Black (78.6%), followed by Hispanic (13.0%), White (7.3%), and Other Race (1.1%) offenders.
- The overwhelming majority of crack cocaine offenders are male (91.5%), and United States citizens (97.3%).
- Crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at a higher rate (64.0%) than drug

offenders overall (45.6%). The principal reason for this difference is that crack cocaine offenders are eligible for relief from mandatory minimum penalty provisions pursuant to the safety valve less often than other drug offenders, due to criminal history or the involvement of a firearm or other dangerous weapon in the offense.

- Six districts reported 100 or more crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010.
- The most common functions for crack cocaine offenders were Street-Level Dealer (47.0%) and Wholesaler (27.9%).

Application and Relief

- In fiscal year 2010, 94.6 percent (n=3,695) of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty pled guilty while 5.4 percent (n=210) proceeded to trial. By comparison, 98.2 percent (n=823) of crack cocaine offenders convicted of a drug offense not carrying a mandatory minimum penalty in fiscal year 2010 pled guilty.
- Less than half (42.1%) of all crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range.
 - One-third (32.9%) of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty received a government sponsored below range sentence.
 - Crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty received a non-government sponsored below range sentence in 23.9 percent of the cases. This is the highest rate of such sentences reported for any drug type.
- Crack cocaine offenders remained subject to a mandatory minimum penalty at sentencing at a higher rate (64.0%) than drug offenders overall (45.6%).
 - The principal reason for this difference is that crack cocaine offenders receive relief from mandatory minimum penalty provisions pursuant to the safety valve less often than do other drug offenders (11.7 percent of crack cocaine offenders compared to 35.1 percent of drug offenders overall).
 - Only 22.8 percent of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty had no or only one criminal history points, which is a requirement for application of the safety valve provision.
- Other Race crack cocaine offenders qualified for some form of relief from a mandatory minimum penalty most often, in 60.5 percent of their offenses carrying such a penalty, followed by White (56.2%) and Black (35.9%) offenders. Hispanic offenders qualified

for relief from mandatory minimum penalties least often, in 26.2 percent of the cases in which they were convicted of an offense carrying such a penalty.

- o Other Race offenders received substantial assistance relief alone from a mandatory minimum penalty most often, in 42.1 percent of their offenses carrying such a penalty, followed by White (33.1%) and Black (25.3%) offenders. Hispanic offenders received relief from mandatory minimum penalties through substantial assistance the least often, in 14.4 percent of their cases.
- o Other Race offenders received safety valve relief alone most often, in 13.2 percent of their cases, followed by White (12.8%) and Hispanic (9.1%) offenders. Black offenders received relief from mandatory minimum penalties through the safety valve the least often, in 7.6 percent of their cases.
- o White offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief most often, in 10.4 percent of their cases, followed by Other Race (5.3%), Black (3.0%) and Hispanic (2.7%) offenders.
- Female crack cocaine offenders received relief from the mandatory minimum penalty in 61.0 percent of their cases, compared to 34.1 percent for male crack offenders.
 - o Female offenders received substantial assistance relief alone from a mandatory minimum penalty more often, in 27.7 percent of their cases, compared to male offenders (24.1%).
 - o Female offenders received safety valve relief alone more often, in 19.6 percent of their cases, compared to male offenders (7.3%).
 - o Female offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often, in 13.7 percent of their cases, compared to 2.7 percent of cases involving male offenders.
- Non-citizen crack cocaine offenders received relief from the mandatory minimum penalty at a higher rate (45.0%) than United States citizen crack cocaine offenders (35.8%).
 - o United States citizen crack cocaine offenders received substantial assistance relief alone from a mandatory minimum penalty more often in 24.5 percent of their cases, compared to non-citizen offenders (19.3%).
 - o Non-citizen offenders received safety valve relief alone more often, in 22.9 percent of their cases, compared to United States citizens (7.7%).
 - o United States citizen offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief

more often, in 3.5 percent of their cases, compared to 2.8 percent of cases involving non-citizens.

- In fiscal year 2010, the average extent of substantial assistance departures in crack cocaine cases was 49.7 percent (87 months) from the bottom of the otherwise applicable guideline range.
- In fiscal year 2010, the average extent of non-government sponsored below range sentences in crack cocaine cases was 30.3 percent (45 months) from the bottom of the otherwise applicable guideline range.

Sentencing

- In fiscal year 2010, 64.0 percent of crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - Hispanic offenders were subject to the mandatory minimum penalty at sentencing most often, in 73.8 percent of their offenses carrying such a penalty, followed by Black (64.1%) and White (43.8%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 39.5 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (65.9% of their cases, compared to 39.0% of cases involving female offenders).
 - United States citizens were subject to the mandatory minimum penalty at sentencing more often than non-citizens offenders (64.2% of their cases, compared to 55.0% of cases involving non-citizen offenders).
- The average sentence for crack cocaine offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 139 months. The average sentence for crack cocaine offenders who obtained relief from a mandatory minimum penalty was 80 months.
- Black offenders convicted of an offense carrying a mandatory minimum penalty also received the highest average sentence (126 months), compared to White offenders (82 months), Hispanic Offenders (91 months), and Other Race offenders (120 months). Black offenders who remained subject to a mandatory minimum penalty at sentencing had a higher average sentence (148 months) than either White (120 months) or Hispanic

offenders (105 months), but Other Race offenders received the highest sentences, on average, at 160 months.

- The higher average sentences for Black crack cocaine offenders is, in part, attributable to criminal history category differences between Black offenders and those in the other racial groups.

Prison Impact

- At the end of fiscal year 2010, crack cocaine offenders constituted 17.0 percent of all drug offenders in the custody of the Bureau of Prisons, more than any other type of drug offender. This is largely attributable to the fact that offenders in crack cocaine cases received the longest sentences, on average, of any type of drug offense.

F. MARIJUANA OFFENSES

In fiscal year 2010, 6,161 of the 23,964 drug offenders (25.7%) were convicted of a marijuana offense. Of those marijuana offenders, 2,725 (44.2%) were convicted of an offense carrying a mandatory minimum penalty. Only 15.6 percent (n=961) of the 6,161 marijuana offenders were subject to the mandatory minimum penalty at sentencing. This is the smallest percentage of drug offenders subject to the mandatory minimum penalty at sentencing among the major drug types.

1. Demographic Characteristics of Marijuana Offenders

The race and citizenship of marijuana offenders is notably different than the race and citizenship of drug offenders generally and of offenders in each of the other major drug types. Table 8-10 presents information on the demographic characteristics of marijuana offenders. This information is then compared to that for marijuana offenders convicted of an offense carrying a mandatory minimum penalty, marijuana offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and then to those marijuana offenders who remained subject to the mandatory minimum penalty at the time of sentencing because they did not qualify for any form of statutory relief.

Table 8-10
Demographic Characteristics of Marijuana Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	6,161	2,725	1,764	961
Race of Offender (Percent)				
White	24.3	25.7	28.6	20.4
Black	7.7	9.3	6.1	15.1
Hispanic	64.6	60.4	59.7	61.7
Other	1.0	1.2	5.6	2.8
Citizenship of Offender (Percent)				
United States Citizen	53.7	57.9	52.0	68.6
Non-U.S. Citizen	46.3	42.1	48.0	31.4
Gender of Offender (Percent)				
Male	88.1	93.6	92.5	95.7
Female	11.9	6.4	7.5	4.3

There was a higher percentage of Hispanic offenders in marijuana offenses than in any other major drug type. Non-citizens also constituted a greater proportion of marijuana offenders generally, and of marijuana offenders convicted of an offense carrying a mandatory minimum penalty, than found for any other major drug type. The proportion of non-citizen marijuana offenders who were subject to the mandatory minimum penalty was lower than the other categories, due in large part to the fact that non-citizen marijuana offenders qualified for safety valve relief at a higher rate than marijuana offenders who were United States citizens.

Table 8-11 displays information about offense characteristics and criminal history category for marijuana offenders generally, for those marijuana offenders convicted of an offense carrying a mandatory minimum penalty, marijuana offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and for those marijuana offenders who remained subject to the mandatory minimum because they did not obtain either safety valve or substantial assistance relief.

Marijuana offenders subject to the mandatory minimum penalty at sentencing had fewer instances of weapon and firearm involvement, compared to most other major drug types.⁶⁶⁸ Only heroin offenses report a lower rate of application of the weapon specific offense characteristic.

⁶⁶⁸ See *supra* Tables 8-5, 8-8, and *infra* Tables 8-14, 8-17.

Marijuana offenses report a lower rate of the application of a firearms mandatory minimum penalty than powder cocaine and crack cocaine among the major drug types (and the same rate as heroin).

About two-thirds of all marijuana offenders (67.7%, n=4,173) and of marijuana offenders convicted of an offense carrying a mandatory minimum penalty (66.4%, n=1,809) were in Criminal History Category I. This was the highest proportion of Criminal History Category I offenders reported for any major drug type, which may account for the small percentage (15.6%, n=961) of marijuana offenders who remained subject to a mandatory minimum penalty at sentencing.

Table 8-11
Guideline Sentencing Characteristics, Role in the Offense, and
Criminal History of Marijuana Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	6,161	2,725	1,764	961
Characteristics (Percent)				
Weapon Specific Offense Characteristic	5.8	8.7	5.3	14.8
Firearms Mandatory Minimum Applied	2.0	4.6	1.8	9.8
Safety Valve Reduction	55.7	52.1	80.3	0.0
Role in the Offense (Percent)				
Aggravating Role	4.1	7.8	4.0	14.8
Mitigating Role	31.4	28.3	37.3	11.6
Criminal History Category (Percent)				
I	67.7	66.4	84.5	33.1
II	10.5	11.5	6.0	21.6
III	10.9	11.8	5.7	23.0
IV	4.7	4.8	1.9	10.3
V	2.7	2.5	0.7	5.7
VI	3.4	3.0	1.2	6.2

2. *Guilty Pleas and Trials*

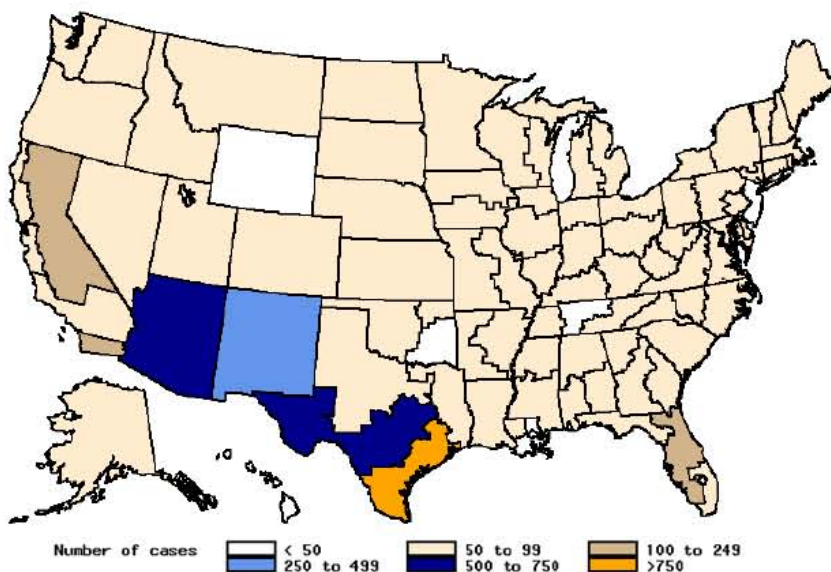
Marijuana offenders convicted of an offense carrying a mandatory minimum penalty sought a trial at about the same rate as all drug offenders convicted of an offense carrying such a penalty. In fiscal year 2010, 95.7 percent (n=2,608) of marijuana offenders convicted of an offense carrying a mandatory minimum penalty pled guilty while 4.3 percent (n=117) proceeded to trial. As discussed above, drug offenders convicted of such statutes pled guilty 95.5 percent of the time. In comparison, 98.8 percent (n=3,384) of marijuana offenders in cases without mandatory minimum penalties pled guilty in fiscal year 2010, while 1.2 percent (n=42) were proceeded to trial.

3. *Geographic Variations*

The 94 judicial districts varied significantly in the number of marijuana cases reported to the Commission in fiscal year 2010. As a result, the number of marijuana offenders in each district convicted of an offense carrying a mandatory minimum penalty also varied.

Four districts reported 100 or more marijuana offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010: Southern Texas (n=560, 6.8% of the criminal caseload), Western Texas (n=423, 6.4%), Arizona (n=270, 5.5%), and New Mexico (n=160, 4.4%). *See* Figure 8-31. All of these districts are located on the United States border with Mexico, a country from which marijuana is often imported into the United States. As a percentage of the overall caseload, marijuana offenders convicted of an offense carrying a mandatory minimum penalty were most common in Western Kentucky, where 7.1 percent of the criminal caseload (n=28 of the 394 offenders) involved this type of case, as well as Southern Iowa (6.7%, n=28 of the 419 offenders), and Oregon (6.7%, n=34 of 507 offenders).

Figure 8-31
Number of Marijuana Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty by District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

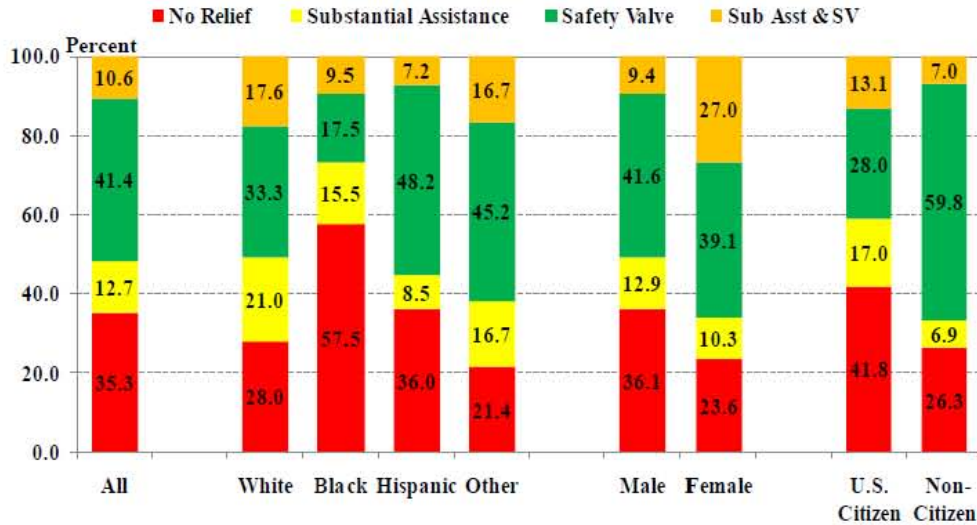
4. *Relief from the Mandatory Minimum Penalty*

Marijuana offenders were subject to the mandatory minimum penalty at a lower rate (35.3%, n=961) than drug offenders overall (45.6%, n=7,212). Compare Figure 8-32 with Figure 8-4. The principal reason for this difference is that marijuana offenders received relief from the mandatory minimum penalty pursuant to the safety valve more often than other drug offenders. More than half (52.0%, n=1,417) of marijuana offenders convicted of an offense carrying a mandatory minimum penalty obtained relief through the operation of the safety valve,⁶⁶⁹ compared to 35.1 percent (n=5,557) of drug offenders overall. This difference was primarily due to the fact that approximately two-thirds (66.4%, n=1,809) of marijuana offenders convicted of an offense carrying a mandatory minimum penalty were in Criminal History Category I (zero to one criminal history point).

Approximately one-quarter (23.3%, n=635) of marijuana offenders received relief from a mandatory minimum penalty by providing substantial assistance to the government, either alone or in conjunction with safety valve relief. See Figure 8-32. This compares to 28.3 percent of drug offenders overall.

⁶⁶⁹ Either alone or in conjunction with relief under 18 U.S.C. § 3553(e) for providing substantial assistance to the government.

Figure 8-32
Percent of Marijuana Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The rate at which offenders received relief from mandatory minimum penalties through these provisions varied by race, gender, and citizenship.⁶⁷⁰ For example, Other Race offenders qualified for some form of relief from a mandatory minimum penalty most often, with 78.6% (n=99) of all Other Race offenders convicted of an offense carrying such a penalty obtaining relief from the penalty. As was observed for other major drug types, Black offenders in marijuana cases qualified for relief from mandatory minimum penalties the least often, in less than half (42.5%; n=107) of cases in which they were convicted of an offense carrying such a penalty. See Figure 8-32.

Over three-quarters of all female marijuana offenders (76.4%, n=133) received relief from the mandatory minimum penalty compared to almost two-thirds (63.9%, n=1,631) of male offenders. See Figure 8-32. Female marijuana offenders qualified for the safety valve more frequently than male marijuana offenders, either alone or in conjunction with providing substantial assistance to the government (compare 66.1%, n=115 to 51.0%, n=1,302, respectively). Female marijuana offenders also received relief from a mandatory minimum penalty by providing substantial assistance to the government, either alone or in conjunction with safety valve relief at a higher rate (37.3%, n=65) than male marijuana offenders (22.3%, n=570).

Marijuana offenders who were non-citizens most often received relief from mandatory minimum penalties through operation of the safety valve provision, alone or in conjunction with

⁶⁷⁰ Figure 8-32 (Percent of Marijuana Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty Who are Relieved of the Penalty (Fiscal Year 2010)) shows the breakdown by categories. For purposes of this discussion, the rates at which offenders received safety valve reflect both cases in which such relief was given alone and those in which it was given after the offender's substantial assistance to the government.

providing substantial assistance. The safety valve applied in two-thirds (66.8%, n=767) of marijuana cases involving a non-citizen convicted of an offense carrying a mandatory minimum penalty. The rate in such cases involving a United States citizen was 41.1 percent (n=649). See Figure 8-32. The difference in rate of application of the safety valve relief for United States citizen and non-citizen marijuana offenders is associated with differences in the criminal history categories for each group. The overwhelming majority (81.9%, n=940) of non-citizen marijuana offenders were in Criminal History Category I. In contrast, slightly more than one half (55.1%, n=868) of United States citizen marijuana offenders were in that criminal history category.⁶⁷¹

5. Sentencing Outcomes

a. Average sentence length

The average sentence for marijuana offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 93 months, compared to 34 months for marijuana offenders who obtained relief.

The different forms of relief from a mandatory minimum penalty affected the average sentence imposed on marijuana offenders. Offenders who qualified for the safety valve and also provided the government with substantial assistance had the lowest average sentence at 20 months. The average sentence imposed on marijuana offenders who provided substantial assistance to the government was 53 months. This average sentence was lower than the average sentence of 90 months for drug offenders generally who provided substantial assistance.

The average sentence imposed on marijuana offenders who received relief from a mandatory minimum through application of the safety valve provision only was 32 months, the shortest for any drug type. This average sentence was lower than the average sentence of 49 months for all drug offenders who received relief from a mandatory minimum through application of the safety valve provision.

b. Position relative to the guideline range

Table 8-12 compares the position of the sentence imposed relative to the guideline range among marijuana offenders generally, marijuana offenders convicted of an offense carrying a mandatory minimum penalty, marijuana offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and then marijuana offenders who remained subject to the mandatory minimum penalty at the time of sentencing because they did not qualify for any form of statutory relief. Slightly more than half (51.6%, n=1,407) of all marijuana offenders convicted of an offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range. Approximately one-third (33.9%, n=925) of marijuana offenders convicted of an offense carrying a mandatory minimum penalty received government sponsored below range sentences. Marijuana offenders convicted of an offense carrying a mandatory minimum penalty received a non-government

⁶⁷¹ See Figure D-28 (Citizenship of Marijuana Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty By Criminal History Category (Fiscal Year 2010)) in Appendix D of this Report.

sponsored below range sentence in 13.6 percent (n=371) of the cases. This is the lowest rate of such sentences reported for any drug type.

Table 8-12
Sentence Relative to the Guideline Range of Marijuana Offenders
Fiscal Year 2010

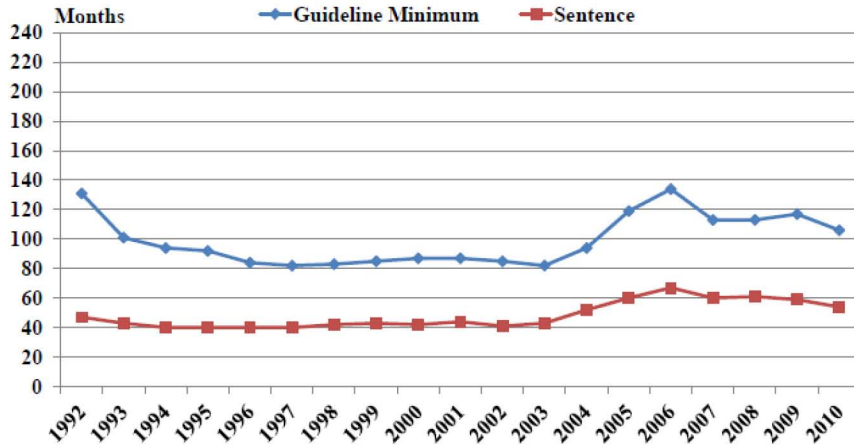
	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	6,161	2,725	1,764	961
Sentence Relative to the Guideline Range (Percent)				
Within Range	56.3	51.6	36.3	79.8
Above Range	1.0	0.8	0.2	1.9
Substantial Assistance §5K1.1	14.1	23.3	36.0	0.0
Other Government Sponsored (no §5K1.1)	16.3	10.6	13.1	6.1
Other Below Range	12.3	13.6	14.4	12.2

Marijuana offenders who remained subject to the mandatory minimum penalty at the time of sentencing received a non-government sponsored below range sentence in 12.2 percent (n=117) of the cases. This is the lowest rate of such sentences reported for any major drug type.⁶⁷² Marijuana offenders subject to a mandatory minimum penalty at the time of sentencing were sentenced above the applicable guideline range in 1.9 percent (n=18) of the cases, the highest rate of such sentences reported for any drug type.

Figures 8-33 and 8-34 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for marijuana offenses for offenders sentenced from fiscal year 1995 to 2010. As the figures demonstrate, the average sentences imposed were often below the five-year mandatory minimum penalty even though the average guideline minimum sentence was above that level.

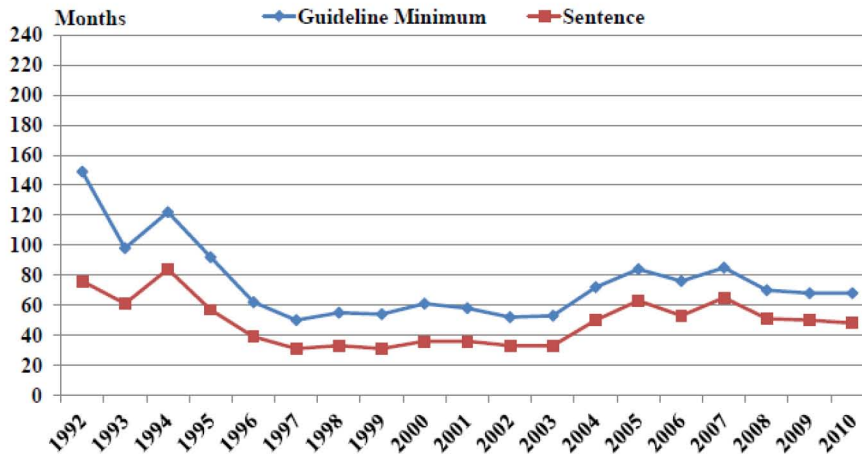
⁶⁷² This finding seems inconsistent with opinions expressed by the district court judges in the survey conducted by the Commission in 2010, in which more than half (54%) of judges responded that mandatory minimum penalties for marijuana offenses were too high. See Commission, *2010 Judges' Survey*.

Figure 8-33
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Substantial Assistance
Marijuana Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992- USSCFY2010.

Figure 8-34
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Non-Substantial Assistance Below Range Sentence
Marijuana Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992- USSCFY2010.

In fiscal year 2010, the average extent of substantial assistance departures in marijuana cases was 52.5 percent (40 months) from the bottom of the otherwise applicable guideline range. In the same year, the average extent of non-government sponsored below range sentences (*i.e.*, departures and variances combined) in marijuana cases was 35.5 percent (21 months) from the bottom of the otherwise applicable guideline range.

6. *Prison Impact*

At the end of fiscal year 2010, 6.5 percent (12,473 of the 191,757 offenders) of those in BOP custody were marijuana offenders. By comparison, at the end of 1995, marijuana offenders accounted for 10.7 percent (n=7,727 of 71,972) of the offenders in BOP custody. The percentage of marijuana offenders convicted of an offense carrying a mandatory minimum penalty, however, has increased from 61.3 percent (n=4,736) in 1995 to the current high of 72.0 percent (n=8,984) in fiscal year 2010. Likewise, the percentage of marijuana offenders in BOP custody subject to the mandatory minimum penalty at sentencing has increased from 40.6 percent (n=3,141) in 1995 to 43.2 percent (n=5,386) in 2010, though to a smaller extent.⁶⁷³

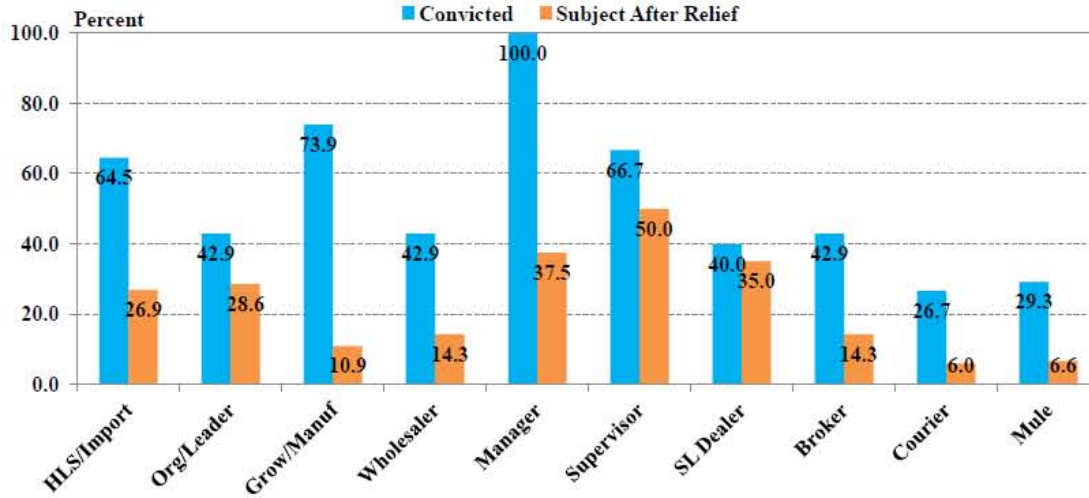
7. *Offender Function*

For marijuana offenses, the most common low-level functions were Courier (54.7%), followed by Mule (12.0%). The only high-level function observed with any significant frequency was High-Level Supplier/Importer (10.5%). The least common functions were Organizer/Leader (0.8%), Manager (0.9%), and Broker (0.9%).⁶⁷⁴ In marijuana offenses, mid-level function offenders were subject to mandatory minimum penalties at higher rates than higher-level function offenders. *See* Figure 8-35.

⁶⁷³ *See* Figure D-33 (Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing- Marijuana Offenders (1995–2010)) in Appendix D of this Report.

⁶⁷⁴ *See* Figure D-34 (Distribution of Offender Function by Primary Drug Type Marijuana Offenders (Fiscal Year 2009 Sample Data)) in Appendix D of this Report.

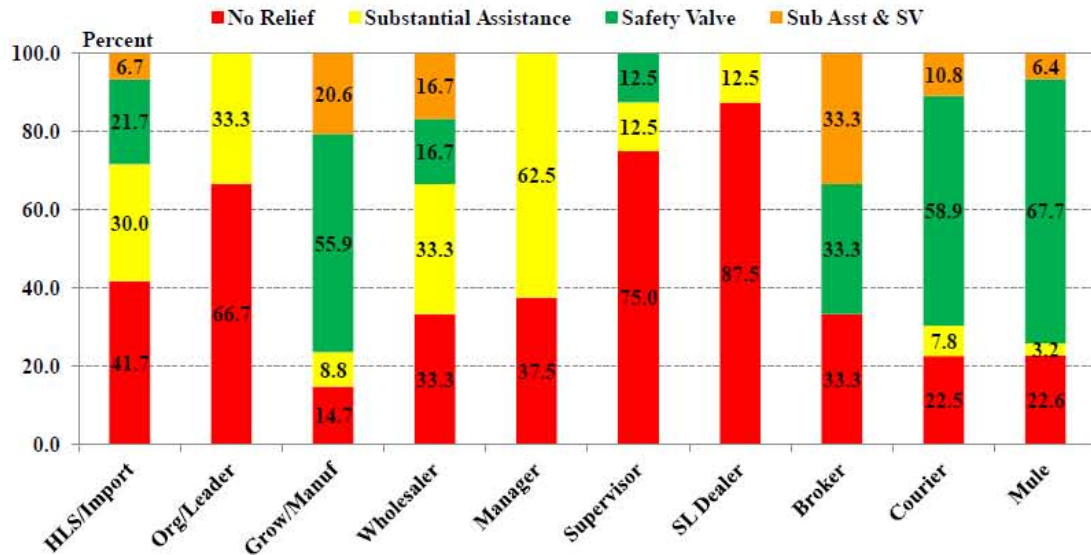
Figure 8-35
Percent of Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty
by Offender Function and Primary Drug Type
Marijuana Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Low-level function offenders in marijuana offenses obtained relief from mandatory minimums at the highest rates. *See* Figure 8-36. Marijuana offenders who performed functions lower than Street-Level Dealer obtained relief in at least two-thirds of their cases (with Broker offenders receiving relief least often, in 67.7% of their cases). Contrary to the pattern observed for most other major drug types, many lower-level function offenders who received relief did so through the safety valve rather than by providing substantial assistance to the government. Some of the highest-level offenders also received relief from a mandatory minimum penalty at high rates. For example, Grower/Manufacturer offenders received relief in 85.3 percent of all cases, higher than every function category. Wholesalers offenders obtained relief in 66.7 percent of their cases, and High-Level Supplier/Importer offenders (the most serious category) obtained relief in 58.3 percent of their cases. Street-Level Dealer offenders, a category in the middle of the groups in terms of culpability, received relief at the lowest rate of any category, in just 12.5 percent of their cases.

Figure 8-36
Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
Who Were Relieved of the Penalty By Offender Function
Marijuana Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

8. Summary

With respect to mandatory minimum penalties for marijuana offenses, Commission analyses demonstrate the following:

Offenses and Offenders

- Marijuana offenses accounted for approximately one-quarter (25.7%, n= 6,161) of all drug offenses in fiscal year 2010. Less than half (44.2%, n= 2,725) of marijuana offenders were convicted of an offense carrying a mandatory minimum penalty.
- Almost two-thirds of marijuana offenders are Hispanic (64.6%), followed by White (24.3%), Black (7.7%) and Other Race (1.0%) offenders.
- The majority of marijuana offenders are male (88.1%).
- United States citizens accounted for 53.7 percent of marijuana offenders.
- Four districts reported 100 or more marijuana offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010.
- The most common functions among marijuana offenders were Courier (54.7%), Mule (12.0%), and High-Level Supplier/Importer (10.5%).

Application and Relief

- In fiscal year 2010, 95.7 percent (n=2,608) of marijuana offenders convicted of an offense carrying a mandatory minimum penalty pled guilty while 4.3 percent (n=117) proceeded to trial. In comparison, 98.8 percent (n=3,384) of marijuana offenders in cases without mandatory minimum penalties pled guilty in fiscal year 2010, while 1.2 percent (n=42) proceeded to trial.
- Marijuana offenders were subject to the mandatory minimum penalty at a lower rate (35.3%) than drug offenders overall (45.6%). The principal reason for this difference is that marijuana offenders received relief from mandatory minimum penalty provisions pursuant to the safety valve more often than other drug offenders.
 - About two-thirds of marijuana offenders convicted of an offense carrying a mandatory minimum penalty (66.4%, n=1,809) were in Criminal History Category I. This was the highest proportion of Criminal History Category I offenders reported for any major drug type.
 - Other Race offenders qualified for some form of relief from a mandatory minimum penalty most often, in 78.6 percent of their offenses carrying such a penalty, followed by White (72.0%) and Hispanic (64%) offenders. Black offenders qualified for relief from mandatory minimum penalties least often, in 42.5 percent of the cases in which they were convicted of an offense carrying such a penalty.
 - White offenders received substantial assistance relief alone from a mandatory minimum penalty most often, in 21.0 percent of their offenses carrying such a penalty, followed by Other Race (16.7%) and Black (15.5%) offenders. Hispanic offenders received relief from mandatory minimum penalties through substantial assistance the least often, in 8.5 percent of their cases.
 - Hispanic offenders received safety valve relief alone most often, in 48.2 percent of their cases, followed by Other Race (45.2%) and White (33.3%) offenders. Black offenders received relief from mandatory minimum penalties through the safety valve the least often, in 17.5 percent of their cases.
 - White offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief most often, in 17.6 percent of their cases, followed by Other Race (16.7%), Black (9.5%) and Hispanic (7.2%) offenders.
 - Over three-quarters of all female marijuana offenders (76.4%) received relief from the mandatory minimum penalty compared to almost two-thirds (63.9%) of male offenders.

- Male offenders received substantial assistance relief alone from a mandatory minimum penalty more often in 12.9 percent of their cases, compared to female offenders (10.3%).
 - Male offenders also received safety valve relief alone more often, in 41.6 percent of their cases, compared to female offenders (39.1%).
 - Female offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often in 27.0 percent of their cases, compared to 9.4 percent of cases involving male offenders.
 - Non-citizen marijuana offenders received relief from the mandatory minimum penalty at a higher rate (73.7%) than United States citizen marijuana offenders (58.2%).
 - United States citizen marijuana offenders received substantial assistance relief alone from a mandatory minimum penalty more often in 17.0 percent of their cases, compared to non-citizen offenders (6.9%).
 - Non-citizen offenders received safety valve relief alone more often, in 59.8 percent of their cases, compared to United States citizens (28.0%).
 - United States citizen offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often, in 13.1 percent of their cases, compared to 7.0 percent of cases involving non-citizens.
- A little over half (51.6%) of all marijuana offenders convicted of an offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range.
 - Almost 35 percent (33.9%) of marijuana offenders convicted of an offense carrying a mandatory minimum penalty received a government sponsored below range sentence.
 - Marijuana offenders convicted of an offense carrying a mandatory minimum penalty received a non-government sponsored below range sentence in 13.6 percent of the cases.
- In fiscal year 2010, the average extent of substantial assistance departures in marijuana cases was 52.5 percent (40 months) from the bottom of the otherwise applicable guideline range.

- In fiscal year 2010, the average extent of non-government sponsored below range sentences in marijuana cases was 35.5 percent (21 months) from the bottom of the otherwise applicable guideline range.

Sentencing

- In fiscal year 2010, 35.3 percent of marijuana offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which marijuana offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 57.5 percent of their offenses carrying such a penalty, followed by Hispanic (36.0%) and White (28.0%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 21.4 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (36.1% of their cases, compared to 23.6% of cases involving female offenders).
 - United States citizens were subject to the mandatory minimum penalty at sentencing more often than non-citizens offenders (41.8% of their cases, compared to 26.3% of cases involving non-citizen offenders).
- Marijuana offenders received the shortest sentences of any major drug type. The average sentence for marijuana offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 93 months. The average sentence for marijuana offenders who obtained relief from a mandatory minimum penalty was 32 months.

Prison Impact

- At the end of fiscal year 2010, 6.5 percent of the offenders in the custody of the Bureau of Prisons were marijuana offenders.

G. METHAMPHETAMINE OFFENSES

In fiscal year 2010, 4,169 (17.4%) of the 23,964 drug offenders committed an offense involving methamphetamine. The majority of those methamphetamine offenders (83.1%, n=3,466) were convicted of an offense carrying a mandatory minimum penalty. Less than half of the methamphetamine offenders convicted of an offense carrying a mandatory minimum

penalty (42.0%, n=1,456) were subject to the mandatory minimum at sentencing. See Table 8-13.

1. *Demographic Characteristics of Methamphetamine Offenders*

Table 8-13 presents information on the demographic characteristics of methamphetamine offenders generally. This information is then compared to that for methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty, methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and then to those methamphetamine offenders who remained subject to the mandatory minimum at the time of sentencing because they did not qualify for any form of statutory relief.

Table 8-13
Demographic Characteristics of Methamphetamine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	4,169	3,466	2,010	1,456
Race of Offender (Percent)				
White	52.6	51.3	52.5	49.7
Black	2.3	2.2	1.9	2.7
Hispanic	41.0	42.6	41.1	44.8
Other	4.1	3.8	4.5	2.9
Citizenship of Offender (Percent)				
United States Citizen	69.0	66.1	62.5	71.0
Non-Citizen	31.0	33.9	37.5	29.0
Gender of Offender (Percent)				
Male	81.4	81.9	77.1	88.5
Female	18.6	18.1	22.9	11.5

The demographic characteristics for methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty differ from those observed for most other major drug types in two ways. First, more than half (51.3%, n=1,776) of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty are White and another 42.6 percent (n=1,476) are Hispanic. Black methamphetamine offenders constitute only 2.2 percent (n=77) of the methamphetamine offenders convicted of an offense carrying a mandatory

minimum penalty. This is the smallest proportion of Black offenders for any major drug type.⁶⁷⁵ In contrast, Other Race offenders constitute 3.8 percent (n=132) of the methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty, which is the largest proportion of Other Race offenders for any drug type.

Second, female offenders accounted for 18.1 percent (n=627) of all methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty. Although this not a large percentage, it is higher than both the proportion of female offenders in the overall population of drug offenders convicted of an offense carrying a mandatory minimum penalty (10.2%, n=1,611) and the proportion of female offenders convicted of an offense carrying a mandatory minimum penalty for any other drug type.⁶⁷⁶

Table 8-14 displays information about offense characteristics and criminal history category of methamphetamine offenders generally. This information is then compared to that for methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty, methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and then to those methamphetamine offenders who remained subject to the mandatory minimum at the time of sentencing because they did not qualify for any form of statutory relief.

⁶⁷⁵ See Tables 8-4, 8-7, 8-10 *infra*, and Table 8-16, *supra*.

⁶⁷⁶ *Id.*

Table 8-14
Guideline Sentencing Characteristics, Role in the Offense, and
Criminal History of Methamphetamine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	4,169	3,466	2,010	1,456
Characteristics (Percent)				
Weapon Specific Offense Characteristic	14.2	13.7	8.9	20.3
Firearms Mandatory Minimum Applied	4.1	4.9	2.4	8.3
Safety Valve Reduction	33.7	36.8	63.4	0.0
Role in the Offense (Percent)				
Aggravating Role	5.5	6.3	4.6	8.5
Mitigating Role	17.1	18.0	25.9	7.0
Criminal History Category (Percent)				
I	48.7	50.1	68.8	24.1
II	12.6	12.8	8.7	18.4
III	14.9	14.5	9.8	21.0
IV	8.1	7.4	3.9	12.3
V	4.2	4.0	2.6	6.0
VI	11.5	11.2	6.2	18.3

2. *Guilty Pleas and Trials*

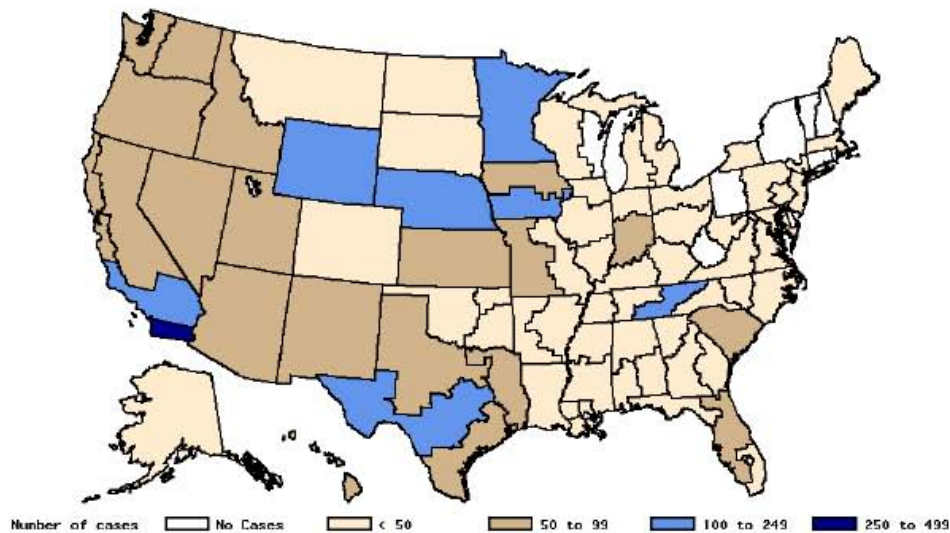
Methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty went to trial at about the same rate as all drug offenders convicted of an offense carrying such a penalty. In fiscal year 2010, 96.9 percent (n=3,358) of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty pled guilty while 3.1 percent (n=108) proceeded to trial. As discussed above, drug offenders convicted of such statutes pled guilty 95.5 percent of the time. By comparison, 97.7 percent (n=682) of methamphetamine offenders in cases without mandatory minimum penalties in fiscal year 2010 pled guilty while 2.3 percent (n=16) were convicted after trial.

3. *Geographic Variations*

As with other drug types, the number of methamphetamine cases reported each year varied among the 94 judicial districts. As a result, the number of methamphetamine offenders in each district convicted of an offense carrying a mandatory minimum penalty also varied.

Eight of the 94 judicial districts reported 100 or more methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010: Southern California (n=301, 10.0% of the overall criminal caseload), Nebraska (n=154, 27.1%), Western Tennessee (n=139, 22.2%), Central California (n=127, 7.0%), Wyoming (n=126, 34.2%), Eastern Tennessee (n=121, 14.8%), Minnesota (n=108, 22.4%), and Southern Iowa (n=100, 23.9%). See Figure 8-37. As a percentage of the overall caseload, methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty were most common in the District of Hawaii, where 41.8 percent of the criminal caseload (66 of the 158 offenders) involved methamphetamine cases, as well as Wyoming (34.2%, 126 of 368 offenders) and Northern Iowa (28.3%, 97 of 343 offenders).

Figure 8-37
Number of Methamphetamine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty by District
Fiscal Year 2010



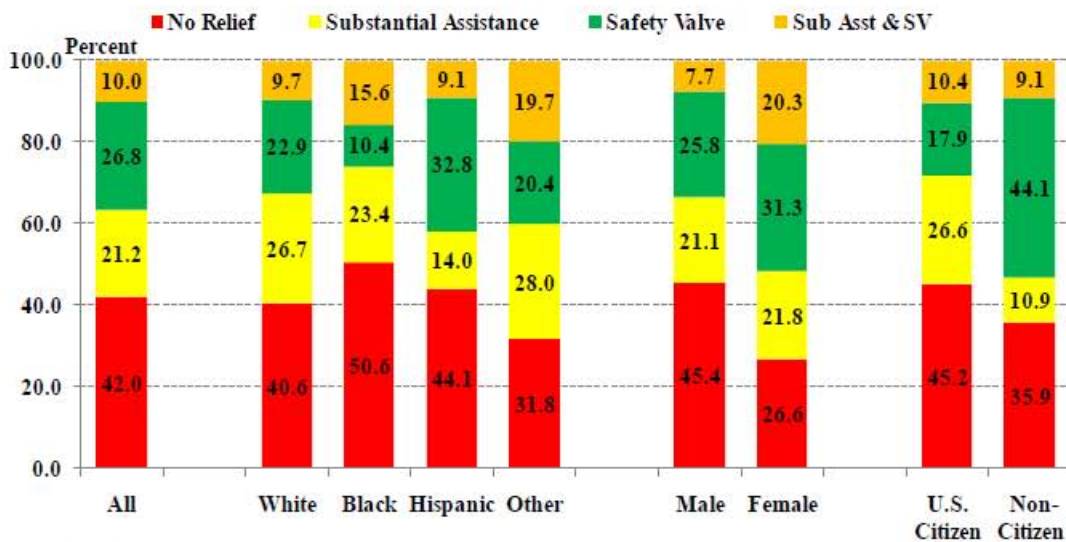
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

4. *Relief from the Mandatory Minimum Penalty*

In fiscal year 2010, more than half (58.0%, n=2,010) of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory minimum penalty. Slightly more than one-quarter (26.8%, n=928) of the methamphetamine offenders received relief through operation of the safety valve alone. Methamphetamine offenders who did not qualify for the safety valve, but who provided

substantial assistance to the government accounted for 21.2 percent (n=736) of all methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty. A smaller percentage (10.0%, n= 346) of methamphetamine offenders received relief from the mandatory minimum penalty by qualifying for application of both the safety valve and substantial assistance provisions. See Figure 8-38.

Figure 8-38
Percent of Methamphetamine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The rate at which offenders received relief from the mandatory minimum through these provisions varied by race, gender, and citizenship.⁶⁷⁷ For example, Other Race offenders qualified for some form of relief from a mandatory minimum penalty most often, with 68.2% (n=90) obtaining relief, either through operation of the safety valve or by providing substantial assistance to the government, or a combination of both. Black offenders qualified for relief from mandatory minimum penalties least often, in only 49.4 percent (n=39) of cases in which they were convicted of an offense carrying such a penalty. See Figure 8-38.

The manner in which relief from a mandatory minimum penalty was obtained also varied by the race and citizenship of the offender. Hispanic offenders most often received such relief through operation of the safety valve provision, alone or in conjunction with providing substantial assistance (41.9%, n=618), followed by Other Race offenders at 40.1 percent (n=53) and White offenders at 32.6 percent (n=580). Conversely, Black offenders qualified for safety

⁶⁷⁷ Figure 8-38 (Percent of Methamphetamine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty Who Were Relieved of the Penalty (Fiscal Year 2010)) shows the breakdown by categories. For purposes of this report, the rates at which offenders received safety valve relief reflect both cases in which such relief was given alone and those in which it was given after the offender's substantial assistance to the government.

valve relief in 26.0 percent (n=20) of the cases, either alone or in conjunction with providing substantial assistance to the government.

Other Race offenders also received relief by providing substantial assistance to the government, alone or in a combination with the safety valve, at the highest rate (47.7%, n=63). Notably, Black offenders received relief by providing substantial assistance at a rate of 39.0 percent (n=30), the highest rate at which Black offenders received such relief for any major drug type.

Almost three-quarters of all female methamphetamine offenders (73.4%, n=460) received relief from the mandatory minimum penalty compared to slightly more than half (54.6%, n=1,550) of male methamphetamine offenders. *See* Figure 8-38. Female offenders received relief through operation of the safety valve⁶⁷⁸ at a higher rate (51.6%, n=323), and received relief by providing substantial assistance⁶⁷⁹ at a higher rate (42.1%, n=264), compared to male offenders (33.5%, n=951 and 28.8%, n=818, respectively).⁶⁸⁰

Non-citizen methamphetamine offenders most often received relief from mandatory minimum penalties through operation of the safety valve provision, alone or in conjunction with providing substantial assistance. The safety valve applied in 53.2 percent (n=626) of methamphetamine cases involving a non-citizen convicted of an offense carrying a mandatory minimum penalty. The rate in such cases involving a United States citizen was 28.3 percent (n=648). *See* Figure 8-38.

In contrast, United States citizen offenders in methamphetamine cases obtained relief by providing substantial assistance to the government, by itself or in conjunction with safety valve relief, more often than non-citizen offenders in such cases. United States citizen methamphetamine offenders received relief from the mandatory minimum in 37.0 percent (n=847) of all cases while non-citizen methamphetamine offenders obtained relief in this manner in only 20.0 percent (n=235) of the cases in which they were the offender.

5. *Sentencing Outcomes*

a. Average sentence length

The average sentence for methamphetamine offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 144 months, which is the highest average sentence for any drug type.⁶⁸¹ In

⁶⁷⁸ This percentage includes safety valve relief either alone, or in conjunction with substantial assistance.

⁶⁷⁹ This percentage includes substantial assistance relief either alone, or in conjunction with safety valve.

⁶⁸⁰ These rates combine offenders receiving each form of relief alone, with offenders who received both forms of relief.

⁶⁸¹ USSG §2D1.1 has several specific offense characteristics applicable only to methamphetamine offenses resulting in an increase in the applicable offense level. *See* USSG §2D1.1(b)(5), (13).

contrast, the average sentence for methamphetamine offenders who obtained relief from a mandatory minimum penalty was 72 months.

The different forms of relief received by methamphetamine offenders affected the average sentence. Methamphetamine offenders who qualified for the safety valve and who also provided the government with substantial assistance had the lowest average sentence at 41 months. The average sentence imposed on methamphetamine offenders who provided substantial assistance to the government was 99 months. This average sentence was slightly higher than the average sentence of 90 months for all drug offenders who provided substantial assistance.

The average sentence imposed on methamphetamine offenders who received relief from a mandatory minimum through application of the safety valve provision was 62 months. This average sentence was slightly higher than the average sentence for all drug offenders who received safety valve relief (49 months).

Offenses involving methamphetamine had a different criminal history category pattern than other major drug types. White offenders are the majority of offenders in every criminal history category, except Criminal History Category I. The proportion of offenders in each criminal history category who are White also increases with the criminal history category. Conversely, the proportion of offenders in each criminal history category who are Hispanic decreases with the criminal history category. The proportion of offenders in each criminal history category who are Black is relatively small, which is largely due to the fact that Black offenders are rarely convicted of methamphetamine offenses.⁶⁸²

In a pattern different than other major drug types, Black methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty and subject to the mandatory minimum at sentencing had the lowest sentences, on average, of any racial group (131 months).⁶⁸³ Other Race methamphetamine offenders had the highest average sentence of 152 months, followed by Hispanic methamphetamine offenders (145 months) and White methamphetamine offenders (143 months). However, when the Commission examined average sentences by race for the methamphetamine offenders who were relieved of the mandatory minimum penalty at sentencing, Black offenders had the highest average sentences (76 months), followed by Hispanic methamphetamine offenders (75 months), and White methamphetamine offenders (70 months). Other Race methamphetamine offenders had the lowest average sentences (61 months).⁶⁸⁴

⁶⁸² See Figure D-36 (Race of Methamphetamine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty by Criminal History Category (Fiscal Year 2010)) in Appendix D of this Report.

⁶⁸³ See Figure D-44 (Average Sentence Length by Race Of Methamphetamine Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty (Fiscal Year 2010)) in Appendix D of this Report.

⁶⁸⁴ *Id.*

b. Position relative to the guideline range

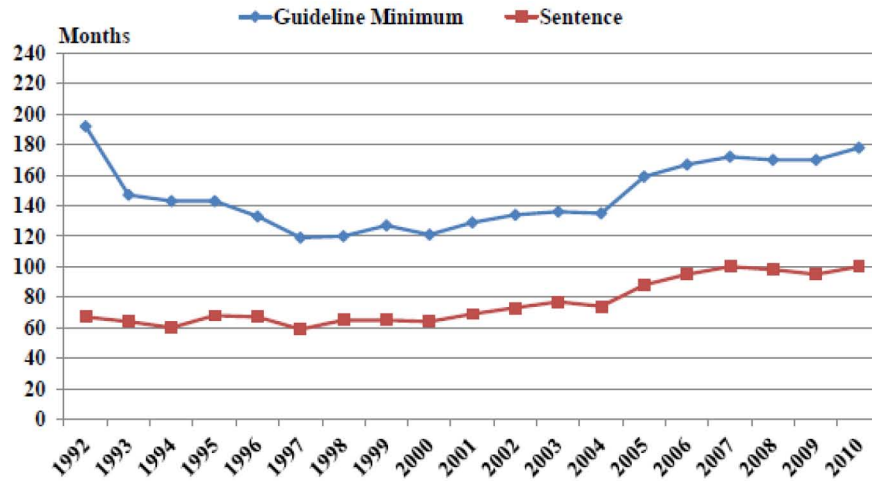
Table 8-15 compares the position of the sentence imposed relative to the guideline range among methamphetamine offenders generally, methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty, methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and then methamphetamine offenders who remained subject to the mandatory minimum penalty at the time of sentencing because they did not qualify for any form of statutory relief. Less than 40 percent (38.3%, n=1,328) of all methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range. Approximately one-third (31.2%, n=1,082) of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty received a substantial assistance departure. Methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty received a non-government sponsored below range sentence in 18.2 percent (n=629) of the cases.

Table 8-15
Sentence Relative to the Guideline Range of Methamphetamine Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	4,169	3,466	2,010	1,456
Sentence Relative to the Guideline Range (Percent)				
Within Range	40.6	38.3	20.4	63.0
Above Range	0.8	0.8	0.4	1.3
Substantial Assistance §5K1.1	28.8	31.2	53.8	0.0
Other Government Sponsored (no §5K1.1)	10.7	11.6	11.7	11.3
Other Below Range	19.0	18.2	13.7	24.3

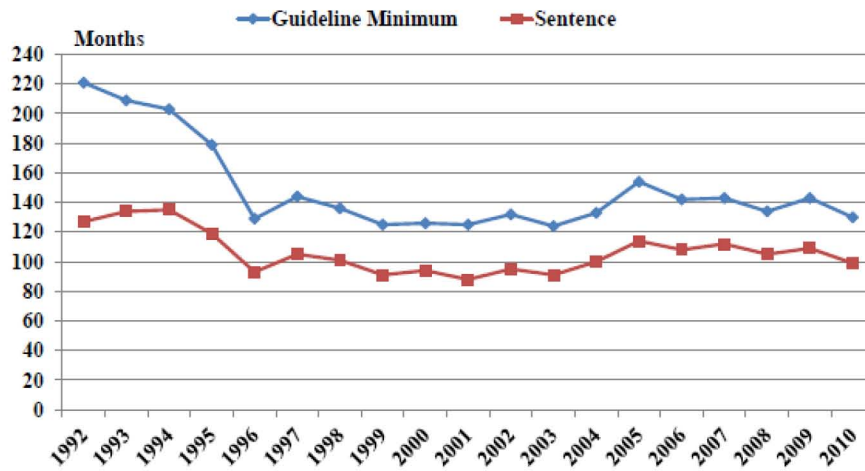
Figures 8-39 and 8-40 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for methamphetamine offenses for offenders sentenced from fiscal year 1992 to 2010. As the figures demonstrate, although the average sentences imposed were below the guideline range in each year, they remained above five years.

Figure 8-39
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Substantial Assistance
Methamphetamine Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992 – USSCFY2010.

Figure 8-40
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Non-Substantial Assistance Below Range Sentence
Methamphetamine Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992 – USSCFY2010.

In fiscal year 2010, the average extent of substantial assistance departures in methamphetamine cases was 45.2 percent (66 months) from the bottom of the otherwise applicable guideline range. In fiscal year 2010, the average extent of non-government sponsored

below range sentences (*i.e.*, departures and variances combined) in methamphetamine cases was 26.1 percent (32 months) from the bottom of the otherwise applicable guideline range.

6. *Prison Impact*

At the end of fiscal year 2010, 12.0 percent of all offenders in BOP custody (n= 22,935 of 191,757 offenders) were methamphetamine offenders. At the end of 1995, only 3.9 percent of the federal prison population were methamphetamine offenders (n= 2,787 of 71,972 offenders). The number of methamphetamine offenders has increased each year since 1995.

The percentage of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty has also increased from 76.4 percent (n=2,129) in 1995 to the current rate of 88.2 percent (n=20,233) in 2010. The percentage of methamphetamine offenders in BOP custody who remained subject to the mandatory minimum penalty at sentencing has increased slightly from 47.0 percent (n=1,311) in 1995 to 49.6 percent (n=11,386) in 2010.⁶⁸⁵

7. *Offender Function*

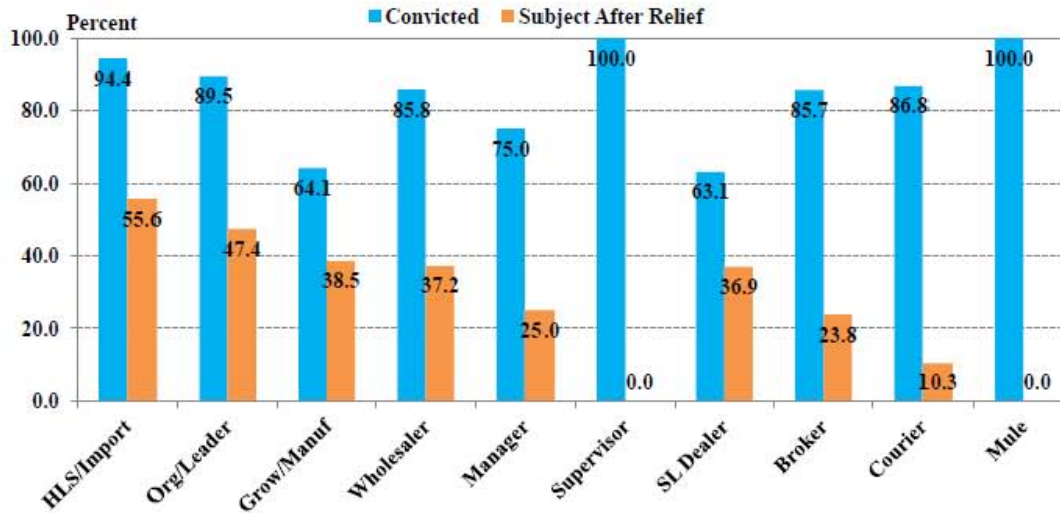
The majority of methamphetamine offenders served in functions that were at least as or more culpable than Supervisor (56.3%). Wholesaler was the most common function (38.5%).⁶⁸⁶ For methamphetamine offenses, more than half of offenders in every function category were convicted of an offense carrying a mandatory minimum penalty.⁶⁸⁷ Supervisor and Mule were convicted of statutes carrying a mandatory minimum penalty in all cases. Other functions, particularly High-Level Supplier/Importer (94.4%), Organizer/Leader (89.5%), and Courier (86.8%), were convicted of statutes carrying mandatory minimum penalties at consistently high rates as well. *See* Figure 8-41.

⁶⁸⁵ *See* Figure D-45 (Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing - Methamphetamine Offenders (1995–2010)) in Appendix D of this Report.

⁶⁸⁶ *See* Figure D-46 (Distribution of Offender Function by Primary Drug Type Methamphetamine Offenders (Fiscal Year 2009 Sample Data)) in Appendix D of this Report.

⁶⁸⁷ As noted earlier, terms used to describe offender function in this analysis do not necessarily correlate with guideline definitions of similar terms. For example, the determination of offender function was made without regard to whether USSG §2D1.1(b)(4) applied.

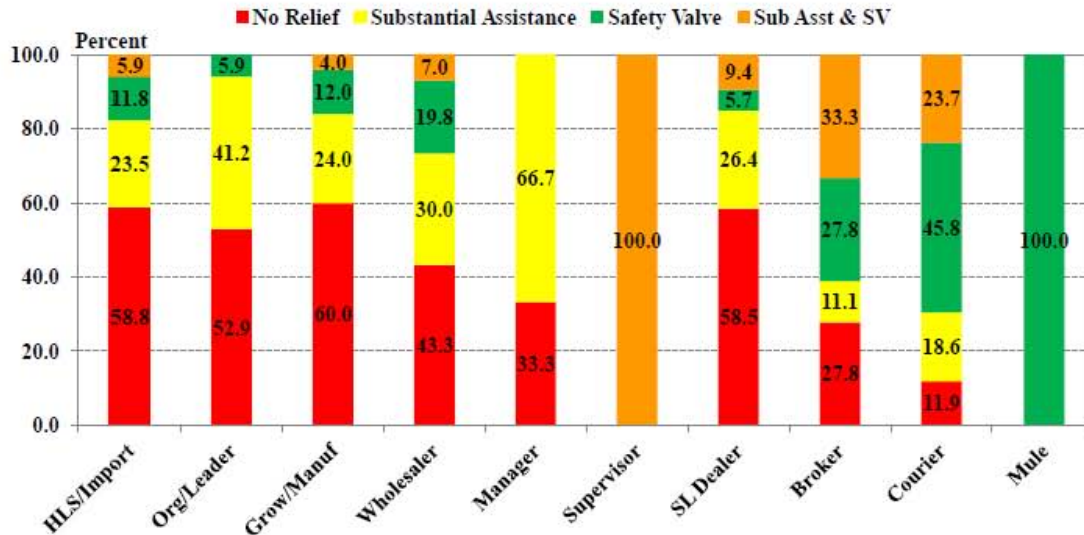
Figure 8-41
Percent of Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty
by Offender Function and Primary Drug Type
Methamphetamine Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

For all major drug types, higher-level function offenders as a group generally received relief based on substantial assistance at higher rates than lower-level function offenders. In methamphetamine cases, however, it appears that function did not play as critical a role in determining the rate of substantial assistance relief as most functions received such relief in approximately one-third to half of the cases. Mid-level methamphetamine functions, Manager and Supervisor, received substantial assistance relief at the highest rates for that drug type (66.7% and 100%, respectively). *See* Figure 8-42.

Figure 8-42
Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
Who Were Relieved of the Penalty By Offender Function
Methamphetamine Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Finally, in methamphetamine offenses, low-level function offenders obtained relief at high rates. Methamphetamine offenders who performed functions lower than Street-Level Dealer obtained relief in at least 72.2 percent of the cases (Broker). Among all function categories in methamphetamine cases, Grower/Manufacturer offenders obtained relief from mandatory minimums at the lowest rate (40.0%). Although Wholesaler offenders obtained relief in 56.7 percent of the cases, High-Level Supplier/Importer offenders and Street-Level Dealer offenders obtained relief at approximately the same rate (41.2% and 41.5%, respectively) despite any differences in their function. See Figure 8-42.

8. Summary

With respect to mandatory minimum penalties for methamphetamine offenses, Commission analyses demonstrate the following:

Offenses and Offenders

- In fiscal year 2010, 17.4 percent (n= 4,169) of drug offenders committed an offense involving methamphetamine. The majority of methamphetamine offenders (83.1%, n=3,466) were convicted of an offense carrying a mandatory minimum penalty, the highest rate of any drug type.
- More than half (51.3%) of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty were White and 42.6 percent were Hispanic, followed by Other Race (3.8%) and Black (2.2%) offenders.

- Female offenders accounted for 18.1 percent (n=627) of all the methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty. Although this is not a large percentage, it is higher than both the proportion of female offenders in the overall population of drug offenders convicted of an offense carrying a mandatory minimum penalty (10.2%, n=1,611) and the proportion of female offenders convicted of an offense carrying a mandatory minimum penalty for any other drug type.
- Almost two-thirds of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty (66.1%) were United States citizens.
- Eight of the 94 judicial districts reported 100 or more methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010.
- Wholesaler was the most common function (38.5%) in methamphetamine offenses.

Application and Relief

- In fiscal year 2010, 96.9 percent (n=3,358) of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty pled guilty while 3.1 percent (n=108) proceeded to trial. By comparison, 97.7 percent (n=682) of methamphetamine offenders in cases without mandatory minimum penalties in fiscal year 2010 pled guilty while 2.3 percent (n=16) were convicted after trial.
- In fiscal year 2010, more than half (58.0%) of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory minimum penalty.
- Less than 40 percent (38.3%) of all methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range.
 - Approximately one-third (31.2%) of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty received a substantial assistance departure.
 - Methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty received a non-government sponsored below range sentence in 18.2 percent of the cases.
- Other Race methamphetamine offenders qualified for some form of relief from a mandatory minimum penalty most often, in 68.2 percent of their offenses carrying such a penalty, followed by White (59.4%) and Hispanic (55.9%) offenders. Black offenders qualified for relief from mandatory minimum penalties least often, in 49.4 percent of the cases in which they were convicted of an offense carrying such a penalty.

- o Other Race offenders received substantial assistance relief alone from a mandatory minimum penalty most often, in 28.0 percent of their offenses carrying such a penalty, followed by White (26.7%) and Black (23.4%) offenders. Hispanic offenders received relief from mandatory minimum penalties through substantial assistance the least often, in 14.0 percent of their cases.
 - o Hispanic offenders received safety valve relief alone most often, in 32.8 percent of their cases, followed by White (22.9%) and Other Race (20.4%) offenders. Black offenders received relief from mandatory minimum penalties through the safety valve the least often, in 10.4 percent of their cases.
 - o Other Race offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief most often, in 19.7 percent of their cases, followed by Black (15.6%), White (9.7%), and Hispanic (9.1%) offenders.
- Almost three-quarters of all female methamphetamine offenders (73.4%, n=460) received relief from the mandatory minimum penalty compared to more than half (54.6%, n=1,550) of male methamphetamine offenders.
 - o Female offenders received substantial assistance relief alone from a mandatory minimum penalty more often, in 21.8 percent of their cases, compared to male offenders (21.1%).
 - o Female offenders received safety valve relief alone more often, in 31.3 percent of their cases, compared to male offenders (25.8%).
 - o Female offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often, in 20.3 percent of their cases, compared to 7.7 percent of cases involving male offenders.
- Non-citizen methamphetamine offenders received relief from the mandatory minimum penalty at a higher rate (64.1%, n=754) than United States citizen methamphetamine offenders (54.8%, n=1,256).
 - o United States citizen methamphetamine offenders received substantial assistance relief alone from a mandatory minimum penalty more often in 26.6 percent of their cases, compared to non-citizen offenders (10.9%).
 - o Non-citizen offenders received safety valve relief alone more often, in 44.1 percent of their cases, compared to United States citizen offenders (17.9%).
 - o United States citizen offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often, in 10.4 percent of their cases, compared to 9.1 percent of cases involving non-citizens.

- In fiscal year 2010, the average extent of substantial assistance departures in methamphetamine cases was 45.2 percent (66 months) from the bottom of the otherwise applicable guideline range.
- In fiscal year 2010, the average extent of non-government sponsored below range sentences in methamphetamine cases was 26.1 percent (32 months) from the bottom of the otherwise applicable guideline range.

Sentencing

- In fiscal year 2010, 42.0 percent of methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 50.6 percent of their offenses carrying such a penalty, followed by Hispanic (44.1%) and White (40.6%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 31.8 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (45.4% of their cases, compared to 26.6% of cases involving female offenders).
 - United States citizen offenders were subject to the mandatory minimum penalty at sentencing more often than non-citizen offenders (45.2% of their cases, compared to 35.9% of cases involving non-citizen offenders).
- The average sentence for methamphetamine offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 144 months. The average sentence for methamphetamine offenders who obtained relief from a mandatory minimum penalty was 72 months.
 - In a pattern different than other major drug types, Black methamphetamine offenders who were subject to a mandatory minimum penalty at sentencing had the lowest sentences, on average, of any racial group (131 months), compared to Other Race offenders (152 months), Hispanic offenders (145 months), and White offenders (143 months).

Prison Impact

- At the end of fiscal year 2010, 12.0 percent of all offenders in the custody of the Bureau of Prison were methamphetamine offenders.

H. HEROIN OFFENSES

In fiscal year 2010, 1,561 (6.5%) of the 23,964 drug offenders committed an offense involving heroin. The majority of those heroin offenders (70.3%, n=1,098) were convicted of an offense carrying a mandatory minimum penalty. Less than one-third of the heroin offenders convicted of an offense carrying a mandatory minimum penalty (30.7%, n=480) remained subject to the mandatory minimum at sentencing. *See* Table 8-16.

1. *Demographic Characteristics of Heroin Offenders*

Heroin offenders exhibit a demographic composition that is similar to powder cocaine offenders. Table 8-16 presents information on the demographic characteristics of heroin offenders generally. This information is then compared to that for heroin offenders convicted of an offense carrying a mandatory minimum penalty, heroin offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and to those heroin offenders who remained subject to the mandatory minimum at the time of sentencing because they did not qualify for any form of statutory relief.

Table 8-16
Demographic Characteristics of Heroin Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	1,561	1,098	618	480
Race of Offender (Percent)				
White	15.9	14.1	15.7	12.1
Black	27.5	23.4	13.7	35.8
Hispanic	55.6	61.3	68.8	51.7
Other	1.0	1.2	1.8	0.4
Citizenship of Offender (Percent)				
United States Citizen	66.5	59.5	45.5	77.7
Non-U.S. Citizen	33.5	40.5	54.5	22.3
Gender of Offender (Percent)				
Male	86.4	88.0	86.2	90.2
Female	13.6	12.0	13.8	9.8

Slightly more than half of heroin offenders convicted of an offense carrying a mandatory minimum penalty were Hispanic (61.3%, n=672) and about one-quarter (23.4%, n=256) were Black. These percentages shift slightly when examining heroin offenders subject to the mandatory minimum penalty at sentencing. Approximately half of heroin offenders subject to the mandatory minimum penalty at sentencing were Hispanic (51.7%, n=247) and about one-third (35.8%, n=171) were Black. The shift is primarily attributable to criminal history differences between the two. The proportion of offenders in each criminal history category who were Black increased with the criminal history category. Conversely, the proportion of offenders in each criminal history category who were Hispanic decreased with the increased criminal history category.⁶⁸⁸

Table 8-17 displays information about offense characteristics and criminal history category of heroin offenders generally. This information is then compared to that for heroin offenders convicted of an offense carrying a mandatory minimum penalty, heroin offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and to those heroin offenders who remained subject to the

⁶⁸⁸ See Figure D-48 (Race of Heroin Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty by Criminal History Category (Fiscal Year 2010)) in Appendix D of this Report.

mandatory minimum at the time of sentencing because they did not qualify for any form of statutory relief.

Table 8-17
Guideline Sentencing Characteristics, Role in the Offense, and
Criminal History of Heroin Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	1,561	1,098	618	480
Characteristics (Percent)				
Weapon Specific Offense Characteristic	8.0	7.3	3.1	12.7
Firearms Mandatory Minimum Applied	3.8	5.4	1.9	9.8
Safety Valve Reduction	37.3	42.4	75.4	0.0
Role in the Offense (Percent)				
Aggravating Role	7.3	9.1	4.1	15.6
Mitigating Role	21.5	21.4	33.7	5.6
Criminal History Category (Percent)				
I	54.5	60.0	79.4	35.0
II	9.2	9.6	5.2	15.4
III	13.4	12.6	6.6	20.2
IV	5.8	4.4	2.1	7.3
V	3.9	4.1	1.5	7.5
VI	13.1	9.3	5.2	14.6

2. *Guilty Pleas and Trials*

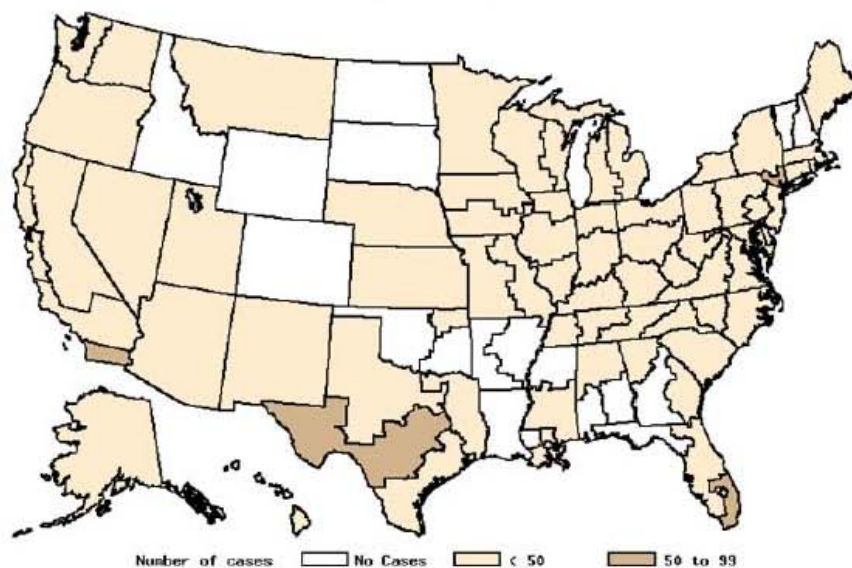
As observed for other drug types, heroin offenders convicted of an offense carrying a mandatory minimum penalty went to trial at about the same rate as all drug offenders convicted of an offense carrying such a penalty. In fiscal year 2010, 96.1 percent (n=1,055) of heroin offenders convicted of an offense carrying a mandatory minimum penalty pled guilty while 3.9 percent (n=43) proceeded to trial. As discussed above, drug offenders convicted of such statutes pled guilty 95.5 percent of the time. In comparison, 98.0 percent (n=452) of heroin offenders in

cases without mandatory minimum penalties in fiscal year 2010 pled guilty while 2.0 percent (n=9) were convicted after trial.

3. *Geographic Variations*

The 94 judicial districts varied significantly in the number of heroin cases reported to the Commission in fiscal year 2010. As a result, the number of heroin offenders in each district convicted of an offense carrying a mandatory minimum penalty also varied. Six districts reported 50 or more heroin offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010: Southern New York (n=95, 7.1% of the overall criminal caseload in the district), Eastern New York (n=83, 7.6%), Southern Florida (n=81, 3.7%), Puerto Rico (n=61, 7.8%), Southern California (n=52, 1.7%), and Western Texas (n=51, 0.8%). See Figure 8-43.

Figure 8-43
Number of Heroin Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty by District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

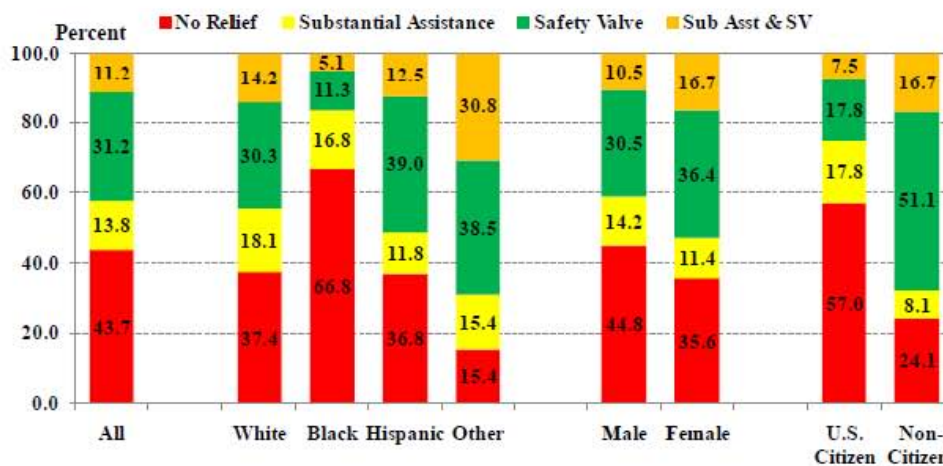
As a percentage of the overall caseload, heroin offenders convicted of an offense carrying a mandatory minimum penalty were most common in the District of Rhode Island, where 12.7 percent of the criminal caseload (n=20 of 157 offenders) involved this type of case, as well as the District of Puerto Rico (7.8%, n=61 of the 780 offenders) and the Eastern District of New York (7.6%, n=83 of 1,100 offenders).

4. *Relief from the Mandatory Minimum Penalty*

In fiscal year 2010, slightly more than half (56.3%, n=618) of heroin offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory

minimum penalty. Of those, almost one-third (31.2%, n=343) of the heroin offenders received relief through operation of the safety valve alone. Heroin offenders who did not qualify for the safety valve, but who received relief for providing substantial assistance to the government, accounted for 13.8 percent (n=152) of all heroin offenders convicted of an offense carrying a mandatory minimum penalty. A smaller percentage (11.2%, n= 123) of heroin offenders received relief from the mandatory minimum penalty by qualifying for application of both the safety valve and substantial assistance provisions. See Figure 8-44.

Figure 8-44
Percent of Heroin Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

As noted for other major drug types, the rate at which offenders received relief from the mandatory minimum penalty through these provisions varied by race, gender, and citizenship. The variations noted for heroin are similar to those noted for drugs in general. Black heroin offenders remained subject to the mandatory minimum penalty at sentencing at the highest rate of all races (66.8%, n=171), as they did in the overall drug population.

Female heroin offenders obtained relief from the mandatory minimum penalty more often than male heroin offenders (64.4%, n=85 compared with 55.2%, n=533). More than half of all female heroin offenders (53.1%, n=70) received relief from the mandatory minimum penalty pursuant to operation of the safety valve, compared with slightly more than one-third (41.0%, n=396) of male offenders. A similar pattern was observed in the overall drug population (compare female drug offenders at 54.7%, n=882 to male drug offenders at 32.9%, n=4,675).

Heroin offenders who were non-citizens also obtained relief from the mandatory minimum penalty at a higher rate (75.9%, n=337) than heroin offenders who were United States citizens (43.0%, n=281). As discussed above, among the overall drug offender population, non-citizens also obtained relief from the mandatory minimum penalty at a higher rate than their United States citizen counterparts.

5. *Sentencing Outcomes*

a. Average sentence length

The average sentence for heroin offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 119 months, compared to 51 months for heroin offenders who obtained relief from a mandatory minimum penalty.

As was the case with the overall drug mandatory minimum population, the different forms of relief received by heroin offenders affected the applicable average sentence. Heroin offenders who qualified for the safety valve and who also provided the government with substantial assistance had the lowest average sentence at 28 months. The average sentence imposed on heroin offenders who provided substantial assistance to the government was 75 months. This average sentence was slightly lower than the average sentence of 90 months for all drug offenders who provided substantial assistance.

The average sentence imposed on heroin offenders who received relief from a mandatory minimum through application of the safety valve provision was 49 months. This average sentence was the same as the average sentence for all drug offenders who received safety valve relief.

b. Position relative to the guideline range

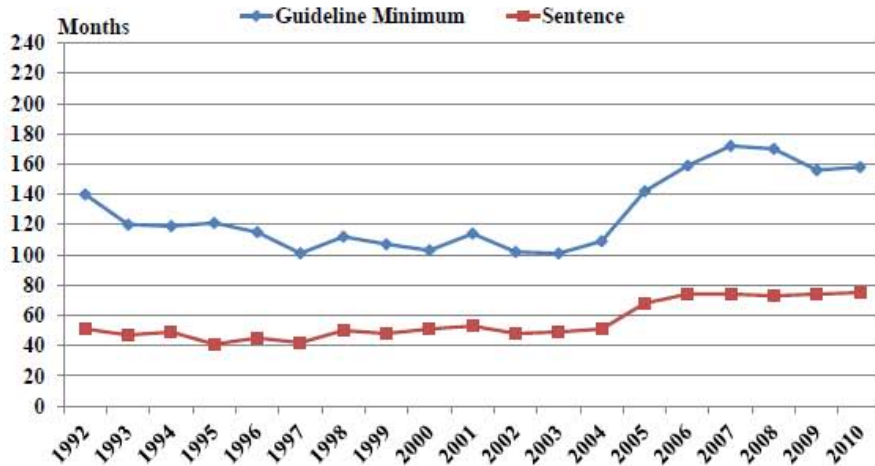
Table 8-18 compares the position of sentences relative to the guideline range among heroin offenders, heroin offenders convicted of an offense carrying a mandatory minimum penalty, heroin offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory minimum penalty, and then heroin offenders who remained subject to the mandatory minimum at the time of sentencing because they did not qualify for any form of statutory relief. Approximately one-quarter (23.3%, n=112) of heroin offenders subject to the mandatory minimum penalty at sentencing received a non-government sponsored below range sentence.

Table 8-18
Sentence Relative to the Guideline Range of Heroin Offenders
Fiscal Year 2010

	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	1,561	1,098	618	480
Sentence Relative to the Guideline Range				
Within Range	44.6	44.9	25.6	69.8
Above Range	1.5	0.6	0.2	1.0
Substantial Assistance §5K1.1	21.9	25.0	44.5	0.0
Other Government Sponsored (no §5K1.1)	5.9	5.8	5.6	5.8
Other Below Range	26.1	23.8	24.1	23.3

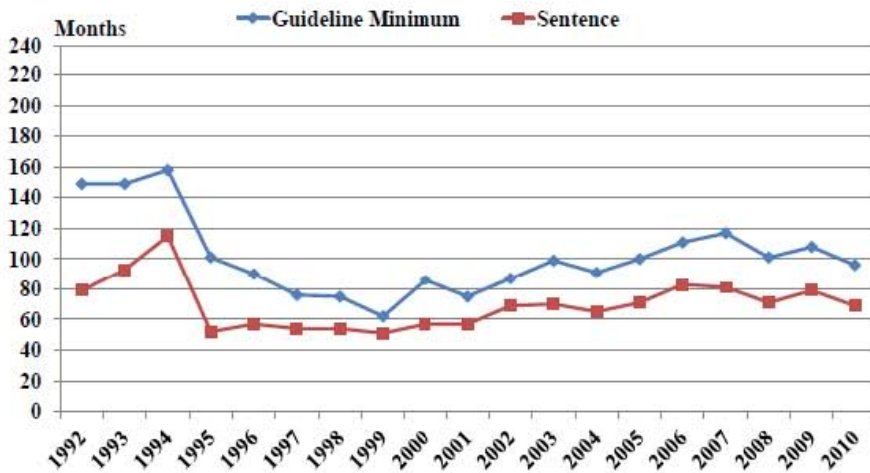
Figures 8-45 and 8-46 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for heroin offenses for offenders sentenced from fiscal year 1992 to 2010.

Figure 8-45
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Substantial Assistance
Heroin Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992 – USSCFY2010.

Figure 8-46
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Non-Substantial Assistance Below Range Sentence
Heroin Offenders
Fiscal Years 1992 - 2010



SOURCE: U.S. Sentencing Commission 1992 through 2010 Datafile, USSCFY1992 – USSCFY2010.

Figure 8-45 shows that in cases where the offender received relief from a mandatory minimum penalty as the result of providing substantial assistance to the government, the average sentence imposed was below five years until fiscal year 2005, even though the average guideline

minimum sentence was well above that level. A similar trend can also be observed on Figure 8-46 for other below range sentences.

In fiscal year 2010, the average extent of substantial assistance departures in heroin cases was 52.8 percent (61 months) from the bottom of the otherwise applicable guideline range. In fiscal year 2010, the average extent of non-government sponsored below range sentences (*i.e.*, departures and variances combined) in heroin cases was 31.3 percent (27 months) from the bottom of the otherwise applicable guideline range.

6. *Prison Impact*

At the end of fiscal year 2010, 3.0 percent (n=5,817 of 191,757 offenders) of offenders in the custody of the Bureau of Prisons were heroin offenders. At the end of fiscal year 1995, heroin offenders were 5.2 percent of the federal prison population (n=3,767 of 71,972 offenders). The number of heroin offenders has continued to increase each year through the end of fiscal year 2010. However, the proportion of these offenders among the overall offender population has decreased.

The percentage of heroin offenders convicted of an offense carrying a mandatory minimum penalty has also increased slightly from 71.1 percent (n=2,677) in 1995 to a high of 80.2 percent (n=4,010) in 1998, to the current rate of 78.6 percent (n=4,570) in 2010. The percentage of heroin offenders in BOP custody who remained subject to the mandatory minimum penalty at sentencing has decreased slightly from 52.7 percent (n=1,987) in 1995 to 49.1 percent (n=2,854) in 2010.⁶⁸⁹

7. *Offender Function*

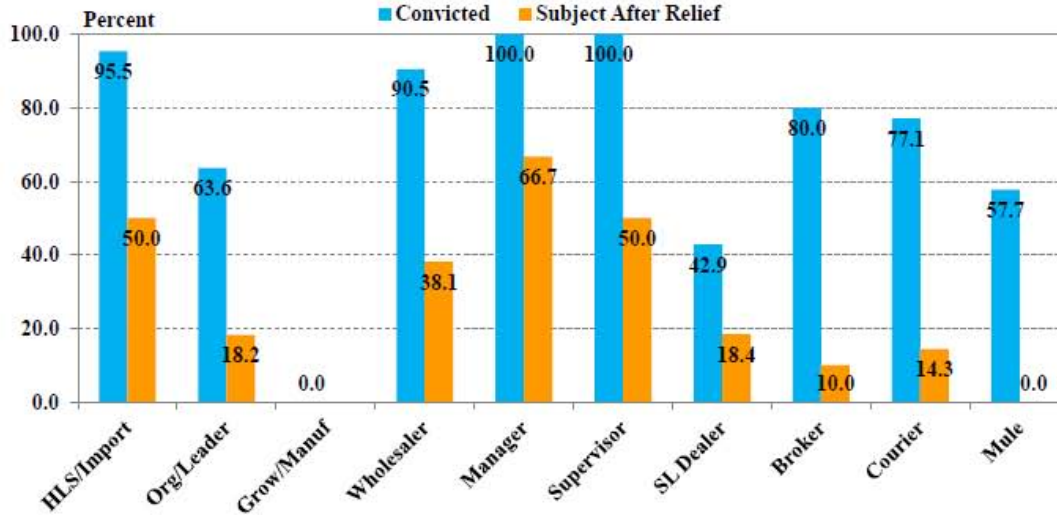
The majority of heroin offenders (52.9%) served in functions that are less culpable than Supervisor. The most common function for heroin offenses was Street-Level Dealer (21.4%).⁶⁹⁰

Manager (100.0%), Supervisor (100.0%), and High-Level Supplier/Importer (95.5%) were convicted of statutes carrying mandatory minimum penalties at consistently high rates in heroin cases. *See* Figure 8-47. Low-level function offenders in heroin offenses obtained relief from mandatory minimums at high rates. Mid-level function offenders were subject to mandatory minimum penalties at higher rates than higher-level function offenders.

⁶⁸⁹ *See* Figure D-57 (Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing - Heroin Offenders (1995–2010)) in Appendix D of this Report.

⁶⁹⁰ *See* Figure D-58 (Distribution of Offender Function by Primary Drug Type Heroin Offenders (Fiscal Year 2009 Sample Data)) in Appendix D of this Report.

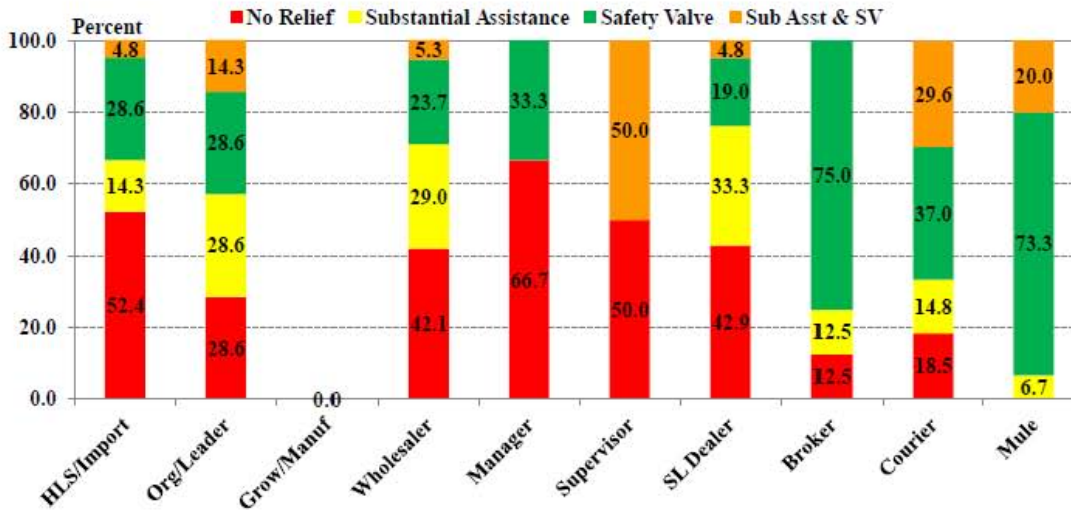
Figure 8-47
Percent of Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty and Subject to Mandatory Minimum Penalty
by Offender Function and Primary Drug Type
Heroin Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Heroin offenders who performed functions lower than Street-Level Dealer obtained relief in at least 81.5 percent of the cases. Conversely, higher-level function offenders obtained relief at lower rates in heroin cases than lower-level function offenders. High-Level Supplier/Importer offenders obtained relief in only 47.6 percent of cases, a lower rate than both Wholesaler (57.9%) and Street-Level Dealer (57.1%) offenders. See Figure 8-48.

Figure 8-48
Percent of Offenders Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
Who Were Relieved of the Penalty By Offender Function
Heroin Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

8. Summary

With respect to mandatory minimum penalties for heroin offenses, Commission analyses demonstrate the following:

Offenses and Offenders

- In fiscal year 2010, 6.5 percent (n= 1,561) of drug offenders committed an offense involving heroin. The majority of heroin offenders (70.3%, n=1,098) were convicted of an offense carrying a mandatory minimum penalty.
- More than half of heroin offenders convicted of an offense carrying a mandatory minimum penalty were Hispanic (61.3%) and one-quarter (23.4%) were Black, followed by White (14.1%) and Other Race (1.2%).
- The majority of heroin offenders are male (86.4%).
- Approximately two-thirds (66.5%) of heroin offenders are United States citizens.
- Six districts reported 50 or more heroin offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010.
- As a percentage of the overall caseload, heroin offenders convicted of an offense carrying a mandatory minimum penalty were most common in the District of Rhode Island, where 12.7 percent of the criminal caseload (n=20 of 157 offenders) involved this type of case,

as well as the District of Puerto Rico (7.8%, n=61 of the 780 offenders) and the Eastern District of New York (7.6%, n=83 of 1,100 offenders).

- The most common function for heroin offenses was Street-Level Dealer (21.4%).

Application and Relief

- In fiscal year 2010, 96.1 percent (n=1,055) of heroin offenders convicted of an offense carrying a mandatory minimum penalty pled guilty while 3.9 percent (n=43) proceeded to trial. In comparison, 98.0 percent (n=452) of heroin offenders in cases without mandatory minimum penalties in fiscal year 2010 pled guilty while 2.0 percent (n=9) were convicted after trial.
- In fiscal year 2010, more than half (56.3%) of heroin offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory minimum penalty.
 - Other Race offenders qualified for some form of relief from a mandatory minimum penalty most often, in 84.6 percent of their offenses carrying such a penalty, followed by Hispanic (63.2%) and White (62.6%) offenders. Black offenders qualified for relief from mandatory minimum penalties least often, in 33.2 percent of the cases in which they were convicted of an offense carrying such a penalty.
 - White offenders received substantial assistance relief alone from a mandatory minimum penalty most often, in 18.1 percent of their offenses carrying such a penalty, followed by Black (16.8%) and Other Race (15.4%) offenders. Hispanic offenders received relief from mandatory minimum penalties through substantial assistance the least often, in 11.8 percent of their cases.
 - Hispanic offenders received safety valve relief alone most often, in 39.0 percent of their cases, followed by Other Race (38.5%) and White (30.3%) offenders. Black offenders received relief from mandatory minimum penalties through the safety valve the least often, in 11.3 percent of their cases.
 - Other Race offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief most often, in 30.8 percent of their cases, followed by White (14.2%), Hispanic (12.5%), and Black (5.1%) offenders.
 - Female heroin offenders obtained relief from the mandatory minimum penalty more often than male heroin offenders (64.4% compared with 55.2%).

- Male offenders received substantial assistance relief alone from a mandatory minimum penalty more often, in 14.2 percent of their cases, compared to female offenders (11.4%).
 - Female offenders received safety valve relief alone more often, in 36.4 percent of their cases, compared to male offenders (30.5%).
 - Female offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often in 16.7 percent of their cases, compared to 10.5 percent of cases involving male offenders.
 - Heroin offenders who were non-citizens obtained relief from the mandatory minimum penalty at a higher rate (75.9%) than United States citizen offenders (43.0%).
 - United States citizens received substantial assistance relief alone from a mandatory minimum penalty more often in 17.8 percent of their cases, compared to non-citizen offenders (8.1%).
 - Non-citizen offenders received safety valve relief alone more often, in 51.1 percent of their cases, compared to United States citizens (17.8%).
 - Non-citizen offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often, in 16.7 percent of their cases, compared to 7.5 percent of cases involving United States citizens.
- Less than half (44.9%) of all heroin offenders convicted of an offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range.
 - Approximately one-third (30.8%) of heroin offenders convicted of an offense carrying a mandatory minimum penalty received a government sponsored below range sentence.
 - Approximately one-quarter (23.3%) of heroin offenders subject to the mandatory minimum penalty at sentencing received a non-government sponsored below range sentence.
- In fiscal year 2010, the average extent of substantial assistance departures in heroin cases was 52.8 percent (61 months) from the bottom of the otherwise applicable guideline range.
- In fiscal year 2010, the average extent of non-government sponsored below range sentences in heroin cases was 31.3 percent (27 months) from the bottom of the otherwise applicable guideline range.

Sentencing

- In fiscal year 2010, 43.7 percent of heroin offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which heroin offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 66.8 percent of their offenses carrying such a penalty, followed by White (37.4%) and Hispanic (36.8%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 15.4 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (44.8% of their cases, compared to 35.6% of cases involving female offenders).
 - United States citizens were subject to the mandatory minimum penalty at sentencing more often than non-citizen offenders (57.0% of their cases, compared to 24.1% of cases involving non-citizen offenders).
- The average sentence for heroin offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 119 months. The average sentence for heroin offenders who obtained from a mandatory minimum penalty was 51 months.

Prison Impact

- At the end of fiscal year 2010, 3.0 percent of the offenders in the custody of the Bureau of Prisons were heroin offenders.

I. SECTION 851 ANALYSIS

1. Introduction

As discussed earlier in this chapter, the penalty structure for drug statutes increases an applicable mandatory minimum penalty when a drug offender is convicted of a second or subsequent felony drug offense.⁶⁹¹ For example, 21 U.S.C. § 841 criminalizes possession of

⁶⁹¹ The term “felony drug offense” is defined in 21 U.S.C. § 802(44) as “an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.”

controlled substances with the intent to distribute and sets penalties based upon the quantities of the particular controlled substance involved in the offense. Section 841(b)(1)(A) sets a ten-year mandatory minimum penalty for specified quantities of enumerated controlled substances and increases that mandatory minimum penalty to 20 years of imprisonment if “any person commits such a violation after a prior conviction for a felony drug offense has become final.”⁶⁹² Section 841(b)(1)(A) increases the mandatory minimum penalty to life imprisonment for any person who commits such a violation “after two or more prior convictions for a felony drug offense have become final.”⁶⁹³ Section 841(b)(1)(B) involves lesser quantities of the controlled substances covered by subsection (b)(1)(A) and doubles the mandatory minimum from five to 10 years of imprisonment.⁶⁹⁴

These increased penalties are not, however, automatically triggered upon conviction. Rather, prosecutors must take affirmative steps prior to the offender’s conviction for these higher penalties to apply. The mechanism by which prosecutors can seek enhanced penalties for drug offenders who have prior convictions for felony drug offenses is set forth in 21 U.S.C. § 851 (Proceedings to establish prior convictions). Section 851 provides, in pertinent part, that “[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.” Once the information is filed, section 851 sets forth additional procedural requirements that must be met before the court can impose the enhanced penalty upon the offender.⁶⁹⁵

2. Methodology

The Commission’s study of drug offenses and mandatory minimum penalties demonstrates a lack of uniformity in application of the enhanced mandatory minimum penalties. To better assess the application of these penalties, the Commission conducted a more targeted analysis of the nation-wide application of 21 U.S.C. § 851 by conducting a specialized coding and analysis project. Assessing whether an offender qualifies for an enhancement under section 851 requires analysis of two factors: 1) the instant offense of conviction under title 21, United

⁶⁹² See 21 U.S.C. § 841(b)(1)(A).

⁶⁹³ See *id.*

⁶⁹⁴ As noted earlier in this chapter, section 846, which criminalizes attempts and conspiracies, adopts the penalty structure for the underlying offense. These three statutes, as noted in Table 4-1, were the three most frequently charged in 2010.

⁶⁹⁵ See generally 21 U.S.C. § 851 (b)-(d). The offender can challenge the prior conviction, which requires a hearing at which the United States Attorney has the burden of proof beyond a reasonable doubt on any issue of fact. See 21 U.S.C. § 851(c)(1). The offender can also challenge the constitutionality of the prior conviction, but must set forth the challenge with particularity. For such challenges, the offender bears the burden of proof by a preponderance on any issue of fact raised by this response. See 21 U.S.C. § 851(c)(2). These challenges must be resolved at a hearing, at which either party may introduce evidence. Either side has the right to appeal the court’s determination. See 21 U.S.C. § 851(d)(2).

States Code; and 2) prior qualifying drug convictions. Information about both factors can be determined objectively from the sentencing documents submitted to the Commission. Thus, evaluating whether section 851 enhancements are uniformly applied lends itself to quantitative analysis.

The Commission used sample groups from three fiscal years (2006,⁶⁹⁶ 2008, and 2009⁶⁹⁷) for the analysis. In all, 3,050 cases from fiscal year 2006, 5,434 cases from fiscal year 2008, and 5,451 cases from fiscal year 2009 were included in this analysis.

Using these groups of cases, the Commission examined all the documents submitted for each case to ascertain whether the enhancement could have applied based on the offender's prior criminal history. To make this determination, the Commission examined each offender's criminal history for any prior conviction involving the distribution, manufacture, sale, possession with the intent to distribute, intent to manufacture, trafficking or importation or exportation of any controlled substances.⁶⁹⁸ The Commission also noted whether any such offenses were specifically identified as a felony and if so, included those cases in the analysis. For any drug offense not specifically identified as a felony, the Commission examined the sentence for the drug conviction to determine whether it exceeded 12 months.⁶⁹⁹ If so, the case was included in the analysis. Juvenile drug convictions were excluded from the analysis.

⁶⁹⁶ The fiscal year 2006 sample was randomly selected from the Commission's fiscal year 2006 datafile and comprises cases that were sentenced after June 6, 2006. The Commission selected offenders in cases where the enhancement was documented as part of the conviction or in cases sentenced under USSG §§2D1.1 or 2D1.2 and where the offender's previous criminal history included a drug offense.

⁶⁹⁷ The fiscal year 2008 and 2009 samples were randomly selected from cases with complete guideline application information sentenced in the third and fourth quarters of those fiscal years. From this sample group, the Commission selected cases with the enhancement documented as a statute of conviction, or with offenders with previous criminal history and sentenced under USSG §§2D1.1 or 2D1.2.

⁶⁹⁸ Although some federal circuit courts have held that juvenile felony drug convictions qualify for enhancement under section 841(b), the Commission excluded juvenile predicate convictions from the analysis of offenses eligible for enhancement because presentence reports sometimes fail to specify whether a defendant was certified as an adult notwithstanding the fact he or she was under the age of majority under state law. Moreover, although some federal courts have broadly interpreted section 802(44) to include convictions for offenses "related to" drugs, such as use of a telephone to facilitate drug trafficking, the Commission only included felony convictions for drug distribution, manufacture, possession, and similar drug offenses.

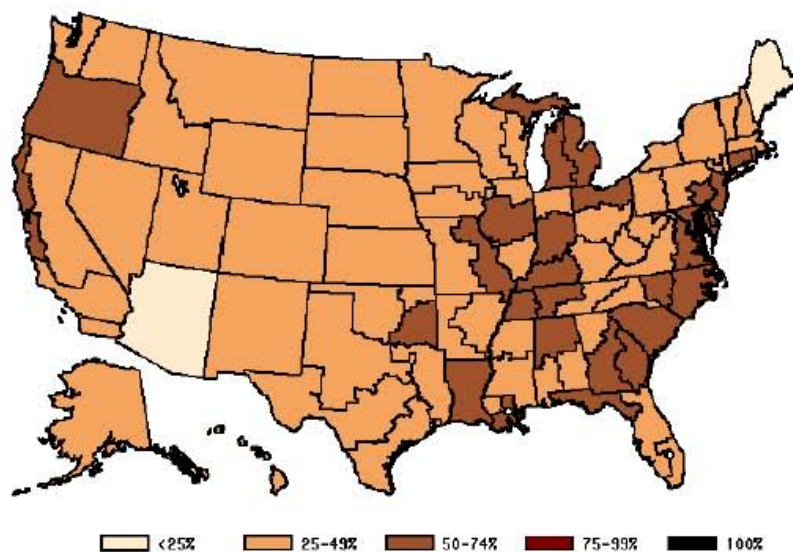
⁶⁹⁹ An important limitation on the Commission's coding project concerning enhancements for prior convictions for felony drug offenses under section 841(b) should be noted. Under 18 U.S.C. § 802(44), a "felony drug offense" includes simple possession of a controlled substance that is punishable in excess of one year in prison even if such an offense is not labeled as a "felony" offense under the relevant state law. Such predicate convictions for simple possession thus can include cases in which an offender was sentenced to a year or less in prison or sentenced to probation. In reviewing the criminal history sections of presentence reports in order to determine whether an offender was eligible for enhancement under section 851 based on a prior conviction for simple possession of a controlled substance, the Commission often could not ascertain whether prior convictions receiving sentences of one year or less (including probationary sentences) were "punishable" in excess of one year in prison under state law. For that reason, the Commission only included convictions for simple possession that received prison sentences of more than one year in order to ensure that such convictions were in fact felonies. This approach likely was under-inclusive insofar as it did not include certain prior convictions that were eligible for enhancement under section 851.

Once the Commission concluded that an offender qualified for the enhancement, the Commission examined the documentation to ascertain whether the court had made any findings of fact relating to the enhancement. The Commission also attempted to determine whether the government had affirmatively agreed not to file the enhancement as part of plea negotiations.

3. *Geographic Variations*

From the sample, the Commission identified, district by district, the percentage of drug offenders who, based on their offense conduct and criminal history, appeared to be eligible for enhancement under 21 U.S.C. § 851 in fiscal years 2006, 2008, and 2009. *See* Figure 8-49. In the majority of the districts, at least one-quarter of all drug offenders were eligible for enhancement under section 851. Specifically, in 62 of 94 judicial districts (66.0%), the rates of drug offenders eligible for enhancement under section 851 were between 25 and 49 percent. In addition, in 29 districts (30.8%), the rates of eligible drug offenders were between 50 and 74 percent. There were only three districts (3.2%) in which less than 25 percent of drug offenders were eligible for enhancement.

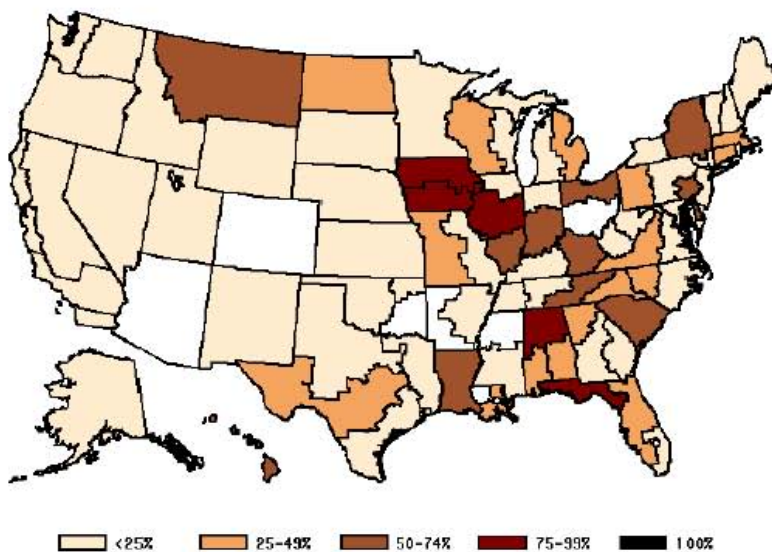
Figure 8-49
Drug Offender Eligibility for 21 U.S.C. § 851 Penalty Enhancement
by District
Fiscal Year 2006, 2008 and 2009 Sample Groups



SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

The Commission's analysis revealed significant variation in the manner in which the enhancement provision was applied. For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty as an enhancement. In contrast, in eight districts, none of the eligible drug offenders received the enhanced penalty. *See* Figure 8-50.

Figure 8-50
Application of 21 U.S.C. § 851 Penalty Enhancement for Eligible Drug Offenders
By District
Fiscal Year 2006, 2008 and 2009 Sample Groups

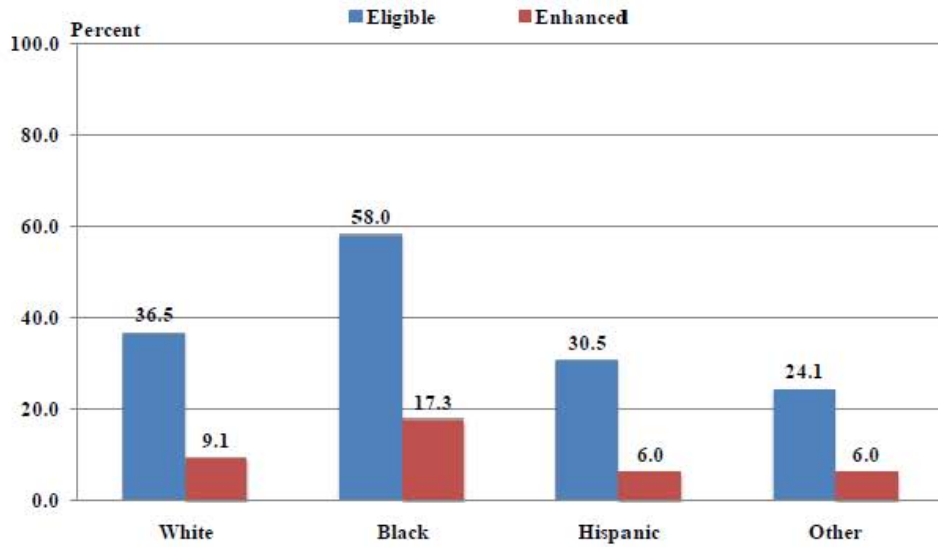


SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

4. *Demographic Characteristics of Offenders Eligible for Section 851 Enhancement*

The Commission also examined demographic data about the offenders eligible for the enhancement. Within each racial demographic group there were offenders who were eligible for the enhancement but did not receive it. *See* Figure 8-51. Black offenders qualified for the enhancement at higher rates than any other racial group. More than half (58.0%) of Black offenders were eligible for the enhancement, but only 17.3 percent received it. More than one-third (36.5%) of White offenders were eligible for the enhancement while 9.1 percent received it. Hispanic offenders were eligible in 30.5 percent of their cases, but 6.0 percent received the enhancement. Finally, 24.1 percent of Other Race offenders were eligible for the enhancement, while 6.0 percent received it.

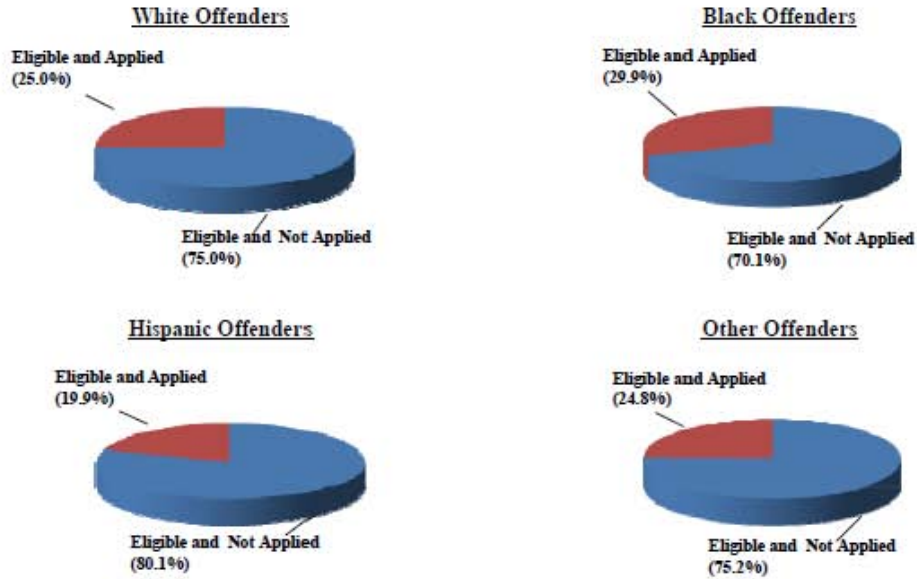
Figure 8-51
Race of Drug Offenders by Exposure to
21 U.S.C. § 851 Penalty Enhancement
Fiscal Year 2006, 2008 and 2009 Sample Groups



SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

A more precise way to analyze the application of the enhancement among racial groups is to examine the percentage of offenders in each racial group who were eligible to receive the enhancement compared to the percentage of those offenders who did receive it. Using this approach, 29.9 percent of Black offenders who were eligible to receive the enhanced penalty did, in fact, receive it. This rate was only slightly higher than the rates for White offenders (25.0%) and Other Race offenders (24.8%). Eligible Hispanic offenders received the enhanced penalty at the lowest rate of any racial group (19.9%). See Figure 8-52.

Figure 8-52
Application of 21 U.S.C. § 851 Penalty Enhancement
By Race of Offenders
Fiscal Year 2006, 2008 and 2009 Sample Groups

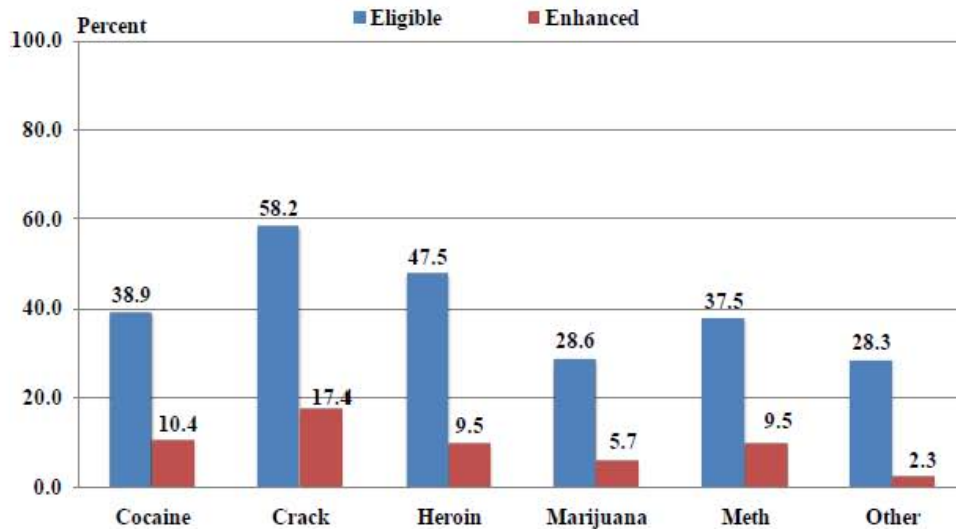


SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

5. *Drug Types Associated with Offenders Eligible for Section 851 Enhancement*

As discussed above, offenders of certain demographic groups (primarily race and citizenship) were more often associated with specific drug types. As a result, there were notable differences among each drug type in the offenders who were eligible for the sentence enhancement under section 851. *See* Figure 8-53. For example, crack cocaine offenders were most often eligible for the enhancement. This is because the vast majority of crack cocaine offenders were Black and had, on average, higher criminal history scores than other drug offenders. In contrast, powder cocaine offenders were often Hispanic, and the majority of these offenders (61.8%) had criminal history scores in Criminal History Category I.

Figure 8-53
Drug Type for Drug Offenders by Exposure to
21 U.S.C. § 851 Penalty Enhancement
Fiscal Year 2006, 2008 and 2009 Sample Groups

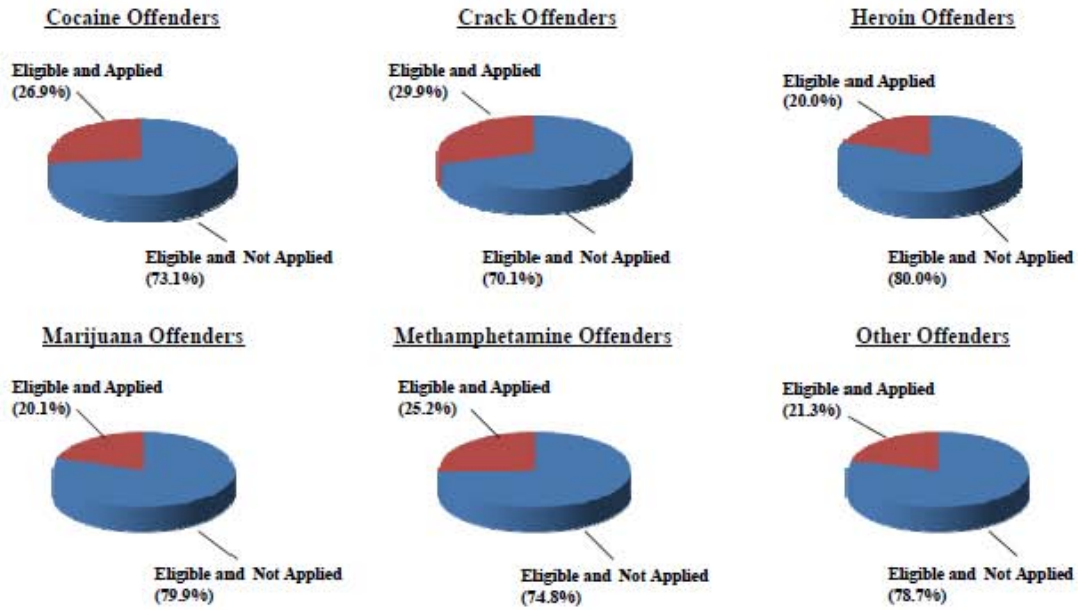


SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

Despite these differences, within each drug type the number of offenders who were eligible for the enhancement was higher than the number of offenders who received the enhancement. Crack cocaine offenders had the highest application rate (29.9%) of the enhancement, followed by powder cocaine offenders (26.9%), and methamphetamine offenders (25.2%). Heroin drug offenders received the enhancement least often (20.0%).⁷⁰⁰ See Figure 8-54.

⁷⁰⁰ This part does not include information about the impact on the federal prison population because the analysis used a sample of cases and the Commission cannot perform an analysis of the prison population using a sample.

Figure 8-54
Application of 21 U.S.C. § 851 Penalty Enhancement by Drug Type
Fiscal Year 2006, 2008 and 2009 Sample Groups



SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

6. Summary

With respect to the application of enhanced mandatory minimum penalties for under 21 U.S.C. § 851, Commission analyses of a sample of cases from fiscal years 2006, 2008, and 2009 demonstrate the following:

- In the majority of the districts, at least one-quarter of all drug offenders were eligible for enhancement under section 851.
 - In 62 of 94 judicial districts (66.0%), the rates of drug offenders eligible for enhancement under section 851 were between 25 and 49 percent.
 - In 29 districts (30.8%), the rates of eligible drug offenders were between 50 and 74 percent.
 - There were only three districts (3.2%) in which less than 25 percent of drug offenders were eligible for enhancement.
- The Commission's analysis revealed significant variation in the manner in which the enhancement provision was applied.
 - In six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty as an enhancement.

- o In contrast, in eight districts, none of the eligible drug offenders received the enhanced penalty.
- More than half (58.0%) of Black offenders were eligible for the enhancement, but only 17.3 percent received it. More than one-third (36.5%) of White offenders were eligible for the enhancement while 9.1 percent received it. Hispanic offenders were eligible in 30.5 percent of their cases, but 6.0 percent received the enhancement. Finally, 24.1 percent of Other Race offenders were eligible for the enhancement, while 6.0 percent received it.
- Black offenders who were eligible to receive the enhanced penalty received it in 29.9 percent of the cases. This rate was only slightly higher than the rates for White offenders (25.0%) and Other Race offenders (24.8%). Eligible Hispanic offenders received the enhanced penalty at the lowest rate of any racial group (19.9%).
- Within each drug type the number of offenders who were eligible for the enhancement was higher than the number of offenders who received the enhancement.
- Crack cocaine offenders had the highest application rate (29.9%) of the enhancement, followed by powder cocaine offenders (26.9%) and methamphetamine offenders (25.2%). Heroin drug offenders received the enhancement least often (20.0%).

J. SUMMARY

With respect to mandatory minimum penalties and drug offenses generally, Commission analyses demonstrate the following:

Offenses and Offenders

- In fiscal year 2010, two of every three offenders convicted of an offense carrying a mandatory minimum penalty were drug offenders. Almost half of all drug offenders (48.7%) who were convicted of an offense carrying a mandatory minimum penalty were convicted of an offense carrying a 10-year penalty.
- The type of drug involved in drug cases significantly impacts the application of mandatory minimum penalties. In fiscal year 2010, the highest rate of conviction of such penalties was in methamphetamine cases (83.2%) while the lowest rate for the major drug types was in marijuana cases (44.3%).⁷⁰¹
- The demographic and offense characteristics of drug offenders vary widely by the type of drug involved in the offense.

⁷⁰¹ “Other” drug cases (such as those involving PCP and LSD) had the lowest rate (11.4%).

- In fiscal year 2010, five of the 94 judicial districts reported more than 500 drug cases involving a mandatory minimum penalty: Southern Texas (n=1,074), Western Texas (n=962), Southern California (n=666), Southern Florida (n=536), and Middle Florida (n=504).
- In fiscal year 2010, districts reporting the highest percentage of drug mandatory minimum cases in their overall caseload included Puerto Rico (59.5%, n=464), Minnesota (49.7%, n=239), Southern Iowa (47.5%, n=199), Hawaii (44.9%, n=71), and Nebraska (43.1%, n=245).
- The Commission's analysis of a 15 percent sample of fiscal year 2009 cases indicates that the mandatory minimum penalties for drug offenses sweep more broadly than Congress may have intended.
 - Among all drug cases, Courier was the most common function, representing 23.0 percent of all offenders, followed by Wholesaler (21.2%), Street-Level Dealer (17.2%), and High-Level Supplier/Importer (10.9%).
 - The majority of offenders in nearly every function, including low-level Secondary and Miscellaneous functions, were convicted of an offense carrying a mandatory minimum penalty, although higher-level functions tended to be convicted of such statutes at higher rates.
 - The Commission's analysis found that, for every function, the quantity of drugs involved in the offense resulted in a base offense level that included or exceeded the five-year mandatory minimum penalty.
 - Furthermore, the Commission's analysis revealed that the quantity of drugs involved in an offense was not closely related to the offender's function in the offense.
 - As a result of the combined effect of the safety valve and applicable guideline adjustments, offenders performing lower-level functions received significantly shorter sentences overall than offenders performing higher-level functions. For example, Mules (29 months) and Couriers (39 months) received significantly shorter average sentences than High-Level Suppliers/Importers (101 months), Organizer/Leaders (154 months), Wholesalers (103 months), and Managers (147 months).

Application and Relief

- In fiscal year 2010, drug offenders convicted of a statute carrying a mandatory minimum penalty went to trial more than twice (4.5%) as often as drug offenders who were not convicted of an offense carrying a mandatory minimum penalty (1.6%). Furthermore, on average, the longer the mandatory minimum penalty an offender was facing, the less likely the offender was to plead guilty.

- In fiscal year 2010, more than half (54.4%) of drug offenders convicted of an offense carrying a mandatory minimum penalty received relief from the mandatory minimum penalty. One-quarter (26.1%) of these offenders received relief through operation of the safety valve alone; 19.3 percent by providing substantial assistance to the government; and 9.0 percent through both the safety valve and substantial assistance provisions.
- The analysis of the 15 percent sample of fiscal year 2009 cases revealed that the rate at which offenders received relief from a mandatory minimum penalty varied by function, but did so differently depending on the type of relief. Offenders who performed high-level functions generally obtained relief for substantial assistance at higher rates than offenders who performed low-level functions. Offenders who performed low-level functions were more likely to obtain relief through the safety valve provision than were offenders who performed high-level functions.
- In fiscal year 2010, the rate at which offenders received relief from the mandatory minimum penalty through these provisions varied by race, gender, and citizenship.
 - Other Race offenders qualified for some form of relief from a mandatory minimum penalty most often, in 72.3 percent of the cases in which they were convicted of an offense carrying such a penalty, followed by White (63.7%) and Hispanic (59.0%) offenders. Black offenders qualified for relief from mandatory minimum penalties least often, in 39.4 percent of the cases in which they were convicted of an offense carrying such a penalty.
 - Black offenders received substantial assistance relief alone from a mandatory minimum penalty most often, in 25.0 percent of their offenses carrying such a penalty, followed by White (24.2%) and Other Race (23.9%) offenders. Hispanic offenders received relief from mandatory minimum penalties through substantial assistance the least often, in 12.6 percent of their cases.
 - Hispanic offenders received safety valve relief alone most often, in 36.8 percent of their cases, followed by Other Race (29.5%) and White (26.9%) offenders. Black offenders received relief from mandatory minimum penalties through the safety valve the least often, in 9.8 percent of their cases.
 - Other Race offenders received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief most often, in 18.9 percent of their cases, followed by White (12.6%), Hispanic (9.5%) and Black (4.6%) offenders.
 - Female offenders qualified for some form of relief from a mandatory minimum penalty in 73.0 percent of the cases in which they were convicted of an offense carrying such a penalty.

- Male offenders received substantial assistance relief alone from a mandatory minimum penalty more often, in 19.5 percent of their cases, compared to female offenders (18.2%).
 - Female offenders received safety valve relief alone more often, in 35.0 percent of their cases, compared to male offenders (25.1%).
 - Female offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often in 19.7 percent of their cases, compared to 7.8 percent of cases involving male offenders.
 - Non-citizen drug offenders received relief from the mandatory minimum penalty at a higher rate (69.5%) than United States citizen drug offenders (48.0%).
 - United States citizen drug offenders received substantial assistance relief alone from a mandatory minimum penalty more often, in 23.4 percent of their cases, compared to non-citizen offenders (9.8%).
 - Non-citizen offenders received safety valve relief alone more often, in 49.3 percent of their cases, compared to United States citizen offenders (16.2%).
 - Non-citizen offenders also received relief from a mandatory minimum penalty through a combination of substantial assistance and safety valve relief more often, in 10.4 percent of their cases, compared to 8.4 percent of cases involving United States citizens.
- In fiscal year 2010, courts imposed a sentence within the applicable guideline range in fewer than half (43.7%) of all cases involving an offense carrying a mandatory minimum penalty. In 28.3 percent of such cases, the sentence was below the applicable guidelines range at the request of the government because the offender had provided substantial assistance to the government in the investigation of another offense.
- In fiscal year 2010, the average extent of substantial assistance departures in drug offenses was 48.8 percent (67 months) from the minimum of the otherwise applicable guideline range. However, the average extent of substantial assistance departures varied by major drug type.
 - The average extent of substantial assistance departures in powder cocaine cases was 48.6 percent (66 months).
 - The average extent of substantial assistance departures in crack cocaine cases was 49.7 percent (87 months). This was the highest in number of months for any major drug type.

- o In fiscal year 2010, the average extent of substantial assistance departures in marijuana cases was 52.5 percent (40 months) from the minimum of the otherwise applicable guideline range. This was lowest in number of months for any major drug type.
- o The average extent of substantial assistance departures in methamphetamine cases was 45.2 percent (66 months).
- o In fiscal year 2010, the average extent of substantial assistance departures in heroin cases was 52.8 percent (61 months) from the minimum of the otherwise applicable guideline range. This was the highest percentage for any major drug type.
- In fiscal year 2010, the average extent of non-government sponsored below range sentences in drug offenses that carried a mandatory minimum penalty was 29.8 percent (34 months) from the minimum of the otherwise applicable guideline range.
 - o The average extent of non-government sponsored below range sentences in powder cocaine cases that carried a mandatory minimum penalty was 29.0 percent (31 months).
 - o The average extent of non-government sponsored below range sentences in crack cocaine cases was 30.3 percent (45 months). This was the highest in number of months for any major drug type.
 - o The average extent of non-government sponsored below range sentences in marijuana cases was 35.5 percent (21 months). This was the highest percentage for any major drug type, but the lowest in number of months.
 - o The average extent of non-government sponsored below range sentences in methamphetamine cases was 26.1 percent (32 months) from the minimum of the otherwise applicable guideline range. This was the lowest percentage for any major drug type.
 - o The average extent of non-government sponsored below range sentences in heroin cases was 31.3 percent (27 months).

Sentencing

- In fiscal year 2010, 45.6 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.

- In fiscal year 2010, the rate at which drug offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 60.6 percent of their offenses carrying such a penalty, followed by Hispanic (41.0%) and White (36.3%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 27.7 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (47.7% of their cases, compared to 27.0% of cases involving female offenders).
 - United States citizen offenders were subject to the mandatory minimum penalty at sentencing more often than non-citizen offenders (52.0% of their cases, compared to 30.5% of cases involving non-citizen offenders).

- The average sentence for drug offenders convicted of an offense carrying a mandatory minimum varied, and was largely dependent upon the type of drug involved in the offense and whether the offender obtained relief from the mandatory minimum penalty.
 - The average sentence for powder cocaine offenders who remained subject to the mandatory minimum penalty was 138 months and the average sentence for those offenders who obtained relief from the mandatory minimum penalty was 62 months.
 - The average sentence for crack cocaine offenders who remained subject to a mandatory minimum penalty was 139 months. The average sentence for crack cocaine offenders who obtained relief from a mandatory minimum penalty was 80 months, which was the highest for any major drug type.
 - Marijuana offenders received the lowest sentences of any major drug type. The average sentence for marijuana offenders who remained subject to a mandatory minimum penalty was 93 months and the average sentence for marijuana offenders who obtained relief from a mandatory minimum penalty was 34 months.
 - Methamphetamine offenders who remained subject to a mandatory minimum penalty received the highest sentences of any major drug type. The average sentence for methamphetamine offenders who remained subject to a mandatory minimum penalty was 144 months. The average sentence for methamphetamine offenders who obtained relief from a mandatory minimum penalty was 72 months.

- o The average sentence for heroin offenders who remained subject to a mandatory minimum penalty at the time of sentencing was 119 months. The average sentence for heroin offenders who obtained relief from a mandatory minimum penalty was 51 months.
- The Commission’s analyses of a sample of cases from fiscal years 2006, 2008, and 2009 indicates that in the majority of the districts, at least one-quarter of all drug offenders were eligible for enhancement under section 851.
 - o In 62 of 94 judicial districts (66.0%), the rates of drug offenders eligible for enhancement under section 851 were between 25 and 49 percent.
 - o In 29 districts (30.8%), the rates of eligible drug offenders were between 50 and 74 percent.
 - o There were only three districts (3.2%) in which less than 25 percent of drug offenders were eligible for enhancement.
- The Commission’s analysis of a sample of cases from fiscal years 2006, 2008, and 2009 revealed significant variation in the manner in which the enhancement provision was applied.
 - o In six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty as an enhancement.
 - o In contrast, in eight districts, none of the eligible drug offenders received the enhanced penalty.
- More than half (58.0%) of Black offenders were eligible for the enhancement, but only 17.3 percent received it. More than one-third (36.5%) of White offenders were eligible for the enhancement while 9.1 percent received it. Hispanic offenders were eligible in 30.5 percent of their cases, but 6.0 percent received the enhancement. Finally, 24.1 percent of Other Race offenders were eligible for the enhancement, while 6.0 percent received it.
- Black offenders who were eligible to receive the enhanced penalty received it in 29.9 percent of the cases. This rate was only slightly higher than the rates for White offenders (25.0%) and Other Race offenders (24.8%). Eligible Hispanic offenders received the enhanced penalty at the lowest rate of any racial group (19.9%).
- Within each drug type the number of offenders who were eligible for the enhancement was higher than the number of offenders who received the enhancement.
- Crack cocaine offenders had the highest application rate (29.9%) of the enhancement, followed by powder cocaine offenders (26.9%) and methamphetamine offenders (25.2%). Heroin drug offenders received the enhancement least often (20.0%).

Prison Impact

- At the end of fiscal year 2010, slightly more than half (53.8%, n=103,194) of the 191,757 offenders incarcerated in the BOP were drug offenders.
 - 13.4 percent (n=25,767) were powder cocaine offenders.
 - 17.0 percent (n=32,694) were crack cocaine offenders.
 - 6.5 percent (n=12,473) were marijuana offenders.
 - 12.0 percent (n= 22,935) were methamphetamine offenders.
 - 3.0 percent (n=5,817) were heroin offenders.
- Slightly more than half (52.9%, n=54,635) of these drug offenders were subject to a mandatory minimum penalty at sentencing.

MANDATORY MINIMUM PENALTIES FOR FIREARM OFFENSES

A. INTRODUCTION

This chapter analyzes the application of two mandatory minimum sentencing provisions relating to firearm offenses. After a brief overview of the applicable statutes and related guidelines, this chapter first provides data and analyses concerning the application of the offenses and accompanying mandatory minimum penalties established at 18 U.S.C. § 924(c) for certain conduct involving firearms. Second, this chapter provides data and analyses concerning the application of the 15-year mandatory minimum penalty established in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), for recidivist offenders who commit certain firearm offenses.

Section 924(c) establishes mandatory minimum penalties for conduct involving a firearm in relation to an underlying offense, as discussed in more detail below. As a result, many offenders who were convicted of an offense under section 924(c) may also have been convicted of an underlying offense that resulted in a sentence imposed pursuant to a primary guideline other than §2K2.4(b) (Use of a Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), or convicted of an underlying offense that also carried a mandatory minimum penalty, or both. For this reason, an offender convicted of an offense under section 924(c) may also be included in the analysis of other offense types in other chapters, most notably drug offenses.

B. THE STATUTES AND RELATED GUIDELINES

1. 18 U.S.C. § 924(c)

Section 924(c) of title 18, United States Code, establishes the offense of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or a drug trafficking crime.⁷⁰² The statute prescribes a mandatory minimum penalty of at least five years of imprisonment for committing the offense, with increasingly longer mandatory minimum penalties based on how the firearm was used (seven years if the firearm was brandished and ten years if the firearm was discharged) and the type of firearm involved (ten years if the firearm was a short-barreled rifle, a short-barreled shotgun, or a semiautomatic assault weapon and 30 years if the firearm was a machinegun, a destructive device, or was

⁷⁰² 18 U.S.C. § 924(c). The statute defines a “crime of violence” as any felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” or “that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” A “drug trafficking crime” includes any felony that is punishable under the Controlled Substances Act, codified at 21 U.S.C. § 801 *et seq.*, or the Controlled Substances Import and Export Act, codified at 21 U.S.C. §§ 951, *et seq.* See 18 U.S.C. § 924(c)(2)–(3).

equipped with a silencer or muffler).⁷⁰³ Section 924(c) further provides that these mandatory minimum penalties are to be imposed in addition to, and also must run consecutively to, “any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the [underlying] crime of violence or drug trafficking crime”⁷⁰⁴

Some provisions in section 924(c) that impose longer mandatory minimum penalties are elements of the offense that must be proven to a jury beyond a reasonable doubt, while others are sentencing factors that may be determined by the court at sentencing. For example, in *Harris v. United States*,⁷⁰⁵ the Supreme Court held that the determination of whether the offender “brandished” a firearm so as to trigger the seven-year mandatory minimum penalty of section 924(c) was a sentencing factor properly found by the court.⁷⁰⁶ However, in *United States v. O’Brien*,⁷⁰⁷ the Supreme Court held that the determination of whether the offense involved a “machinegun” so as to trigger the statute’s 30-year mandatory minimum penalty is an element of the offense that must be submitted to a jury or admitted by the defendant.⁷⁰⁸ Accordingly, offenders convicted of an offense under section 924(c) may be subject to varying procedural and proof requirements depending on which portion of the statute applies.

Section 924(c) also establishes longer mandatory minimum penalties, generally requiring 25 years of imprisonment, for each “second or subsequent conviction” of a section 924(c) offense.⁷⁰⁹ The Supreme Court has held that when multiple section 924(c) counts are charged in the same proceeding, the longer mandatory minimum penalty applies because any additional convictions of an offense under section 924(c) are “second or subsequent” to the first such conviction.⁷¹⁰ Thus, the longer recidivist mandatory minimum penalty must be served consecutively to any sentences imposed for the underlying offenses *and* other section 924(c) offenses, even when all of the offenses were charged in a single indictment. This practice of

⁷⁰³ See 18 U.S.C. § 924(c)(1)(A)–(C).

⁷⁰⁴ *Id.* § 924(c)(1)(A), (c)(1)(D).

⁷⁰⁵ 536 U.S. 545 (2002).

⁷⁰⁶ *Id.* at 554.

⁷⁰⁷ 130 S. Ct. 2169 (2010).

⁷⁰⁸ See *id.* at 2174–80. For additional discussion of *Harris*, *O’Brien*, and the constitutional principles underlying the Court’s decisions in those cases, see *supra* Chapter 3 and *infra* Appendix E(A)(1).

⁷⁰⁹ The mandatory minimum penalty for a second or subsequent violation of section 924(c) is 25 years of imprisonment. See 18 U.S.C. § 924(c)(1)(C)(i). The mandatory minimum penalty for a second or subsequent violation becomes life imprisonment if the firearm involved was a machinegun, a destructive device, or was equipped with a silencer or muffler. See *id.* § 924(c)(1)(C)(ii).

⁷¹⁰ See *Deal v. United States*, 508 U.S. 129 (1993). For additional discussion of *Deal* and second or subsequent violations of section 924(c), see *infra* Appendix E(B)(2).

charging multiple violations of section 924(c) within the same indictment is commonly known as “stacking” mandatory minimum penalties.

USSG §2K2.4(b) provides that the guideline sentence for an offender convicted of an offense under section 924(c) “is the minimum term of imprisonment required by statute.”⁷¹¹ When the offender is convicted of offenses in addition to an offense under section 924(c), the applicable guideline range for the additional offenses is determined using the guideline provisions and grouping rules applicable to those crimes.⁷¹² The resulting range guides the sentence for the additional offenses, to which the court must add a consecutive sentence for the 924(c) offense.⁷¹³ The guidelines establish a separate sentencing table with higher penalties for offenders who are convicted of an offense under section 924(c) and qualify as a “career offender.”⁷¹⁴

2. *The Armed Career Criminal Act, 18 U.S.C. § 924(e)*

ACCA requires at least 15 years of imprisonment if the defendant violates 18 U.S.C. § 922(g) and has at least three previous convictions for a violent felony or a serious drug offense.⁷¹⁵ Section 922(g) makes it unlawful for certain prohibited persons, including convicted felons, fugitives from justice, persons dishonorably discharged from the armed forces, and aliens who are illegally or unlawfully in the United States, to possess a firearm or ammunition that is in or affecting commerce, to ship or transport a firearm or ammunition in interstate or foreign commerce, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.⁷¹⁶

⁷¹¹ USSG §2K2.4(b).

⁷¹² See USSG §5G1.2(b) (Sentencing on Multiple Counts of Conviction).

⁷¹³ See USSG §5G1.2(a) & (b); see also USSG §3D1.1(b)(1) (Procedure for Determining Offense Level on Multiple Counts).

⁷¹⁴ Under §4B1.1, a defendant qualifies as a career offender if the defendant was at least 18 years old at the time he or she committed the instant offense, the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and the defendant has at least two such prior convictions. See USSG §4B1.1(a). Offenders convicted of an offense under section 924(c) and who qualify as career criminals receive a guideline range of 360 months to life imprisonment, with lower ranges for offenders who also receive a reduction for acceptance (262–327 months for a 3-level reduction, and 292–365 months for a 2-level reduction). See USSG §4B1.1(c). For career offenders convicted of multiple counts of an offense under section 924(c), §4B1.1 provides that the guideline range is the greater of the range determined by the separate career offender sentencing table, or the range that results by adding the mandatory minimum penalties “to the minimum and the maximum of the otherwise applicable guideline range determined” for the non-section 924(c) counts. See USSG §4B1.1(c)(2).

⁷¹⁵ See 18 U.S.C. § 924(e)(1). The definitions of “violent felony” and “serious drug offense” require only that the prior offense be “punishable” by a term of more than one year of imprisonment, or a term of at least ten years of imprisonment, respectively. See 18 U.S.C. § 924(e)(2). ACCA does not contain limitation on the date of the predicate offense conviction, meaning that an offender may be subject to the mandatory minimum penalty on account of offenses committed many years or even decades earlier. See *id.*

⁷¹⁶ 18 U.S.C. § 922(g).

Section 924(e) is a sentencing enhancement for committing an offense under section 922(g). Section 924(e) therefore does not establish a separate criminal offense,⁷¹⁷ and its application does not infringe on the defendant’s Sixth Amendment rights because the fact of a prior conviction need not be proven to a jury beyond a reasonable doubt.⁷¹⁸ The statute does not prescribe a formal procedure the government must follow when it intends to seek an enhancement pursuant to section 924(e), though due process requires that the defendant be afforded some notice that the enhancement may apply.⁷¹⁹ All other determinations necessary to apply the enhancement, including whether the predicate conviction was a “crime of violence” or “drug trafficking offense,” are questions of law.⁷²⁰ If a defendant qualifies as an armed career criminal, the court must impose the 15-year mandatory minimum penalty.⁷²¹

The guideline applicable to offenders who qualify as armed career criminals, §4B1.4, assigns a base offense level of 33, or a base offense level of 34 if the defendant used or possessed a firearm in connection with a crime of violence or a controlled substance offense, or if the firearm was of a particularly dangerous type. Alternatively, §4B1.4 uses the offender’s otherwise applicable offense level if it is higher than level 33 or 34. Section 4B1.4 further assigns a criminal history category that is the greatest of: Category IV; Category VI if the defendant used or possessed a firearm in connection with a crime of violence or a controlled substance offense, or if the firearm was of a particularly dangerous type; or the offender’s otherwise applicable criminal history category.

3. *The Categorical Approach*

Section 924(c) and ACCA require that the offender have committed certain underlying or predicate offenses, specifically a “crime of violence” or a “drug trafficking crime” (for section 924(c) to apply), or a “violent felony” or a “serious drug offense” (for ACCA to apply). The statutes further define those terms, or reference other statutes that define them. To determine whether the offender’s underlying or predicate offense meets the statutory definitions, the court uses the “categorical approach” articulated by the Supreme Court in *Taylor v. United States*.⁷²²

⁷¹⁷ See *Custis v. United States*, 511 U.S. 485, 490 (1994); *United States v. Stone*, 306 F.3d 241, 243 & n.2 (5th Cir. 2002) (collecting cases).

⁷¹⁸ See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); *United States v. Greer*, 440 F.3d 1267, 1273 (11th Cir. 2006).

⁷¹⁹ See *United States v. Mack*, 229 F.3d 226, 231 (3d Cir. 2000) (“[T]he ACCA does not require formal, pretrial notice. Thus, only notice necessary to satisfy constitutional due process requirements need be given.” (citations omitted)).

⁷²⁰ See, e.g., *United States v. Dancy*, 640 F.3d 455, 464-65 (1st Cir. 2011); *United States v. Canty*, 570 F.3d 1251, 1254-55 (11th Cir. 2009).

⁷²¹ *United States v. Johnson*, 973 F.2d 857, 860 (10th Cir. 1992) (“Once the sentencing court was aware that the requirements of § 924(e)(1) were satisfied, the enhancement was mandatory.”); *United States v. Anderson*, 921 F.2d 335, 337 (1st Cir. 1990) (“If the requisite preconditions [of section 924(e)] are present, the district court must impose a sentence at or above the congressionally mandated minimum.”).

⁷²² 495 U.S. 575, 602 (1990).

Under the categorical approach, the court looks only to the fact of the conviction and statutory elements of the offense, without regard to particular facts underlying the conviction.⁷²³ When the statutory elements establish alternative modes of committing an offense, only some of which qualify as an underlying or predicate offense for purposes of section 924(c) or ACCA, the court may also look to the charging documents, jury instructions, and documents related to the guilty plea in the prior case.⁷²⁴ There has been extensive litigation over whether particular state and federal crimes qualify as underlying and predicate offenses, producing criticisms of both the statutory definitions and the categorical approach itself.⁷²⁵

C. MANDATORY MINIMUM PENALTIES FOR SECTION 924(c) OFFENSES

Of the 73,239 offenders included in this analysis, 2,294 (3.1%) were convicted of an offense under section 924(c). Of the 2,294 offenders convicted of an offense under section 924(c), 2,147 (93.6%) were convicted of a single count of an offense under section 924(c) and 147 (6.4%) were convicted of multiple counts of an offense under section 924(c).

The sentences imposed on a majority of offenders convicted of a single count of an offense under section 924(c) were governed by the statute's five-year mandatory minimum for using or carrying a firearm during, or possessing a firearm in furtherance of, the predicate offense. Of the 2,147 offenders convicted of a single count of an offense under section 924(c) in fiscal year 2010, the five-year mandatory minimum penalty applied in 1,391 (64.8%) cases; the seven-year mandatory minimum penalty for brandishing a firearm applied in 488 (22.7%) cases; and the ten-year mandatory minimum penalty applied in another 188 (8.8%) cases because the offender either discharged the firearm or because the offense involved a short-barreled rifle, short-barreled shotgun, or a semiautomatic assault weapon. In 71 cases (3.3%) a mandatory minimum penalty of more than ten years applied either because it was the second or subsequent conviction of that offender for an offense under 924(c), or the instant offense involved a machinegun, destructive device, or firearm equipped with a silencer or muffler. Finally, in nine cases (0.4%), the life mandatory minimum penalty applied because it was the second or subsequent conviction of that offender and the offense involved a machinegun, destructive device, or firearm equipped with a silencer or muffler.

Most offenders convicted of multiple counts of an offense under section 924(c) were convicted of two such counts. Of the 147 offenders convicted of multiple counts of an offense under section 924(c) in fiscal year 2010, 110 (74.8%) were convicted of two counts of an

⁷²³ *See id.*

⁷²⁴ *See id.*; *see also* *Shepard v. United States*, 544 U.S. 13, 26 (2005).

⁷²⁵ *See, e.g., Chambers v. United States*, 555 U.S. 122, 133-34 (2009) (Alito, J., concurring) ("After almost two decades with *Taylor's* "categorical approach," only one thing is clear: ACCA's residual clause is nearly impossible to apply consistently. Indeed, the "categorical approach" to predicate offenses has created numerous splits among the lower federal courts, the resolution of which could occupy this Court for years."); *James v. United States*, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting) ("Years of prison hinge on the scope of ACCA's residual provision, yet its boundaries are ill defined.").

offense under section 924(c), 12 (8.2%) were convicted of three counts, nine (6.1%) were convicted of four counts, and 16 (10.9%) were convicted of five or more counts.

1. *Demographic Characteristics*

Table 9-1 compares the demographic characteristics of all offenders convicted of an offense under section 924(c) with the demographic characteristics of offenders subject to the mandatory minimum penalties under section 924(c) at sentencing because they did not receive relief for rendering substantial assistance to authorities, and the demographic characteristics of offenders convicted of multiple counts of an offense under section 924(c). Table 9-1 shows that Black, male, and United States citizen offenders were convicted of an offense under section 924(c), were subject to the mandatory minimum penalty at sentencing, and were convicted of multiple counts of an offense under section 924(c), at higher rates than offenders with other demographic characteristics.

Table 9-2 presents information about the criminal histories of those groups of offenders. In fiscal year 2010, 12.2 percent (n=280) of offenders convicted of an offense under section 924(c) were sentenced as career offenders pursuant to §4B1.1(c).

Table 9-1
Demographic Characteristics of Offenders Convicted of 18 U.S.C. § 924(c)
Fiscal Year 2010

Demographics	Convicted of 18 U.S.C. § 924(c)	Subject to 18 U.S.C. § 924(c) at Sentencing	Convicted of Multiple Counts of 18 U.S.C. § 924(c)
Total (# of offenders)	2,294	1,733	147
Race of Offender (Percent)			
White	20.1	20.0	15.1
Black	55.9	55.7	61.0
Hispanic	21.0	21.0	21.2
Other	3.1	3.2	2.7
Citizenship of Offender (Percent)			
United States Citizen	86.7	87.3	84.4
Non-Citizen	13.3	12.7	15.6
Gender of Offender (Percent)			
Male	97.1	97.9	99.3
Female	2.9	2.1	0.7

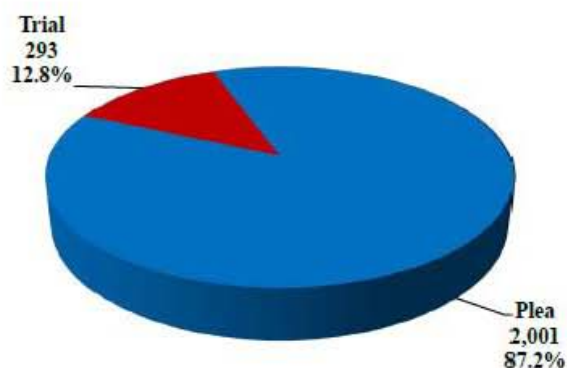
**Table 9-2
Criminal History of Offenders Convicted of 18 U.S.C. § 924(c)
Fiscal Year 2010**

Criminal History Category	Convicted of 18 U.S.C. § 924(c)	Subject to 18 U.S.C. § 924(c) at Sentencing	Convicted of Multiple Counts of 18 U.S.C. § 924(c)
Total (# of offenders)	2,294	1,733	147
	Criminal History Category (Percent)		
I	29.9	27.9	22.1
II	12.9	12.4	11.0
III	18.4	19.1	20.0
IV	12.2	13.2	17.9
V	6.4	6.8	8.3
VI	20.1	20.6	20.7

2. *Guilty Pleas and Trials*

Offenders convicted of an offense under section 924(c) were more likely to proceed to trial than offenders convicted of an offense carrying a mandatory minimum penalty generally. In fiscal year 2010, 12.8 percent (n=293) of offenders convicted of an offense under section 924(c) proceeded to trial, compared to only 5.9 percent (n=1,181) of all offenders convicted of an offense carrying a mandatory minimum penalty. See Figure 9-1.

**Figure 9-1
Plea and Trial Rate for Firearm Offenders Convicted of an Offense Under
18 U.S.C. § 924(c)
Fiscal Year 2010**



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Offenders convicted of multiple counts of an offense under section 924(c) were much more likely to proceed to trial than offenders convicted of a single count of an offense under section 924(c). Of the 147 offenders convicted of multiple counts of an offense under section 924(c) in fiscal year 2010, 34.7 percent (n=51) proceeded to trial. In contrast, of the 2,147 offenders convicted of a single count of an offense under section 924(c), 11.3 percent (n=242) proceeded to trial. Thus, the trial rate for offenders convicted of multiple counts of an offense under section 924(c) was three times higher than the trial rate for offenders convicted of only a single count of an offense under section 924(c), and nearly six times higher than the trial rate for all offenders convicted of an offense carrying a mandatory minimum penalty.

3. *Geographic Variations*

Cases involving a conviction of an offense under section 924(c) were primarily concentrated in three circuits. Of the 2,294 cases in fiscal year 2010 that involved a conviction of an offense under section 924(c), 520 (22.7%) were from the district courts in the Fourth Circuit, 338 (14.7%) were from the district courts in the Eleventh Circuit, and 263 (11.5%) were from the district courts in the Sixth Circuit. Thus, nearly half (48.9%, n=1,121) of the 2,294 cases involving a conviction of an offense under section 924(c) came from the district courts in those three circuits.⁷²⁶ By way of comparison, 23.8 percent of all federal criminal cases reported to the Commission for fiscal year 2010 came from the district courts in those three circuits.⁷²⁷

Cases involving a conviction of an offense under section 924(c) were similarly geographically concentrated when viewed at the district level. In fiscal year 2010, 12 districts reported 43.8 percent of the cases involving a conviction of an offense under section 924(c) (and only five of those districts reported having at least 100 such cases). Those districts were: Eastern Pennsylvania (5.8% of all 924(c) cases, n=134); Eastern North Carolina (5.5%, n=126); Middle Florida (5.4%, n=123), Eastern Virginia (4.6%, n=105); South Carolina (4.5%, n=104); Eastern Tennessee (3.0%, n=69); Southern Florida (2.9%, n=66); Southern New York (2.7%, n=62); Middle North Carolina (2.6%, n=60); Central California (2.3%, n=53); Eastern New York (2.2%, n=51); and Western Texas (2.2%, n=51).⁷²⁸ See Figure 9-2. By comparison, those districts reported 28.6 percent of all federal criminal cases heard in fiscal year 2010.⁷²⁹ Thirty-eight districts reported having ten or fewer cases involving a conviction of an offense under section 924(c).⁷³⁰

⁷²⁶ See Table D-14 (Mandatory Minimum Status for 18 U.S.C. § 924(c) Offenders in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

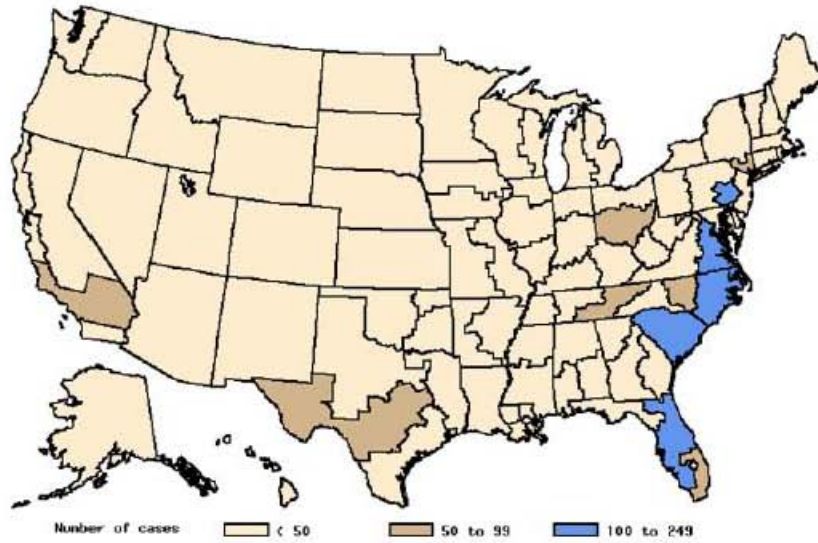
⁷²⁷ See Table D-1 (Mandatory Minimum Status of Cases in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁷²⁸ See Table D-14 in Appendix D of this Report.

⁷²⁹ See Table D-1 in Appendix D of this Report.

⁷³⁰ See Table D-14 in Appendix D of this Report.

Figure 9-2
Number of Offenders Convicted of an Offense Under 18 U.S.C. § 924(c)
By District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

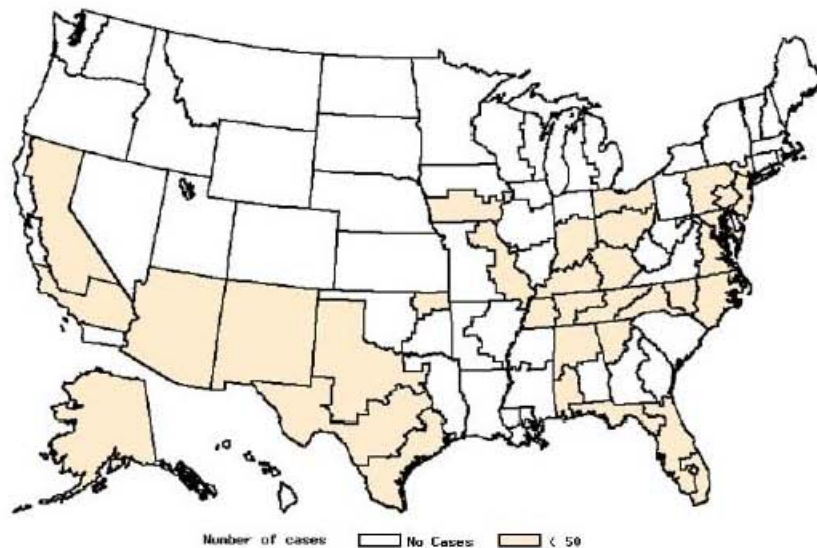
Cases involving a conviction of an offense under section 924(c) constituted varying percentages of the districts' criminal case docket. Three districts had over ten percent of their overall caseload involving a conviction of an offense under 924(c): Eastern North Carolina (18.1%, n=126), Eastern Pennsylvania (15.0%, n=134) and Middle North Carolina (11.0%, n=60). Conversely, ten districts had less than one percent of their overall caseload involving a conviction of an offense under section 924(c): Northern Mariana Islands (0.0%, n=0), Southern California (0.1%, n=3), Southern Texas (0.2%, n=16), Northern Iowa (0.3%, n=1), Northern West Virginia (0.4%, n=1), Massachusetts (0.5%, n=2), Arizona (0.7%, n=35), New Mexico (0.7%, n=24), Western Texas (0.8%, n=51), and Western Arkansas (0.8%, n=2).

The Commission further analyzed the geographic distribution of cases involving convictions of multiple section 924(c) counts. This analysis shows that cases involving convictions of multiple section 924(c) counts were more geographically concentrated than cases involving a conviction of an offense under section 924(c) as a whole, particularly when viewed at the district level. In fiscal year 2010, the ten districts that reported the highest number of the 147 cases involving multiple convictions of section 924(c) accounted for 62.7 percent of all such cases. Those districts were: Eastern Pennsylvania (13.6%, n=20); Southern New York (10.2%, n=15); Middle Florida (6.8%, n=10); Eastern Virginia (6.1%, n=9); Eastern Tennessee (4.8%, n=7); Northern Georgia (4.8%, n=7); Eastern North Carolina (4.1%, n=6); Northern Texas (4.1%, n=6); Eastern Kentucky (4.1%, n=6); Southern Florida (4.1%, n=6).⁷³¹ By contrast, 59

⁷³¹ The remaining districts that reported at least one case involving convictions of multiple section 924(c) counts were: Arizona (5), Northern Florida (5), Eastern California (4), Southern Ohio (4), Northern Alabama (3), Central California (3), Southern Indiana (3), Maryland (3), Middle Tennessee (3), Western Tennessee (3), New Jersey (2), Eastern New York (2), Middle Pennsylvania (2), Eastern Oklahoma (2), Southern Alabama (1), Alaska (1), Southern

districts each reported no cases involving multiple convictions of an offense under section 924(c), and 11 districts each reported only one such case.⁷³² See Figure 9-3.

Figure 9-3
Number of Offenders Convicted of Multiple Offenses Under 18 U.S.C. § 924(c)
By District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

4. *Other Counts of Conviction*

Of the 2,294 offenders convicted of an offense under section 924(c) in fiscal year 2010, 2,025 (88.2%) were convicted of at least one additional felony offense. The type of additional felony offense in these cases can be determined by reference to the primary guideline provision applicable at sentencing. Of the 2,025 offenders convicted of a least one additional felony offense, 54.9% (n=1,112) were sentenced pursuant to §2D1.1, 29.9% (n=605) were sentenced pursuant to §2B3.1; 6.4% (n=129) were sentenced pursuant to §2K2.1; and 2.3% (n=46) were sentenced pursuant to §2A1.1 (First Degree Murder). The remaining 133 offenders were sentenced pursuant to various other guideline provisions. Of the 2,025 section 924(c) offenders convicted of additional offenses, 40.6 percent (n=823) were convicted of an additional offense that carried a mandatory minimum penalty.

The Commission further analyzed the other counts of conviction of offenders convicted of multiple counts of an offense under section 924(c). Of the 147 offenders convicted of multiple counts of an offense under section 924(c) in fiscal year 2010, 128 were convicted of at least one additional felony offense. Of those 128 offenders, 60.9% (n=78) were sentenced

Iowa (1), Western Kentucky (1), Eastern Missouri (1), New Mexico (1), Middle North Carolina (1), Western North Carolina (1), Northern Ohio (1), Southern Texas (1), and Western Texas (1).

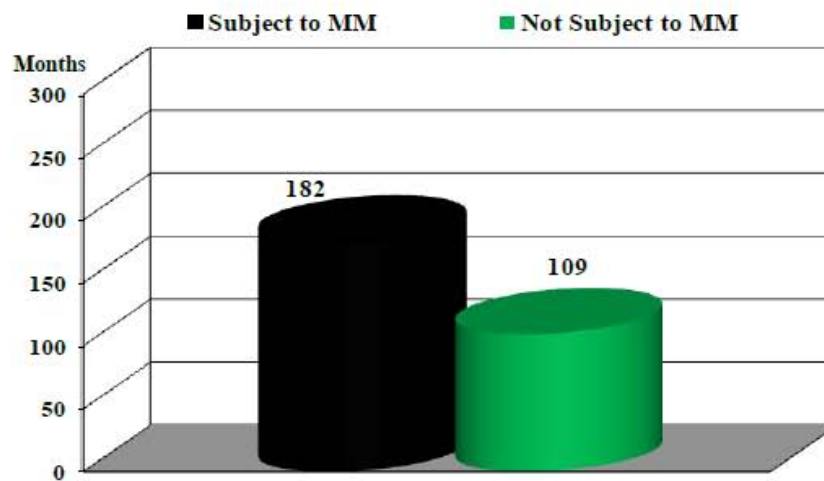
⁷³² *Id.*

pursuant to §2B3.1; 17.2% (n=22) were sentenced pursuant to §2D1.1; 6.2% (n=8) were sentenced pursuant to §2A1.1; 7.8% (n=10) were sentenced pursuant to other Chapter 2, Part A (Offenses Against the Person) guidelines; and 2.3% (n=3) were sentenced pursuant to §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity).

5. Sentence Length

In fiscal year 2010, the average sentence for offenders convicted of an offense under section 924(c) who were subject to the mandatory minimum penalty was 182 months. The average sentence for offenders convicted of an offense under section 924(c) but who were relieved of the mandatory minimum penalty was 109 months. See Figure 9-4. The length of the sentence necessarily includes both the consecutive penalty imposed for conviction of an offense under section 924(c), as well as other counts of conviction (including offenses that served as underlying crimes for the section 924(c) offense).

Figure 9-4
Average Sentence Length for Firearm Offenders Convicted of an Offense Under
18 U.S.C. § 924(c)
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Offenders convicted of multiple counts of an offense under section 924(c) received sentences that were approximately twice as long as the sentences received by offenders convicted of a single count of an offense under section 924(c). In fiscal year 2010, the average sentence for offenders convicted of multiple counts of an offense under section 924(c) was 351 months, which was more than twice the average sentence of 151 months that offenders convicted of a single count of an offense under section 924(c) received. The average sentence for offenders convicted of multiple counts of an offense under section 924(c) who were relieved of the mandatory minimum penalties was 198 months, which was nearly twice the average sentence of 100 months received by offenders convicted of a single count of an offense under section 924(c) who were relieved of the mandatory minimum penalty.

Table 9-3 compares the position of sentences relative to the guideline range for all offenders convicted of an offense under section 924(c), offenders subject to the mandatory minimum penalties for an offense under section 924(c) at sentencing, and offenders convicted of multiple counts of an offense under section 924(c).

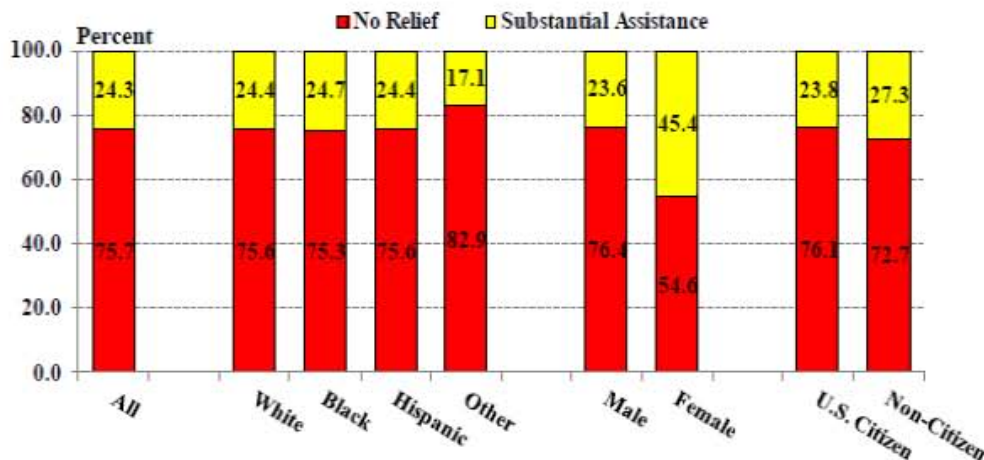
Table 9-3
Position Relative to the Guideline Range of Offenders Convicted of 18 U.S.C. § 924(c)
Fiscal Year 2010

Position Relative to the Guidelines	Convicted of 18 U.S.C. § 924(c)	Subject to 18 U.S.C. § 924(c) at Sentencing	Convicted of Multiple Counts of 18 U.S.C. § 924(c)
Total (# of offenders)	2,294	1,733	147
Sentence Relative to the Guideline Range (Percent)			
Within Range	48.2	63.8	41.5
Above Range	4.8	6.3	1.4
Substantial Assistance §5K1.1	24.3	0.0	36.7
Other Government Sponsored (no §5K1.1)	3.9	5.1	2.8
Other Below Range	18.8	24.8	17.7

6. *Relief from the Mandatory Minimum Penalty*

In fiscal year 2010, 24.3 percent of offenders convicted of an offense under section 924(c) were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government. *See* Figure 9-5. Offenders convicted of multiple counts of an offense under section 924(c) were relieved of the mandatory minimum penalty at a higher rate (36.7%). Figure 9-5 presents the demographic characteristics of offenders convicted of an offense under section 924(c) and the rates of relief from the mandatory minimum penalty. Although there are generally only minimal differences in the rates of relief by demographic characteristic among offenders, female offenders convicted of an offense under section 924(c) obtained relief from the mandatory minimum penalty nearly twice as often as male offenders (45.4% compared to 23.6%).

Figure 9-5
Percent of Firearm Offenders Convicted of an Offense Under 18 U.S.C. § 924(c)
Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

7. Guidelines Compared

To assess the effect of section 924(c)'s mandatory minimum penalties on sentencing outcomes relative to the guidelines, the Commission undertook additional analyses comparing the 1,112 offenders convicted of an offense under section 924(c) who were also sentenced under §2D1.1,⁷³³ with offenders sentenced pursuant to §2D1.1 who received a 2-level enhancement under the guidelines for possessing a dangerous weapon.⁷³⁴ These analyses compared the trial rates and average sentence length for those groups of offenders.

Section 924(c) offenders who were also sentenced under §2D1.1 proceeded to trial more often and received longer sentences than offenders who were sentenced pursuant to §2D1.1 and received the 2-level dangerous weapon enhancement. In fiscal year 2010, 10.2 percent of section 924(c) offenders who were also sentenced under §2D1.1 proceeded to trial, compared to 5.4 percent of offenders who received the §2D1.1 dangerous weapon enhancement. Section 924(c) offenders who were also sentenced under section §2D1.1 received an average sentence of 147 months, which was 27.8 percent longer than the average sentence of 115 months given to offenders who received the §2D1.1 dangerous weapon enhancement.

⁷³³ Fifteen of the 1,112 offenders (1.4%) also received a 2-level enhancement under §2D1.1(b)(1). There are some circumstances in which an offender may be convicted of an offense under section 924(c) and also receive the 2-level enhancement under §2D1.1(b)(1), such as when the offender is also held responsible for the possession of a dangerous weapon for an offense that was not an "underlying offense" for purposes of section 924(c). See USSG §2K2.4, comment. (n.4) (explaining that if a sentence is imposed for conviction of an offense under section 924(c), the court should "not apply any specific offense characteristics for possession . . . of an explosive or firearm when determining the sentence for the underlying offense.").

⁷³⁴ For additional discussion of the §2D1.1(b)(1) 2-level dangerous weapon enhancement, and for further comparison of the enhancement to section 924(c), see *supra* Chapter 3.

Both groups of offenders, however, received sentences below the applicable guideline range at comparable rates. Offenders convicted of an offense under section 924(c) received below range substantial assistance sentences in 28.3 percent of cases; other government sponsored below range sentences in 4.7 percent of cases; and other below range sentences in 21.7 percent of cases. Similarly, offenders who received the 2-level dangerous weapon enhancement obtained below range substantial assistance sentences in 28.1 percent of cases; other government sponsored below range sentences in 6.1 percent of cases, and other below range sentences in 19.4 percent of cases.

The Commission further compared the racial characteristics of offenders in each group. Of the offenders convicted of an offense under section 924(c) who were also sentenced under §2D1.1, 607 (54.7%) were Black, 266 (24.0%) were Hispanic, 212 (19.1%) were White, and 25 (2.2%) were Other Race offenders. Of the offenders sentenced pursuant to §2D1.1 who received a 2-level enhancement under the guidelines for possessing a dangerous weapon, 1,068 (40.8%) were Black, 880 (33.6%) were Hispanic, 613 (23.4%) were White, and 58 (2.2%) were Other Race offenders.

D. MANDATORY MINIMUM PENALTIES UNDER THE ARMED CAREER CRIMINAL ACT

Of the 73,239 offenders included in this analysis, 592 (0.8%) qualified as an armed career criminal under ACCA.⁷³⁵ Of those 592 offenders, 369 (62.3%) were convicted only of an offense under 18 U.S.C. § 922(g). An additional 53 offenders who qualified as armed career criminals under ACCA were also convicted of an offense under section 924(c).

1. Demographic Characteristics

Table 9-4 provides the demographic characteristics of offenders who qualified as armed career criminals under ACCA and of those offenders who were subject to ACCA's 15-year mandatory minimum penalty at sentencing. Table 9-5 displays information about the criminal history categories for these groups of offenders.

⁷³⁵ For purposes of this chapter, the term “qualified as an armed career criminal under ACCA” means that the court found that the 15-year mandatory minimum penalty established at 18 U.S.C. § 924(e) applied to the offender, but does not denote whether the offender obtained relief from the mandatory minimum penalty for rendering substantial assistance pursuant to 18 U.S.C. § 3553(e). Offenders who qualified as armed career criminals under ACCA but did not obtain relief are “subject to” the mandatory minimum penalty. *See supra* Chapter 3.

**Table 9-4
Demographic Characteristics of Offenders Subject to Armed Career Criminal Act
Fiscal Year 2010**

	All Offenders Qualifying for Armed Career Criminal Mandatory Minimum Penalty	Subject to Armed Career Criminal Mandatory Minimum Penalty
Total (# of offenders)	592	489
Race of Offender (Percent)		
White	29.5	29.1
Black	63.7	63.9
Hispanic	5.2	5.5
Other	1.5	1.4
Citizenship of Offender (Percent)		
United States Citizen	98.6	98.6
Non-Citizen	1.4	1.4
Gender of Offender (Percent)		
Male	99.3	99.2
Female	0.7	0.8

**Table 9-5
Criminal History of Offenders Subject to Armed Career Criminal Act
Fiscal Year 2010**

	All Offenders Qualifying for Armed Career Criminal Mandatory Minimum Penalty	Subject to Armed Career Criminal Mandatory Minimum Penalty
Total (# of offenders)	592	489
Criminal History Category (Percent)		
I	0.0	0.0
II	0.0	0.0
III	0.0	0.0
IV	16.7	15.1
V	11.0	11.2
VI	72.3	73.6

2. *Guilty Pleas and Trials*

Offenders who qualified as armed career criminals under ACCA were much more likely to proceed to trial than offenders convicted of an offense carrying a mandatory minimum penalty as a whole. Of the 592 offenders who qualified as armed career criminals under ACCA in fiscal year 2010, 103 (17.4%) proceeded to trial, compared to 5.9 percent of all offenders convicted of an offense carrying a mandatory minimum penalty.

3. *Geographic Variations*

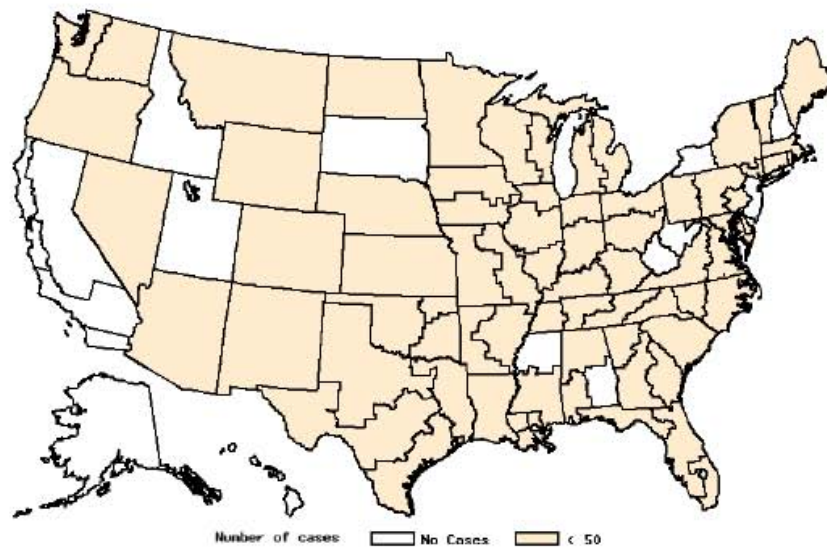
Cases involving offenders who qualified as armed career criminals under ACCA were geographically concentrated in a few circuits. Of the 592 cases in fiscal year 2010 that involved an offender who qualified as an armed career criminal under ACCA, 191 (32.3%) were from the district courts in the Fourth Circuit and 124 (20.9%) were from the district courts in the Eleventh Circuit. Thus, district courts in two circuits accounted for more than half of the cases that involved an offender who qualified as an armed career criminal under ACCA.⁷³⁶ By way of comparison, 16.7 percent of all federal criminal cases reported to the Commission for fiscal year 2010 came from the district courts in those two circuits.⁷³⁷

⁷³⁶ See Table D-15 (Mandatory Minimum Status for Armed Career Criminal Offenders in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁷³⁷ See Table D-1 in Appendix D of this Report.

Cases involving offenders who qualified as armed career criminals under ACCA were also geographically concentrated when viewed at the district level. In fiscal year 2010, the ten districts with the highest number of cases involving offenders who qualified as armed career criminals under ACCA reported 47.9 percent of all such cases. Those districts were: Middle North Carolina (6.8%, n=40); Middle Florida (5.9%, n=35); South Carolina (5.7%, n=34); Southern Florida (5.1%, n=30); Eastern Pennsylvania (4.6%, n=27); Maryland (4.4%, n=26); Western Tennessee (4.2%, n=25); Eastern Tennessee (3.9%, n=23); Eastern Missouri (3.7%, n=22); and Northern Georgia (3.6%, n=21).⁷³⁸ By way of comparison, those districts reported 14.1 percent of all federal criminal cases heard in fiscal year 2010.⁷³⁹ Fourteen districts each reported having no cases involving an offender who qualified as an armed career criminal under ACCA in fiscal year 2010.⁷⁴⁰ See Figure 9-6.

Figure 9-6
Number of Offenders Subject to Armed Career Criminal Provision
By District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Cases involving offenders who qualified as armed career criminals under ACCA constituted only a small percentage of any district's criminal case docket. In fiscal year 2010, only six of the 94 districts reported that more than 3.5 percent of the total criminal case docket involved offenders who qualified as armed career criminals under ACCA: Middle North Carolina (7.3%, n=40), Western Virginia (4.2%, n=15), Maryland (3.9%, n=26), Western Tennessee (4.0%, n=25), Middle Tennessee (3.9%, n=11), and Massachusetts (3.8%, n=16).

⁷³⁸ See Table D-15 in Appendix D of this Report.

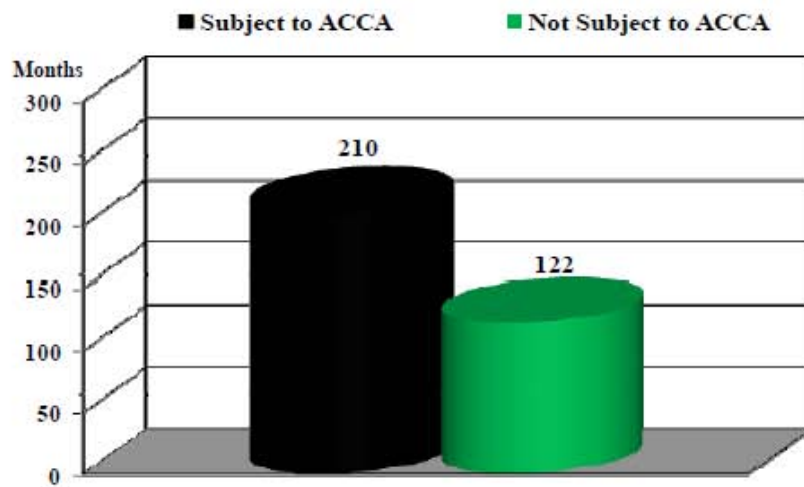
⁷³⁹ See Table D-1 in Appendix D of this Report.

⁷⁴⁰ See Table D-15 in Appendix D of this Report.

4. *Sentence Information*

In fiscal year 2010, the average sentence for offenders who qualified as armed career criminals under ACCA and who remained subject to the mandatory minimum penalty was 210 months. The average sentence for offenders who qualified as armed career criminals under ACCA but who were relieved of the mandatory minimum penalty for rendering substantial assistance to authorities was 122 months. See Figure 9-7.

Figure 9-7
Average Sentence Length for Offenders Subject to Armed Career Criminal Provision
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table 9-6 provides the position of sentences relative to the guideline range for all offenders who qualified as armed career criminals under ACCA and for those offenders still subject to the mandatory minimum penalty at sentencing.

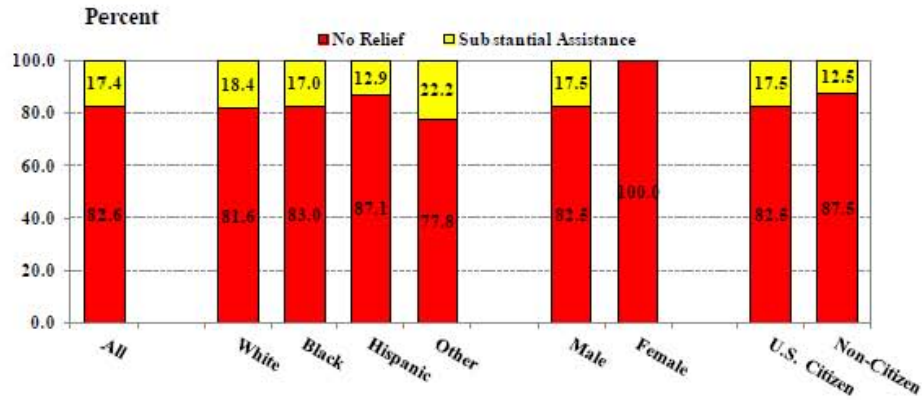
Table 9-6
Position Relative to the Guideline Range of Offenders
Subject to Armed Career Criminal Provisions
Fiscal Year 2010

	All Offenders Qualifying for Armed Career Criminal Mandatory Minimum Penalty	Subject to Armed Career Criminal Mandatory Minimum Penalty
Total (# of offenders)	592	489
Sentence Relative to the Guideline Range (Percent)		
Within Range	62.8	76.1
Above Range	1.5	1.8
Substantial Assistance §5K1.1	17.4	0.0
Other Government Sponsored (no §5K1.1)	5.2	6.3
Other Below Range	13.0	15.8

5. *Relief from the Mandatory Minimum Penalty*

In fiscal year 2010, 17.4 percent of offenders who qualified as an armed career criminal under ACCA were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government. *See* Figure 9-8. There were generally only minimal demographic differences in the rates of relief for those offenders, although Hispanic offenders and non-citizen offenders received relief at slightly lower rates than offenders in other demographic groups and United States citizen offenders, respectively. *See* Figure 9-8.

Figure 9-8
Percent of Firearm Offenders Subject to Armed Career Criminal Provision
Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

E. PRISON IMPACT

The percentage of prisoners convicted of an offense under section 924(c) has remained relatively steady over time. On September 30, 2010, of the 191,757 offenders in prison, 20,109 (10.5%) were convicted of an offense under section 924(c). Similarly, of the 71,972 offenders in prison on September 30, 1995, 7,425 (10.3%) were convicted of an offense under section 924(c).

The percentage of prisoners qualifying as armed career criminals under ACCA has slowly increased over time. Of the 71,972 offenders in prison on September 30, 1995, 989 (1.4%) qualified as armed career criminals under ACCA. By contrast, of the 191,757 offenders in prison on September 30, 2010, 5,605 (2.9%) qualified as armed career criminals under ACCA.

F. SUMMARY

With respect to mandatory minimum penalties for firearm offenses, Commission analyses demonstrate the following:

Offenses and Offenders

- In fiscal year 2010, 2,294 (3.1%) offenders were convicted of an offense under section 924(c). Of the 2,294 offenders convicted of an offense under section 924(c), 2,147 (93.6%) were convicted of a single count of an offense under section 924(c) and 147 (6.4%) were convicted of multiple counts of an offense under section 924(c).
 - o Over two-thirds of offenders convicted of a single count of an offense under section 924(c) were convicted of offenses carrying a five- or seven-year mandatory minimum penalty (64.8% and 22.7%, respectively). Only 3.7% of

offenders convicted of a single count of an offense under section 924(c) were convicted of offenses carrying a mandatory minimum penalty of more than ten years of imprisonment.

- o More than half of all offenders convicted of an offense under section 924(c) were Black (55.9%). Less than one-quarter (21.0%) were Hispanic, followed by White (20.1%) and Other Race (3.1%) offenders. Among offenders convicted of multiple counts of an offense under section 924(c), 61.0 percent were Black, 21.2 percent were Hispanic, 15.1 percent were White, and 2.7 percent were Other Race.
- o The overwhelming majority of all offenders convicted of an offense under section 924(c) (97.1%) and those offenders convicted of multiple counts of an offense under section 924(c) (99.3%) were male.
- o United States citizens accounted for over 80 percent of all offenders convicted of an offense under section 924(c) (86.7%) and those offenders convicted of multiple counts of an offense under section 924(c) (84.4%).
- In fiscal year 2010, 592 (0.8%) offenders qualified as an armed career criminal under ACCA.
 - o More than 60 percent of the offenders who qualified as an armed career criminal under ACCA were Black (63.7%), followed by White (29.5%), Hispanic (5.2%), and Other Race (1.5%) offenders.
 - o The overwhelming majority of offenders who qualified as an armed career criminal under ACCA were male (99.3%).
 - o United States citizens accounted for 98.6 percent of offenders who qualified as an armed career criminal under ACCA.
- Cases involving a conviction of an offense under section 924(c) or involving offenders who qualified as armed career criminal under ACCA were geographically concentrated.
 - o In fiscal year 2010, 12 districts reported 43.7 percent of the cases involving a conviction of an offense under section 924(c) (and only five of those districts reported having at least 100 such cases).
 - o Cases involving convictions of multiple section 924(c) counts were more geographically concentrated than cases involving a conviction of an offense under section 924(c) as a whole. In fiscal year 2010, the ten districts that reported the highest number of cases involving multiple convictions of section 924(c) accounted for 62.7 percent of all such cases.

- o In fiscal year 2010, the ten districts with the highest number of cases involving offenders who qualified as armed career criminals under ACCA reported 47.9 percent of all such cases.

Application and Relief

- In fiscal year 2010, offenders convicted of an offense under section 924(c) and offenders who qualified as armed career criminals under ACCA proceeded to trial at a higher rate than all offenders convicted of an offense carrying a mandatory minimum penalty (5.9%).
 - o Of the 2,294 offenders convicted of an offense under section 924(c), 12.8 percent (n=293) proceeded to trial.
 - o Of the 147 offenders convicted of multiple counts of an offense under section 924(c) in fiscal year 2010, 34.7 percent (n=51) proceeded to trial. Of the 2,147 offenders convicted of a single count of an offense under section 924(c), 11.3 percent (n=242) proceeded to trial.
 - o Of the 592 offenders who qualified as armed career criminals under ACCA, 17.4 percent (n=103) proceeded to trial.
- In fiscal year 2010, 24.3 percent of offenders convicted of an offense under section 924(c) were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government.
 - o Black, White, and Hispanic offenders convicted of an offense under section 924(c) obtained relief at comparable rates (24.7%, 24.4%, and 24.4%, respectively), followed by Other Race offenders (17.1%).
 - o Female offenders constituted only a small percentage of offenders convicted of an offense under section 924(c), but obtained relief from the mandatory minimum penalty at a higher rate (45.4%) than male offenders convicted of such an offense (23.6%).
 - o Non-citizen offenders convicted of an offense under section 924(c) obtained relief from the mandatory minimum penalty at a higher rate (27.3%) than United States citizens convicted of such an offense (23.8%).
 - o Offenders convicted of multiple counts of an offense under section 924(c) were relieved of the mandatory minimum penalty in 36.7% of the cases.
- In fiscal year 2010, 17.4 percent of offenders who qualified as an armed career criminal under ACCA were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government.

- In fiscal year 2010, the rate at which offenders received substantial assistance relief varied by race, gender and citizenship.
 - Other Race offenders who qualified as armed career criminals under ACCA obtained relief at the highest rate of any racial group (22.2%), followed by White (18.4%), Black (17.0%), and Hispanic (12.9%) offenders.
 - Male offenders who qualified as armed career criminals under ACCA obtained relief from the mandatory minimum penalty at a higher rate (17.5%) than qualifying female offenders (0.0%).
 - United States citizen offenders who qualified as armed career criminals under ACCA obtained relief from the mandatory minimum penalty at a higher rate (17.5%) than qualifying non-citizen offenders (12.5%).
- Less than half (48.2%) of all offenders convicted of an offense under section 924(c) were sentenced within the applicable guideline range.
 - More than one-quarter (28.2%) of offenders convicted of an offense under section 924(c) received a government sponsored below range sentence, and 18.8 percent received a non-government sponsored below range sentence.
- Over 60 percent (62.8%) of offenders who qualified as armed career criminals under ACCA were sentenced within the applicable guideline range.
 - Nearly one-quarter (22.6%) of offenders who qualified as armed career criminals under ACCA received a government sponsored below range sentence, and 13.0 percent received a non-government sponsored below range sentence.

Sentencing

- In fiscal year 2010, 75.5 percent of offenders convicted of an offense under section 924(c) were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of an offense under section 924(c) were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - Other Race offenders were subject to the mandatory minimum penalty at sentencing most often, in 82.9 percent of their offenses carrying such a penalty, followed by Hispanic (75.6%) and White (75.6%) offenders. Black offenders were subject to the mandatory minimum penalty at sentencing the least often, in 75.3 percent of their cases.

- o Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (76.4% of their cases, compared to 54.6% of cases involving female offenders).
 - o United States citizens were subject to the mandatory minimum penalty at sentencing more often than non-citizens offenders (76.1% of their cases, compared to 72.7% of cases involving non-citizen offenders).
- The average sentence for offenders convicted of an offense under section 924(c) who remained subject to the mandatory minimum penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 182 months. The average sentence for offenders convicted of an offense under section 924(c) but who were relieved of the mandatory minimum penalty was 109 months. These sentences include the sentence imposed on the underlying offenses and other counts of conviction, if any, in addition to the mandatory minimum penalty under section 924(c).
 - o The average sentence for offenders convicted of a single count of an offense under section 924(c) was 151 months. The average sentence for offenders convicted of a single count of an offense under section 924(c) who were relieved of the mandatory minimum penalty was 100 months.
 - o The average sentence for offenders convicted of multiple counts of an offense under section 924(c) was 351 months. The average sentence for offenders convicted of multiple counts of an offense under section 924(c) who were relieved for the mandatory minimum penalties was 198 months.
- In fiscal year 2010, 82.6 percent of offenders who qualified as armed career criminals under ACCA were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders who qualified as armed career criminals under ACCA were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - o Hispanic offenders were subject to the mandatory minimum penalty at sentencing most often, in 87.1 percent of their offenses carrying such a penalty, followed by Black (83.0%) and White (81.6%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 77.8 percent of their cases.
 - o Female offenders were subject to the mandatory minimum penalty at sentencing more often than male offenders (100.0% of their cases, compared to 82.5% of cases involving male offenders).
 - o Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizen offenders (87.5% of their cases, compared to 82.5% of cases involving United States citizen offenders).

- The average sentence for offenders who qualified as armed career criminals under ACCA and who were subject to the mandatory minimum penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 210 months. The average sentence for offenders who qualified as armed career criminals under ACCA but who were relieved of the mandatory minimum penalty was 122 months.

Prison Impact

- At the end of fiscal year 2010, 10.5 percent of the offenders in the custody of the Bureau of Prisons were convicted of an offense under section 924(c). The percentage of prisoners convicted of an offense under section 924(c) has remained relatively steady over time, constituting 10.3 percent of the federal prison population at the end of fiscal year 1995.
- At the end of fiscal year 2010, 2.9 percent of the offenders in the custody of the Bureau of Prisons qualified as armed career criminals under ACCA. The percentage of prisoners who so qualified has slowly increased over time, rising from 1.4 percent of the federal prison population at the end of fiscal year 1995.

MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES

A. INTRODUCTION

This chapter analyzes the application of mandatory minimum penalties for federal sex offenses. First, this chapter provides an overview of the statutory scheme and the applicable sentencing guideline provisions. Second, this chapter provides a general statistical overview of sex offenders with a focus on such offenders convicted of offenses carrying a mandatory minimum penalty. Third, this chapter considers the general effect of mandatory minimum penalties on sentences for sex offenders and, in particular, presents relevant findings of the Commission's special coding project concerning a random sample of child pornography cases from fiscal year 2010. Finally, this chapter sets forth findings with respect to mandatory minimum penalties and sex offenses.

As used in this chapter, the term "sex offenses" refers to cases in which the primary sentencing guideline was in either: (1) Chapter 2, part A, subpart 3 (which concerns sexual abuse and sexual contact offenses victimizing adults or minors), excluding failure to register offenses;⁷⁴¹ or (2) Chapter 2, part G (which concerns promotion of illegal sex acts involving an adult or minor, offenses involving travel to engage in an illegal sexual act, and child pornography offenses), excluding obscenity offenses not cross-referenced to the child pornography guidelines.⁷⁴²

In addition, for purposes of this chapter, federal sex offenses are divided into two types: (1) sexual abuse (also called "contact") offenses, *i.e.*, those offenses involving actual or attempted sexual contact with the victim regardless of the victim's age; and (2) child pornography (other than an offense related to the production of pornography depicting an actual child, which is deemed a "contact" offense).⁷⁴³ Some parts of the analysis in this chapter aggregate both types of sex offenses; however, more often the analysis is divided according to the two types of sex offenses. Such bifurcation is appropriate because, as discussed below, sexual abuse cases involve actual or intended sexual *contact* with a victim, while child pornography offenses concern the possession, receipt, transportation, or distribution of sexually-oriented *images* of children.

⁷⁴¹ Such offenses are sentenced under USSG §§2A3.5 (Failure to Register as a Sex Offender) and 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender).

⁷⁴² Such obscenity offenses are sentenced under USSG §§2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names) and 2G3.2 (Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material).

⁷⁴³ A similar bifurcation of federal sex offenses appears in the Commission's *2010 Sourcebook of Federal Sentencing Statistics* at 12 (Table 3); *see also id.* at 166–67 (definitions of "sexual abuse" and "child pornography" as "primary offense categories").

B. OFFENSES AND RELATED GUIDELINES

1. *Federal Sex Offenses*

a. Sexual abuse offenses

The vast majority of federal sexual abuse offenses are found in Chapters 109A and 117 of Title 18 of the United States Code. A handful of other sexual abuse offenses, including offenses related to the production of child pornography, are found in other parts of the United States Code.⁷⁴⁴ Congress has provided for mandatory minimum terms of imprisonment for many sexual abuse offenses, including the majority of such offenses that involve the victimization or attempted victimization of minors. Mandatory minimum terms exist for violations of the following sections of Title 18:

- § 1591(b)(1) and (2) (minimum ten- or 15-year term for sex trafficking of a minor depending on the age of the victim);
- § 2241(c) (minimum 30-year term for traveling across state lines with the intent to have sex with a child under 12 years of age or for crossing state lines and having sex with a child between the ages of 12 and 16 under certain aggravating circumstances);
- §§ 2251(e) and 2260(c)(1) (minimum term of 15 years for production of child pornography and enhanced minimum terms if such a defendant has a prior felony conviction for an enumerated sex offense);⁷⁴⁵
- § 2251A(a) & (b) (minimum term of 30 years for buying or selling, or otherwise transferring, children for the purpose of participating in the production of child pornography);
- § 2422(b) (minimum term of ten years for using mails or facilities or means of commerce to cause a minor to engage in prostitution or other criminal sexual activity);

⁷⁴⁴ *See, e.g.*, 18 U.S.C. §§ 1591 (sex trafficking of children by fraud, force, or deception) and 2251 & 2251A (offenses related to production of child pornography).

⁷⁴⁵ Advertising for the exchange of completed child pornography in violation of § 2251(d)(1) also is subject to a 15-year mandatory minimum penalty, yet it is punished under USSG §2G2.2 rather than USSG §2G2.1. *See* USSG App. A. Conversely, advertising that seeks “participation” in the production of child pornography, which also is subject to a 15-year mandatory minimum penalty, is governed by USSG §2G2.1. *See* USSG App. A. The latter is deemed a “sexual abuse” offense for purposes of this chapter, while the former is deemed a “child pornography” offense.

If a defendant has a prior federal or state conviction for one of the enumerated sex offenses, the penalty range for production or advertising increases to a mandatory minimum term of 25 years and a maximum term of 50 years of imprisonment. If a defendant has a prior federal or state conviction for two or more enumerated sex offenses, the penalty range for production increases to a mandatory minimum term of 35 years and a maximum term of life imprisonment. *See* 18 U.S.C. §§ 2251(e) & 2260(c)(1).

- § 2423(a) (minimum term of ten years for transporting a minor in commerce for the purpose of engaging in prostitution or other criminal sexual activity); and
- § 3559(e) (mandatory life imprisonment for second conviction for certain sex offenses against minors).⁷⁴⁶

Many of the other sexual abuse offenses in Chapters 109A and 117 that do not carry mandatory minimum penalties outlaw similar conduct where the victim is an adult.⁷⁴⁷

b. Child pornography offenses⁷⁴⁸

Federal law broadly prohibits a variety of acts related to the distribution,⁷⁴⁹ transportation (including by shipping or mailing),⁷⁵⁰ importation, receipt, and possession of child pornography, including attempted acts and conspiracies to commit such acts.⁷⁵¹ The four primary types of offenses (distribution, transportation, receipt, and possession) are set forth in Chapter 110 of

⁷⁴⁶ Section 3559(e) is a rarely used statute. Only one offender was sentenced to life imprisonment under that statute in fiscal year 2010.

⁷⁴⁷ See, e.g., 18 U.S.C. § 2242 (providing for a fine and/or term of imprisonment of “any term of years or for life” for sexual abuse of an adult victim); 18 U.S.C. § 2422(a) (providing for a term of imprisonment of “not more than 20 years” for causing an adult to travel in interstate or foreign commerce in order to engage in prostitution or other illegal sexual activity).

⁷⁴⁸ See 18 U.S.C. § 2256(8) (defining “child pornography” as “visual depiction” of a minor “engaging in sexually explicit conduct”). “Sexually explicit conduct” encompasses various sexual conduct, including sexual intercourse, oral and anal sex, masturbation, bestiality, and the “lascivious exhibition of the genitals or pubic area.” 18 U.S.C. § 2256(2). Federal statutes outlawing obscenity – primarily 18 U.S.C. §§ 1462, 1466, and 1466A – also prohibit certain acts related to photographic and non-photographic visual representations of minors engaged in “sexually explicit conduct.” Such offenses, if they involve the obscene depiction of minors rather than adults, are subject to the guidelines’ child pornography provisions rather than the obscenity provisions. See, e.g., USSG §2G3.1(c).

⁷⁴⁹ Sections 2252 and 2252A use not only the term “distribute” but also the term “sell,” thus, broadly encompassing any type of transmission of child pornography to another, both electronic and non-electronic distribution and both commercial or non-commercial distribution. See, e.g., 18 U.S.C. §§ 2252(a)(1), (a)(3) & 2252A(a)(1), (a)(4)(B). In addition, §§ 2252, 2252A and 2260(b) each prohibit the possession of child pornography with the intent to distribute it (in different circumstances). See 18 U.S.C. §§ 2252(a)(3)(B), 2252A(a)(4)(B), & 2260(b). The sentencing guideline provisions related to child pornography use the terms “trafficking” and “distribution” interchangeably. See, e.g., USSC §2G2.2(b)(1). For simplicity’s sake, this report will use the term “distribute” to refer to all types of distribution (as well as possession with the intent to distribute). Cf. 21 U.S.C. § 841(a)(2) (treating distribution of drugs and possession with intent to distribute drugs as equivalents).

⁷⁵⁰ The transportation of child pornography proscribed by statute does not require that the defendant intended to distribute it to another person. See, e.g., *United States v. Fore*, 507 F.3d 412, 415 (6th Cir. 2007); *United States v. Burgess*, 576 F.3d 1078, 1102 (10th Cir. 2009). However, as explained below, unlike simple possession, transportation of child pornography (including shipping or mailing) is punished with a five-year mandatory minimum prison sentence.

⁷⁵¹ See 18 U.S.C. §§ 2251(e), 2252(b), 2252A(b), and 2260(c). Section 2252 concerns child pornography depicting an actual minor, while section 2252A concerns child pornography depicting a computer-generated image “indistinguishable from that of” an actual minor “engaging in sexually explicit conduct” or modified “to appear that an identifiable minor is engaging in sexually explicit conduct.” 18 U.S.C. §§ 2252A and 2256(8)(B) & (C).

Title 18 of the United States Code at 18 U.S.C. §§ 2251, 2252, 2252A, and 2260. The statutes prohibit distribution, shipping, and transportation of child pornography regardless of whether such activities have a commercial or non-commercial purpose (*e.g.*, exchanging child pornography through “peer-to-peer” Internet file-sharing programs).⁷⁵² The offense of receipt requires a defendant’s knowledge that he is coming into possession of child pornography at the time that the image is received.⁷⁵³ That a defendant knowingly possesses child pornography – a lesser-included offense of receipt – does not necessarily mean that the defendant previously knowingly received it.⁷⁵⁴ An additional statute, 18 U.S.C. § 1466A, prohibits possession, receipt, distribution, and production of “obscene visual representations of the sexual abuse of children”; its violation is considered a child pornography offense.⁷⁵⁵

The statutory penalty ranges for violations of these provisions vary in severity depending on both the act involved and the defendant’s prior criminal record. Violations of section 1466A involving receipt, distribution, or production of “obscene visual representations of the sexual abuse of children” carry a mandatory minimum penalty of five years of imprisonment and a maximum of 20 years of imprisonment, while violations of section 1466A involving simple possession of such obscene material carry no mandatory minimum penalty and have a statutory maximum of ten years of imprisonment.⁷⁵⁶

Simple possession of child pornography is punishable by up to ten years in federal prison but – unlike the other offenses involving actual child pornography⁷⁵⁷ – does not carry a mandatory minimum term of imprisonment.⁷⁵⁸ If a defendant has a prior federal or state conviction for one or more enumerated sex offenses,⁷⁵⁹ however, the penalty range for simple

⁷⁵² See *United States v. Holston*, 343 F.3d 83, 85-86 (2d Cir. 2003); see also *United States v. Williams*, 553 U.S. 285, 296 (2008) (“[I]n much Internet file sharing of child pornography each participant makes his files available for free to other participants.”).

⁷⁵³ See, *e.g.*, *United States v. Meyers*, 355 F.3d 1040, 1042 (7th Cir. 2004).

⁷⁵⁴ See, *e.g.*, *United States v. Ehle*, 640 F.3d 689, 698 (6th Cir. 2011).

⁷⁵⁵ See USSG App. A (referring violations of 18 U.S.C. § 1466A to USSG §2G2.2).

⁷⁵⁶ 18 U.S.C. § 1466A(a) & (b).

⁷⁵⁷ “Morphing” offenses – which do not involve actual child pornography – do not carry mandatory minimum penalties. See 18 U.S.C. § 2252A(a)(7), (b)(3). In addition, on rare occasions, a defendant convicted of an obscenity offense other than 18 U.S.C. § 1466A that does not carry mandatory minimum penalty (*e.g.*, 18 U.S.C. § 1462) will be cross-referenced to §2G2.2 under §2G3.1(c)(1) because the obscene matter was in fact actual child pornography. In such a case, a defendant may have engaged in conduct that, if charged under the child pornography statutes, would have carried a mandatory minimum penalty (*e.g.*, transportation or distribution of obscene matter that qualified as child pornography). However, because it was charged as an obscenity offense rather than a child pornography offense, it does not carry a mandatory minimum penalty.

⁷⁵⁸ 18 U.S.C. §§ 2252(b)(2) & 2252A(b)(2).

⁷⁵⁹ Such enumerated sex offenses include prior convictions for sex trafficking of children, obscenity offenses, sexual abuse of adults or children, and child pornography offenses. 18 U.S.C. § 2252(b)(2).

possession increases to a mandatory minimum term of ten years and a maximum term of 20 years of imprisonment.⁷⁶⁰

Transportation (including mailing or shipping), receipt, distribution, and possession with the intent to distribute or sell child pornography offenses each carry a mandatory minimum term of five years of imprisonment and a maximum term of 20 years.⁷⁶¹ If a defendant has a prior federal or state conviction for one or more enumerated sex offenses, however, the penalty range increases to a mandatory minimum term of 15 years and a maximum term of 40 years of imprisonment.⁷⁶² Section 2252A(b)(3) provides a separate punishment range of up to 15 years in prison for production (as well as distribution) of a “morphed” image of an actual, identifiable minor appearing to engage in sexually explicit conduct. No statutory mandatory minimum applies to this offense.

2. *Related Guidelines*

a. Sexual abuse offenses

The sentencing guidelines for sexual abuse offenses are contained in Chapter 2, part A, subpart 3 of the *Guidelines Manual*, as well as in section 2G2.1, which addresses offenses related to production of child pornography. Like the penal statutes governing sexual abuse offenses, the relevant guidelines cover a wide variety of conduct involving both adult and minor victims.⁷⁶³

b. Child pornography offenses

The sentencing guideline for child pornography offenses other than production is §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor;

⁷⁶⁰ *See id.* In fiscal year 2010, 878 offenders were convicted of possession of child pornography. Offenders were so classified by having a base offense level of 18 under USSG §2G2.2. Of the 878 offenders convicted of possession, 6.8% (n=60) were subject to mandatory minimum ten-year prison sentences under 18 U.S.C. §§ 2252(b)(2) and 2252A(b)(2) based on prior convictions for sex offenses. The remaining 93.2% of offenders (n=827) who were convicted of possession were not subject to a mandatory minimum penalty and faced a maximum term of imprisonment of ten years under §§ 2252(b)(2) and 2252A(b)(2).

⁷⁶¹ 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1), 2260(c)(2).

⁷⁶² *See id.*

⁷⁶³ The relevant provisions are §§2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor). The Commission's 2009 report, *The History of the Child Pornography Guidelines*, details the evolving nature of the child pornography guidelines during the past three decades.⁷⁶⁴ As noted in that report:

For more than 30 years, and particularly in recent years, Congress has focused attention on the scope of child pornography offenses and the severity of penalties for child pornography offenders. Through creating new offenses, enacting new mandatory minimums, increasing statutory maximums, and providing directives to the Commission, Congress has repeatedly expressed its will regarding appropriate penalties for child pornography offenders. Congress has specifically expressed an intent to raise penalties associated with certain child pornography offenses several times through directives to the Commission and statutory changes aimed at increasing the guideline penalties and reducing the incidence of downward departures.⁷⁶⁵

Certain other guidelines contain cross-references to §2G2.2 if relevant conduct in the case included possession, transportation, receipt, or distribution of child pornography – including §2G3.1(c) (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names).

C. STATISTICAL OVERVIEW

Sex offenses constitute a small percentage of federal criminal cases. Of the 73,239 federal cases in fiscal year 2010 included in this analysis, just 3.2 percent (n=2,317) involved sex offenses. Of those 2,317 cases, 72.4 percent (n=1,677) were child pornography cases, while 27.6 percent (n=640) were sexual abuse cases. Of the total number of sex offense cases, 50.8 percent (n=1,176) involved a conviction of an offense that carried a mandatory minimum penalty, which represented only 1.6 percent of all federal criminal cases.

Although sex offenses have always been a small percentage of the federal criminal docket, the number of defendants convicted of sex offenses carrying a mandatory minimum penalty – both sexual abuse offenses and child pornography offenses – has increased significantly during the past decade, as demonstrated in Figure 10-1. Before 2001, a small fraction of defendants convicted of sex offenses were convicted of offenses that carried a mandatory minimum penalty. Of the 59,882 offenders for whom the Commission received sentencing information in fiscal year 2001, 733 were sex offenders, only 39 of whom (5.3%) were convicted of an offense carrying a mandatory minimum penalty. By fiscal year 2006, there were 1,471 sex offenders, 584 of whom (39.7%) were convicted of an offense that carried a mandatory minimum penalty. By fiscal year 2008, there were 2,017 sex offenders, 924 of whom (45.8%) were convicted of an offense that carried a mandatory minimum penalty.⁷⁶⁶

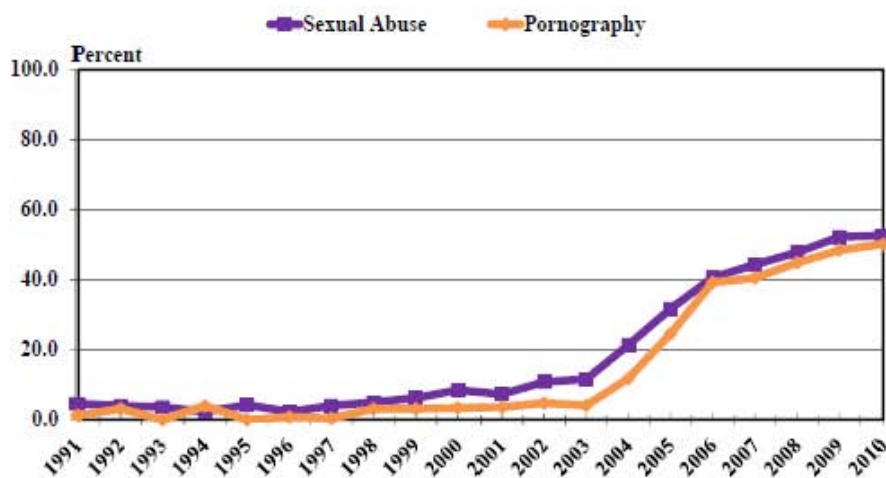
⁷⁶⁴ See U.S. SENT'G COMM'N, *THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES* (2009).

⁷⁶⁵ *Id.* at 6.

⁷⁶⁶ The increase in the number of sex offenders convicted of an offense carrying a mandatory minimum penalty is partly explained by the fact that, before the PROTECT Act was enacted in 2003, trafficking and receipt of child pornography did not carry mandatory minimum penalties. See Chapter 2, *supra*.

Figure 10-1 shows that the number of both sexual abuse cases and child pornography cases involving convictions for offenses carrying mandatory minimum penalties has increased as a percentage of the overall sex offense caseload. In fiscal year 2010, 50.1 percent of all child pornography cases (840 of 1677 child pornography cases) and 52.5 percent of sexual abuse cases (336 of 640 sexual abuse cases) involved convictions carrying mandatory minimum penalties. Of the 837 child pornography cases involving convictions not carrying a mandatory minimum penalty, 98.1 percent (821 of 837) were convictions for simple possession of child pornography under 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5).

Figure 10-1
Sexual Abuse/Pornography Offenders Convicted of an Offense Carrying a
Mandatory Minimum Penalty
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91 – USSCFY10.

A discussion of several statistical analyses of federal sex offenses carrying mandatory minimum penalties – using the 73,239 offenders included in the analysis for this Report – is set forth below.

1. *Demographic Characteristics of Sex Offenders*

Table 10-1 presents the demographic characteristics of sexual abuse offenders in fiscal year 2010. The table also compares the demographic characteristics of four groups of sexual abuse offenders: (1) all sexual abuse offenders, including those not convicted of an offense carrying a mandatory minimum penalty; (2) those convicted of an offense carrying a mandatory minimum penalty; (3) those convicted of an offense carrying a mandatory minimum penalty who were relieved from the mandatory minimum penalty because of substantial assistance; and (4) those convicted of an offense carrying a mandatory minimum who remained subject to that penalty at the time of sentencing because they did not qualify for relief based on substantial assistance. Table 10-2 contains comparable information about child pornography offenders. As demonstrated in these two tables, the most notable difference between the two types of sex offenders is that sexual abuse offenders include substantially more non-white offenders (22.5%

Other Race offenders, typically Native American offenders), compared to child pornography offenders (who are 89.0% White).

**Table 10-1
Demographic Characteristics of Sexual Abuse Offenders
Fiscal Year 2010**

Demographics	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	640	336	14	322
Race of Offender (Percent)				
White	55.2	76.4	50.0	77.6
Black	12.5	11.9	35.7	10.9
Hispanic	9.7	8.7	7.1	8.7
Other	22.5	3.0	7.1	2.8
Citizenship of Offender (Percent)				
United States Citizen	93.4	94.9	100.0	94.7
Non-Citizen	6.6	5.1	0.0	5.3
Gender of Offender (Percent)				
Male	94.2	97.9	85.7	98.4
Female	5.8	2.1	14.3	1.6

Table 10-2
Demographic Characteristics of Child Pornography Offenders
Fiscal Year 2010

Demographics	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	1,677	840	35	805
Race of Offender (Percent)				
White	89.0	88.2	91.4	88.0
Black	2.8	3.2	0.0	3.4
Hispanic	6.2	6.4	5.7	6.5
Other	2.0	2.2	2.9	2.1
Citizenship of Offender (Percent)				
United States Citizen	97.4	97.9	100.0	97.8
Non-Citizen	2.6	2.1	0.0	2.2
Gender of Offender (Percent)				
Male	99.4	99.4	100.0	99.4
Female	0.6	0.6	0.0	0.6

Tables 10-3 and 10-4 present information about the criminal histories of those groups of offenders. The vast majority of sex offenders – both sexual abuse and child pornography offenders – had no prior criminal record at the time they were sentenced and only a very small percentage were in Criminal History Categories IV through VI. *See* Tables 10-3 & 10-4.

**Table 10-3
Criminal History of Sexual Abuse Offenders
Fiscal Year 2010**

Criminal History Category	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	640	336	14	322
Criminal History Category (Percent)				
I	69.8	69.6	64.3	69.9
II	10.3	8.0	21.4	7.5
III	8.4	8.9	0.0	9.3
IV	3.3	2.7	0.0	2.8
V	5.0	6.9	7.1	6.8
VI	3.1	3.9	7.1	3.7

**Table 10-4
Criminal History of Child Pornography Offenders
Fiscal Year 2010**

Criminal History Category	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	1,677	840	35	805
Criminal History Category (Percent)				
I	81.9	77.0	91.4	76.4
II	7.9	9.6	2.9	9.9
III	6.0	8.0	2.9	8.2
IV	2.4	3.2	2.9	3.2
V	0.9	1.3	0.0	1.4
VI	0.8	0.8	0.0	0.9

2. Guilty Pleas and Trials

Sex offenders convicted of an offense carrying a mandatory minimum penalty – both sexual abuse offenders and child pornography offenders – proceeded to trial more often than sex

offenders who were not convicted of an offense carrying a mandatory minimum penalty. In fiscal year 2010, the trial rate for such sexual abuse offenders was 15.2 percent – more than twice the rate for sexual abuse offenders not convicted of an offense carrying a mandatory minimum penalty (6.9%). In fiscal year 2010, the trial rate for child pornography offenders convicted of an offense carrying a mandatory minimum penalty was 6.4 percent – four times the rate for child pornography offenders not convicted of an offense carrying a mandatory minimum penalty (1.6%).

3. *Geographic Variations*

A majority of federal convictions of a sexual abuse offense carrying a mandatory minimum penalty occurred in the district courts in four of the 12 federal circuits. Of the 336 cases in fiscal year 2010 that involved a conviction of a sexual abuse offense carrying a mandatory minimum penalty, 50 (14.9%) were from districts within the Eleventh Circuit, 43 each (12.8%) were from districts within the Sixth and Ninth Circuits, and 38 (11.3%) were from districts within the Eighth Circuit.⁷⁶⁷ Thus, 51.8 percent (n=174) of the 336 cases involving a conviction for a sexual abuse offense carrying a mandatory minimum penalty came from those four circuits. By way of comparison, 42.4 percent of all federal criminal cases in fiscal year 2010 came from those four circuits.⁷⁶⁸

A majority of the convictions of a child pornography offense carrying a mandatory minimum penalty likewise occurred in the district courts within the same four circuits. Of the 840 cases in fiscal year 2010 that involved a conviction of a child pornography offense carrying a mandatory minimum penalty, 130 (15.5%) were from districts within the Ninth Circuit, 122 (14.5%) were from districts within the Eleventh Circuit, 118 (14.0%) were from districts within the Sixth Circuit, and 100 (11.9%) were from districts within the Eighth Circuit. Thus, 56.0 percent (n=470) of the 840 cases involving a conviction for a child pornography carrying a mandatory minimum penalty came from those four circuits.⁷⁶⁹ As noted, 42.4 percent of all federal cases sentenced in fiscal year 2010 came from those four circuits.

With respect to differences among the 94 districts, federal sexual abuse prosecutions occurred most often in Southern Florida (n=16, 0.7% of all cases sentenced in the district), Northern New York (n=11, 2.5%), Eastern California (n=10, 1.0%), and Northern Georgia (n=10, 1.5%). These four districts together accounted for 14.0 percent of all federal sexual abuse cases.⁷⁷⁰ Nevertheless, no district had more than 50 sexual abuse offenses. *See* Figure 10-2.

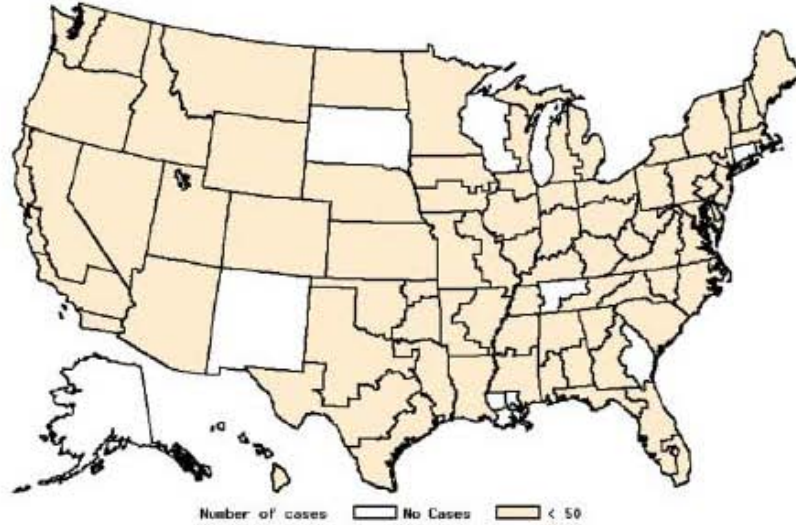
⁷⁶⁷ *See* Table D-16 (Mandatory Minimum Status for Sexual Abuse Offenders in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁷⁶⁸ *See* Table D-1 (Mandatory Minimum Status of Cases in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁷⁶⁹ *See* Table D-17 (Mandatory Minimum Status for Child Pornography Offenders in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁷⁷⁰ *See* Table D-16 in Appendix D of this Report.

Figure 10-2
Number of Sexual Abuse Offenders Convicted of an Offense Carrying a
Mandatory Minimum Penalty
by District
Fiscal Year 2010



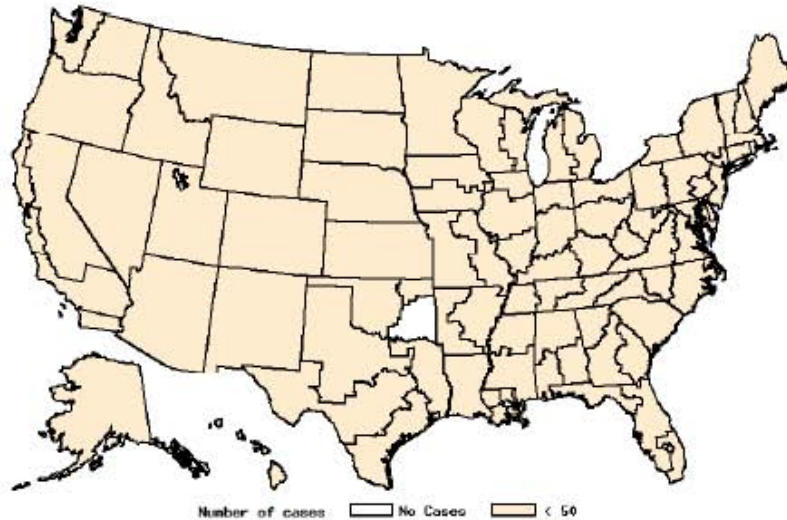
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Child pornography cases were also more concentrated in a few of the 94 districts, with the largest numbers occurring in Eastern Virginia (n=39, 3.2% of all cases sentenced in the district), Middle Florida (n=34, 2.0%), Southern Florida (n=30, 1.4%), Southern Indiana (n=28, 8.6%), and Western Texas (n=27, 0.4%). These districts together accounted for 18.8 percent of all child pornography cases⁷⁷¹ and 16.3 percent of all federal criminal cases.⁷⁷² As was the case with sexual abuse offenses, however, no district reported more than 50 child pornography cases. See Figure 10-3.

⁷⁷¹ See Table D-17 in Appendix D of this Report.

⁷⁷² *Id.*

Figure 10-3
Number of Child Pornography Offenders Convicted of an Offense Carrying a
Mandatory Minimum Penalty
by District
Fiscal Year 2010



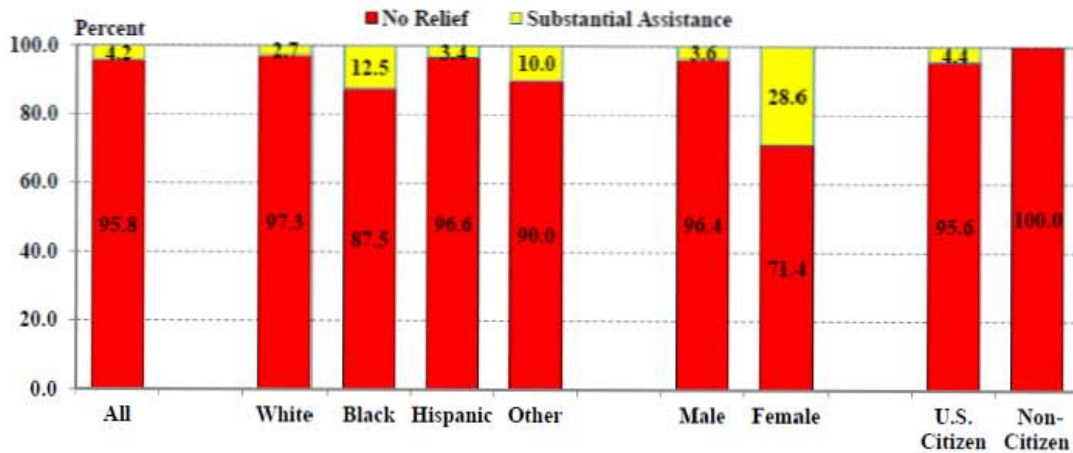
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

4. *Relief from the Mandatory Minimum Penalty*

In fiscal year 2010, the overwhelming majority of offenders convicted of an offense carrying a mandatory minimum penalty – both sexual abuse offenders and child pornography offenders – were ultimately subject to that penalty at sentencing because they did not obtain relief under 18 U.S.C. § 3553(e) based on substantial assistance to the government. *See* Figures 10-4 and 10-5. Of the 336 sexual abuse defendants convicted of an offense carrying a mandatory minimum penalty, Black offenders (12.5%, n=5), Other Race offenders (10.0%, n=1) and female offenders (28.6%, n=2) were more likely to be relieved from the mandatory minimum penalty than members of other demographic groups. This number of cases is too small, however, to draw any meaningful conclusions about the role of race, gender, or citizenship as it relates to relief from the mandatory minimum penalty.⁷⁷³

⁷⁷³ In fiscal year 2010, there were 40 Black offenders, ten Other Race offenders, and seven female offenders convicted of a sexual abuse offense that carried a mandatory minimum sentence.

Figure 10-4
Percent of Sexual Abuse Offenders Convicted of an Offense Carrying a
Mandatory Minimum Penalty Who Were Relieved of the Penalty
Fiscal Year 2010

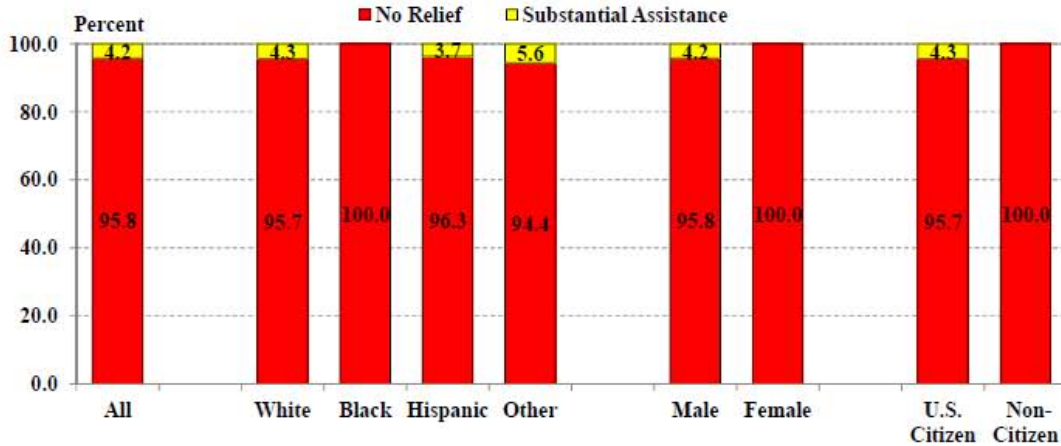


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The vast majority of the 840 child pornography defendants convicted of an offense carrying a mandatory penalty were White (88.0%, n=739), male (99.4%, n=835), and U.S. citizens (97.9%, n=822). No Black, female, or non-citizen offenders obtained relief from the operation of the mandatory minimum penalties. However, the number of each of those groups of child pornographers was so small that no meaningful conclusions can be drawn about the role of race, gender, or citizenship as it relates to substantial assistance relief.⁷⁷⁴

⁷⁷⁴ In fiscal year 2010, there were 27 Black offenders, 5 female offenders, and 18 non-citizen offenders convicted of a child pornography offense that carried a mandatory minimum sentence.

Figure 10-5
Percent of Child Pornography Offenders Convicted of an Offense Carrying a
Mandatory Minimum Penalty Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

D. SENTENCING OUTCOMES

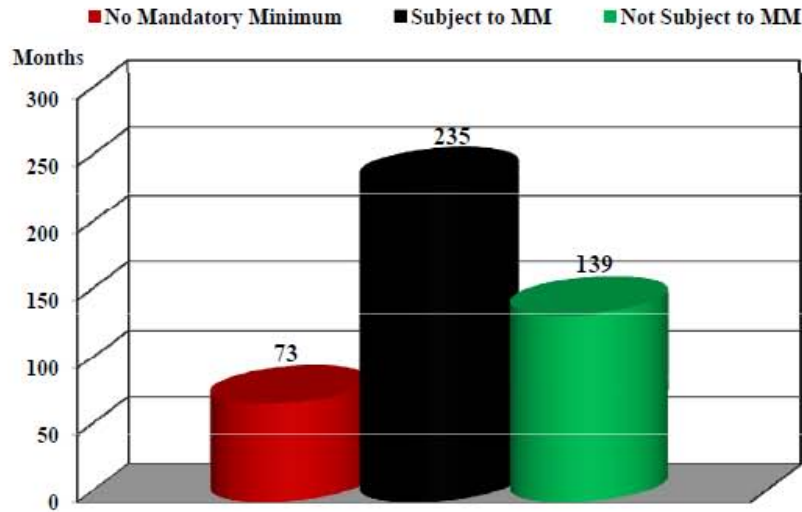
1. Sentencing Outcomes Generally in Sex Offense Cases

a. Average sentence length

In considering the effect of mandatory minimum penalties on sentencing outcomes for sex offenders, the Commission compared the average length of sentences imposed on sex offenders not convicted of an offense carrying a mandatory minimum penalty, sex offenders relieved from application of a mandatory minimum penalty because of substantial assistance, and sex offenders who remained subject to the mandatory minimum penalty at sentencing.

An analysis of the length of sentences imposed on each type of sex offender shows that the average sentences were highest for offenders convicted of an offense carrying a mandatory minimum penalty who remained subject to that penalty at sentencing. The average sentence for those sexual abuse offenders who remained subject to a mandatory minimum penalty (235 months) was substantially higher than the average sentence for sexual abuse offenders not convicted of an offense carrying a mandatory minimum penalty (73 months) and sexual abuse offenders relieved from application of a mandatory minimum penalty (139 months). *See* Figure 10-6.

Figure 10-6
Average Sentence Length by Mandatory Minimum Status for Sexual Abuse Offenders
Fiscal Year 2010

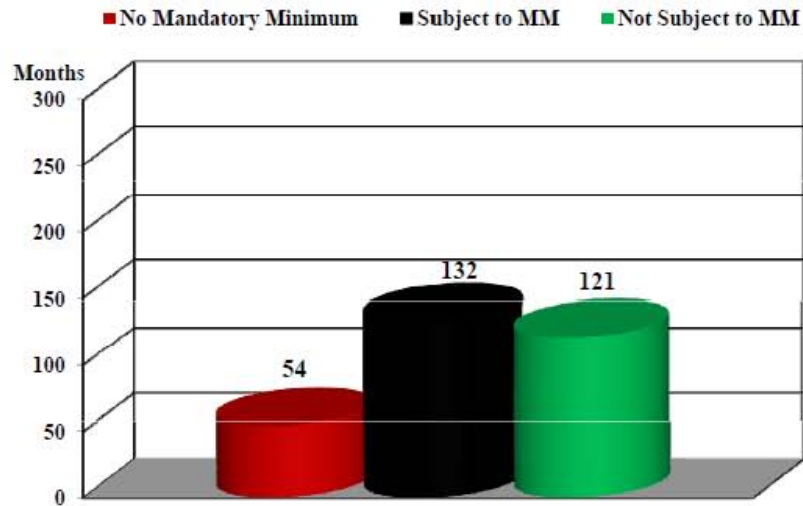


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The average sentence for those child pornography offenders subject to a mandatory minimum penalty (132 months) was higher than the average sentence for child pornography offenders not convicted of an offense carrying a mandatory minimum penalty (54 months)⁷⁷⁵ and child pornography offenders relieved from application of a mandatory minimum penalty (121 months). See Figure 10-7.

⁷⁷⁵ As noted above, of the 837 child pornography cases involving convictions not carrying a mandatory minimum penalty, 98.1% (821 of 837) were convictions for simple possession of child pornography under 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5).

Figure 10-7
Average Sentence Length by Mandatory Minimum Status for
Child Pornography Offenders
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

b. Sentences relative to the applicable guideline range

Table 10-5 compares the position of the sentence relative to the guideline range in sexual abuse cases. Table 10-5 demonstrates that most sexual abuse offenders are sentenced within the guideline range regardless of whether a mandatory minimum penalty applied. The departure and variance rates were similar when comparing all sexual abuse offenders in the aggregate to the subsets of sexual abuse offenders who were convicted of offenses carrying a mandatory minimum penalty and those who remained subject to the mandatory minimum penalty at sentencing.

**Table 10-5
Position Relative to the Guideline Range of Sexual Abuse Offenders
Fiscal Year 2010**

	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	640	336	14	322
Sentence Relative to the Guideline Range (Percent)				
Within Range	60.2	63.7	0.0	66.5
Above Range	5.9	5.9	0.0	6.2
Substantial Assistance §5K1.1	4.5	4.2	100.0	0.0
Other Government Sponsored (no §5K1.1)	11.6	8.9	0.0	9.3
Other Below Range	17.8	17.3	0.0	18.0

Table 10-6 compares the position of sentences relative to the guideline range of child pornography offenders in the aggregate as well as the child pornography offenders convicted of an offense carrying a mandatory minimum penalty, child pornography offenders relieved from application of a mandatory minimum penalty because of substantial assistance, and child pornography offenders who remained subject to the mandatory minimum penalty at sentencing. As demonstrated in Table 10-6, courts imposed within-range sentences less frequently in child pornography cases compared to sexual abuse cases. Furthermore, the downward departure/variance rate in child pornography cases is higher than the rate in any of the other major offense types.⁷⁷⁶

Table 10-6 also demonstrates that the vast majority of all government-sponsored departures and variances were *not* based on a defendant's substantial assistance to the government. Only 3.0 percent of all child pornography offenders received a departure based on substantial assistance – in contrast to 10.4 percent who received a government-sponsored departure or variance for some other reason.

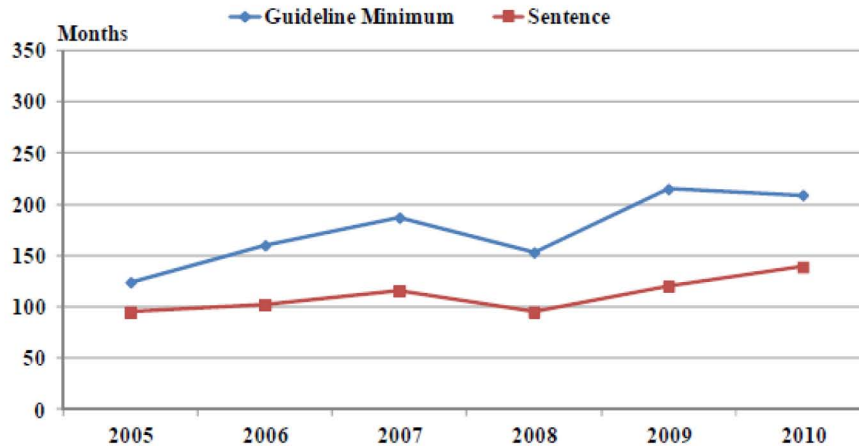
⁷⁷⁶ U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 54 (2009). *See generally* Chapters 8 and 9, *supra*, and Chapter 11, *infra*, for the downward departure/variance rate for the offense types discussed in this report.

Table 10-6
Position Relative to the Guideline Range of Child Pornography Offenders
Fiscal Year 2010

	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	1,677	840	35	805
Sentence Relative to the Guideline Range (Percent)				
Within Range	39.8	42.5	0.0	44.4
Above Range	2.0	2.1	0.0	2.2
Substantial Assistance §5K1.1	3.0	4.2	100.0	0.0
Other Government Sponsored (no §5K1.1)	10.4	9.2	0.0	9.7
Other Below Range	44.8	41.9	0.0	43.7

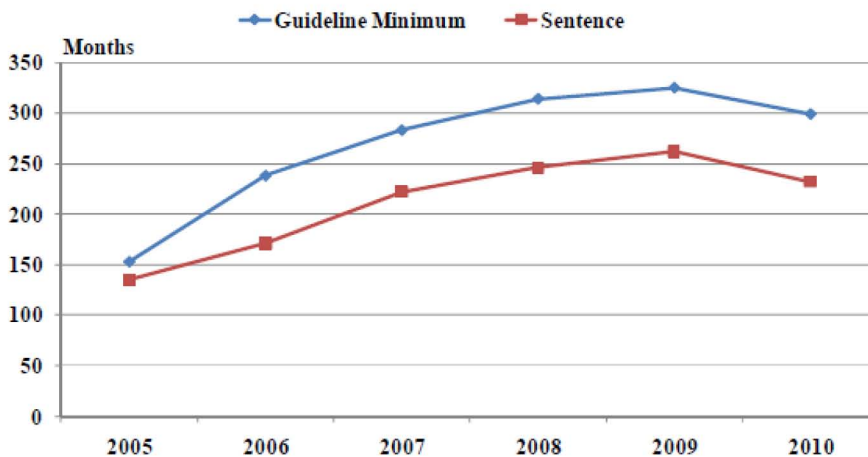
Figures 10-8 and 10-9 show the impact on sentences for sexual abuse offenders from substantial assistance departures and from non-substantial assistance below range sentences. These figures compare the average guideline range minimum to the average sentence imposed on offenders sentenced from fiscal year 2005 to 2010.

Figure 10-8
Average Guideline Minimum and Average Sentence for Offenders Convicted of an Offense
Carrying a Sexual Abuse Mandatory Minimum Penalty
Substantial Assistance Offenders
Fiscal Years 2005 - 2010



SOURCE: U.S. Sentencing Commission 2005 through 2010 Datafile, USSCFY2005–USSCFY2010.

Figure 10-9
Average Guideline Minimum and Average Sentence for Offenders Convicted of an Offense
Carrying a Sexual Abuse Mandatory Minimum Penalty
Non-Substantial Assistance Below Range Offenders
Fiscal Years 2005 - 2010

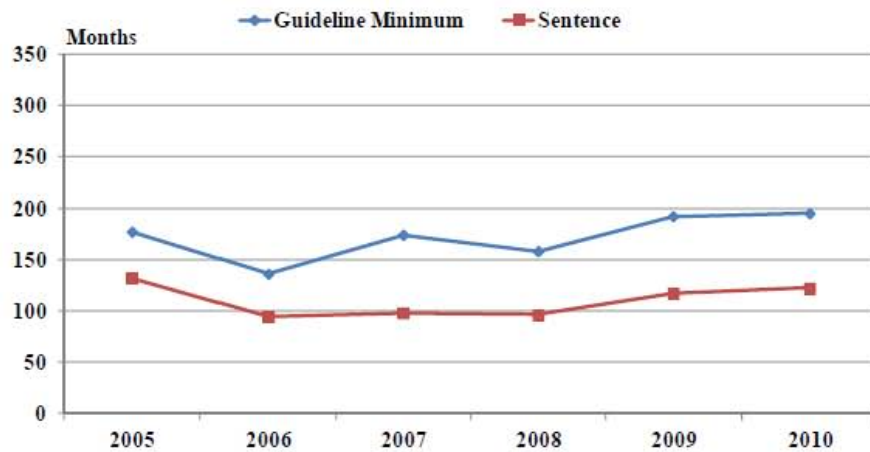


SOURCE: U.S. Sentencing Commission 2005 through 2010 Datafile, USSCFY2005–USSCFY2010.

In fiscal year 2010, the average extent of substantial assistance departures in sexual abuse cases was 35.9 percent (70 months) from the bottom of the otherwise applicable guideline range. In fiscal year 2010, the average extent of non-government sponsored below range sentences (*i.e.*, departures and variances combined) in sexual abuse cases that carried a mandatory minimum penalty was 19.2 percent (59 months) from the bottom of the otherwise applicable guideline range.

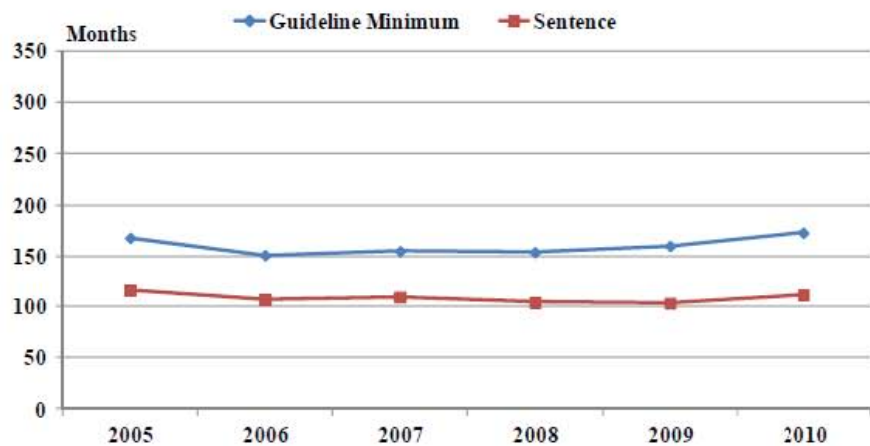
Figures 10-10 and 10-11 show the impact on sentences for child pornography offenders from substantial assistance departures and from non-substantial assistance below range sentences. These figures compare the average guideline range minimum to the average sentence imposed on offenders sentenced from fiscal year 2005 to 2010.

Figure 10-10
Average Guideline Minimum and Average Sentence for Offenders Convicted of an Offense Carrying a Child Pornography Mandatory Minimum Penalty
Substantial Assistance Offenders
Fiscal Years 2005 - 2010



SOURCE: U.S. Sentencing Commission 2005 through 2010 Datafile, USSCFY2005– USSCFY2010.

Figure 10-11
Average Guideline Minimum and Average Sentence for Offenders Convicted of an Offense Carrying a Child Pornography Mandatory Minimum Penalty
Non-Substantial Assistance Below Range Offenders
Fiscal Years 2005 - 2010



SOURCE: U.S. Sentencing Commission 2005 through 2010 Datafile, USSCFY2005– USSCFY2010.

In fiscal year 2010, the average extent of substantial assistance departures in child pornography cases was 31.9 percent (45 months) from the bottom of the otherwise applicable guideline range. In fiscal year 2010, the average extent of non-government sponsored below range sentences (*i.e.*, departures and variances combined) in child pornography cases that carried a mandatory minimum penalty was 36.0 percent (64 months) from the bottom of the otherwise applicable guideline range.

2. *Special Coding Project: Application of Mandatory Minimum Penalties in Child Pornography Cases*

In order to further assess the application of mandatory minimum penalties on child pornography offenders sentenced under USSG §2G2.2 – constituting nearly three out of four federal sex offenders in fiscal year 2010⁷⁷⁷ – the Commission conducted a special coding project of a 20-percent random sample of such cases (336 of 1,669 cases).⁷⁷⁸ That coding project involved an analysis of the charging instrument, judgment and commitment order, presentence report (PSR), and statement of reasons form in each case. The analysis focused on several issues, including two relevant to this report: (1) the nature of the most serious offense of conviction in each case; and (2) whether, in cases in which the sole offense of conviction was simple possession of child pornography, the offense conduct section of PSRs (unless rejected by sentencing courts) involved the offender’s knowing distribution of child pornography to another person.

The Commission is undertaking a broader special coding project of all 1,669 child pornography cases from fiscal year 2010 in which offenders were sentenced under USSG §2G2.2 and will include the results of that analysis in a separate report on child pornography cases that it expects to issue in the coming year. It should be noted that the results of an analysis of a relatively small sample, such as the 20-percent sample studied for this report, should be taken with some degree of caution. The findings of such an analysis are only intended to be preliminary. The findings of an analysis of all 1,669 cases will provide a more accurate empirical description of child pornography cases.

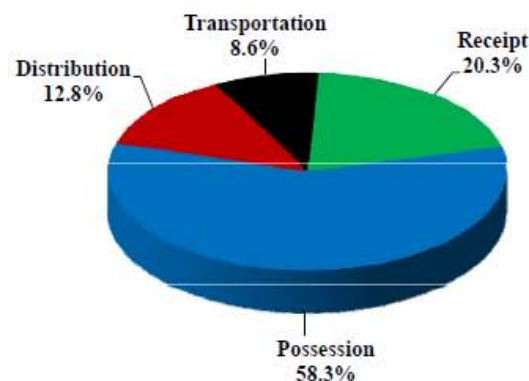
With respect to the first issue, the Commission identified all federal penal statutes under which a conviction resulted in sentencing pursuant to §2G2.2. Those statutes related to child pornography offenses are discussed above. The Commission classified such statutes according

⁷⁷⁷ Of the 2,317 sex offense cases in fiscal year 2010, 72% (n=1,669) were sentenced under USSG §2G2.2. It should be noted that the analyses discussed in the prior portions of this chapter refer to 1,677 child pornography offenders rather than 1,669 offenders. The additional eight offenders were sentenced under the former USSG §2G2.4, which solely applied to offenders convicted of simple possession and which was deleted by consolidation with USSG §2G2.2 on November 1, 2004. *See* USSC App. C, amend. 664. Those eight offenders, although sentenced in fiscal year 2010, committed their offenses before November 1, 2004, and thus were sentenced under the former §2G2.4 to avoid a violation of the *Ex Post Facto* Clause.

⁷⁷⁸ The original analysis included an additional case in which the offender was sentenced under USSG §2G2.2, but where the statute under which the offender was convicted was a federal obscenity statute (prohibiting the distribution of obscenity to a minor) that did not carry a mandatory minimum penalty. The Commission excluded that case from analysis because, although it involved distribution of child pornography and was treated as such under USSG §2G2.2, the offender was not subject to a mandatory minimum penalty.

to the nature of the conduct proscribed; the offense types (in order of most serious to least serious) include distribution, importation, transportation (including shipping and mailing), receipt, possession, and “morphing” offenses. An examination of the charging instrument and judgment and commitment order in each case revealed the most serious offense of conviction.⁷⁷⁹ The results of the Commission’s analysis⁷⁸⁰ are depicted in Figure 10-12. The most serious offense of conviction for the majority (58.3%) of the offenders studied was possession of child pornography.

Figure 10-12
Most Serious Offense of Conviction for Child Pornography Offenders
Fiscal Year 2010 Sample Group



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The Commission’s special coding project also sought to determine whether there was evidence that offenders convicted of possession who did not face any mandatory minimum penalty⁷⁸¹ could have been convicted and sentenced based on distribution, a more serious child pornography offense carrying a mandatory minimum penalty.⁷⁸² Figure 10-13 compares the

⁷⁷⁹ Occasionally, a particular statutory provision includes two or more offense types in the disjunctive (*e.g.*, receipt or distribution in 18 U.S.C. § 2252(a)(2)), which required the Commission to examine the indictment and judgment and commitment order to determine under which prong of a multi-prong statute the defendant was convicted. If the judgment and commitment order referred to multiple offenses disjunctively in a single count of conviction (*e.g.*, “receipt or distribution”), the less serious offense type was chosen.

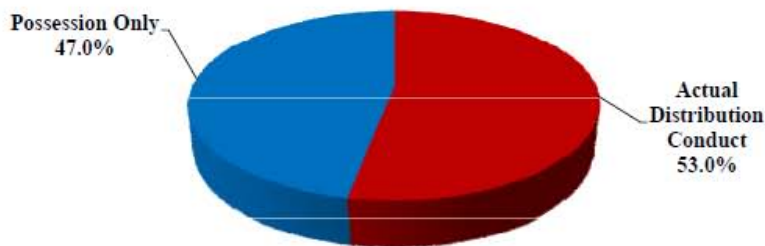
⁷⁸⁰ None of the 336 cases examined involved convictions of importation or morphing offenses.

⁷⁸¹ The 13 offenders convicted of simple possession but who were subject to a ten-year mandatory minimum penalty based on a prior conviction for a sex offense were not included in this analysis. Such offenders are subject to a mandatory minimum ten-year prison term (unless they receive a downward departure based on substantial assistance) and thus differ significantly from first-time sex offenders convicted of simple possession, who face a ten-year maximum penalty.

⁷⁸² An analysis of the offense conduct section of PSRs (except those portions rejected by district courts) in the 183 cases in which offenders were convicted only of possession and who did not receive an enhanced sentence based on a prior conviction for a sex offense revealed that the PSRs typically (but not always) discussed the offense conduct in sufficient detail to determine whether an offender had in fact knowingly distributed child pornography to

percentage of defendants convicted of simple possession who in fact engaged in distribution conduct to the percentage of those who did not. Of the offenders studied, the Commission found that the majority (53.0%) of offenders convicted of only simple possession also engaged in distribution conduct. However, because these offenders were convicted of simple possession, they were not subject to any mandatory minimum penalty.

Figure 10-13
Distribution Conduct Among Offenders Convicted Only of Simple Possession
Fiscal Year 2010 Sample Group



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

The results of this preliminary analysis of a 20-percent sample of child pornography cases suggest that a substantial number of similarly situated offenders are being treated differently under the mandatory minimum penalties applicable to child pornography offenses. Further analysis of this issue will occur in the Commission's comprehensive study of all 1,669 child pornography cases from fiscal year 2010, which will appear in a future report on child pornography offenses. The Commission's comprehensive study of all fiscal year 2010 cases also will examine whether offenders convicted solely of possession also could have been convicted of and sentenced for knowing receipt, which (like distribution but unlike possession) carries a mandatory minimum penalty. The future report also will examine those possession cases with substantial evidence of one or more offenses carrying a mandatory minimum penalty with those possession cases in which no such evidence existed in order to determine whether any material similarities or differences appear in the two types of cases.

another person in violation of 18 U.S.C. §§ 2252(a)(2) or 2252A(a)(2). It should be noted that only those cases in which the offense conduct section of the PSR unequivocally found that the defendant had knowingly distributed child pornography were included in the analysis. Several cases were excluded from the analysis because the PSR mentioned possible distribution (*e.g.*, the defendant used a peer-to-peer file-sharing program) but was unclear whether the defendant *knowingly* distributed. Thus, the percentage of cases in which the Commission found that an offender convicted of possession appeared eligible for prosecution for a distribution offense may be an under-inclusive number.

E. PRISON IMPACT

The number of federal offenders convicted of sex offenses is a small but increasing part of the federal prison population. In 2010, 4.6 percent (8,767 of the 191,757 offenders) in federal prison were sex offenders. Of those 8,767, 52.5 percent (n=4,601) were convicted of an offense carrying a mandatory minimum penalty, 50.4 percent (4,414 of the 8,767) of whom were subject to that penalty at sentencing. In 1995, less than one percent (492 of the 71,972 offenders in federal prison) were sex offenders. Of those 492, 6.5 percent (n=32) were convicted of an offense carrying a mandatory minimum penalty, and all but one of those offenders remained subject to such a penalty at sentencing.

F. SUMMARY

With respect to mandatory minimum penalties and sex offenses, Commission analyses demonstrate the following:

Offenses and Offenders

- In fiscal year 2010, 2,317 (3.2%) offenders were convicted of a sex offense. Of the 2,317 offenders convicted of a sex offense, 640 (27.6%) were convicted of a sexual abuse offense and 1,677 (72.4%) were convicted of a child pornography offense.
- Of the 2,317 offenders convicted of a sex offense, 1,176 (50.8%) were convicted of an offense carrying a mandatory minimum penalty.
- Of the 640 offenders convicted of a sexual abuse offense, 336 (52.5%) were convicted of an offense carrying a mandatory minimum penalty.
 - Among sexual abuse offenders convicted of an offense carrying a mandatory minimum penalty, over three-quarters (76.4%) of the offenders were White, followed by Black (11.9%), Hispanic (8.7%), and Other Race (3.0%) offenders. By comparison, among all offenders convicted of a sexual abuse offense, 55.2 percent were White, followed by Other Race (22.5%), Black (12.5%), and Hispanic (9.7%) offenders.
 - The overwhelming majority of offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty (97.9%) were male.
 - United States citizens accounted for 94.9 percent of offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty.
- Of the 1,677 offenders convicted of a child pornography offense, 840 (50.1%) were convicted of an offense carrying a mandatory minimum penalty.

- o Among child pornography offenders convicted of an offense carrying a mandatory minimum penalty, 88.2 percent were White, followed by Hispanic (6.4%), Black (3.2%), and Other Race (2.2%) offenders.
- o The overwhelming majority of offenders convicted of a child pornography offense carrying a mandatory minimum penalty (99.4%) were male.
- o United States citizens accounted for 97.9 percent of offenders convicted of a child pornography offense carrying a mandatory minimum penalty.
- No district had more than 50 convictions for sexual abuse offenses. Convictions occurred most often in the Districts of Southern Georgia (n=16, 0.7% of all cases sentenced in the district), Northern New York (n=11, 2.5%), Eastern California (n=10, 1.0%), and Northern Georgia (n=10, 1.5%). These four districts together accounted for 14.0 percent of all federal sexual abuse cases.
- No district had more than 50 convictions for child pornography offenses. Convictions occurred most often in Eastern Virginia (n=39, 3.2% of all cases sentenced in the district), Middle Florida (n=34, 2.0%), Southern Florida (n=30, 1.4%), Southern Indiana (n=28, 8.6%), and Western Texas (n=27, 0.4%). These districts together accounted for 18.8 percent of all child pornography cases.
- The vast majority of sexual abuse and child pornography offenders had no prior criminal record at the time they were sentenced and only a very small percentage were in Criminal History Categories IV through VI.

Application and Relief

- In fiscal year 2010, the trial rate for sexual abuse offenders was 15.2 percent – more than twice the rate for sexual abuse offenders not convicted of an offense carrying a mandatory minimum penalty (6.9%). The trial rate for child pornography offenders convicted of an offense carrying a mandatory minimum penalty was 6.4 percent – four times the rate for child pornography offenders not convicted of an offense carrying a mandatory minimum penalty (1.6%).
- In fiscal year 2010, 4.2 percent of offenders convicted of a sexual abuse or child pornography offense carrying a mandatory minimum penalty were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government.
 - o The number of cases is too small to draw any meaningful conclusions about the role of race, gender, or citizenship as it relates to substantial assistance relief in sexual abuse cases.
- Over 60 percent (63.7%) of offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty and 42.5 percent of offenders convicted of a child

pornography offense carrying a mandatory minimum penalty were sentenced within the applicable guideline range.

- o Approximately 13 percent of offenders convicted of a sexual abuse or child pornography offense carrying a mandatory minimum penalty received a government sponsored below range sentence (13.1% and 13.4%, respectively).
- o Offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty received a non-government sponsored below range sentence in 17.3 percent of the cases, compared to 41.9 percent of offenders convicted of a child pornography offense carrying a mandatory minimum penalty.
- The average extent of substantial assistance departures in sexual abuse cases was 35.9 percent (70 months) from the bottom of the otherwise applicable guideline range; the average extent of substantial assistance departures in child pornography cases was 31.9 percent (45 months) from the bottom of the otherwise applicable guideline range.
- The average extent of non-government sponsored below range sentences in sexual abuse cases that carried a mandatory minimum penalty was 19.2 percent (59 months) from the bottom of the otherwise applicable guideline range; the average extent of non-government sponsored below range sentences in child pornography cases that carried a mandatory minimum penalty was 36.0 percent (64 months) below the otherwise applicable guideline range.

Sentencing

- In fiscal year 2010, 95.8 percent of offenders convicted of a sexual abuse offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of a sexual abuse offense who were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - o White offenders were subject to the mandatory minimum penalty at sentencing most often, in 97.3 percent of their offenses carrying such a penalty, followed by Hispanic (96.6%) and Other Race (90.0%) offenders. Black offenders were subject to the mandatory minimum penalty at sentencing the least often, in 87.5 percent of their cases.
 - o Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (96.4% of their cases, compared to 71.4% of cases involving female offenders).

- o Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizen offenders (100.0% of their cases, compared to 95.6% of cases involving United States citizen offenders).
- The average sentence for offenders convicted of a sexual abuse offense who were subject to the mandatory minimum penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 235 months. The average sentence for those offenders who obtained relief from the mandatory minimum penalty was 139 months. The average sentence for offenders convicted of a sexual abuse offense not carrying a mandatory minimum penalty was 73 months.
- In fiscal year 2010, 95.8 percent of offenders convicted of a child pornography offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of a child pornography offense who were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - o Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 100.0 percent of their offenses carrying such a penalty, followed by Hispanic (96.3%) and White (95.7%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 94.4 percent of their cases.
 - o Female offenders were subject to the mandatory minimum penalty at sentencing more often than male offenders (100.0% of their cases, compared to 95.8% of cases involving male offenders).
 - o Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizen offenders (100.0% of their cases, compared to 95.7% of cases involving United States citizen offenders).
- The average sentence for offenders convicted of a child pornography offense who remained subject to the mandatory minimum penalty (*i.e.*, who did not receive relief for rendering substantial assistance) was 132 months. The average sentence for those offenders who obtained relief from the mandatory minimum penalty was 121 months. The average sentence for offenders convicted of a child pornography offense not carrying a mandatory minimum penalty was 54 months.

Prison Impact

- At the end of fiscal year 2010, 4.6 percent of the offenders in the custody of the Bureau of Prisons were convicted of a sex offense. Of those offenders, 52.2 percent were convicted of an offense carrying a mandatory minimum penalty. The percentage of prisoners convicted of a sex offense has slowly increased over time, rising from less than

one percent in 1995 (of those prisoners, only 6.5 were convicted of an offense carrying a mandatory minimum penalty).

Further Study

- The Commission's special coding project of a 20-percent random sample of child pornography cases indicates that approximately half of offenders convicted of possession (who did not face a mandatory minimum penalty) could have been prosecuted and sentenced for distribution of child pornography, an offense carrying a mandatory minimum penalty.
- The preliminary analysis of data concerning child pornography offenses contained in this report will be followed up by a more comprehensive analysis of child pornography offenses and offenders in a future report issued by the Commission.

MANDATORY MINIMUM PENALTIES FOR IDENTITY THEFT OFFENSES

A. INTRODUCTION

This chapter analyzes the application of mandatory minimum penalties for identity theft offenses. First, this chapter provides an overview of the aggravated identity theft statute,⁷⁸³ related offenses, and the applicable sentencing guideline provisions. Second, this chapter provides a statistical overview of identity theft offenses and the application of section 1028A. Third, this chapter analyzes the effect of section 1028A on sentencing outcomes, including sentence length and rates of relief from the mandatory penalty. Finally, this chapter presents findings with respect to mandatory minimum penalties and identity theft offenses.

As used in this chapter, the term “identity theft offenses” refers to the offenses established at 18 U.S.C. § 1028 (general identity theft) and 18 U.S.C. § 1028A (aggravated identity theft), as well as any other offense sentenced under the fraud guideline, §2B1.1,⁷⁸⁴ that received the 2-level enhancement for identity theft conduct.⁷⁸⁵ The term “identity theft offender” means a person who committed an identity theft offense.

There are other offense types, particularly immigration offenses, in which an offender may have engaged in identity theft or similar conduct but was not convicted of identity theft under section 1028 or aggravated identity theft under section 1028A. Those cases are not included in the Commission’s analyses because such an offender was not convicted of an identity theft offense, and the guideline provisions applicable to immigration offenses do not include identity theft enhancements.⁷⁸⁶ As a result, there is no reliable way to identify such cases. The Commission’s analysis of identity theft offenses therefore may be under-inclusive.

⁷⁸³ 18 U.S.C § 1028A.

⁷⁸⁴ USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).

⁷⁸⁵ The enhancement for identity theft is found at USSG §2B1.1(b)(10)(C). Effective November 1, 2011, this provision will be redesignated as §2B1.1(b)(11)(C).

⁷⁸⁶ *See, e.g.*, USSG §§2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).

B. OFFENSES AND RELATED GUIDELINES

1. *Identity Theft Offenses*

Congress created the offense of aggravated identity theft, codified at 18 U.S.C. § 1028A, in 2004.⁷⁸⁷ That section provides, “Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.”⁷⁸⁸ The enumerated felony offenses include theft offenses,⁷⁸⁹ offenses involving false statements and fraud,⁷⁹⁰ offenses related to nationality and citizenship,⁷⁹¹ offenses related to passports and visas,⁷⁹² and immigration offenses.⁷⁹³

Section 1028A requires that the mandatory two-year term of imprisonment be imposed consecutively to “any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the

⁷⁸⁷ See Identity Theft Penalty Enhancement Act, Pub. L. No. 108–275, § 2, 118 Stat. 831 (2004).

⁷⁸⁸ “[T]he term ‘means of identification’ means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual,” and includes names, social security numbers, dates of birth, driver’s licenses, taxpayer identification numbers, biometric data, and access devices. 18 U.S.C. § 1028(d)(7). In turn, the term “access device” means “any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number . . . or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value” 18 U.S.C. § 1029(e)(1), incorporated by reference in 18 U.S.C. § 1028(d)(7).

⁷⁸⁹ See 18 U.S.C. § 1028A (c)(1) (“[18 U.S.C. §] 641 (relating to theft of public money, property, or rewards), [] 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or [] 664 (relating to theft from employee benefit plans”).

⁷⁹⁰ § 1028A (c)(3) (“[Title 18, United States Code,] section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm”); § 1028A(c)(4) (“any provision contained in [chapter 47 of title 18, United States Code] (relating to fraud and false statements), other than this section or section 1028(a)(7)”; § 1028A(c)(5) (“any provision contained in chapter 63 [of Title 18, United States Code] (relating to mail, bank, and wire fraud)”; § 1028A(c)(8) (“section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. § 6823) (relating to obtaining customer information by false pretenses”); § 1028A(c)(11) (“section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. §§ 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act”).

⁷⁹¹ § 1028A (c)(2) (“[Title 18, United States Code,] section 911 (relating to false personation of citizenship)”; § 1028A(c)(6) (“any provision contained in chapter 69 [of title 18, United States Code] (relating to nationality and citizenship”).

⁷⁹² § 1028A (c)(7) (“any provision contained in chapter 75 [of title 18, United States Code] (relating to passports and visas”).

⁷⁹³ § 1028A (c)(9) (“section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. §§ 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card”); § 1028A(c)(10) (“any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. § 1321 *et seq.*) (relating to various immigration offenses”).

means of identification was transferred, possessed, or used.”⁷⁹⁴ Moreover, the statute directs the court not to reduce any sentence for the underlying felony, assuming the defendant is convicted separately of the underlying felony, to “compensate for, or otherwise take into account, any separate term of imprisonment”⁷⁹⁵ to be imposed for a violation of section 1028A.

The statute has a feature by which sentences for multiple violations of section 1028A may be “stacked.” As described above, the sentencing court must impose the mandatory two-year penalty for the first section 1028A count and must run that sentence consecutively to any sentence imposed for the underlying felony. However, the court may in its discretion run the sentence for any additional 1028A counts “concurrently, in whole or in part, [] with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of [section 1028A].”⁷⁹⁶ Thus, section 1028A does not require that multiple counts of conviction be served consecutively, or “stacked,” with one another.

Other statutes penalize conduct that is similar to aggravated identity theft; however, unlike section 1028A, those statutes do not carry mandatory minimum penalties. The general identity theft statute, 18 U.S.C. § 1028, which does not carry a mandatory minimum,⁷⁹⁷ proscribes a broader range of identity theft activities than section 1028A. Thus, all conduct that violates section 1028A also violates section 1028.⁷⁹⁸ Conduct that violates section 1028 often will also violate section 1028A (depending primarily on the underlying offense), though not necessarily.⁷⁹⁹ Additionally, in some circumstances, conduct covered by the aggravated identity theft statute may be punishable under various fraud offense statutes, which do not carry mandatory minimum penalties.⁸⁰⁰ These overlapping statutes thus provide multiple charging options for offenders who engage in identity theft.

⁷⁹⁴ § 1028A(b)(2).

⁷⁹⁵ § 1028A(b)(3).

⁷⁹⁶ § 1028A(b)(4).

⁷⁹⁷ *See* 18 U.S.C. § 1028(b).

⁷⁹⁸ A person violates section 1028 if he or she, among other acts, “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit . . . or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.” 18 U.S.C. § 1028(a)(7). *See* United States v. Bonilla, 579 F.3d 1233 (11th Cir. 2009) (concluding that the defendant’s indictment and conviction of both identity theft in violation of section 1028(a)(7) and aggravated identity theft in violation of section 1028A(a)(1) violated the double jeopardy clause).

⁷⁹⁹ For example, in addition to using a means of identification in connection with certain offenses, section 1028 proscribes the unlawful production or transfer of an identification document, authentication feature, or a false identification document. *See* 18 U.S.C. § 1028(a)(1) & (2). This conduct does not necessarily give rise to criminal liability for aggravated identity theft under section 1028A.

⁸⁰⁰ *See, e.g.*, 18 U.S.C. § 1029 (access device fraud), 18 U.S.C. § 1343 (wire fraud), and 42 U.S.C. § 408 (a)(7) (fraudulent use of a social security account number).

The exercise of prosecutorial discretion in charging identity theft offenses is limited to some degree by the differing proof requirements of the aggravated identity theft offense, compared to identity theft offenses that do not carry a mandatory minimum penalty. In *Flores-Figueroa v. United States*,⁸⁰¹ the Supreme Court held that to establish the section 1028A element that the defendant “knowingly” transferred, possessed, or used a means of identity of another person, the government must prove that the defendant both knew that he or she was transferring, possessing, or using a means of identification *and* knew that the means of identification in fact belonged to another person.⁸⁰² Although a similar proof requirement may exist under the general identity theft statute insofar as the government alleges the defendant violated section 1028(a)(7) (“knowingly transfers, possesses or uses, without lawful authority, a means of identity of another person”)⁸⁰³ other sections of the general identity theft offense, other fraud statutes, and the guidelines identity-theft enhancement impose less stringent proof requirements than section 1028A.

2. *Related Guidelines*

The guideline applicable to fraud and other offenses (including non-aggravated identity theft), USSG §2B1.1 applies to identity theft offenders generally, as it establishes a 2-level enhancement if the offense involved certain identity theft conduct. As relevant here, an offender is subject to the enhancement pursuant to §2B1.1(b)(10)(C) if the offense involved “the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification” or “the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification.”⁸⁰⁴ Conduct that triggers the guideline enhancement is also generally punishable under section 1028A. First, the guideline enhancement requires the commission of an underlying offense, that is, an offense covered by the §2B1.1 guideline. Those offenses include many of the enumerated felonies in section 1028A, such as mail fraud, wire fraud, bank fraud, and various social security frauds. Second, many, though not all,⁸⁰⁵ of the acts that trigger the guideline enhancement may also violate section 1028A, such as using another’s name and social security number to obtain a bank loan or a credit card.⁸⁰⁶ The guideline also provides incremental enhancements based on

⁸⁰¹ 129 S. Ct. 1886 (2009).

⁸⁰² *See id.* at 1894.

⁸⁰³ *See id.* at 1891 (explaining that “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element”).

⁸⁰⁴ *See* USSG §2B1.1(b)(10).

⁸⁰⁵ The enhancement and section 1028A are not entirely coextensive. For example, if the offender used the means of identification only to purchase consumer goods or merely forged a signature to cash a stolen check, he or she may have committed aggravated identity theft, but §2B1.1(b)(10)(C) likely would not apply. *See* USSG §2B1.1, comment. (n.9(C)(iii)).

⁸⁰⁶ *See* USSG §2B1.1, comment. (n.9(C)(ii)).

the amount of loss incurred in the offense⁸⁰⁷ and an enhancement of two, four, or six levels based on the number of victims involved.⁸⁰⁸

The guideline provision applicable to convictions of an offense under section 1028A reflects the statute's fixed, mandatory penalty by providing that "the guideline sentence is the term of imprisonment required by statute."⁸⁰⁹ In addition, the guidelines provide a non-exhaustive list of factors for the court to consider in exercising its discretion concerning multiple section 1028A counts. Those factors are: (1) the nature and seriousness of the underlying offenses (*e.g.*, whether the underlying offenses are crimes of violence); (2) whether the underlying offenses are able to be grouped for guidelines purposes and, if so, specifying that multiple section 1028A counts in that case "should run concurrently with one another"; and (3) whether the purposes of sentencing as specified at 18 U.S.C. § 3553(a)(2) "are better achieved by imposing a concurrent or a consecutive sentence" for the multiple section 1028A counts.⁸¹⁰

C. STATISTICAL OVERVIEW

Identity theft offenses constitute a small percentage of federal criminal cases. Of the 73,239 offenders sentenced in fiscal year 2010 and included in this analysis, 2.6 percent (n=1,870) were convicted of identity theft offenses. Of the 1,870 cases involving identity theft offenses, 42.6 percent (n=797) involved a conviction of an offense under section 1028A. *See* Figure 11-1. Cases involving a conviction of an offense under section 1028A were only 0.9 percent of all federal criminal cases.

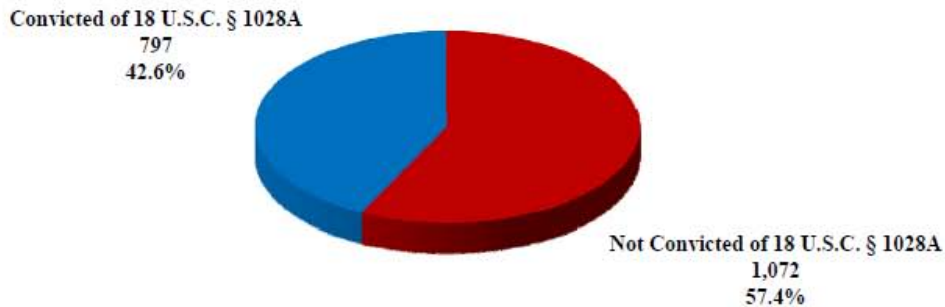
⁸⁰⁷ *See* USSG §2B1.1(b)(1).

⁸⁰⁸ *See* USSG §2B1.1(b)(2). Ten is the minimum number of victims triggering an increase.

⁸⁰⁹ *See* USSG §2B1.6 (Aggravated Identity Theft).

⁸¹⁰ *See* USSG §5G1.2, comment. (n.2(B)).

Figure 11-1
Percent of Identity Theft Offenders Convicted of an Offense Under
18 U.S.C § 1028A
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Although identity theft offenses are only a small percentage of the federal criminal docket, the number of offenders convicted of section 1028A has increased since the Commission began collecting data concerning those offenders.⁸¹¹ Of all offenders for whom the Commission received sentencing information in fiscal year 2006, less than one percent (0.4%, n=309) were convicted of an offense under section 1028A.⁸¹²

Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 690 (86.6%) were also convicted of at least one additional felony offense. The type of additional felony offenses in these cases can be determined by reference to the primary guideline provision applicable at sentencing. Of the 797 offenders convicted of an offense under section 1028A, 71.1 percent (n=567) were sentenced pursuant to USSG §2B1.1; 13.4 percent (n=107) were sentenced pursuant to USSG §2B1.6 because they were convicted only of violating section 1028A; and 10.8 percent (n=86) were sentenced pursuant to guidelines relating to immigration offenses. The remaining offenders were sentenced under other guidelines.⁸¹³

A discussion of several statistical analyses of identity theft offenses – using Commission data from fiscal year 2010 – is set forth below.

⁸¹¹ The Commission began identifying offenders convicted of violating 18 U.S.C. § 1028A beginning with the data for fiscal year 2006 (Congress created the offense in July 2004). In order to assess the prison impact of the mandatory penalty, Commission data files were combined with a Bureau of Prisons data file to determine how many offenders were in prison, what percentage of offenders at the end of each fiscal year were in prison due to conviction of an offense under section 1028A, and what percentage of prisoners were subject to the mandatory penalty at sentencing. All statistics are based on what offenders are in prison as of September 30 of the respective year (the end of the fiscal year).

⁸¹² There were 575 convictions of offenses under section 1028A in fiscal year 2007 (0.8% of all offenders), 904 in fiscal year 2008 (1.2% of all offenders); and 935 in fiscal year 2009 (1.1% of all offenders).

⁸¹³ See Table D-19 (Average Sentence by Guideline for Identity Theft Offenders (Fiscal Year 2010)) in Appendix D of this Report.

1. *Demographic Characteristics of Identity Theft Offenders*

Table 11-1 presents the demographic characteristics of all identity theft offenders in fiscal year 2010. This information is then compared to the demographic characteristics of identity theft offenders convicted of an offense under section 1028A; identity theft offenders convicted of an offense under section 1028A but relieved from its mandatory penalty because they rendered substantial assistance; and identity theft offenders convicted of an offense under section 1028A and subject to the mandatory penalty at sentencing. Table 11-2 presents information about the criminal histories of those groups of offenders.

**Table 11-1
Demographic Characteristics of Identity Theft Offenders
Fiscal Year 2010**

	All Identity Theft Offenders	Convicted of 18 U.S.C. § 1028A	Relieved of Application of 18 U.S.C. § 1028A	Subject to 18 U.S.C. § 1028A at Sentencing
Total (# of offenders)	1,870	797	124	673
Race of Offender (Percent)				
White	29.9	32.8	27.6	33.7
Black	39.7	40.2	44.7	39.4
Hispanic	25.7	22.3	21.1	22.5
Other	4.7	4.7	6.5	4.3
Citizenship of Offender (Percent)				
United States Citizen	70.3	74.4	83.1	72.8
Non-Citizen	29.7	25.6	16.9	27.2
Gender of Offender (Percent)				
Male	72.7	71.8	62.9	73.4
Female	27.3	28.2	37.1	26.6

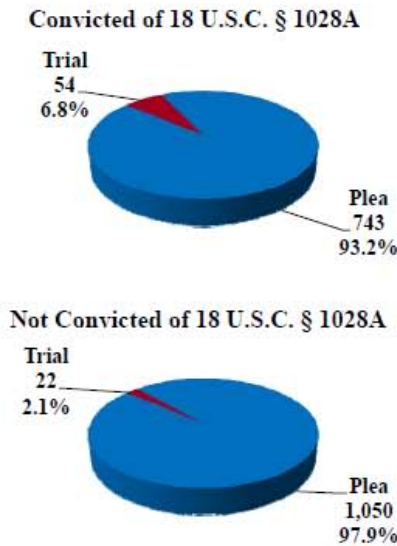
Table 11-2
Criminal History of Identity Theft Offenders
Fiscal Year 2010

Criminal History Category	All Offenders	Convicted of 18 U.S.C. § 1028A	Relieved of Application of 18 U.S.C. § 1028A	Subject to 18 U.S.C. § 1028A at Sentencing
Total (# of offenders)	1,870	797	124	673
Criminal History Category (Percent)				
I	52.2	45.4	49.6	44.6
II	9.9	10.5	9.2	10.8
III	13.1	12.2	7.6	13.1
IV	7.0	8.8	10.1	8.6
V	6.0	8.0	6.7	8.3
VI	11.9	15.0	16.8	14.7

2. *Guilty Pleas and Trials*

Identity theft offenders convicted of an offense under section 1028A went to trial more often than identity theft offenders who were not convicted of an offense under section 1028A. Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 6.8 percent (n=54) proceeded to trial. By contrast, of the 1,072 identity theft offenders not convicted of an offense under section 1028A, 2.1 percent (n=22) proceeded to trial. *See* Figure 11-2.

Figure 11-2
Plea and Trial Rates of Identity Theft Offenders by Mandatory Minimum Status
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

3. *Geographic Variations*

Cases involving a conviction of an offense under section 1028A were primarily concentrated in three circuits. Of the 797 cases in fiscal year 2010 that involved a conviction of an offense under section 1028A, 23.8 percent (n=190) were from district courts in the Eleventh Circuit, 16.1 percent (n=128) were from district courts in the Ninth Circuit, and 14.4 percent (n=115) were from district courts in the Fourth Circuit. Thus, over half (54.3%, n=433) of the 797 cases involving the aggravated identity theft mandatory penalty came from district courts in those three circuits.⁸¹⁴ By way of comparison, 36.6 percent of all federal cases sentenced in fiscal year 2010 came from district courts in those three circuits.⁸¹⁵

Cases involving a conviction of an offense under 1028A were more geographically dispersed at the district level than at the circuit level. Nonetheless, a disproportionately large number of cases involving a conviction of an offense under section 1028A came from only three judicial districts. The Southern District of Florida had significantly more cases involving a conviction of an offense under section 1028A than other districts. Of the 797 cases in fiscal year 2010 that involved a conviction of section 1028A, 103 (12.9%) were from the Southern District of Florida. By way of comparison, only 3.0 percent of all federal cases sentenced in fiscal year 2010 came from that district.⁸¹⁶ Two other districts reported 30 or more cases that involved a

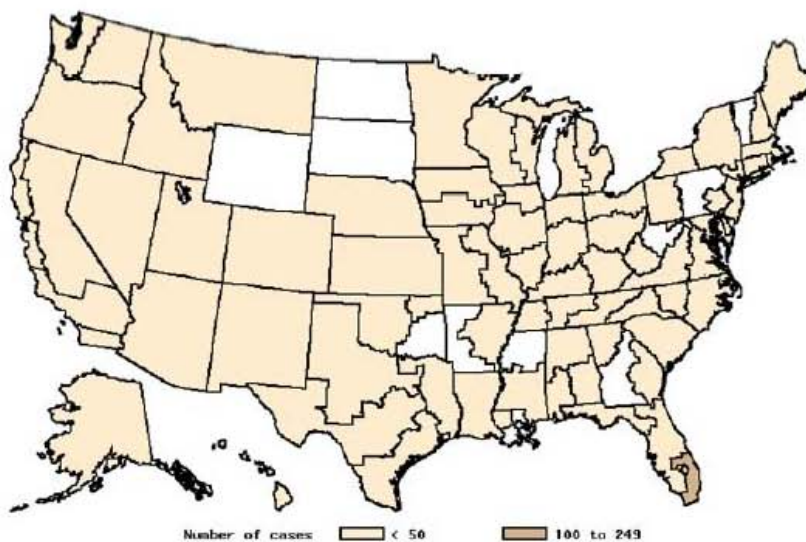
⁸¹⁴ See Table D-18 (Mandatory Minimum Status for Identity Theft Offenders in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁸¹⁵ See Table D-1 (Mandatory Minimum Status of Cases in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁸¹⁶ *Id.*

conviction of an offense under section 1028A: 37 in Eastern Pennsylvania (comprising 4.6% of all cases involving a conviction of section 1028A compared to 1.1% of all federal cases) and 30 in Eastern Virginia (comprising 3.7% of all cases involving a conviction of section 1028A compared to 2.5% of all federal cases). Sixty-six districts reported fewer than ten cases involving a conviction of an offense under section 1028A and 12 reported having no cases involving a conviction of an offense under section 1028A.⁸¹⁷ See Figure 11-3.

Figure 11-3
Number of Offenders Convicted of an Offense Under 18 U.S.C. § 1028A
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Cases involving a conviction of an offense under section 1028A, while geographically concentrated in only a few districts, comprised only a small percentage of any district's criminal case docket. In fiscal year 2010, only five of the 94 federal districts reported that more than four percent of the total criminal case docket involved a conviction of an offense under section 1028A: Hawaii (5.1%, n=8), Northern Alabama (4.9%, n=20), Southern Florida (4.8%, n=103), Western Washington (4.3%, n=28), and Eastern Pennsylvania (4.1%, n=37).

4. *Application of Section 1028A*

Because the statutes punishing identity theft overlap in the conduct they proscribe, and only section 1028A carries a mandatory minimum penalty, the Commission conducted additional analyses to determine whether any specific offense or offender characteristics are associated with convictions of offenses under section 1028A. These analyses indicate that identity theft offenders who commit more severe identity theft offenses or who have more significant criminal

⁸¹⁷ See Table D-18 In Appendix D of this Report.

histories are generally more likely to be convicted of an offense under section 1028A than identity theft offenders with less severe offenses or who have less significant criminal histories.

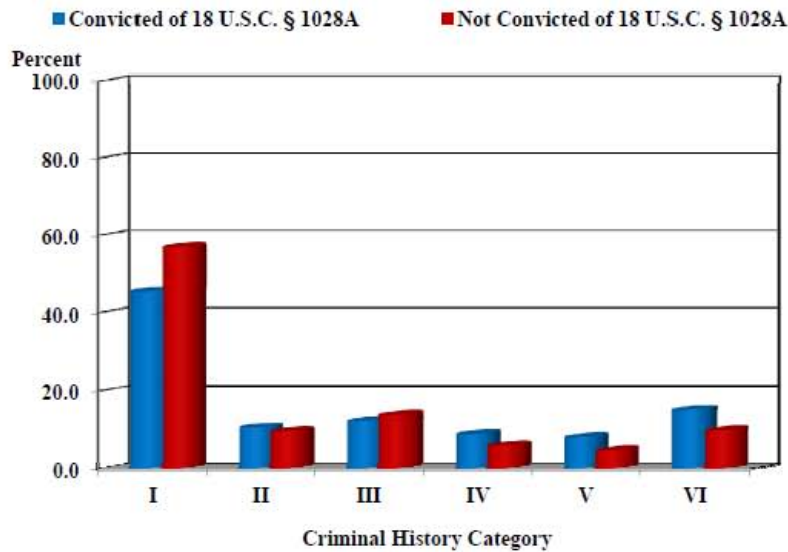
As an initial matter, it does not appear that offender demographic characteristics are associated with the application of section 1028A. In fiscal year 2010, there are only minimal demographic differences between identity theft offenders convicted of an offense under section 1028A and identity theft offenders who were not. *See* Table 11-1.

With respect to offense severity, it appears that identity theft offenders who committed somewhat more severe offenses, as measured by the amount of the loss and the number of victims involved in the offense, were more likely to be convicted of an offense under section 1028A. The Commission compared the amount of loss and the number of victims among identity theft offenders sentenced pursuant to USSG §2B1.1 by mandatory minimum status.⁸¹⁸ Identity theft cases involving a conviction of an offense under section 1028A had a median loss amount (\$75,836) that was 28.2 percent higher than the median loss amount in identity theft cases not involving a conviction of an offense under section 1028A (\$54,400). Additionally, identity theft cases involving a conviction of an offense under section 1028A were more likely to have ten or more victims (in 39.5% of the cases) than identity theft cases not involving a conviction of an offense under section 1028A (in 31.5% of the cases).

With respect to criminal history, it appears that identity theft offenders with somewhat more significant criminal histories also were more likely to be convicted of an offense under section 1028A. *See* Figure 11-4. For example, a higher percentage of identity theft offenders convicted of an offense under section 1028A were in Criminal History VI (15.0%, n=114) than identity theft offenders not convicted of an offense under section 1028A (9.7%, n=104). Conversely, a lower percentage of identity theft offenders convicted of an offense under section 1028A were in Criminal History Category I (45.4%, n=345) than identity theft offenders not convicted of section 1028A (56.9%, n=610).

⁸¹⁸ USSG §2B1.1 contains specific offense characteristics that enhance the defendant's offense level based on the amount of loss and the number of victims involved in the offense. *See* USSG §2B1.1(b)(1) & (2).

Figure 11-4
Criminal History Category of Identity Theft Offenders by Mandatory Minimum Status
Fiscal Year 2010



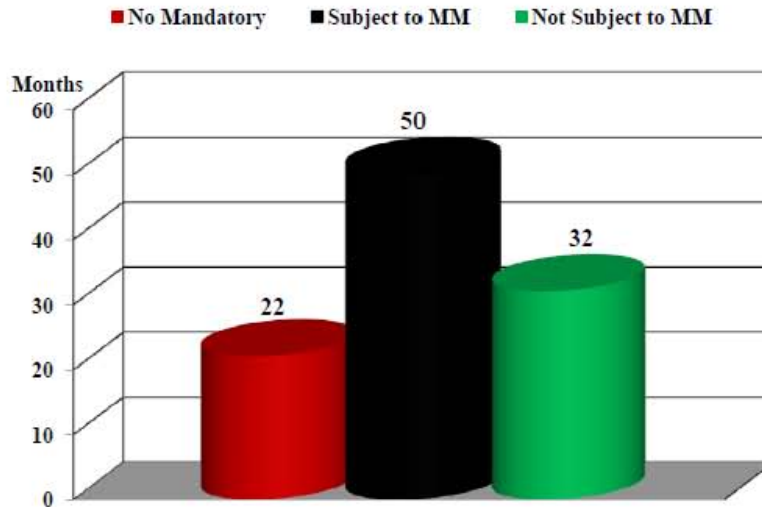
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

D. SENTENCING OUTCOMES

1. Sentence Length

Identity theft offenders convicted of an offense under section 1028A received longer sentences, regardless of whether they received relief from the mandatory penalty at sentencing, than identity theft offenders not convicted of an offense under section 1028A. In fiscal year 2010, identity theft offenders not convicted of an offense under section 1028A received an average sentence of 22 months. Identity theft offenders convicted of an offense under section 1028A and who were subject to the mandatory penalty at sentencing received an average sentence of 50 months. Identity theft offenders convicted of an offense under section 1028A but who were relieved of the mandatory penalty at sentencing received an average sentence of 32 months. *See* Figure 11-5.

Figure 11-5
Average Sentence Length for Identity Theft Offenders by
Mandatory Minimum Status
Fiscal Year 2010



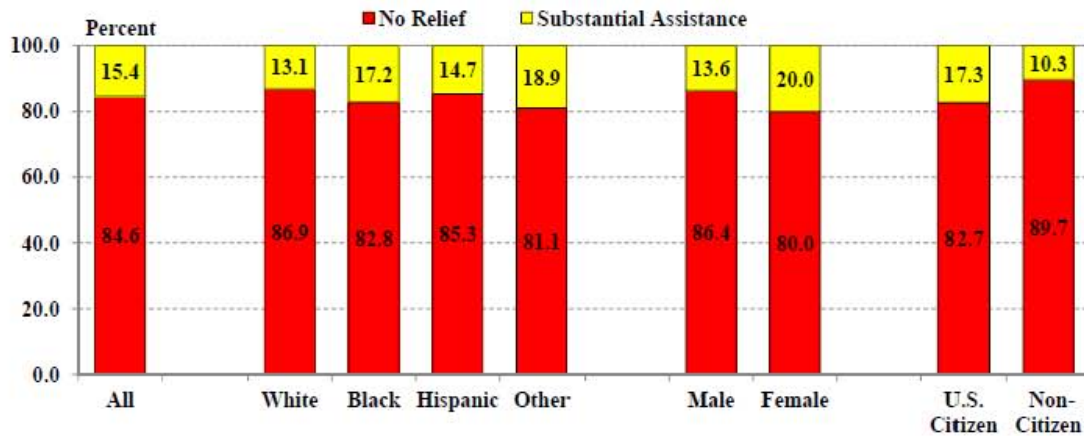
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

2. *Relief from the Mandatory Minimum Penalty*

Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 15.4 percent (n=123) were relieved of its mandatory penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government. *See* Figure 11-6. Of the 123 offenders who were relieved of the mandatory minimum penalty, 44.7 percent (n=55) received a sentence that was less than the mandatory minimum penalty (*i.e.*, less than two years). Offenders relieved of the mandatory minimum penalty received, on average, sentences that were 48.7 percent below the guideline minimum.

Figure 11-6 presents the demographic characteristics of offenders convicted of an offense under section 1028A and the rates of relief from the mandatory minimum penalty.

Figure 11-6
Percent of Identity Theft Offenders Convicted of an Offense Under
18 U.S.C. § 1028A
Who Were Relieved of the Penalty
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

There were only slight differences in the severity of offenses committed by offenders who were relieved of the mandatory penalty and offenses committed by those who were not relieved of the mandatory penalty. The Commission compared the amount of the loss and the number of victims for identity theft offenders convicted of an offense under section 1028A and sentenced pursuant to §2B1.1 because of another count of conviction.⁸¹⁹ Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 71.1 percent (n=567) were sentenced pursuant to §2B1.1 and are therefore included in this analysis. Of these 567 offenders, 81.1 percent (n=460) were subject to the mandatory penalty and 18.8 percent (n=107) were relieved of the mandatory penalty. Offenders subject to the mandatory penalty had a median loss amount of \$71,452 and 38.3 percent (n=176) committed an offense involving ten or more victims, while offenders relieved of the mandatory penalty had a median loss amount of \$86,258 and 43.9 percent (n=47) committed an offense involving ten or more victims. *See* Table 11-3.

⁸¹⁹ Accordingly, this analysis of offense severity and rates of relief does not include identity theft offenders whose only count of conviction was of an offense under section 1028A or, by virtue of another count of conviction, were sentenced pursuant to a guideline provision other than §2B1.1. The amount of the loss and number of victims are not available for those offenders because the applicable guideline provisions did not call for the sentencing court to make those calculations to determine the offense level.

Table 11-3
Guideline Sentencing Characteristics of Identity Theft Offenders
Fiscal Year 2010

Specific Offense Characteristics	Convicted of 18 U.S.C. § 1028A	Relieved of Application of 18 U.S.C. § 1028A	Subject to 18 U.S.C. § 1028A at Sentencing
Sentenced Under §2B1.1 (# of offenders)	567	107	460
Characteristics			
More than 10 victims (percent)	39.3	43.9	38.3
Median Loss	\$75,836	\$86,258	\$71,452

There was not an association between criminal history and rates of relief from the mandatory penalty. *See* Table 11-2, *supra*. The proportion of offenders in each criminal history category is generally similar, regardless of whether the offender was relieved of the mandatory penalty.

3. *Stacking of Multiple Counts*

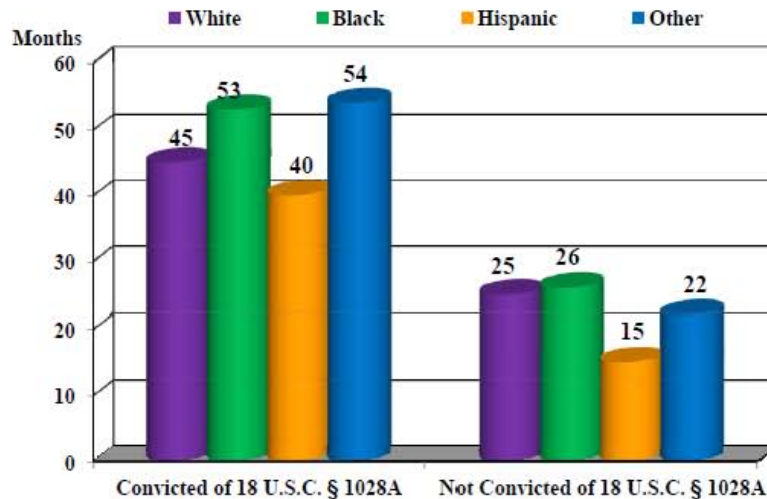
Of the 797 cases in fiscal year 2010 that involved a conviction of an offense under section 1028A, 10.2 percent (n=82) involved convictions of multiple counts of an offense under section 1028A. In 69 of those 82 cases, the court exercised its discretion to impose a concurrent two-year sentence for the multiple counts of conviction of an offense under section 1028A. In the remaining 13 cases, the court imposed consecutive sentences for the multiple counts of conviction of an offense under section 1028A.⁸²⁰

4. *Demographic Characteristics and Average Sentence Length*

As noted above, demographic differences do not appear to affect the application of section 1028A to identity theft offenders. *See* Figure 11-7. Identity theft offenders convicted of an offense under section 1028A received longer average sentences than offenders not convicted of an offense under section 1028A, regardless of race. However, among those identity theft offenders to whom section 1028A applies, the average length of sentence imposed differs by the offender's race. Among those offenders, Other Race and Black offenders received average sentences that were somewhat longer (54 and 53 months, respectively) than their White and Hispanic counterparts (45 and 40 months, respectively).

⁸²⁰ This number of cases is too small to allow for any meaningful conclusions about offense severity and criminal history. The Commission's analysis revealed, however, that the median loss amount for these cases was \$269,368. Six of the 13 cases involved loss amounts in excess of \$1 million, and five of the 13 involved offenders with a Criminal History Category VI. The Commission further analyzed the loss amounts and criminal history categories of offenders convicted of multiple counts of an offense under section 1028A who did not receive consecutive mandatory penalties. Of the 69 cases in which the offender was convicted of multiple counts of 1028A and the court did not impose consecutive mandatory penalties, 59 were sentenced under §2B1.1. These 59 offenders had a median loss amount of \$102,214; 28 (47.5%) were in Criminal History Category I; and 10 (17.0%) were in Criminal History Category VI.

Figure 11-7
Average Sentence by Race and Mandatory Minimum Status of Identity Theft Offenders
Fiscal Year 2010



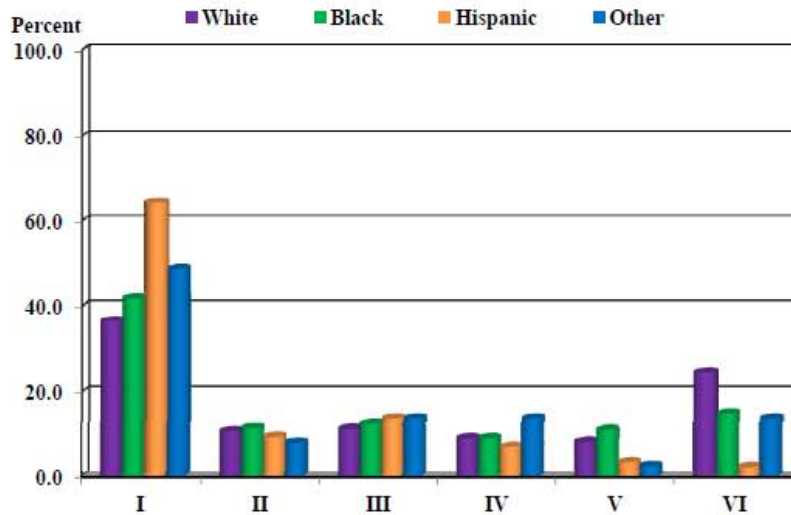
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

To study why Other Race and Black offenders convicted of an offense under section 1028A received longer sentences than White and Hispanic offenders, the Commission conducted additional analyses related to: offense severity, criminal history, “stacking” of multiple counts of section 1028A, and relief from application of section 1028A. First, among identity theft offenders convicted of an offense under section 1028A, Other Race and Black offenders tend to be convicted of more severe offenses than White and Hispanic offenders, as measured by the amount of loss and the number of victims involved in the offense. The median loss amount in cases involving Black offenders convicted of an offense under section 1028A was \$111,323, which was the highest median loss amount among racial groups and 46.8 percent higher than the median loss amount for all identity theft offenders convicted of an offense under section 1028A (\$75,836). Other Race offenders convicted of an offense under section 1028A had the next highest median loss amount (\$77,518), followed by Hispanic offenders (\$51,021), and White offenders (\$49,615). Cases involving Other Race and Black offenders convicted of an offense under section 1028A were also more likely to have ten or more victims (50.0% and 40.8% of the cases, respectively) than cases involving White and Hispanic offenders convicted of an offense under section 1028A (34.0% and 26.6% of the cases, respectively).

Second, the criminal history of identity theft offenders convicted of an offense under section 1028A does not appear to be associated with average sentence length. For example, White offenders convicted of an offense under section 1028A, who received the second shortest average sentences, had the smallest percentage of offenders in Criminal History Category I (36.4%, n=88) of any racial group, followed by Black offenders (41.6%, n=128), Other Race offenders (48.6%, n=18), and Hispanic offenders (64.1%, n=109). Moreover, White offenders also had the highest percentage of offenders in Criminal History Category VI (24.4%, n=59),

followed by Black offenders (14.6%, n=45), Other Race offenders (13.5%, n=5), and Hispanic offenders (2.4%, n=4). See Figure 11-8.

Figure 11-8
Race of Offenders Convicted of an Offense Under 18 U.S.C. § 1028A
by Criminal History Category
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Third, there were too few cases involving multiple section 1028A cases to draw any meaningful conclusions about the role of race in the decision to run multiple section 1028A counts consecutively and, in any event, these few cases did not significantly affect the average sentence length data. As discussed above, of the 82 cases in fiscal year 2010 that involved multiple section 1028A counts, courts imposed consecutive sentences in only 13 of them. Of the 13 cases in which courts imposed consecutive sentences, nine (69.2%) involved Black offenders.

Fourth, the rates of relief for offenders convicted of an offense under section 1028A, when compared by race of the offender, did not produce higher average sentences for Other Race and Black offenders. Other Race and Black offenders convicted of an offense under 1028A received relief under section 3553(e) at higher rates than White and Hispanic offenders convicted of an offense under section 1028A. See Figure 11-5.

E. PRISON IMPACT

The number of offenders convicted of aggravated identity theft is a small but slowly increasing part of the federal prison population. Of the 191,757 offenders in prison on September 30, 2010, 1,649 (0.9%) were convicted of an offense under section 1028A. By contrast, of the 173,922 offenders in prison on September 30, 2006, 273 (0.2%) were convicted of an offense under section 1028A. The number of prisoners convicted of an offense under section 1028A grew in subsequent years to 639 of 179,635 prisoners in 2007 (0.4%); 1,259 of 183,717 prisoners in 2008 (0.7%); and 1,649 of 188,876 prisoners in 2009 (0.9%).

F. SUMMARY

With respect to mandatory minimum penalties and identity theft offenses, Commission analyses demonstrate the following:

Offenses and Offenders

- In fiscal year 2010, 1,870 offenders (2.6%) were convicted of an identity theft offense. Of those 1,870 offenders, 797 (42.6%) were convicted of an offense under section 1028A.
- Over 40 percent of offenders convicted of an offense under section 1028A were Black (40.2%), followed by White (32.8%), Hispanic (22.3%), and Other Race (4.7%) offenders.
- The majority of offenders convicted of an offense under section 1028A (71.8%) were male.
- United States citizens accounted for 74.4 percent of offenders convicted of an offense under section 1028A.
- A disproportionately large number of cases involving a conviction of an offense under section 1028A came from only three judicial districts in fiscal year 2010: Southern Florida (n=103, 12.9% of all cases involving a conviction of an offense under section 1028A); Eastern Pennsylvania (n=37, 4.6%); and Eastern Virginia (n=30, 3.7%).

Application and Relief

- Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 6.8 percent (n=54) proceeded to trial. By contrast, of the 1,072 identity theft offenders not convicted of an offense under section 1028A, 2.1 percent (n=22) proceeded to trial.
- Identity theft offenders who committed more severe identity theft offenses or who had more significant criminal histories were generally more likely to be convicted of an offense under section 1028A.
 - Identity theft cases involving a conviction of an offense under section 1028A had a 28.2 percent higher median loss amount and were more likely to involve ten or more victims than identity theft cases that did not involve such a conviction.
 - A higher percentage of identity theft offenders convicted of an offense under section 1028A were in Criminal History Category VI, and a lower percentage were in Criminal History Category I, than identity theft offenders not convicted of an offense under section 1028A.

- In fiscal year 2010, 15.4 percent of offenders convicted of an offense under section 1028A were relieved of the mandatory penalty at sentencing because they rendered substantial assistance to the government.
 - Other Race offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at the highest rate (18.9%), followed by Black (17.2%), Hispanic (14.7%), and White (13.1%) offenders.
 - Female offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at a higher rate (20.0%) than male offenders convicted of such an offense (13.6%).
 - United States citizen offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at a higher rate (17.3%) than non-citizens convicted of such an offense (10.3%).
- Of the 797 cases in fiscal year 2010 that involved a conviction of an offense under section 1028A, 10.2 percent (n=82) involved convictions of multiple counts of an offense under section 1028A. In 69 of those 82 cases, the court exercised its discretion to impose the mandatory penalties for violating section 1028A concurrently.

Sentencing

- In fiscal year 2010, 84.6 percent of offenders convicted of an offense under section 1028A were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of an offense under section 1028A were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - White offenders were subject to the mandatory minimum penalty at sentencing most often, in 86.9 percent of their offenses carrying such a penalty, followed by Hispanic (85.3%) and Black (82.8%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 81.1 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (86.4% of their cases, compared to 80.0% of cases involving female offenders).
 - Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizens (89.7% of their cases, compared to 82.7% of cases involving non-citizen offenders).
- The average sentence for offenders convicted of an offense under section 1028A who were subject to the mandatory penalty (*i.e.*, who did not receive relief for rendering

substantial assistance) was 50 months. The average sentence for offenders convicted of an offense under section 1028A but who were relieved of the mandatory penalty was 32 months. By contrast, identity theft offenders not convicted of an offense under section 1028A received an average sentence of 22 months.

- Among offenders convicted of an offense under section 1028A, Other Race and Black offenders received higher average sentences (53 and 54 months, respectively) than White and Hispanic offenders (45 and 40 months, respectively).
- The higher average sentences for Other Race and Black offenders convicted of an offense under section 1028A may be attributable to the fact that those offenders tended to be convicted of more severe offenses than White and Hispanic offenders, as measured by the amount of loss and number of victims involved in the offense.

Prison Impact

- At the end of fiscal year 2010, 0.9 percent of the offenders in the custody of the Bureau of Prisons were convicted of an offense under section 1028A. The percentage of prisoners convicted of an offense under section 1028A has slowly increased over time, rising from 0.2% of the federal prison population at the end of fiscal year 2006.

CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

The statutory directive for this report requires the Commission to assess the compatibility of mandatory minimum penalties with the federal guideline system established under the Sentencing Reform Act and as modified by the Supreme Court's decision in *Booker v. United States*, and to discuss mechanisms other than mandatory minimum sentencing laws by which Congress may take action with respect to sentencing policy. To fulfill this part of the statutory directive, this chapter first provides general findings and conclusions regarding mandatory minimum penalties and the federal sentencing guidelines and then provides specific recommendations regarding the four major offense types studied in this report.

B. GENERAL CONCLUSIONS AND RECOMMENDATIONS

Mandatory minimum penalties have existed in varying number and severity throughout the nation's history,⁸²¹ and their role in the federal criminal justice system has long been debated by members of Congress, judges, prosecutors, defense attorneys, academics, and the public. Stakeholders in the federal criminal justice system continue to hold a range of views regarding mandatory minimum penalties.⁸²² While there is a spectrum of views among members of the Commission regarding mandatory minimum penalties, the Commission uniformly believes, consistent with the general findings of the *1991 Commission Report*, that a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act. However, if Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties, the Commission believes such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently. Guided by these general principles, the Commission believes that the current system of mandatory minimum penalties can be improved.

As discussed in more detail below, certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute. This has led to inconsistencies in application of certain mandatory minimum penalties, as shown by the Commission's data analyses and confirmed by interviews of prosecutors and defense attorneys who practice in 13 district courts.⁸²³ These analyses and interviews indicate that different charging and plea practices have developed in various districts that result in the disparate

⁸²¹ Chapter 2 provides an overview of the history of mandatory minimum penalties.

⁸²² Chapter 5 provides an overview of the views held by stakeholders in the federal criminal justice system with respect to mandatory minimum penalties. Appendix G and Appendix J summarize testimony before the Commission pertaining to mandatory minimum penalties.

⁸²³ Chapter 6 summarizes the results of field interviews conducted with federal prosecutors and defense attorneys, which included discussions of charging and plea practices in their respective districts.

application of certain mandatory minimum penalties, particularly those provisions that require substantial increases in sentence length.

The Commission believes that these findings can largely be traced to the structure and severity of mandatory minimum penalties. Mandatory minimum provisions typically use a limited number of aggravating factors to trigger the prescribed penalty, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower sentence. For such a sentence to be reasonable in every case, the factors triggering the mandatory minimum penalty must *always* warrant the prescribed mandatory minimum penalty, regardless of the individualized circumstances of the offense or the offender. This cannot necessarily be said for all cases subject to certain mandatory minimum penalties. For this reason, Congress should consider whether a statutory “safety valve” mechanism similar to the one available for certain drug trafficking offenders at 18 U.S.C. § 3553(f) may be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.⁸²⁴

In contrast to mandatory minimum penalties, the guidelines prescribe proportional individualized sentences based on many factors relating to the seriousness of the offense, the harms associated with the commission of the offense, the culpability of the offender, and the criminal history and other characteristics of the offender.⁸²⁵ This multi-dimensional approach to sentencing seeks to avoid the problems inherent in the structure of mandatory minimum penalties and, for this reason, best serves the purposes of the Sentencing Reform Act.

The Commission, however, recognizes that Supreme Court decisions rendering the guidelines advisory and establishing a deferential appellate standard of review⁸²⁶ have increased inconsistencies in sentencing practices. Since *Booker*, the national rate of offenders receiving a government sponsored below range sentence has been relatively stable, with 25.4 percent of offenders receiving government sponsored below range sentences in fiscal year 2010⁸²⁷ compared to 24.6 percent in fiscal year 2006.⁸²⁸ In contrast, the national rate of offenders

⁸²⁴ Expansion of the safety valve would be consistent with the intent of 28 U.S.C. § 994(j), which directs the Commission to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense” Expansion of the safety valve may also conserve prosecutorial and judicial resources by increasing the number of offenders who plead guilty rather than proceed to trial. Drug offenders who were eligible for the safety valve pleaded guilty at a higher rate (99.6%) than all drug offenders convicted of an offense carrying a mandatory minimum penalty (95.5%) and drug offenders not convicted of an offense carrying a mandatory minimum penalty (98.4%). See *supra* Chapter 8(C)(2).

⁸²⁵ Chapter 3 discusses the structural differences in how mandatory minimum penalties and the guidelines determine sentences.

⁸²⁶ See *Booker v. United States*, 543 U.S. 220 (2005); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Rita v. United States*, 551 U.S. 338 (2007); *Spears v. United States*, 555 U.S. 261 (2009); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

⁸²⁷ See Commission, *2010 Sourcebook of Federal Sentencing Statistics* 50 (2010).

⁸²⁸ See Commission, *2006 Sourcebook of Federal Sentencing Statistics* 52 (2006). The composition of government sponsored below range sentences has changed somewhat since fiscal year 2006. The percent of offenders receiving

receiving a non-government sponsored below range sentence has increased from 12.1 percent in fiscal year 2006 to 17.8 percent in fiscal year 2010.⁸²⁹ Geographical variations also have increased since *Booker*. In fiscal year 2010, the rate of non-government sponsored below range sentences ranged from 12.0 percent (Tenth Circuit) to 37.3 percent (Second Circuit), a difference of 25.3 percentage points.⁸³⁰ By comparison, in fiscal year 2006, the rate of non-government sponsored below range sentences ranged from 7.3 percent (Fifth Circuit) to 24.1 percent (Second Circuit), a difference of 16.8 percentage points.⁸³¹ Similar variations occur at the district level.

Recent analyses also indicate that some sentencing differences may be associated with specific demographic characteristics, and these differences may be increasing post-*Booker*.⁸³² For example, a recent Commission analysis found that, after controlling for relevant factors, Black male offenders received longer sentences than White male offenders, and that those differences in sentence length have increased steadily since *Booker*.⁸³³ Female offenders of all races received shorter sentences than male offenders, and non-citizen offenders received longer sentences than offenders who were United States citizens, after controlling for relevant factors.⁸³⁴ The Commission is concerned about these developments and stands ready to work with Congress on possible legislative reforms to strengthen and improve the sentencing guidelines system.

Despite these developments, the Supreme Court's decisions and the Commission's sentencing data make clear that the guidelines continue to play a central role in federal sentencing. The Supreme Court has stated that “[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark” in sentencing.⁸³⁵ Sentencing data show that the guidelines continue to play this role. The

a government sponsored below range sentence pursuant to an Early Disposition Program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides has increased from 10.1 percent in fiscal year 2006 to 13.8 percent in fiscal year 2010, which reflects the increasing immigration caseload in the federal docket. The percent of offenders receiving a government sponsored below range sentence for providing substantial assistance to the government has decreased from 14.4 percent to 11.5 percent during the same time period. *See* Commission, *2010 Sourcebook of Federal Sentencing Statistics* 63 (2010).

⁸²⁹ *See* Commission, *2010 Sourcebook of Federal Sentencing Statistics* 63 (2010).

⁸³⁰ *See id.* at 50–62.

⁸³¹ *See* Commission, *2006 Sourcebook of Federal Sentencing Statistics* 52–64 (2006).

⁸³² *See* Commission, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis* 1–2 (2010).

⁸³³ *Id.* at 2.

⁸³⁴ *Id.*

⁸³⁵ *Gall*, 552 U.S. at 49. Accordingly, district courts are required to properly calculate and consider the guidelines and the grounds for departure provided in the policy statements when sentencing, even though after such consideration courts may impose non-guidelines sentences, or “variances.” *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable guideline range).

overwhelming majority of offenders — 80.4 percent in fiscal year 2010 — still receive a sentence either within the guideline sentencing range or below the guideline sentencing range for a reason sponsored by the government (most often congressionally authorized reductions for substantial assistance to the government or an expedited guilty plea pursuant to an Early Disposition Program approved by the Attorney General).⁸³⁶

Furthermore, average sentences for all major offense types continue to parallel the average guideline minimum across time periods, including post-*Booker*.⁸³⁷ This ongoing trend shows how changes in offense severity and offender culpability, as measured by the guidelines, affect sentencing decisions over time and demonstrates that the guidelines continue to have a strong gravitational pull on federal sentencing practices. Thus, although increasing differences in sentencing practices suggest the need to strengthen the current guidelines system, effective guidelines may provide a viable alternative to mandatory minimum penalties.

C. SPECIFIC CONCLUSIONS AND RECOMMENDATIONS

Consistent with the general conclusions and recommendations set forth above, the Commission provides specific conclusions and recommendations with respect to each of the major offense types studied in this report: drug offenses, firearms offenses, sex offenses, and identity theft offenses.⁸³⁸

The Commission makes these recommendations cognizant of its responsibility to “take into account the nature and capacity of the penal, correctional, and other facilities available,”⁸³⁹ and notes that 208,188 inmates were in the custody of the BOP as of December 31, 2009. This figure is almost triple the number of inmates in the custody of BOP on December 31, 1991, and is 35 percent over the BOP’s rated capacity for its 116 facilities.⁸⁴⁰ While mandatory minimum penalties are only one of a myriad of factors that have contributed to the increased number of inmates in the custody of the BOP and its corresponding budget of over \$6 billion in fiscal year 2010,⁸⁴¹ the Commission recommends that Congress request prison impact analyses from the Commission as early as possible in its legislative process whenever it considers enacting or

⁸³⁶ See USSG §§5K1.1, 5K3.1; Commission, *2010 Sourcebook of Federal Sentencing Statistics* 50 (2010).

⁸³⁷ See Figure 4-4 and accompanying text in Chapter 4 (All Offenses); Figures 8-6 to 8-7 and accompanying text in Chapter 8 (Drug Offenses); Figures 10-8 to 10-11 and accompanying text in Chapter 10 (Sex Offenses); see also Commission, *Preliminary Quarterly Data Report: 2nd Quarter Release* 32–37 (2011) (comparing average sentence and average guideline minimum over time for multiple offense types).

⁸³⁸ Many of the 195 statutes carrying mandatory minimum penalties listed in Appendix A are rarely, if ever, used. Compare Table A-1 (Current Statutory Provisions Requiring Mandatory Minimum Terms of Imprisonment) in Appendix A, with Table D-3 (Number of Convictions and Mean Sentence for Mandatory Minimum Statutes) in Appendix D. Congress may wish to consider whether such penalties should be revised in light of their infrequent use.

⁸³⁹ 28 U.S.C. § 994(g).

⁸⁴⁰ See Figure 4-8, note 456, and accompanying text in Chapter 4.

⁸⁴¹ See text accompanying note 455 in Chapter 4.

amending criminal penalties. These analyses may assist Congress in focusing increasingly strained federal prison resources on the offenders who commit the most serious offenses.

1. *Drug Offenses*

a. Importance of drug quantity and other factors

As discussed in Chapter 2, the Anti-Drug Abuse Act of 1986⁸⁴² established the basic framework of mandatory minimum penalties currently applicable to federal drug trafficking offenses. The drug quantities triggering those mandatory minimum penalties, which range from five years to life imprisonment, differ for various drugs and in some cases different forms of the same drug. The available legislative history indicates that Congress intended to create a two-tiered penalty structure under which “serious” traffickers would be subject to five-year mandatory minimum penalties and “major” traffickers would be subject to ten-year mandatory minimum penalties.⁸⁴³ Congress determined that drug quantity would serve as the proxy to identify those categories of traffickers.⁸⁴⁴ The Commission responded to the mandatory minimum penalties by establishing base offense levels in the Drug Quantity Table at §2D1.1(c) that correspond to the first range on the sentencing table that exceeds the mandatory minimum (*i.e.*, levels 26 and 32, respectively, for the commonly applied five- and ten-year mandatory minimums) and extrapolating upward and downward to set guidelines sentencing ranges for all drug quantities.⁸⁴⁵

Drug quantity, however, is just one of many important factors in determining the appropriate sentence for drug offenders. In addition to the guideline adjustments that apply to all offense types, such as aggravating role,⁸⁴⁶ mitigating role,⁸⁴⁷ and acceptance of responsibility,⁸⁴⁸ the Commission has amended §2D1.1 numerous times over the years — many times in response

⁸⁴² Pub. L. No. 99–570, 100 Stat. 3207.

⁸⁴³ See H.R. Rep. No. 99–845, pt. 1, at 11–12 (1986); 132 Cong. Rec. 27,193–194 (Sept. 30, 1986) (statement of Sen. Byrd); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce).

⁸⁴⁴ See Cong. Rec. 27,193–194 (Sept. 30, 1986) (statement of Sen. Byrd). For more discussion of the enactment of the Anti-Drug Abuse Act of 1986, see *supra* Chapter 2(F)(2).

⁸⁴⁵ As explained in Chapter 3, incorporating the mandatory minimum penalties in this manner serves multiple purposes. First, it fulfills the Commission’s statutory requirements to promulgate guidelines that are “consistent with all pertinent provisions” of federal law, 28 U.S.C. § 994(a) & (b)(1), and to consider “the community view of the gravity of the offense,” 28 U.S.C. § 994(c)(4), to the extent that mandatory minimum penalties reflect Congress’s expression of the community view of such offenses. Second, it provides for graduated, proportional increases based on drug quantity for the full range of possible drug types and quantities. Third, it reflects the Commission’s concurrence with Congress’s judgment that the quantity of drug involved in an offense is an important measure of the seriousness of the offense and the culpability of the offender. See *supra* Chapter 3(C).

⁸⁴⁶ USSG §3B1.1.

⁸⁴⁷ USSG §3B1.2.

⁸⁴⁸ USSG §3E1.1.

to congressional directives — to account for a variety of aggravating and mitigating factors. Section 2D1.1 as initially promulgated in 1987 contained three alternative base offense levels and one specific offense characteristic.⁸⁴⁹ Today, §2D1.1 contains five alternative base offense levels and 16 specific offense characteristics to account for factors such as meeting the statutory safety valve criteria, death or serious bodily injury resulting from the use of a drug, possession of a dangerous weapon, use of certain aircrafts and submersible vessels, distribution in a prison or correctional facility, distribution through mass-marketing, importation and manufacture of amphetamine and methamphetamine, and environmental risks and risks of harm to people created by certain methamphetamine offenses.⁸⁵⁰

Most recently, in response to congressional directives in the Fair Sentencing Act of 2010,⁸⁵¹ the Commission amended §2D1.1 to expand upon the previously existing “mitigating role cap” at subsection (a)(5) to provide a more lenient “minimal role cap” and added five specific offense characteristics to account for the use or threat of violence, bribery of a law enforcement officer to facilitate the commission of the offense, maintenance of a premises for the purpose of manufacturing or distributing a controlled substance, certain specified aggravating conduct by offenders who receive the aggravating role adjustment, and certain specified mitigating conduct by offenders who receive the 4-level minimal participant adjustment.⁸⁵²

b. Relationship between current mandatory minimum penalties and offender function

Commission analysis indicates that the quantity of drugs involved in an offense is not as closely related to the offender’s function in the offense as perhaps Congress expected. As discussed in Chapter 8, the Commission studied a 15-percent sample of drug cases reported to the Commission in fiscal year 2009 and assigned each offender to one of 21 separate offense functions by reviewing the offense conduct section of the presentence report. The functions ranged from higher-level functions such as High-Level Supplier/Importers to lower-level functions such as Couriers and Mules. Offenders performing higher-level functions tended to be convicted of a drug offense carrying a mandatory minimum penalty more often than offenders performing lower-level functions. For example, offenders who acted as Managers, Supervisors, and High-Level Suppliers/Importers were convicted of drug offenses carrying mandatory minimum penalties in the overwhelming majority of their cases (92.3%, 84.2%, and 82.8%, respectively).⁸⁵³ However, offenders who performed lower-level functions such as Couriers and Mules also were convicted of drug offenses carrying a mandatory minimum penalty in a significant proportion of their cases (49.6% and 43.1%, respectively).⁸⁵⁴ For every function, the

⁸⁴⁹ USSG §2D1.1 (Nov. 1987).

⁸⁵⁰ USSG §2D1.1 (Nov. 2011).

⁸⁵¹ Pub. L. No. 111–220, 124 Stat. 2372.

⁸⁵² See USSG App. C, amend. 748 (effective Nov. 1, 2010).

⁸⁵³ See Figure 8-9 and accompanying text in Chapter 8.

⁸⁵⁴ See *id.*

quantity of drugs involved in the offense on average resulted in a median base offense level that included or exceeded the five-year mandatory minimum penalty.⁸⁵⁵

While the current mandatory minimum penalties for drug offenses may apply more broadly than originally intended by Congress, the impact of such penalties on certain drug offenders who perform lower-level functions is significantly ameliorated by the combined effect of the safety valve and downward guideline adjustments.⁸⁵⁶ The Commission's analysis shows that offenders who performed lower-level functions were more likely to qualify for the safety valve than offenders who performed higher-level functions. For example, offenders acting as Mules and Couriers who were convicted of a drug offense carrying a mandatory minimum penalty qualified for the safety valve (either by itself or in combination with substantial assistance) in 79.2 percent and 67.9 percent of their cases, respectively, compared to offenders who performed higher-level functions such as High-Level Suppliers/Importers (26.7%), Organizer/Leaders (11.6%), Wholesalers (19.4%), and Managers (13.9%).⁸⁵⁷

The high rate of safety valve relief for offenders who performed lower-level functions has enabled downward adjustments in the guidelines to differentiate these least serious drug offenders from the more serious drug offenders in many cases. For example, offenders convicted of a statute carrying a mandatory minimum penalty who acted as Mules and Couriers received a mitigating role adjustment under §3B1.2 in 51.4 percent and 39.8 percent of their cases, respectively. Conversely, offenders convicted of a statute carrying a mandatory minimum penalty who acted as Organizer/Leaders, Managers, and Supervisors received an aggravating role adjustment under §3B1.1 in 74.7 percent, 52.8 percent, and 37.5 percent of their cases, respectively. As a result of these and other guideline adjustments, such as the "mitigating role cap" in §2D1.1(a), offenders who performed lower-level functions received significantly lower final offense levels than offenders who performed higher-level functions.⁸⁵⁸ For example, the median final offense level for Mules (level 20) and Couriers (level 21) was significantly lower than for High-Level Suppliers/Importers (level 29), Organizer/Leaders (level 34), Managers (level 33), and Supervisors (level 28).⁸⁵⁹

⁸⁵⁵ See Figure 8-10 and accompanying text in Chapter 8.

⁸⁵⁶ See *supra* Chapter 8(C)(7); see also *supra* Chapter 2(H)(3) (detailing the enactment of the statutory safety valve in 1994) and notes 116-127 and accompanying text in Appendix E (describing case law interpreting and applying the safety valve).

⁸⁵⁷ See Figure 8-11 and accompanying text in Chapter 8. In contrast, offenders performing lower-level functions tended to receive relief for substantial assistance (either by itself or in combination with the safety valve) at lower rates than offenders performing higher-level functions. Managers (50.0%), Organizers/Leaders (39.1%), and Wholesalers (33.8%), for example, received relief for substantial assistance significantly more often than Couriers (27.1%) and Mules (19.5%). See *id.*

⁸⁵⁸ See Figures D-3 and D-4 in Appendix D.

⁸⁵⁹ See Figure 8-10 in Chapter 8.

As a result of the combined effect of the safety valve and applicable guideline adjustments, offenders who performed lower-level functions received significantly shorter average sentences than offenders who performed higher-level functions. For example, the average sentences for Mules (29 months) and Couriers (39 months) were significantly shorter than for High Level Suppliers/Importers (101 months), Organizer/Leaders (154 months), Wholesalers (103 months), and Managers (147 months).⁸⁶⁰

c. Cumulative impact of criminal history

Criminal history can have a disproportionate and excessively severe cumulative sentencing impact on certain drug offenders. The impact of criminal history on drug sentences is in part a function of the minimum term of imprisonment required by statute, and in part a function of the interaction between the mandatory minimum penalties, the safety valve, and the guidelines. For this reason, a single criminal history event can have a three-fold impact on the sentence of certain drug offenders. First, the mandatory minimum penalties provided by 21 U.S.C. §§ 841 or 960 double from five to ten years of imprisonment, and from ten to 20 years of imprisonment if the offender has a prior conviction for a “felony drug offense.”⁸⁶¹ An offender with two or more prior drug felonies is subject to a mandatory minimum term of life imprisonment under section 841.⁸⁶² The statute also defines the term “felony drug offense” broadly to mean an offense that is “punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.”⁸⁶³ Second, the guidelines provide graduated sentencing increases for criminal history along the Criminal History axis of the Sentencing Table. Third, an offender with more than one criminal history point under the guidelines is ineligible for the statutory safety valve⁸⁶⁴ and its guideline counterparts.⁸⁶⁵

These cumulative impacts⁸⁶⁶ can result in disproportionate and excessively severe sentences in certain cases. Commission data show inconsistent application of certain mandatory

⁸⁶⁰ See Figure 8-12 in Chapter 8.

⁸⁶¹ 21 U.S.C. §§ 841(b)(1)(A)–(B), 960(b)(1)–(2).

⁸⁶² 21 U.S.C. §§ 841(b)(1)(A).

⁸⁶³ 21 U.S.C. § 802(44).

⁸⁶⁴ See 18 U.S.C. § 3553(f)(1).

⁸⁶⁵ See USSG §§2D1.1(b)(16), 5C1.2.

⁸⁶⁶ Weapon involvement has a similar cumulative impact on certain drug offenders. If the offender is convicted of violating 18 U.S.C. § 924(c), a mandatory minimum penalty ranging from five years to life imprisonment applies. Alternatively, if the offender is not convicted under 18 U.S.C. § 924(c) but a dangerous weapon was possessed during the offense, USSG §2D1.1 provides an enhancement of two levels (an approximate 25% increase in sentence length). In either case, an offender who possesses a firearm or other dangerous weapon (or induces another participant to do so) in connection with the offense is excluded from safety valve eligibility under 18 U.S.C. § 3553(f)(2).

minimum penalties, particularly in cases in which 21 U.S.C. § 851 could apply.⁸⁶⁷ Interviews of prosecutors and defense attorneys in 13 districts confirm that different districts have adopted different practices with respect to filing the necessary information required to seek an enhanced penalty under 21 U.S.C. § 851 in part because of its severity.⁸⁶⁸

The structure of the recidivist provisions in 21 U.S.C. §§ 841 and 960 fosters inconsistent application, in part, because their applicability turns on the varying statutory maximum penalties for state drug offenses. The term “felony drug offense” as used in sections 841 and 960 “means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a state . . . that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.”⁸⁶⁹ States have adopted differing punishments for drug offenses, so that conduct qualifying as a “felony drug offense” in one state may not qualify as such an offense in another state. Furthermore, the recidivist provisions apply to a broad range of offenders, which vary depending on the state in which the prior conviction occurred. For example, states have adopted differing approaches with respect to the punishment of simple possession of controlled substances. As a result, some offenders with prior convictions for simple possession may be subject to the enhanced penalties under sections 841 and 960 even though other offenders with prior state or federal convictions for simple possession may not.⁸⁷⁰ Some states also classify offenses as misdemeanors even though the crime is punishable by more than one year of imprisonment. These offenses are considered “felony drug offenses” under federal law despite the state’s classification of the offense as a misdemeanor.⁸⁷¹

d. Demographic effects

Notable differences exist in the application of drug mandatory minimum penalties among various demographic groups, but these differences are largely attributable to the cumulative effects of criminal history and weapon involvement. While these differences are attributable to

⁸⁶⁷ See *supra* Chapter 8(I). Mandatory minimum penalties for drug offenses typically increase the applicable mandatory minimum penalty when the drug offender is convicted of a second or subsequent felony drug offense. See 21 U.S.C. § 841(b). For these increased penalties to apply, the government must affirmatively seek the enhanced penalties by filing an information with the court before trial, or before a guilty plea is entered, pursuant to 21 U.S.C. § 851(a). See *supra* Chapter 8(I)(1).

⁸⁶⁸ For further discussion of the different practices adopted with respect to the filing of information required under section 851, see *supra* Chapter 6(D)(1) and Chapter 8(I).

⁸⁶⁹ 21 U.S.C. § 802(44); see also 21 U.S.C. § 951(b).

⁸⁷⁰ See *Lopez v. Gonzalez*, 549 U.S. 47, 54 & n.4 (2006) (noting the states’ different approaches to classifying simple possession offenses); Michael M. O’Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 288–89 (2003) (same); see also *United States v. Brown*, 383 F. App’x 543, 546 (7th Cir. 2010) (“We are not aware of any court holding that a state felony drug conviction for possession does not trigger the increased mandatory minimum in 21 U.S.C. § 841(b)(1)(B) because simple possession is not a felony in the federal system.”).

⁸⁷¹ See *Burgess v. United States*, 553 U.S. 124, 127 (2008) (“A state drug offense punishable by more than one year . . . qualifies as a ‘felony drug offense,’ even if state law classifies the offense as a misdemeanor.”).

legally relevant factors, they may create perceptions of unfairness and unwarranted disparity that cause concern insofar as they may foster disrespect for and lack of confidence in the federal criminal justice system.⁸⁷²

The cumulative sentencing impacts of criminal history and weapon involvement appear to be particularly acute for Black drug offenders. Three-quarters (75.6%) of Black drug offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010 were excluded from safety valve eligibility due to criminal history scores of more than one point.⁸⁷³ Black drug offenders in Criminal History Category I who were convicted under 18 U.S.C. § 924(c) or who received the weapon involvement enhancement in the drug guideline constituted an additional 2.4 percent and 3.3 percent, respectively, of Black drug offenders sentenced in fiscal year 2010. These figures largely explain why only 14.4 percent of Black offenders convicted of a drug offense carrying a mandatory minimum penalty received safety valve relief (either by itself or in combination with substantial assistance), compared to 48.4 percent of Other Race offenders, 46.3 percent of Hispanic offenders, and 39.5 percent of White offenders.⁸⁷⁴

These differences in safety valve eligibility in turn drive differences in the application of mandatory minimum penalties among the various racial groups. Blacks account for 30.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty. However, Blacks account for a higher percentage — 40.4 percent — of drug offenders subject to a mandatory minimum penalty at sentencing, even though they receive relief for substantial assistance more often than offenders in any other racial group.⁸⁷⁵ This result occurs because Black drug offenders qualify for the safety valve less often than any other racial group.⁸⁷⁶ In contrast, Hispanics account for 44.0 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty, and 46.3 percent of those Hispanic offenders qualify for the safety valve. As a result, Hispanics account for only 39.6 percent of drug offenders subject to a mandatory minimum penalty at sentencing.⁸⁷⁷

⁸⁷² See Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 102-03 (2002) (“Perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system”); see also *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 38 (prepared statement of Chief Judge Julie E. Carnes on behalf of the Judicial Conference of the United States) (“To function successfully, our judicial system must enjoy the respect of the public. The robotic imposition of sentences that are viewed as unfair or irrational greatly undermines that respect.”).

⁸⁷³ See *supra* Chapter 8(C)(4).

⁸⁷⁴ See Figure 8-4 and accompanying text in Chapter 8.

⁸⁷⁵ See Table 8-1, Figure 8-4, and accompanying text in Chapter 8.

⁸⁷⁶ See Figure 8-4 in Chapter 8.

⁸⁷⁷ See Table 8-1, Figure 8-4, and accompanying text in Chapter 8.

United States citizens account for 70.0 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty. However, United States citizens account for a higher percentage — 79.9 percent — of drug offenders subject to a mandatory minimum penalty at sentencing, even though they receive relief for substantial assistance more often than non-citizens, because they qualify for the safety valve significantly less often than non-citizens (24.6% for United States citizens compared to 59.7% for non-citizens).⁸⁷⁸ The difference in the rates of safety valve application is attributable to the fact that non-citizen offenders tend to have fewer criminal history points than United States citizen offenders, which may in part be due to the exclusion of sentences resulting from foreign convictions from criminal history calculations under Chapter Four of the *Guidelines Manual*.⁸⁷⁹

Male offenders also account for a higher percentage (94.0%) of drug offenders subject to a mandatory minimum penalty at sentencing than their proportion (89.8%) of drug offenders convicted of an offense carrying a mandatory minimum penalty. This difference is attributable to male offenders qualifying for the safety valve less often than female offenders.⁸⁸⁰

e. Recommendations for drug offenses

In light of these findings and observations, the Commission recommends that Congress consider the following suggestions for amending the mandatory minimum penalties for drug offenses.

i. *Safety valve eligibility*

Congress should consider expanding the safety valve at 18 U.S.C. § 3553(f) to include certain offenders who receive two, or perhaps three, criminal history points under the guidelines. Although further study would be needed before considering any specific proposals (for example, study of the type of prior offenses committed by offenders who receive two and three criminal history points), the Commission's review of available data for fiscal year 2010 indicates that 1,127 offenders convicted of a drug offense carrying a mandatory minimum penalty would have been eligible for the safety valve if it had included non-violent drug offenders in Criminal History Category II (offenders who receive two or three criminal history points).⁸⁸¹ Of these

⁸⁷⁸ See Table 8-1, Figure 8-4, and accompanying text in Chapter 8.

⁸⁷⁹ See USSG §4A1.2(h). Foreign convictions are excluded because of uncertainty regarding whether the offender received adequate due process. Furthermore, it may be uncertain whether the defendant in fact has any such convictions because “[i]t is often difficult to obtain the foreign defendant’s criminal history from the foreign jurisdiction.” See Michael Edmond O’Neill et al., *Past as Prologue: Reconciling Recidivism and Culpability*, 73 *FORDHAM L. REV.* 245, 253 n.49 (2004). A court, however, may consider prior foreign convictions in determining the adequacy of the defendant’s criminal history category, see USSG §4A1.2(h).

⁸⁸⁰ See Table 8-1, Figure 8-4, and accompanying text in Chapter 8.

⁸⁸¹ See Table D-20 (Offenders Affected by Expansion of Safety Valve to Criminal History Category II by Race and Drug Type) in Appendix D. The breakdown of the type of drug involved in the offense for these 1,127 offenders is methamphetamine (305), powder cocaine (301), crack cocaine (236), marijuana (206), heroin (62), and other drugs (17).

1,127 offenders, 260 (23.1%) offenders received three points pursuant to §4A1.1(a) for a prior sentence of imprisonment exceeding one year and one month, and 190 (16.9%) offenders received two points pursuant to §4A1.1(b) for a prior sentence of imprisonment of at least 60 days.⁸⁸² An expansion of the safety valve would mitigate the cumulative impact of criminal history for certain less serious offenders as measured by their criminal history score under the guidelines.

It is important to note that an expansion of the safety valve to include certain offenders in Criminal History Category II likely would have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders. The lack of significant effect is because the demographic characteristics of offenders who are estimated to become eligible if the safety valve were expanded to include Criminal History Category II are similar to the demographic characteristics of offenders who are currently eligible under 18 U.S.C. § 3553(f).

ii. Recidivist provisions at 21 U.S.C. §§ 841 and 960

Congress should mitigate the cumulative impact of criminal history by reassessing both the scope and severity of the recidivist provisions at 21 U.S.C. §§ 841 and 960. The mandatory minimum penalties provided in those provisions are doubled (from five to ten years of imprisonment, and from ten to 20 years of imprisonment) if the offender has a prior conviction for a “felony drug offense.” An offender with two or more prior drug felonies is subject to a mandatory minimum term of life imprisonment. This doubling of the mandatory minimum penalties, and the mandatory minimum term of life imprisonment, are sometimes viewed as disproportionate and excessively severe in individual cases and far exceed the more graduated, proportional increases provided by the guidelines for such prior conduct.

In addition, Congress should more finely tailor their scope to reduce inconsistent application of these provisions. This could be accomplished by amending the current definition of “felony drug offenses” that triggers the heightened mandatory minimum penalties. Among other possible changes, Congress might consider incorporating the particular state’s classification of an offense as a “felony” or “misdemeanor” to better reflect the state’s judgment concerning the seriousness of the prior offense, or by excluding simple possession offenses from the definition of “prior drug offense.”

2. Firearm Offenses

The firearm offenses to which mandatory minimum penalties most commonly apply are serious crimes that can result in violence and bodily injury. The penalties established at 18 U.S.C. § 924(c) reflect Congress’s judgment that when a firearm is involved, crimes of violence and drug trafficking offenses are more serious and deserving of lengthier sentences. Similarly, the penalties established in the Armed Career Criminal Act, 18 U.S.C. § 924(e), reflect Congress’s judgment that offenders with prior violent felony and drug trafficking offense convictions who illegally possess firearms should receive greater punishment than other

⁸⁸² See *supra* Chapter 3(B)(3) for a discussion of how criminal history is calculated under the guidelines.

offenders. Consistent with these policy determinations, the Commission has established guideline enhancements for conduct involving firearms and other dangerous weapons,⁸⁸³ as well as enhancements based on a firearm offender’s history of convictions for crimes of violence and controlled substance offenses.⁸⁸⁴

There are important differences, however, in how the statutes and the guidelines account for similar conduct, particularly with respect to enhancements for firearm involvement. Section 924(c) establishes mandatory minimum penalties that range from five years to life imprisonment for conduct involving a firearm in the commission of a broadly defined “crime of violence” or “drug trafficking crime.” The length of the applicable mandatory minimum penalty depends on how the weapon was used,⁸⁸⁵ the type of firearm,⁸⁸⁶ and whether the offender committed other violations of section 924(c).⁸⁸⁷ The statute defines a “crime of violence” as any felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” or “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”⁸⁸⁸ A “drug trafficking crime” is any felony that is punishable under the Controlled Substances Act, codified at 21 U.S.C. § 801 *et seq.*, or the Controlled Substances Import and Export Act, codified at 21 U.S.C. § 951 *et seq.*⁸⁸⁹ The sentence imposed for violating section 924(c) must be served consecutively to any other sentences imposed on the offender, including sentences for other violations of section 924(c).⁸⁹⁰

⁸⁸³ See USSG §§2B3.1(b)(2), 2D1.1(b)(1).

⁸⁸⁴ See USSG §2K2.1(a)(2), (a)(4).

⁸⁸⁵ Section 924(c) establishes a five-year mandatory minimum penalty for an offender who “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” 18 U.S.C. § 924(c)(1)(A)(i). The mandatory minimum penalty increases to seven years of imprisonment if the firearm was “brandished” and to ten years of imprisonment if the firearm was “discharged.” *See id.* § 924(c)(1)(A)(ii) – (iii).

⁸⁸⁶ The statute establishes a ten-year mandatory minimum penalty if the firearm was “a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon” and a 30-year mandatory minimum if the firearm was “a machinegun or a destructive device, or [was] equipped with a firearm silencer or firearm muffler.” 18 U.S.C. § 924(c)(1)(B).

⁸⁸⁷ A 25-year mandatory minimum penalty applies to offenders convicted of a “second or subsequent” violation of section 924(c), and mandatory life imprisonment applies to offenders convicted of a “second or subsequent” violation of section 924(c) when the firearm involved was “a machinegun or a destructive device, or [was] equipped with a firearm silencer or firearm muffler.” 18 U.S.C. § 924(c)(1)(C). The “second or subsequent” violation of section 924(c) may be charged in the same indictment and may be part of a single series of events as the predicate section 924(c) offense. *See Deal v. United States*, 508 U.S. 129 (1993).

⁸⁸⁸ 18 U.S.C. § 924(c)(3).

⁸⁸⁹ 18 U.S.C. § 924(c)(2).

⁸⁹⁰ 18 U.S.C. § 924(c)(1)(D).

In contrast, the guidelines enhance sentences based on firearms in a more graduated manner, also depending on the circumstances of the underlying offense and the individual offender. Most offenders convicted of an offense under section 924(c) are convicted of robbery and drug trafficking offenses referenced under §§2B1.3 and 2D1.1, respectively. Sections 2B1.3 and 2D1.1 each contain enhancements for conduct involving a firearm.⁸⁹¹ USSG §2B1.3 provides for enhancements ranging from 5 to 7 levels for possessing, brandishing, using, or discharging a firearm,⁸⁹² which approximately doubles the otherwise applicable guideline range. USSG §2D1.1 provides for a 2-level enhancement “[i]f a dangerous weapon (including a firearm) was possessed,”⁸⁹³ which increases the otherwise applicable guideline range by approximately 25 percent. Because the guideline enhancements operate through offense levels rather than prescribing particular lengths of imprisonment, the amount of the increase based on weapon involvement changes in proportion to the seriousness of the offense and the characteristics of the offender.

The guidelines further consider the involvement of a firearm in the context of the various offense- and offender-specific factors that determine the sentencing range. For example, the guidelines provide enhancements for certain aggravating circumstances in addition to firearm involvement, such as death and bodily injury,⁸⁹⁴ the abduction or restraint of a person,⁸⁹⁵ risks to minors,⁸⁹⁶ the offender’s aggravating role in the offense,⁸⁹⁷ and the offender’s criminal history.⁸⁹⁸ The guidelines also account for certain mitigating circumstances, such as the offender’s minor or minimal role in the offense⁸⁹⁹ and acceptance of responsibility.⁹⁰⁰ By viewing weapon involvement as one of many relevant factors and not requiring a specific sentence in addition to the sentence for the underlying offense, the guidelines provide a proportionally higher sentence.

⁸⁹¹ If an offender is convicted of an offense under section 924(c) and an underlying offense for which the applicable guideline provision contains an enhancement for firearm involvement, the guideline enhancement does not apply. *See* USSG §2K2.4 comment. (n.4) (“If a sentence under this guideline [for violations of section 924(c)] is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristics for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.”).

⁸⁹² *See* USSG §2B3.1(b)(2).

⁸⁹³ USSG §2D1.1(b)(1).

⁸⁹⁴ *See* USSG §§2B3.1(b)(3), 2D1.1(a)(1)–(4).

⁸⁹⁵ *See* USSG §2B3.1(b)(4).

⁸⁹⁶ *See* USSG §2D1.1(b)(13).

⁸⁹⁷ *See* USSG §3B1.1.

⁸⁹⁸ *See* USSG Ch.4, Pt.A.

⁸⁹⁹ *See* USSG §3B1.2.

⁹⁰⁰ *See* USSG §3E1.1.

With those general observations, the Commission offers the following specific findings and recommendations with respect to mandatory minimum penalties for firearm offenses.

a. “Stacking” mandatory minimum penalties under section 924(c)

Unlike other statutes and sentencing enhancements that apply based on an offender’s prior convictions, section 924(c) requires the “stacking” of its mandatory minimum penalties based on multiple offenses charged in the same indictment.⁹⁰¹ Thus, an offender convicted of an underlying offense and two counts of an offense under section 924(c) will receive consecutive mandatory minimum penalties of at least 5 years and 25 years of imprisonment, in addition to any term of imprisonment imposed for the underlying offense and other counts of conviction. An offender charged with three counts of an offense under section 924(c) will face another consecutive 25-year mandatory minimum penalty. Such a result may occur even if the offender has no prior record.

The “stacking” of mandatory minimum penalties for multiple violations of section 924(c) results in excessively severe and unjust sentences in some cases. The sentences for offenders convicted of multiple counts of an offense under section 924(c) were the highest average sentences for any offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010. Offenders convicted of multiple counts of an offense under section 924(c) received an average sentence of 351 months of imprisonment, which was more than twice the length of the average sentence of 151 months of imprisonment received by offenders convicted of only a single count of an offense under section 924(c).⁹⁰² The underlying offenses committed by these offenders were primarily robbery and drug trafficking offenses. There are some circumstances where such a long sentence may be appropriate (*e.g.*, in the eight cases in fiscal year 2010 in which the offender’s primary guideline was §2A1.1, which covers first degree murder), but there are other circumstances in which the offender received such a long sentence even though the offense did not involve any physical harm or threat of physical harm to a person. This severity mismatch can lead to sentences that are excessively severe and disproportionate to the offense committed.⁹⁰³

⁹⁰¹ See *Deal v. United States*, 508 U.S. 129 (1993).

⁹⁰² See *supra* Chapter 9(C)(5). The Commission further notes that offenders convicted of multiple counts of an offense under section 924(c) received below-range sentences at a higher rate than offenders convicted of an offense carrying a mandatory minimum penalty in drug offenses or sex offenses. See Table 9-3 in Chapter 9. This high rate of below-range sentences suggests that the courts viewed the guideline range sentence, as it incorporated the mandatory minimum penalties, as too severe.

⁹⁰³ The case of Weldon Angelos illustrates the unduly severe sentences that stacking mandatory minimum penalties under section 924(c) produces. The Judicial Conference of the United States has twice cited Angelos’s case in opposition to stacking section 924(c) penalties in its testimony before Congress, and has similarly cited the case in testimony before the Commission. Angelos was a 24-year-old first-time offender convicted of three counts of an offense under section 924(c), among other offenses, in the District of Utah. His offense conduct was not extraordinary among drug offenses; he was the target of “controlled buys” in which a governmental informant purchased eight ounces of marijuana from Angelos on three occasions. On two of those occasions, Angelos was known to have possessed a firearm. A subsequent search of Angelos’s residence revealed three pounds of marijuana and three additional firearms. Angelos’s three convictions of an offense under section 924(c) were based on the two transactions at which he possessed a firearm, and the additional firearms found at his residence. The district court sentenced Angelos to the mandatory minimum penalty of 55 years of imprisonment for violating section 924(c) (five

While only 147 cases sentenced in fiscal year 2010 involved multiple violations of section 924(c), many stakeholders agree that Congress should address the excessively severe sentences that stacking produces in some cases. The Commission conducted hearings on mandatory minimum sentencing, at which witnesses from a variety of perspectives — including judges,⁹⁰⁴ prosecutors⁹⁰⁵ and defense counsel⁹⁰⁶ — identified the stacking of penalties under section 924(c) as potentially producing unjustly severe sentences. In district interviews with Commission staff, many representatives of the FPD and CJA panels, and some prosecutors, stated that the mandatory minimum penalties for committing multiple violations of section 924(c) are particularly harsh.⁹⁰⁷

The Judicial Conference of the United States has historically opposed mandatory minimum penalties, but it has rarely articulated a policy position with respect to particular mandatory minimum sentencing provisions. Evidencing the strength of its opposition to the stacking of mandatory minimum penalties under section 924(c), the Judicial Conference has urged Congress on at least two occasions to amend the “draconian” penalties established at

years for the first section 924(c) offense and consecutive terms of 25 years of imprisonment for the second and third offenses), in addition to a one-day term of imprisonment imposed for the underlying and other offenses. Assuming Angelos receives good-time reductions, he can expect to be eligible for release from prison when he is 78 years old. The sentencing judge concluded that this sentence, though constitutional and required by the statute, was “unjust, cruel, and even irrational,” and he further noted that had Angelos been sentenced under the guidelines, his guideline range would have been 97 to 121 months, still a substantial sentence. *See United States v. Angelos*, 345 F. Supp. 2d 1227, 1230-31, 1241 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006).

⁹⁰⁴ *See* Testimony of Chief Judge Robert J. Conrad, Jr., U.S. District Court for the Western District of North Carolina, to the Commission, at 130 (Feb. 11, 2009) (“Mandatory minimums have the most potential for disproportionate sentencing in the stacking of Title 18 U.S.C. Section 924(c) charges.”); *see also Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 60–61 (2009) (statement of Chief Judge Julie E. Carnes on behalf of the Judicial Conference of the United States) (identifying the stacking of penalties under section 924(c) as among the “most egregious mandatory minimum provisions that produce the fairest, harshest, and most irrational results”); *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 43–101 (2007) (testimony and statement of Judge Paul G. Cassell on behalf of the Judicial Conference of the United States) (criticizing the lengthy sentences produced by stacking section 924(c) penalties).

⁹⁰⁵ *See* Testimony of Sally Quillian Yates, U.S. Attorney, Northern District of Georgia, to the Commission, at 59–60 (May 27, 2010) (explaining her personal view that “there are criticisms and concerns about the stacking of 924(c) [penalties], particularly in a scenario where you have an individual who is charged with multiple 924(c) counts in the same indictment. And so consequently, while the purpose of 924(c) may have originally been as a recidivist statute, where you have an individual who goes out on a spree and robs three banks is now looking at life as a result of that, . . . that might not necessarily be the most appropriate use of the sentencing structure.”).

⁹⁰⁶ *See* Prepared Statement of Michael S. Nachmanoff, Federal Public Defender for the Eastern District of Virginia, to the Commission, at 25–26, 29 (May 27, 2010) (explaining that “[t]he flat mandatory minimum statutory enhancements for possession or use of a firearm under 18 U.S.C. § 924(c) are among the worst sources of disparity,” that the “[s]tacking of § 924(c) counts result in the most egregiously severe sentences,” and that the stacking of penalties under section 924(c) “has led to extreme abuses”).

⁹⁰⁷ *See supra* Chapter 6(C) and (D)(2).

section 924(c) by making it a “true recidivist statute, if not rescinding it all together.”⁹⁰⁸ The Judicial Conference has supported its position by observing that the sentences resulting from stacking section 924(c) mandatory minimum penalties are “greater by many years” than the guideline sentences for offenders who commit the most serious, violent crimes.⁹⁰⁹

The Department of Justice has issued policies that allow prosecutors to refrain from charging multiple section 924(c) counts because of the particularly long sentences that stacking can produce. In September 2003, for example, then-Attorney General John Ashcroft instructed federal prosecutors to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.” The memorandum defined the “most serious” offense as the count “that generate[s] the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.”⁹¹⁰ The memorandum instructed prosecutors to charge the first readily provable violation of section 924(c), but it permitted prosecutors not to charge a second violation of section 924(c). The memorandum recognized that multiple violations of section 924(c) “[i]n many cases . . . will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty.”⁹¹¹ Similarly, recent policies implemented by current Attorney General Eric Holder instruct prosecutors to continue to charge the most serious offense but to do so in accordance with an “individualized assessment” of the offender and the circumstances of the particular case.⁹¹²

b. Inconsistencies in the application of stacked section 924(c) penalties

The severity of the mandatory minimum penalties for violating section 924(c), particularly the penalties for committing multiple violations of section 924(c), has produced inconsistencies in the application of the penalties among judicial districts. The Commission’s sentencing data show that cases involving multiple violations of section 924(c) are concentrated in only a few districts.⁹¹³ The Commission has identified no evidence that those offenses occur more frequently in those districts than in others, and the Commission therefore believes that this

⁹⁰⁸ See *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 35 (2009) (testimony of Chief Judge Julie E. Carnes on behalf of the Judicial Conference of the United States).

⁹⁰⁹ See *id.*

⁹¹⁰ See Memorandum from John Ashcroft, Attorney General, to all Federal Prosecutors dated September 22, 2003, regarding Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

⁹¹¹ See *id.*

⁹¹² See Memorandum from Eric H. Holder, Jr., Attorney General, to all Federal Prosecutors dated May 19, 2010, regarding Department Policy on Charging and Sentencing, available at <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf>.

⁹¹³ See Figure 9-2, Figure 9-3, and accompanying text in Chapter 9.

geographic concentration is attributable to inconsistencies in the charging of multiple violations of section 924(c). Accordingly, in the context of multiple violations of section 924(c), offenders who commit similar offenses are treated differently — resulting in dramatically different sentencing outcomes — based largely on the judicial district in which they are charged.

In interviews conducted with federal prosecutors, most U.S. Attorney’s offices stated that they consistently charge the first, readily provable violation of section 924(c).⁹¹⁴ There was, however, at least one exception to this general practice. One office acknowledged that it frequently exercised its discretion not to immediately charge the first violation of section 924(c) where the underlying offense was a drug trafficking offense rather than a crime of violence. In those circumstances, the office waited to charge the first violation of section 924(c) until it appeared that the case would proceed to trial. In another district, according to defense counsel, even though the first section 924(c) violation was consistently charged, in drug trafficking cases the government was frequently willing to dismiss that count and instead seek application of the 2-level dangerous weapon guideline enhancement in exchange for a guilty plea.⁹¹⁵

The Commission’s interviews with prosecutors and defense attorneys confirmed that there are divergent practices among U.S. Attorney’s offices with respect to charging multiple violations of section 924(c). The interviews further confirmed that some of the inconsistencies in the charging of multiple section 924(c) counts are attributable to the severity of stacking the mandatory minimum penalties. Prosecutors in some districts reported that they always charge multiple violations of section 924(c) when supported by the facts, while prosecutors in other districts reported that they “rarely” charge multiple violations of section 924(c). Other prosecutors reported that they charge multiple violations of section 924(c) only when the facts of the particular case warrant the severe penalties, as in the case of violent crimes. Defense attorneys in those districts generally confirmed the local practices with respect to charging multiple violations of section 924(c).⁹¹⁶

c. Definitions of underlying and predicate offenses

The statutory definitions of “violent felony” and “serious drug offense” in 18 U.S.C § 924(e)(2) may contribute to inconsistent application of the Armed Career Criminal Act’s 15-year mandatory minimum penalty. Those statutory definitions depend, in part, on the varying statutory maximum penalties for offenses provided by the states. The 15-year mandatory minimum applies to an offender convicted of an offense under 18 U.S.C. § 922(g) if the offender also “has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both.”⁹¹⁷ The definitions of “violent felony” and “serious drug offense” require only that the prior offense be punishable by a maximum term of more than one year or at least ten

⁹¹⁴ See *supra* Chapter 6(D)(2).

⁹¹⁵ See *id.*

⁹¹⁶ See *id.*

⁹¹⁷ See 18 U.S.C. § 924(e)(1).

years of imprisonment, respectively.⁹¹⁸ As a result, the Armed Career Criminal Act’s mandatory minimum penalty can apply to offenders who served no or minimal terms of imprisonment for their predicate offenses, further increasing the potential for inconsistent application insofar as the penalty may be viewed as excessively severe in those cases.

The Commission further notes that ongoing uncertainty exists as to which crimes qualify as underlying and predicate offenses for purposes of section 924(c) and the Armed Career Criminal Act. This uncertainty stems from the difficulty in applying the statutory definitions of “crime of violence,” “drug trafficking crime,” “violent felony,” and “serious drug offense,” as evidenced by the substantial litigation and criticisms these definitions have generated.⁹¹⁹ Uncertainty in applying these statutory definitions increases the potential for inconsistent application of the mandatory minimum penalties and burdens limited judicial and prosecutorial resources.

d. Demographic effects

There are notable demographic differences in the application of mandatory minimum penalties for firearm offenses. Black offenders constitute the majority of offenders convicted of an offense under section 924(c) (55.9%) and the majority of offenders who remain subject to its mandatory minimum penalties at sentencing (55.7%). Black offenders constitute an even greater proportion (61.0%) of offenders convicted of multiple counts of an offense under section 924(c). By contrast, White and Hispanic offenders constitute only 15.1 and 21.2 percent of offenders convicted of multiple counts of an offense under section 924(c), respectively.⁹²⁰

Similarly, Black offenders constitute a majority of offenders who qualify for the Armed Career Criminal Act’s 15-year mandatory minimum penalty (63.7%) and of offenders who remain subject to its mandatory minimum penalty at sentencing (63.9%). White and Hispanic offenders, by comparison, constitute only 29.5 percent and 5.2 percent of offenders who qualify for the Armed Career Criminal Act’s 15-year mandatory minimum penalty, respectively.⁹²¹

The effects of these demographic differences are two-fold. First, to the extent the mandatory minimum penalties for firearm offenses are unduly severe, these effects fall on Black offenders to a greater degree than on offenders in other racial groups. Second, as in drug

⁹¹⁸ See 18 U.S.C. § 924(e)(2).

⁹¹⁹ See, e.g., *Chambers v. United States*, 555 U.S. 122, 133-34 (2009) (Alito, J., concurring) (“After almost two decades with *Taylor*’s ‘categorical approach,’ only one thing is clear: ACCA’s residual clause is nearly impossible to apply consistently. Indeed, the ‘categorical approach’ to predicate offenses has created numerous splits among the lower federal courts, the resolution of which could occupy this Court for years.”); *James v. United States*, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting) (“Years of prison hinge on the scope of ACCA’s residual provision, yet its boundaries are ill defined.”).

⁹²⁰ See Table 9-1 in Chapter 9.

⁹²¹ See Table 9-4 in Chapter 9.

offenses, demographic differences in the application of mandatory minimum penalties for firearm offenses create perceptions of unfairness and unwarranted disparity.⁹²²

e. Recommendations for firearm offenses

In light of these findings and observations, the Commission recommends that Congress consider amending the mandatory minimum penalties established at 18 U.S.C. § 924(c) to ameliorate the problems associated with mandatory minimum penalties for firearm offenses. Congress could do so in a number of ways.

i. *Amend the length of section 924(c) penalties*

Congress should consider amending the mandatory minimum penalties established at section 924(c), particularly the penalties for “second or subsequent” violations of the statute, to lesser terms. Section 924(c), for example, requires a 25-year mandatory minimum penalty for offenders convicted of a “second or subsequent” violation of the statute. Reducing the length of the mandatory minimum penalty would reduce the risk of excessive severity, permit the guidelines to better account for the variety of mitigating and aggravating factors that may be present in the particular case, and mitigate the inconsistencies in application produced by the severity of the existing mandatory minimum penalties.

ii. *Make section 924(c) a “true” recidivist statute*

Congress should consider amending section 924(c) so that the increased mandatory minimum penalties for a “second or subsequent” offense apply only to *prior* convictions. In those circumstances, the mandatory minimum penalties for multiple violations of section 924(c) charged in the same indictment would continue to apply consecutively, but would require significantly shorter sentences for offenders who do not have a prior conviction under section 924(c). This would reduce the potential for overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c), and ameliorate some of the demographic impacts resulting from stacking.

iii. *Give discretion to impose concurrent sentences for multiple section 924(c) violations*

Congress should consider amending section 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently. Congress has recently used this approach in enacting the offense of aggravated identity theft and the accompanying mandatory penalty at 18 U.S.C. § 1028A. This limited discretion would provide the flexibility to impose sentences that appropriately reflect the gravity of the offense and reduce the risk that an offender will receive an excessively severe punishment.

⁹²² It should be noted that Blacks also are victims of violent crime at a higher rate than members all other racial groups except Native American/Alaska Natives, and Blacks are the victims of violent crimes involving a firearm more often than members of all other racial groups. See Erika Harrell, Bureau of Justice Statistics, U.S. Department of Justice, *Black Victims of Violent Crime* 3–5 (2007).

iv. *Amend statutory definitions*

Congress should consider clarifying the statutory definitions of the underlying and predicate offenses that trigger mandatory minimum penalties under section 924(c) and the Armed Career Criminal Act to reduce the risk of inconsistent application and the litigation that those definitions have fostered. To further reduce the risk of inconsistent application, Congress also should consider more finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act's mandatory minimum penalty.

3. *Sex Offenses*

As discussed in Chapter 10, there are two types of federal sex offenses — sexual abuse (or “contact”) offenses and child pornography offenses (other than an offense related to the production of pornography depicting an actual child, which is deemed a “contact” offense). Many of these offenses carry mandatory minimum penalties.

The Commission's review of available sentencing data indicates that further study of these penalties is needed before it can offer specific recommendations in this area. However, preliminary review of the available sentencing data suggests that the mandatory minimum penalties for certain child pornography offenses and the resulting guidelines sentencing ranges may be excessively severe and as a result are being applied inconsistently. For example, in fiscal year 2010, 41.9 percent of the offenders convicted of a child pornography offense carrying a mandatory minimum sentence received a sentence below the guidelines range for a reason not sponsored by the government, a higher rate than for any other major offense type.⁹²³ This high non-government sponsored below range rate is consistent with the views of federal district judges expressed in the Commission's 2010 survey in which almost three-quarters (71%) of judges surveyed stated that the mandatory minimum penalty for receipt of child pornography is too high, and over one-third (37%) stated the mandatory minimum penalty for distribution of child pornography is too high.⁹²⁴

Sentencing data for fiscal year 2010 also suggests that prosecutors may believe the mandatory minimum penalties for certain child pornography offenses, and the resulting guidelines sentencing range, are excessive in individual cases. The Commission reviewed sentencing data for a 20-percent sample (336 of 1,669) of offenders sentenced under §2G2.2, the guideline that covers trafficking, receipt, and possession of child pornography. This review revealed that over half (53.0%) of offenders convicted of possession of child pornography, which does not carry a mandatory minimum penalty, engaged in distribution conduct that could have been prosecuted under a statute carrying a mandatory minimum penalty.⁹²⁵ In addition, in 9.2 percent of all child pornography cases sentenced in fiscal year 2010, the offender received a

⁹²³ See Table 10-6 in Chapter 10.

⁹²⁴ See Commission, *Results of Survey of United States District Judges: January 2010 through March 2010*, at 5 (2010). In contrast, 23% and 26% of respondents stated that the mandatory minimum penalties for production of child pornography and “other child exploitation offenses” are too high. *Id.*

⁹²⁵ See Figure 10-13 in Chapter 10.

sentence below the guidelines range for reasons sponsored by the government other than substantial assistance.⁹²⁶

The current structure of the statutory penalties for certain child pornography offenses may be causing inconsistent practices. In particular, there does not seem to be a significant practical difference in the offense conduct that constitutes simple possession of child pornography, which does not carry a mandatory minimum penalty, and offense conduct that constitutes receipt of child pornography, which carries a five-year mandatory minimum penalty. Although it is technically possible for an offender to knowingly possess child pornography without having knowingly received it,⁹²⁷ in the vast majority of child pornography cases the offender in fact knowingly received the child pornography that was possessed.⁹²⁸ The Commission believes that further study of both the manner in which offenders receive child pornography and how child pornography cases are charged is necessary in order to assess whether the significant differences in the statutory penalties for simple possession and receipt of child pornography are warranted.

In response to concerns raised about the guidelines pertaining to child pornography offenses generally and the preliminary findings contained in this report, the Commission is undertaking a more comprehensive study of child pornography offenses and expects to issue a report in the near future.

4. *Identity Theft Offenses*

Section 1028A establishes the offense of aggravated identity theft and carries a two-year mandatory penalty.⁹²⁹ The aggravated identity theft offense, established in 2004, is relatively new and there is continuing uncertainty regarding the proof required to show a violation of the statute.⁹³⁰ Prosecutions of aggravated identity theft offenses are heavily concentrated in only a handful of districts,⁹³¹ and identity theft offenses are still emerging as a federal law enforcement priority.⁹³² These factors make it difficult to issue specific findings and recommendations

⁹²⁶ See Table 10-6 in Chapter 10.

⁹²⁷ See, e.g., *United States v. Myers*, 355 F.3d 1040, 1042 (7th Cir. 2004); *United States v. Ehle*, 640 F.3d 689, 698 (6th Cir. 2011).

⁹²⁸ Cf. *United States v. Richardson*, 238 F.3d 837, 839-40 (7th Cir. 2001) (Posner, J.) (finding the distinction between possession and receipt of child pornography to be “tenuous” and “puzzl[ing]”); see also Stephen L. Bacon, *A Distinction without a Difference: “Receipt” and “Possession” of Child Pornography and the Double Jeopardy Problem*, 65 U. MIAMI L. REV. 1027 (2011).

⁹²⁹ 18 U.S.C. § 1028A.

⁹³⁰ The Supreme Court only recently clarified the *mens rea* required to commit an offense under section 1028A, see *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), and the Commission’s field interviews with prosecutors revealed some differences in prosecutors’ views regarding the difficulty of establishing violations of section 1028A, see *supra* Chapter 6(D)(4).

⁹³¹ See Figure 11-3 and accompanying text in Chapter 11.

⁹³² See notes 812–813 and accompanying text in Chapter 11.

regarding the operation of section 1028A at this time. However, the Commission offers the following general observations with respect to section 1028A.

The Commission notes that section 1028A differs from other, more commonly used mandatory minimum penalties in several respects. Unlike other mandatory minimum penalties, section 1028A establishes a fixed, definite mandatory penalty that requires a relatively short term of imprisonment. As a result, the sentences for committing aggravated identity theft are comparable to sentences that might be imposed for violating the general identity theft statute or for receiving guideline enhancements for identity theft conduct. Although the mandatory penalty must be imposed consecutively to any term of imprisonment received for the underlying offense, section 1028A also gives the court discretion to impose the terms of imprisonment for multiple violations of section 1028A concurrently to each other, rather than consecutively. Finally, section 1028A does not include graduated penalties for subsequent violations, and its application does not depend on weapon involvement or criminal history.

The Commission believes that those differences may explain why some of the problems associated with mandatory minimum penalties for other offenses are not observed, or are not as pronounced, in identity theft offenses. Like other mandatory minimum penalties, section 1028A imposes a sentence based on a narrow set of facts without considering the multitude of mitigating and aggravating circumstances that the guidelines take into account. The relatively short length of the two-year mandatory penalty, however, ameliorates to some extent the risk of excessive severity that other mandatory minimum provisions present. Similarly, the court's discretion to impose penalties for multiple violations of section 1028A concurrently further reduces the risk of over severity, while also allowing the court to impose longer terms of imprisonment when warranted by the circumstances of a particular case.

Unlike other mandatory minimum penalties, there are no notable demographic differences in the application of section 1028A. In particular, the mandatory penalty for violating section 1028A does not appear to fall more heavily on some racial groups than on others,⁹³³ perhaps in part because its application does not depend on weapon involvement or criminal history.

Finally, although there may be some inconsistencies in the application of section 1028A among judicial districts, the Commission believes these inconsistencies may be attributable to the interpretation of the relatively new section 1028A offense⁹³⁴ and, in any event, the penalty's relatively short length mitigates the problems associated with its inconsistent application.

D. SUMMARY OF RECOMMENDATIONS

The Commission makes the following specific recommendations for congressional consideration:

⁹³³ See Table 11-2 in Chapter 11.

⁹³⁴ See Chapter 6(D)(4).

General Recommendations

- A strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act. Although the continued importance and influence of the guidelines on sentencing decisions is evident from both Supreme Court decisions and sentencing data, the Commission has observed increasing inconsistencies in sentencing practices since *Booker*. The Commission is concerned about these developments and stands ready to work with Congress on possible legislative reforms to strengthen and improve the sentencing guidelines system.
- If Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties, the Commission believes that such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently. Sentencing data and interviews with prosecutors and defense attorneys indicate that mandatory minimum penalties that are considered excessively severe tend to be applied inconsistently.
- Congress should consider whether a statutory “safety valve” mechanism similar to the one available for certain drug trafficking offenders at 18 U.S.C. § 3553(f) may be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.
- Congress should request prison impact analyses from the Commission as early as possible in its legislative process whenever it considers enacting or amending criminal penalties. The Commission believes that early analyses of prison impact may assist Congress in focusing increasingly strained federal prison resources on offenders who commit the most serious offenses.

Drug offenses

- Congress should consider marginally expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the guidelines.
- Congress should reassess both the severity and scope of the recidivist provisions at 21 U.S.C. §§ 841 and 960.

Firearms offenses

- Congress should consider amending 18 U.S.C. § 924(c) so that the enhanced mandatory minimum penalties for a “second or subsequent” offense apply only to prior convictions, and should consider amending the penalties for such offenses to lesser terms.
- Congress should eliminate the “stacking” requirement and amend 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other.

- Congress should consider clarifying the statutory definitions of the underlying and predicate offenses that trigger mandatory penalties under 18 U.S.C § 924(c) and the Armed Career Criminal Act to reduce the risk of inconsistent application and litigation that those definitions have fostered. To further reduce the risk of inconsistent application, Congress should also consider more finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.

Sex offenses

- The Commission’s preliminary review of the available sentencing data suggests that the mandatory minimum penalties for certain non-contact child pornography offenses may be excessively severe and as a result are being applied inconsistently. The Commission is undertaking a more comprehensive study of child pornography offenses and expects to issue a report in the near future.

Identity theft offenses

- The problems associated with certain mandatory minimum penalties are not observed, or are not as pronounced, in identity theft offenses. The Commission believes this is due, in part, to 18 U.S.C. § 1028A requiring a relatively short mandatory penalty and not requiring stacking of penalties for multiple counts. The statute is relatively new and is used in only a handful of districts, however, so specific findings are difficult to make at this time.

E. CONCLUSION

The Commission intends for the information contained in this report to contribute to the ongoing assessment of mandatory minimum penalties by Congress and others in the federal criminal justice system. While there is a spectrum of views among members of the Commission regarding mandatory minimum penalties, the Commission continues to believe that a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act. The Commission stands ready to work with Congress on measures that can be taken to enhance the strength and effectiveness of the current guidelines system and address the problems with certain mandatory minimum penalties identified in this report. To that end, as required by the Sentencing Reform Act, the Commission will continue providing timely and objective sentencing data, information, and analysis to assist the efficient and effective exercise of congressional power to direct sentencing policy.

Appendix A

TABLE A-1

**Current Statutory Provisions Requiring
Mandatory Minimum Terms of Imprisonment**

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
1	2 U.S.C. § 192 (§§2J1.1, 2J1.5)	Refusing to testify before Congress	1857	1 month
2	2 U.S.C. § 390	Failure to appear, testify, or produce documents when subpoenaed for contested election case before Congress	1969	1 month or fine or both*
3	7 U.S.C. § 13a (§2B1.1)	Disobeying cease and desist order by registered entity	1922	6 months or fine or both*
4	7 U.S.C. § 13b (to be repealed in 2011)	Disobeying cease and desist order by person other than a registered entity	1922	6 months or fine or both*
5	7 U.S.C. § 15b(k)	Violating provisions of cotton futures contract regulation	1976	30 days
6	7 U.S.C. § 195(3) (§2N2.1)	Violation of court order by packer or swine contractor concerning packers and stockyards	1921	6 months or fine or both*
7	7 U.S.C. § 2024(b)(1) (§2B1.1)	Second and subsequent offense; illegal food stamp activity; value of \$100 to \$4,999	1981	6 months
8	7 U.S.C. § 2024(c) (§2B1.1)	Second and subsequent offense; presentation of illegal food stamp for redemption; value of \$100 or more	1981	1 year
9	8 U.S.C. § 1324(a)(2)(B)(i) (§2L1.1)	First or second offense; bringing in or harboring certain aliens where the offense was committed with the intent or with reason to believe that the unlawful alien will commit a felony	1996	3 years
10	8 U.S.C. § 1324(a)(2)(B)(i) (§2L1.1)	Third or subsequent offense; bringing in or harboring certain aliens where the offense was committed with the intent or with reason to believe that the unlawful alien will commit a felony	1996	5 years

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
11	8 U.S.C. § 1324(a)(2)(B)(ii) (\$2L1.1)	First or second offense; bringing in or harboring certain aliens where the offense was committed for the purpose of commercial advantage or private financial gain	1996	3 years
12	8 U.S.C. § 1324(a)(2)(B)(ii) (\$2L1.1)	Third or subsequent offense; bringing in or harboring certain aliens where the offense was committed for the purpose of commercial advantage or private financial gain	1996	5 years
13	8 U.S.C. § 1326(b)(3) (\$2L1.2)	Reentry of an alien removed on national security grounds	1996	10 years
14	12 U.S.C. § 617	Commodities price fixing	1913	1 year or fine or both*
15	12 U.S.C. § 630	Embezzlement, fraud, or false entries by banking officer	1913	2 years
16	15 U.S.C. § 8 (\$2R1.1)	Trust in restraint of import trade	1894	3 months
17	15 U.S.C. § 1245(b)	Possession/use of a ballistic knife during commission of federal crime of violence	1958	5 years or fine or both*
18	15 U.S.C. § 1825(a)(2)(c) (\$2A1.1)	First degree murder of horse official	1970	Life
19	16 U.S.C. § 414	Trespassing on federal land for hunting or shooting	1897	5 days or fine or both*
20	18 U.S.C. § 33(b) (§§2A2.1, 2A2.2, 2B1.1, 2K1.4)	Damage to or destruction of a motor vehicle carrying high-level radioactive waste or spent nuclear fuel with intent to endanger safety of person	1956	30 years
21	18 U.S.C. § 115 (§§2A1.1, 2A1.2, 2A2.1, 2X1.1)	First degree murder of federal official's family member	1984	Life

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
22	18 U.S.C. § 175c(c)(1) (§2M6.1)	Knowingly produce, engineer, synthesize, acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use variola virus	2004	25 years
23	18 U.S.C. §175c(c)(2) (§2M6.1)	Any person who, in the course of a violation of subsection (a) uses, attempts or conspires to use, or possesses and threatens to use, any item or items described in subsection (a)	2004	30 years
24	18 U.S.C. § 175c(c)(3) (§2M6.1)	If the death of another results from a person's violation of subsection (a)	2004	Life
25	18 U.S.C. § 225 (§§2B1.1, 2B4.1, 2F1.1)	Organizing, managing, or supervising a continuing financial criminal enterprise	1990	10 years
26	18 U.S.C. § 229A(a)(2)	Develop/produce/acquires/transfer/possess/use any chemical weapon that results in the death of another person	1998	Life
27	18 U.S.C. § 351 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4)	First degree murder of Congress, Cabinet, or Supreme Court member	1971	Life
28	18 U.S.C. § 844(f) (§§2K1.4, 2X1.1)	Maliciously damages, or attempts to damage, property of the U.S. by means of fire or explosives	1970	5 years or fine or both*
29	18 U.S.C. § 844(h) (§2K2.4 (§2K1.4 for offenses committed prior to 11/18/88))	Second or subsequent offense, use of fire or explosives to commit a felony, penalty enhancement provision	1970	20 year enhancement
30	18 U.S.C. § 844(h) (§2K2.4 (§2K1.4 for offenses committed prior to 11/18/88))	First offense, use of fire or explosives to commit a felony, penalty enhancement provision	1970	10 year enhancement
31	18 U.S.C. § 844(i) (§2K1.4)	Use of fire or explosives to destroy property used in interstate commerce	1970	5 years or fine or both*

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
32	18 U.S.C. § 844(o) (§2K2.4)	First offense involving the transfer of explosive materials to be used to commit crime of violence or drug trafficking crime	1970	10 year enhancement
33	18 U.S.C. § 844(o) (§2K2.4)	Second or subsequent offense involving the transfer of explosive materials to be used to commit crime of violence or drug trafficking crime	1970	20 year enhancement
34	18 U.S.C. § 924(c)(1)(A)(i) (§2K2.4)	First offense, using or carrying a firearm during a crime of violence or drug trafficking crime; penalty enhancement provision	1986	5 years
35	18 U.S.C. § 924(c)(1)(A)(ii) (§2K2.4)	First offense, brandishing a firearm during a crime of violence or drug trafficking crime; penalty enhancement provision	1986	7 years
36	18 U.S.C. § 924(c)(1)(A)(iii) (§2K2.4)	First offense, discharging a firearm during a crime of violence or drug trafficking crime; penalty enhancement provision	1986	10 years
37	18 U.S.C. § 924(c)(1)(B)(i) (§2K2.4)	First offense, firearm is a short-barreled rifle, short barreled-shotgun	1986	10 years
38	18 U.S.C. § 924(c)(1)(B)(ii)	First offense, firearm is a machine gun or destructive device or the firearm is equipped with a silence or muffler	1986	30 years
39	18 U.S.C. § 924(c)(1)(C)(i) (§2K2.4)	Second or subsequent conviction under § 924(c)(1)(A)	1986	25 years
40	18 U.S.C. § 924(c)(1)(C)(ii) (§2K2.4)	Second or subsequent conviction under § 924(c)(1)(A) and firearm is a machine gun or destructive device or the firearm is equipped with a silencer or muffler	1986	Life
41	18 U.S.C. § 924(c)(5)(A) (§2K2.4)	Possession or use of armor piercing ammunition during a crime of violence or drug trafficking crime; penalty enhancement provision	1986	15 years

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
42	18 U.S.C. § 924(e)(1) (§2K2.1 (see also §4B1.4))	Possession of a firearm or ammunition by a fugitive or addict who has three prior convictions for violent felonies or drug offenses	1986	15 years
43	18 U.S.C. § 929(a)(1) (§2K2.4)	Carrying firearm during crime of violence or drug trafficking crime. Penalty enhancement provision	1984	5 year enhancement
44	18 U.S.C. § 930(c) (§2K2.5)	First degree murder involving the possession or use of a firearm or other dangerous weapon in a Federal Facility	1988	Life
45	18 U.S.C. § 1028A(a)(1) (§2B1.6)	Aggravated identity theft	2004	2 years
46	18 U.S.C. § 1028A(a)(2) (§2B1.6)	Aggravated identity theft in relation to any offense listed at 18 U.S.C. §2332b(g)(5)(B) (Federal Crime of Terrorism)	2004	5 years
47	18 U.S.C. § 1091 (§2H1.3)	Genocide killing	1988	Life
48	18 U.S.C. § 1111 (§§ 2A1.1, 2A1.2)	First degree murder	1790	Life
49	18 U.S.C. § 1114 (§§ 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1)	First degree murder of federal officers	1934	Life
50	18 U.S.C. § 1116 (§§ 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1)	First degree murder of foreign officials, official guests, or internationally protected persons	1972	Life
51	18 U.S.C. § 1118 (§§2A1.1, 2A1.2)	Murder in a federal correctional facility by inmate sentenced to a term of life imprisonment	1994	Life
52	18 U.S.C. § 1119(b) (§§ 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1)	First degree murder of a U.S. national by a U.S. national while outside the United States	1994	Life

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
53	18 U.S.C. § 1120 (§§ 2A1.1, 2A1.2, 2A1.3, 2A1.4)	Murder by escaped federal prisoner	1996	Life
54	18 U.S.C. § 1121(a)(1) (§§2A1.1, 2A1.2)	First degree murder of a state or local law enforcement officer or any person assisting in a federal criminal investigation	1996	Life
55	18 U.S.C. § 1121(b)(1) (§§2A1.1, 2A1.2)	Killing of a state correctional officer by an inmate	1996	20 years
56	18 U.S.C. § 1122	Selling or donating, or the attempt to do so, of HIV positive tissue or bodily fluids to another person for subsequent use other than medical research	1994	1 year or fine or both*
57	18 U.S.C. §1201(a)	Kidnapping	2003	Life
58	18 U.S.C. § 1201(g)	Kidnapping involving minor (under age 18)	2003	20 years
59	18 U.S.C. § 1203 (§§2A4.1, 2X1.1)	Hostage taking resulting in the death of any person	2003	Life
60	18 U.S.C. § 1389	Assault resulting in bodily injury or battery of a US serviceman or their immediate family member	2009	6 months
61	18 U.S.C. § 1466A(a) (§2G2.2)	Production/possession/receipt/ transport of obscene visual representations of the sexual abuse of children	2003	Mandatory minimum term of imprisonment specified at section 2252A(b)(1)
62	18 U.S.C. § 1503(b)(1) (§2J1.2)	First degree murder of an officer of the court or juror	1948	Life
63	18 U.S.C. § 1512(a)(1) (§§2A1.1, 2A1.2, 2A1.3, 2A2.1)	First degree murder of any person with the intent to prevent their attendance or testimony in an official proceeding	1982	Life

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
64	18 U.S.C. § 1512(a)(2) (§§2A1.1, 2A1.2, 2A1.3, 2A2.1)	Obstructing justice by using, or attempting to use, physical force against another	1982	Life
65	18 U.S.C. § 1512(a)(3)(A) (§§2A1.1, 2A1.2, 2A1.3, 2A2.1)	Obstructing justice by tampering with a witness, victim, or an informant	1982	Life
66	18 U.S.C. § 1591(b)(1) (§§2G1.1, 2D2.1, 2G1.3)	Sex trafficking of children under the age of 14 by force, fraud, or coercion	2000	15 years
67	18 U.S.C. § 1591(b)(2) (§§2G1.1, 2D2.1, 2G1.3)	Sex trafficking of children, over the age of 14 but below the age of 18, by force, fraud, or coercion	2000	10 years
68	18 U.S.C. § 1651	Piracy under the laws of nations	1790	Life
69	18 U.S.C. § 1652	Piracy by U.S. citizen	1790	Life
70	18 U.S.C. § 1653	Piracy against the United States by an alien	1790	Life
71	18 U.S.C. § 1655	Piracy in the form of assault on a commander	1790	Life
72	18 U.S.C. § 1658(b)	Prevention of escape from a vessel or holding out a false light, or extinguishing a true light with intent to cause distress to a sailing vessel	1790	10 years
73	18 U.S.C. § 1661	Robbery ashore by a pirates	1790	Life
74	18 U.S.C. § 1751(a) (§§2A1.1, 2A1.2, 2A1.3, 2A1.4)	Killing the President of the United States, the next in the order of succession to the Office of the President, or any person who is acting as the President of the United States; or any person employed in the Executive Office of the President or Office of the Vice President	1965	Life
75	18 U.S.C. § 1917	Interference with Civil Service Examinations	1966	10 days or fine or both*

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
76	18 U.S.C. § 1958(a) (§2E1.4)	Causing death through the use of interstate commerce facilities in the commission of a murder-for-hire	1984	Life
77	18 U.S.C. § 1992	Wrecking train carrying high level nuclear waste and thereby causing death	2006	Life
78	18 U.S.C. § 2113(e) (§§2A1.1, 2B3.1)	Bank robbery; avoiding apprehension for bank robbery; escaping custody after bank robbery; causing death in the course of a bank robbery	1934	10 years; but if death results-Life
79	18 U.S.C. § 2241(c) (§2A3.1)	First offense, engaging in a sexual act with a child under the age of 12, or engaging in a sexual act by force with a child who is above the age of 12, but under the age of 16	1986	30 years
80	18 U.S.C. § 2241(c) (§2A3.1)	Second or subsequent offense, engaging in a sexual act with a child under the age of 12, or engaging in a sexual act by force with a child who is above the age of 12, but under the age of 16	1986	Life
81	18 U.S.C. § 2250(c) (§2A3.6)	Fails to register as a sex offender and commits a crime of violence	2006	5 years
82	18 U.S.C. § 2251(a) (§2G2.1)	Engaging in explicit conduct with a child for the purpose of producing any visual depiction of such conduct	1978	15 years
83	18 U.S.C. § 2251(a) (§2G2.1)	Engaging in explicit conduct with a child for the purpose of producing any visual depiction of such conduct and offender has one prior conviction for sexual exploitation	1978	25 years
84	18 U.S.C. § 2251(a) (§2G2.1)	Engaging in explicit conduct with a child for the purpose of producing any visual depiction of such conduct and the offender has two or more prior convictions for sexual exploitation	1978	35 years
85	18 U.S.C. § 2251(a) (§2G2.1)	Engaging in explicit conduct with a child for the purpose of producing any visual depiction of such conduct and death results	1978	30 years

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
86	18 U.S.C. § 2251(b) (§2G2.1)	Any parent who permits or assists a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct	1978	15 years
87	18 U.S.C. § 2251(b) (§2G2.1)	Any parent who permits or assists a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct and the offender has one prior conviction for sexual exploitation	1978	25 years
88	18 U.S.C. § 2251(b) (§2G2.1)	Any parent who permits or assists a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct and the offender has two or more prior convictions for sexual exploitation	1978	35 years
89	18 U.S.C. § 2251(b) (§2G2.1)	Any parent who permits or assists a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct and death results	1978	30 years
90	18 U.S.C. § 2251(c) (§2G2.1, 2G2.2)	Enticing a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct	1978	15 years
91	18 U.S.C. § 2251(c) (§2G2.1, 2G2.2)	Enticing a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct and the offender has one prior conviction for sexual exploitation	1978	25 years
92	18 U.S.C. § 2251(c) (§2G2.1, 2G2.2)	Enticing a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct and the offender has two or more prior convictions for sexual exploitation	1978	35 years
93	18 U.S.C. § 2251(c) (§2G2.1, 2G2.2)	Enticing a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct and death results	1978	30 years

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
94	18 U.S.C. § 2251(d) (§2G2.2)	Producing or publishing a notice or advertisement seeking or offering a visual depiction of a child engaging in an elicit sexual act	1978	15 years
95	18 U.S.C. § 2251(d) (§2G2.2)	Producing or publishing a notice or advertisement seeking or offering a visual depiction of a child engaging in an elicit sexual act and the offender has one prior conviction for sexual exploitation	1978	25 years
96	18 U.S.C. § 2251(d) (§2G2.2)	Producing or publishing a notice or advertisement seeking or offering a visual depiction of a child engaging in an elicit sexual act and the offender has two or more prior convictions for sexual exploitation	1978	35 years
97	18 U.S.C. § 2251(d) (§2G2.2)	Producing or publishing a notice or advertisement seeking or offering a visual depiction of a child engaging in an elicit sexual act and death results	1978	30 years
98	18 U.S.C. § 2251A(a) (§2G2.3)	Sale of child by parent or custodian for the purpose of sexual exploitation	1988	30 years
99	18 U.S.C. § 2251A(b) (§2G2.3)	Purchasing a child for the purpose of sexual exploitation	2003	30 years
100	18 U.S.C. § 2252(a)(1, 2, or 3) (§§2G2.2)	Interstate transportation of visual depictions of a minor engaging in sexually explicit conduct; receipt, sale, or possession with intent to sell visual depictions of a minor engaging in sexually explicit conduct	1978	5 years; if the offender has a prior conviction for sexual exploitation of children, 15 years
101	18 U.S.C. § 2252(a)(4)	Possession of visual depictions of minors engaging in sexually explicit conduct, second offense	1990	10 years if the defendant has a prior conviction for sexual exploitation of children

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
102	18 U.S.C. § 2252A(a)(1)-(4), (6) (§2G2.2)	Interstate transportation of child pornography	1996	5 years; 15 years for a second or subsequent violation
103	18 U.S.C. § 2252A(a)(5) (§2G2.2)	Possession of child pornography	1996	10 years if the offender has a prior conviction for possession of child pornography
104	18 U.S.C. § 2252A(b) (§2G2.2)	Child pornography; penalties	1996	5 years for violations of sections 2252A(1)-(4), (6); 15 years for a second or subsequent violation of section 2252A(1)-(4),(6); 10 years for a second or subsequent violation of section 2252A(5)
105	18 U.S.C. § 2252A(g) (§2G2.2)	Child exploitation enterprise	1996	20 years
106	18 U.S.C. § 2257 (§2G2.5)	Failure to keep records of sexually explicit depictions	1988	2 years
107	18 U.S.C. § 2257A(i)(3) (§2G2.5)	Failure to keep records of depictions of simulated sexual conduct	2006	2 years if prior conviction under this section
108	18 U.S.C. § 2260(a) (§2G2.1)	Use of a minor in the production of sexually explicit depictions of a minor for importation into the United States	1994	Mandatory minimum term of imprisonment specified at section 2251(e)

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
109	18 U.S.C. § 2260(b) (§2G2.2)	Use of a visual depiction of a minor engaging in sexually explicit conduct with the intent of importing the visual depiction into the United States	1994	Mandatory minimum term of imprisonment specified at section 2252(b)(1)
110	18 U.S.C. § 2260A (§2A3.6)	Penalty enhancement for registered sex offenders who commit specified offenses involving a minor	2006	10 year enhancement
111	18 U.S.C. § 2261(b)(6)	Stalking in violation of a restraining order, or other order described in 18 U.S.C. § 2266	1994	1 year
112	18 U.S.C. § 2332g (§2K2.1)	Knowingly produce, acquire, transfer, possess missile systems designed to destroy aircraft	2004	25 years
113	18 U.S.C. § 2332g (§2K2.1)	While in course of violating or attempting to violate subsection (a), uses, attempts or conspires to use or possess and threatens to use, any item or items described in subsection (a)	2004	30 years
114	18 U.S.C. § 2332g (§2K2.1)	If the death of another results from the violation of subsection (a)	2004	Life
115	18 U.S.C. § 2332h(c)(1) (§2M6.1)	Knowingly produce, acquire, transfer, receive, possess any weapon designed to release radiation or radioactivity at a level dangerous to human life	2004	25 years
116	18 U.S.C. § 2332h(c)(2) (§2M6.1)	While in the course of violating or attempting to violate subsection (a), uses, attempts or conspires to use, or possesses and threatens to use, any item or items described in subsection (a)	2004	30 years
117	18 U.S.C. § 2332h(c)(3) (§2M6.1)	If the death results from a person's violation of subsection (a)	2004	Life
118	18 U.S.C. § 2381 (§2M1.1)	Treason and sedition	1948	5 years

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
119	18 U.S.C. § 2422(b) (§§2G1.1, 2G1.3)	Coercion and enticement using mail or means of commerce, of a minor for illegal sexual activity	1986	10 years
120	18 U.S.C. § 2423(a) (§2G1.3)	Transportation of minors across state lines for the purpose of prostitution or another sexual activity which can be charged as a criminal offense	2003	10 years
121	18 U.S.C. § 2423(e) (§2G1.3)	Attempt or conspiracy to transport a minor across state lines for the purpose of prostitution or another sexual activity which can be charged as a criminal offense	2003	10 years
122	18 U.S.C. § 3559(c)(1)	Upon conviction for a serious violent felony, if offender has two or more prior serious violent felony convictions, or one or more prior serious violent felony convictions and one or more prior serious drug offense convictions, apply enhancement	2003	Life
123	18 U.S.C. § 3559(d)(1)	Sentence enhancement; if the death of a child of less than 14 years results from a serious violent felony as described in section 3591(a)(2), apply enhancement	2003	Life
124	18 U.S.C. § 3559(e)(1)	Where a federal sex offense committed against a minor and the offender has a prior sex conviction in which a minor was the victim, apply enhancement	2003	Life
125	18 U.S.C. § 3559(f)(1)	Sentence enhancement; murder of a child less than 18	2004	30 years
126	18 U.S.C. § 3559(f)(2)	Sentence enhancement, kidnapping or maiming of child less than 18	2004	25 years
127	18 U.S.C. § 3559(f)(3)	Sentence enhancement; crime of violence resulting in serious bodily injury or if a dangerous weapon is used during and in relation to a crime of violence	2004	10 years
128	19 U.S.C. § 283 (§2T3.1)	Failure to report seaboard saloon purchases to customers	1886	3 months

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
129	21 U.S.C. § 212 [petty offense]	Practice of pharmacy and sale of poisons in China	1915	10 months or fine or both*
130	21 U.S.C. § 461(c) (§2N2.1)	Killing any person engaged in or on account of performance of his official duties as a poultry or poultry products inspector	1957	Life
131	21 U.S.C. § 622 (§2C1.1)	Bribery of meat inspectors and acceptance of bribes	1907	1 year
132	21 U.S.C. § 675 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3)	Killing any person engaged in or on account of performance of his official duties as a meat inspector	1907	Life
133	21 U.S.C. § 841(a) (§2D1.1)	Manufacturing, distributing, dispensing, or possessing a controlled substance or counterfeit substance with intent to distribute	1986	Mandatory minimum term of imprisonment specified at section 841(b)
134	21 U.S.C. § 841(b)(1)(A) (§2D1.1)	First offense, manufacturing, distributing, or possessing with intent to distribute, no death or serious bodily injury	1986	10 years or fine or both*
135	21 U.S.C. § 841(b)(1)(A) (§2D1.1)	First offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results from the use	1986	20 years or fine or both*
136	21 U.S.C. § 841(b)(1)(A) (§2D1.1)	Second offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results from the use	1986	Life
137	21 U.S.C. § 841(b)(1)(A) (§2D1.1)	Second offense, manufacturing, distributing, or possessing with intent to distribute, no death or serious bodily injury	1986	20 years or fine or both*
138	21 U.S.C. § 841(b)(1)(A) (§2D1.1)	Third offense, manufacturing, distributing, or possessing with intent to distribute	1986	Life

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
139	21 U.S.C. § 841(b)(1)(B) (§2D1.1)	First offense, manufacture, distribution, or possession with intent to distribute, no death or serious bodily injury results	1984	5 years or fine or both*
140	21 U.S.C. § 841(b)(1)(B) (§2D1.1)	First offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	1984	20 years or fine or both*
141	21 U.S.C. § 841(b)(1)(B) (§2D1.1)	Second and all subsequent offenses, manufacture, distribution, or possession with intent to distribute, no death or serious bodily injury results	1984	10 years or fine or both*
142	21 U.S.C. § 841(b)(1)(B) (§2D1.1)	Second or any subsequent offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	1984	Life
143	21 U.S.C. § 841(b)(1)(C) (§2D1.1)	First offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	1986	20 years or fine or both*
144	21 U.S.C. § 841(b)(1)(C) (§2D1.1)	Second or any subsequent offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	1986	Life
145	21 U.S.C. § 844(a) (§2D2.1)	Second offense, simple possession, all substances other than those containing cocaine base and those containing cocaine base but weighing three grams or less	1986	15 days
146	21 U.S.C. § 844(a) (§2D1.1)	Second offense, simple possession, substance contains cocaine base and weighs more than 3 grams	1988	5 years
147	21 U.S.C. § 844(a) (§2D2.1)	Third and all subsequent offenses, simple possession, all substances other than those containing cocaine base and those containing cocaine base but weighing 1 gram or less	1986	90 days

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
148	21 U.S.C. § 844(a) (§2D2.1)	Third and all subsequent offenses, simple possession, substance contains cocaine base and weighs more than 1 gram	1988	5 years
149	21 U.S.C. § 846 (§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2)	Attempt and conspiracy under Chapter 13-Drug Abuse Prevention and Control: Subchapter-Offenses and Penalties	1970	Mandatory minimum term of imprisonment applicable to the underlying offense
150	21 U.S.C. § 848(a) (§2D1.5)	First offense, continuing criminal enterprise	1970	20 years
151	21 U.S.C. § 848(a) (§2D1.5)	Second and all subsequent offenses, continuing criminal enterprise	1970	30 years
152	21 U.S.C. § 848(b) (§2D1.5)	Any offense; principal administrator, organizer, or leader (“kingpin”) of continuing criminal enterprise	1986	Life
153	21 U.S.C. § 848(e)(1) (§2A1.1)	Engaged in a continuing criminal enterprise and intentionally kills an individual or law enforcement officer	1988	20 years
154	21 U.S.C. § 851	Proceedings to establish prior convictions; sentence enhancement provisions	1970	1 year
155	21 U.S.C. § 859(a)	First offense, distribution to persons under age 21	1986	1 year or the applicable minimum from 841(b), whichever is the greater
156	21 U.S.C. § 859(b)	Second offense, distribution to persons under age 21	1986	1 year or the applicable minimum from 841(b), whichever is the greater

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
157	21 U.S.C. § 859(b) (§2D1.2)	Third and subsequent offenses, distribution to persons under age 21	1988	Mandatory minimum term of imprisonment specified at section 841(b)(1)(A)
158	21 U.S.C. § 860(a) (§2D1.2)	First offense, distribution of a controlled substance near a school or similar facility	1986	1 year or the applicable minimum from 841(b), whichever is the greater
159	21 U.S.C. § 860(b) (§2D1.2)	Second offense, distribution of a controlled substance near a school or similar facility	1984	3 years or the applicable minimum from 841(b), whichever is the greater
160	21 U.S.C. § 860(b) (§2D1.2)	Third offense, distribution of a controlled substance near a school or similar facility	1988	Mandatory minimum term of imprisonment specified at section 841(b)(1)(A)
161	21 U.S.C. § 861(b) (§2D1.2)	First offense, employing or using a person under age 18 to engage in a controlled substance offense	1986	1 year
162	21 U.S.C. § 861(c) (§2D1.2)	Second offense, employing or using a person under age 18 to engage in a controlled substance offense	1986	1 year
163	21 U.S.C. § 861(c) (§2D1.2)	Third or subsequent offense, employing or using a person under age 18 to engage in a controlled substance offense	1988	Mandatory minimum term of imprisonment specified at section 841(b)

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
164	21 U.S.C. § 861(f) (§2D1.2)	Knowing or intentionally distributing a controlled substance to a pregnant individual	1988	1 year
165	21 U.S.C. § 960(b)(1) (§2D1.1)	First offense, unlawful import or export, no death or serious bodily injury results	1986	10 years or fine or both*
166	21 U.S.C. §960(b)(1) (§2D1.1)	First offense, unlawful import or export, death or serious bodily injury results	1986	20 years or fine or both*
167	21 U.S.C. § 960(b)(1) (§2D1.1)	Second or any subsequent offense, unlawful import or export, no death or serious bodily injury results	1986	20 years or fine or both*
168	21 U.S.C. § 960(b)(1) (§2D1.1)	Second or any subsequent offense, unlawful import or export, death or serious bodily injury results	1986	Life
169	21 U.S.C. § 960(b)(2) (§2D1.1)	First offense, unlawful import or export, no death or serious bodily injury results	1986	5 years or fine or both*
170	21 U.S.C. § 960(b)(2) (§2D1.1)	First offense, unlawful import or export, death or serious bodily injury results	1986	20 years or fine or both*
171	21 U.S.C. § 960(b)(2) (§2D1.1)	Second and all subsequent offenses, no death or serious bodily injury results	1986	10 years or fine or both*
172	21 U.S.C. § 960(b)(2) (§2D1.1)	Second or any subsequent offense, unlawful import or export, serious death or bodily injury results	1986	Life
173	21 U.S.C. § 960(b)(3) (§2D1.1)	First offense, unlawful import or export, death or serious bodily injury results	1986	20 years or fine or both*
174	21 U.S.C. § 960(b)(3) (§2D1.1)	Second offense, unlawful import or export, death or serious bodily injury results	1986	Life

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
175	21 U.S.C. § 963 (§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2)	Attempt and conspiracy under Chapter 13-Drug Abuse Prevention and Control: Subchapter-Import and Export	1970	Mandatory minimum term of imprisonment applicable to the underlying offense
176	21 U.S.C. § 1041(b)	Killing any person engaged in or on account of performance of his official duties under Chapter 15-Egg Products Inspection	1970	Life
177	22 U.S.C. § 4221 (§2B1.1)	Forgery of notary seal	1906	1 year
178	33 U.S.C. § 410	Navigable water regulation violation	1900	30 days or fine or both*
179	33 U.S.C. § 411 (§2Q1.3)	Deposit of refuse or obstruction of navigable waterway	1899	30 days or fine or both*
180	33 U.S.C. § 441	New York and Baltimore harbors, deposit of refuse	1958	30 days or fine or both*
181	42 U.S.C. § 2272(b) (§2M6.1)	Violation of prohibitions governing atomic weapons; no death resulting	1954	25 years
182	42 U.S.C. § 2272(b) (§2M6.1)	Using, attempting to use, or threatening while possessing, an atomic weapon	1954	30 years
183	42 U.S.C. § 2272(b) (§2M6.1)	Violation of prohibitions governing atomic weapons; death of another resulting	1954	Life
184	46 U.S.C. § 58109(a)	Individual convicted of violating merchant marine act	2006	1 year or fine or both*
185	47 U.S.C. § 13	Refusal to operate railroad or telegraph lines	1934	6 months
186	47 U.S.C. § 220(e)	Falsely entering or destroying books or accounts of common carrier	1989	1 year or fine or both*

<u>Number</u>	<u>Statute (Guideline)</u>	<u>Description</u>	<u>Date Enacted**</u>	<u>Minimum Term</u>
187	49 U.S.C. § 11911	(omitted in 1995)	1978	1 year
188	49 U.S.C. § 46502(a)(2)(A) (§§2A5.1, 2X1.1)	Committing or attempting to commit aircraft piracy in special aircraft jurisdiction of the U.S.; no death of another individual	1958	20 years
189	49 U.S.C. § 26502(a)(2)(B) (§§2A5.1, 2X1.1)	Committing or attempting to commit aircraft piracy in special aircraft jurisdiction of the U.S.; resulting in death of another individual	1958	Life
190	49 U.S.C. § 46502(b)(1)(A) (§§2A5.1, 2X1.1)	Violation of Convention for the Suppression of Unlawful Seizure of Aircraft outside special aircraft jurisdiction of U.S.; no death of another individual	1958	20 years
191	49 U.S.C. § 46502(b)(1)(B) (§§2A5.1, 2X1.1)	Violation of Convention for the Suppression of Unlawful Seizure of Aircraft outside special aircraft jurisdiction of U.S.; resulting in death of another individual	1958	Life
192	49 U.S.C. § 46506(1) (§2A5.3)	Application of certain criminal laws to acts on aircraft if in special maritime and territorial jurisdiction of the U.S.	1958	Mandatory minimum term of imprisonment applicable to the underlying offense
193	49 U.S.C. Appx. § 1472(n) (§2A5.1)	Commits a defined offense aboard an aircraft outside U.S. jurisdiction, no death results (see 49 U.S.C. § 46402)	1974	20 years
194	49 U.S.C. Appx. § 1472(n) (§2A5.1)	Commits a defined offense aboard an aircraft outside U.S. jurisdiction, death results (see 49 U.S.C. § 46402)	1974	Life
<p>* These statutes require a minimum period of imprisonment only when the court imposes a term of imprisonment.</p> <p>** Year during which mandatory minimum first enacted with respect to the substantive offense proscribed by the relevant statute.</p>				

**PENDING MANDATORY MINIMUM LEGISLATION
(AS OF SEPTEMBER 28, 2011)**

SENATE

S. 596—Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2011

Sec. 10 **Minimum Penalties for Possession of Child Pornography**

18 U.S.C. § 2252(b)(2) (Certain activities relating to material involving the sexual exploitation of minors) is amended by providing not less than one year imprisonment if any visual depiction involved in the offense involved a prepubescent minor who had not attained 12 years of age.

18 U.S.C. § 2252A(b)(2) (Certain activities relating to material constituting or containing child pornography) is amended by providing not less than one year imprisonment if any visual depiction involved in the offense involved a prepubescent minor who had not attained 12 years of age.

S. 867—Fighting Gangs and Empowering Youth Act of 2011

Sec. 301 **Criminal Street Gangs**

18 U.S.C. § 521 (Criminal Street Gangs) is amended by providing for imprisonment for any term of years or for life if the violation under amended subsection (b) is based on a predicate gang crime for which the maximum penalty includes life imprisonment.

Sec. 302 **Solicitation or Recruitment of Persons and Violent Crimes in Furtherance or in Aid of Criminal Street Gangs**

Section 523 is added to title 18 to provide imprisonment for any term of years or for life for any person who (1) murders, (2) kidnaps or sexually assaults, or (3) maims any individual, for the purpose of gaining entrance to or maintaining or increasing position in, or in furtherance or in aid of, or for the direct or indirect benefit of, or in purposeful association with a criminal street gang, or as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value to or from a criminal street gang.

Sec. 303 **Interstate and Foreign Travel or Transport in Aid of Racketeering Enterprises and Criminal Street Gangs**

18 U.S.C. § 1952 is amended by adding subsection (b), providing for imprisonment for any term of years for whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with the intent to kill, assault, bribe, force, intimidate, or threaten any person, to delay or influence the testimony of, or prevent from testifying, a witness in a State

criminal proceeding and thereafter performs, or attempts or conspires to perform, an act described in this subsection. Subsection (b) also provides for imprisonment for any term of years or for life, if death results.

Sec. 311 Increased Penalties for use of Firearm in Crime of Violence or Drug Trafficking Crime

18 U.S.C. § 924(c)(1)(A) is amended to increase the minimum penalty from not less than five years to not less than seven years.

S. 977–Fighting Gangs and Empowering Youth Act of 2011

Sec. 301 Criminal Street Gangs

18 U.S.C. § 521 (Criminal Street Gangs) is amended by providing for imprisonment for any term of years or for life if the violation under amended subsection (b) is based on a predicate gang crime for which the maximum penalty includes life imprisonment.

Sec. 302 Solicitation or Recruitment of Persons and Violent Crimes in Furtherance or in Aid of Criminal Street Gangs

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Sec. 303 Interstate and Foreign Travel or Transport in Aid of Racketeering Enterprises and Criminal Street Gangs

18 U.S.C. § 1952 is amended by adding subsection (b), providing for imprisonment for any term of years for whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with the intent to kill, assault, bribe, force, intimidate, or threaten any person, to delay or influence the testimony of, or prevent from testifying, a witness in a State criminal proceeding and thereafter performs, or attempts or conspires to perform, an act described in this subsection. Subsection (b) also provides for imprisonment for any term of years or for life, if death results.

Sec. 311 Increased Penalties for use of Firearm in Crime of Violence or Drug Trafficking Crime

18 U.S.C. § 924(c)(1)(A) is amended to increase the minimum penalty from not less than five years to not less than seven years.

S. 1002—Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2011 or the SAFE DOSES Act

Sec. 2 Theft of Medical Products

Section 670 (Theft of medical products) is added to title 18 to provide imprisonment for not less than one year for using any means or facility of interstate or foreign commerce, or in or affecting interstate or foreign commerce, to knowingly (1) steal, take without authorization, embezzle, carry away, or obtain by fraud or deception a medical product, or attempt or conspire to do so; (2) transport, handle, traffic in, or store a stolen medical product, or attempt or conspire to do so; or (3) participate, in any way, in a scheme to alter, forge, or falsify the labeling or documentation (including documentation relating to origination or shipping) of a stolen medical product; and the additional factors are present: (A) the value of the medical product or products is not less than \$5,000; and (B) the (i) person (I) buys, or otherwise a medical product, knowing or with reckless disregard as to whether the medical product is expired or has been stolen, with the intent to sell or distribute the medical product; (II) sells, or distributes, a medical product, knowing or with reckless disregard as to whether the medical product is expired or has been stolen; or (III) at the time of the violation is employed by, or is an agent of, an organization in the supply chain from which the stolen or expired medical products were removed, including a manufacturer, wholesaler, repacker, own-label distributor, private-label distributor, jobber, broker, drug trader, transportation company, hospital, pharmacy, or security company; or (ii) the violation (I) involves the use of violence, force, or a threat of violence or force; (II) involves the use of a deadly weapon; (III) results in injury, including the injury of deprivation of treatment, or death caused by ingestion or use of a stolen or expired medical product; or (IV) is the second or subsequent offense under subsection (b) committed by the person.

S. 1151—Personal Data Privacy and Security Act of 2011

Sec. 109 Damage to Critical Infrastructure Computers

Section 1030A is added to title 18 to provide imprisonment for not less than three years nor more than 20 years for offenses, during and in relation to a felony violation of section 1030, intentionally cause or attempt to cause damage to a critical infrastructure computer, and such damage results in (or in the case of an attempt, would, if completed have resulted in) the substantial impairment (1) of the operation of the critical infrastructure computer; or (2) of the critical infrastructure associated with the computer.

S. 1196—Accountability Through Electronic Verification Act

Sec. 4 Consequences of Failure to Participate

8 U.S.C. § 1324a(f) (Criminal penalties and injunctions for pattern or practice violations) is amended to increase the penalty from imprisonment for not more than six months to not less than one year and not more than 10 years.

HOUSE OF REPRESENTATIVES

H.R. 45–Criminal Alien Accountability Act

Sec. 2 Mandatory Sentencing Ranges Related to Reentry By Removed Alien

8 U.S.C. § 1326(a) (Reentry of removed aliens, In general) is amended to increase the penalty from imprisonment for not more than two years to not less than one year and not more than two years. Section 1326(b) of title 8 (Criminal penalties for reentry of certain removed aliens) is amended to increase the penalty under paragraph (1) from imprisonment for not more than ten years to not less than five years and not more than 10 years. Paragraph (2) is amended to increase the penalty from imprisonment for not more than 20 years to not less than ten years and not more than 20 years. Paragraph (4) is amended to increase the penalty from imprisonment for not more than 10 years to not less than five years and not more than ten years.

Section 1327 of title 8 (Aiding or assisting certain aliens to enter) is amended to increase the penalty from imprisonment for not more than ten years to the “range to which the reentering alien is subject” under section 1326(b) of title 8.

H.R. 98–Illegal Immigration Enforcement and Social Security Protection Act of 2011

Sec. 4 Employment Eligibility Database

Creates a penalty of imprisonment for not less than five and not more than seven years, for whoever accesses or uses information in the Employment Eligibility Database without authority to do so, or for an unauthorized purpose.

H.R. 224–David Ray Hate Crimes Prevention Act of 2011 or David’s Law

Sec. 4 Prohibition of Certain Acts of Violence

Section 245 of title 18 is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and adds newly designated subsection (c)(1) to provide for imprisonment for any term of years or for life for whoever, whether or not acting under color of law, willfully causes bodily injury to any person, or, through the use of fire, a firearm, or an explosive device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person and death results; or the act included kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

Section 245 of title 18 is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and adds newly designated subsection (c)(2) to provide for imprisonment for any term of years or for life for whoever, whether or not acting under color of law, (i) in connection with the offense, the defendant or the victim travels in interstate or foreign

commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in any activity affecting interstate or foreign commerce; or (ii) the offense is in or affects interstate or foreign commerce, willfully causes bodily injury to any person, or, through the use of fire, a firearm, or an explosive device, attempts to cause bodily injury to any person, because of the actual or perceived religion, gender, sexual orientation, or disability of any person and death results; or the act included kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

H.R. 1196–Loophole Elimination and Verification Enforcement Act of the LEAVE Act

Sec. 101 Alien Smuggling and Related Offenses

Section 1324 of title 8 (Bringing in and harboring certain aliens) is amended to provide a series of increased penalties for various offenses. First, a penalty of imprisonment for not less than three years and not more than 20 years is proscribed for any second or subsequent violation of this section absent any specific mandatory sentencing provision.

Second, in the case where the offense furthers or aids the commission of any offense against the United States or any State, which is punishable by imprisonment for not more than one year, the minimum penalty in the case of a first violation is increased from not less than three years to not less than five years. The penalty for second and subsequent violations remains at not less than five years imprisonment. This provision also removes language that the offense was committed with “the intent or reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States...”

Third, a penalty of imprisonment for not less than five and not more than 20 years is proscribed if an offense created a substantial risk of death or serious bodily injury to another person.

Fourth, a penalty of imprisonment for not less than seven years and not more than 30 years is added for cases where the offense caused serious bodily injury to any person.

Fifth, a penalty of imprisonment for not less than 10 years and not more than 30 years is created for cases where the offense involved an alien who the offender knew or had reason to believe was an alien (i) engaged in terrorist activity or (ii) intended to engage in such terrorist activity.

Sixth, if the offense caused or resulted in the death of any person, a penalty of imprisonment for not less than ten years is proscribed; punishment of death, or for any term of years or for life, remains in the statute.

H.R. 1820–Fighting Gangs and Empowering Youth Act of 2011

Sec. 301 Criminal Street Gangs

18 U.S.C. § 521 (Criminal Street Gangs) is amended by providing for imprisonment for any term of years or for life if the violation under amended subsection (b) is based on a predicate gang crime for which the maximum penalty includes life imprisonment.

Sec. 302 Solicitation or Recruitment of Persons and Violent Crimes in Furtherance or in Aid of Criminal Street Gangs

Section 523 is added to title 18 to provide imprisonment for any term of years or for life for any person who (1) murders, (2) kidnaps or sexually assaults, or (3) maims any individual, for the purpose of gaining entrance to or maintaining or increasing position in, or in furtherance or in aid of, or for the direct or indirect benefit of, or in purposeful association with a criminal street gang, or as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value to or from a criminal street gang.

Sec. 303 Interstate and Foreign Travel or Transport in Aid of Racketeering Enterprises and Criminal Street Gangs

18 U.S.C. § 1952 is amended by adding subsection (b), providing for imprisonment for any term of years for whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with the intent to kill, assault, bribe, force, intimidate, or threaten any person, to delay or influence the testimony of, or prevent from testifying, a witness in a State criminal proceeding and thereafter performs, or attempts or conspires to perform, an act described in this subsection. Subsection (b) also provides for imprisonment for any term of years or for life, if death results.

Sec. 311 Increased Penalties for use of Firearm in Crime of Violence or Drug Trafficking Crime

18 U.S.C. § 924(c)(1)(A) is amended to increase the minimum penalty from not less than five years to not less than seven years.

H.R. 2000–Secure America Through Verification and Enforcement Act of 2011 or the SAVE Act of 2011

Sec. 141 Alien Smuggling and Terrorism Prevention

Amends 8 U.S.C. § 1324(a)(1) and (2) (Criminal Penalties) providing for imprisonment for any term of years or for life if the offense involves kidnapping, an attempt to kidnap, the conduct required for aggravated sexual abuse (as defined in section 2241 of title 18, United State Code, without regard to where it takes place), or an attempt to commit such abuse, or an attempt to kill.

Section 2237 of title 18 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information) is amended by adding attempts to commit aggravated sexual abuse (as defined in section 2241 without regard to where it takes place) to the aggravating factors set forth under subsection (b)(2)(B) that carry a range of imprisonment for any term of years or for life.

H.R. 2164—Legal Workforce Act

Sec. 2 Employment Eligibility Verification Process

Section 1824a(b) of title 8 (Employment verification system) is amended and provides for a penalty of imprisonment for not less than one year and not more than 15 years for any individual who provides a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to another person, knowing that the number does not belong to the individual providing the number. This section also provides for a penalty of imprisonment for a term of two years for any individual who provides, during and in relation to any felony violation enumerated in section 1028A(c) of title 18, United States Code, a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to another person, knowing that the number does not belong to the individual providing the number, in addition to the punishment provided for such felony.

Sec. 3 Employment Eligibility Verification System

Section 1324a(d) of title 8 (Evaluation and changes in employment verification system) is amended, providing a penalty of imprisonment for not less than one year and not more than 15 years for any person or entity, that making an inquiry under subsection (b)(1)(C)(i)(II) (Retention of Verification Form and Verification), provides to the verification system a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to a person other than the individual whose identity and employment authorization are being verified, knowing that the number does not belong to the individual whose identity and employment are being verified. This section also provides for a penalty of imprisonment for a term of two years if the person or entity, in making an inquiry under subsection (b)(1)(C)(i)(II) (Retention of Verification Form and Verification), during and in relation to any felony violation enumerated in section 1028A(c) of title 18, United States Code, provides to the verification system a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to a person other than the individual whose identity and employment authorization are being verified, knowing that the number does not belong to the individual whose identity and work authorization are being verified, in addition to the punishment provided for such felony.

Sec. 8 Penalties

Section 1324a(f) of title 8 (Criminal penalties and injunctions for pattern or practice violations) is amended to increase the penalty for any person or entity which engages in a pattern or practice

of violations from “be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both...” to “be fined not more than \$15,000 for each unauthorized alien with respect to which such a violation occurs, imprisoned for not less than one year and not more than ten years, or both..”

H.R. 2839–Piracy Suppression Act

Sec. 2 Act of Piracy

Section 4297 of the Revised Statutes of The United States (Section 385 of title 33 (Seizure and condemnation of vessels fitted out for piracy)) is amended by providing for punishment by death or imprisonment for life for whoever commits an act of piracy.

H.R. 2885–Legal Workforce Act

Sec. 2 Employment Eligibility Verification Process

Section 1824a(b) of title 8 (Employment verification system) is amended and provides for a penalty of imprisonment for not less than one year and not more than 15 years for any individual who provides a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to another person, knowing that the number does not belong to the individual providing the number. This section also provides for a penalty of imprisonment for a term of two years for any individual who provides, during and in relation to any felony violation enumerated in section 1028A(c) of title 18, United States Code, a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to another person, knowing that the number does not belong to the individual providing the number, in addition to the punishment provided for such felony.

Sec. 3 Employment Eligibility Verification System

Section 1324a(d) of title 8 (Evaluation and changes in employment verification system) is amended, providing a penalty of imprisonment for not less than one year and not more than 15 years for any person or entity, that making an inquiry under subsection (b)(1)(C)(i)(II) (Retention of Verification Form and Verification), provides to the verification system a social security account number or an identification or authorization number established by the Secretary of Homeland Security that belongs to a person other than the individual whose identity and employment authorization are being verified, knowing that the number does not belong to the individual whose identity and employment are being verified. This section also provides for a penalty of imprisonment for a term of two years if the person or entity, in making an inquiry under subsection (b)(1)(C)(i)(II) (Retention of Verification Form and Verification), during and in relation to any felony violation enumerated in section 1028A(c) of title 18, United States Code, provides to the verification system a social security account number or an identification or

authorization number established by the Secretary of Homeland Security that belongs to a person other than the individual whose identity and employment authorization are being verified, knowing that the number does not belong to the individual whose identity and work authorization are being verified, in addition to the punishment provided for such felony.

Sec. 8 Penalties

Section 1324a(f) of title 8 (Criminal penalties and injunctions for pattern or practice violations) is amended to increase the penalty for any person or entity which engages in a pattern or practice of violations from “be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both...” to “be fined not more than \$15,000 for each unauthorized alien with respect to which such a violation occurs, imprisoned for not less than one year and not more than ten years, or both...”

Appendix C

**Table C-1
Mandatory Minimum Penalties in the 1878 Revised Statutes**

Rev. Stat. §	Description	Mandatory Minimum Term	Statutory Maximum Term
3376	Failure to destroy tobacco package stamp upon emptying	Ten days	Six months
3406	Failure to destroy cigar box stamp upon emptying	Ten days	Six months
3376	Distribution of empty stamped tobacco package	Twenty days	One year
3279	Falsely holding out to be a lawful distiller	One month	Six months
102	Refusal of witness to testify before Congress	One month	One year
3326	Altering stamping, shifting spirits, and related conduct	One month	One year
3258	Failure to register still or distilling apparatus	One month	Two years
5447	Resisting revenue officers	One month	Ten years
5474	Deserting the U.S. mail	Three months	One year
3113	Failing to pay duties on saloon stores	Three months	Two years
3252	Adding substances to distilled spirits to create fictitious proof	Three months	Two years
3300	Storekeeper removing any cask or package without order	Three months	Two years
3292	Fraudulent alcohol inspection and gauging	Three months	Three years
3296	Concealing or removing spirits with unpaid taxes	Three months	Three years
3318	Failure to properly keep wholesale liquor book	Three months	Three years
3387	Manufacturing cigars without giving bond	Three months	Five years
5528	Unlawful presence of troops at an election	Three months	Five years
2998	Breaking into merchandise for transportation	Six months	Two years
3260	Failure to give distiller's bond	Six months	Two years
3242	Failure to pay special tax on liquor and related equipment	Six months	Two years
3259	Giving false notice of distillery	Six months	Two years
3266	Distilling on prohibited premises	Six months	Two years

Rev. Stat. §	Description	Mandatory Minimum Term	Statutory Maximum Term
3282	Conduct relating to illegal mash and wort	Six months	Two years
3281	Carrying on distillery without giving bond	Six months	Two years
3305	Falsification of distiller's books	Six months	Two years
3360	Failure by leaf-tobacco dealer to keep or open books	Six months	Two years
3363	Selling manufactured tobacco in unstamped packages	Six months	Two years
3374	Removing manufactured tobacco without proper packages and stamps	Six months	Two years
3380	Representing tobacco as being manufactured and taxed before 7/20/1868	Six months	Two years
3392	Improperly packaging cigars	Six months	Two years
3397	Removing cigars without proper packages and stamps	Six months	Two years
3403	Selling improperly packed imported cigars	Six months	Two years
5448	Falsely assuming to be a revenue officer	Six months	Two years
5503	Government official contracting beyond a specific appropriation	Six months	Two years
3169	Misconduct by revenue officers and agents	Six months	Three years
3257	Tax fraud by a spirit distiller	Six months	Three years
3316	Revenue officer misconduct regarding distilled spirit stamps	Six months	Three years
3358	Failure by tobacco or snuff manufacturer to keep accounts	Six months	Three years
3370	Fraud in affixing commissioned tobacco manufacturing stamps	Six months	Three years
3377	Customs officer permitting imported tobacco to pass without paying appropriate taxes	Six months	Three years
3390	Failure by cigar manufacturer to keep accounts	Six months	Three years
3397	Using false cigar tax stamps	Six months	Three years
3399	Fraud in affixing commission cigar manufacturing stamps	Six months	Three years
3401	Representing cigars as being manufactured and taxed before 7/20/1868	Six months	Three years

Rev. Stat. §	Description	Mandatory Minimum Term	Statutory Maximum Term
3402	Customs officer permitting imported cigars to pass without paying appropriate taxes	Six months	Three years
5455	Enticing desertions from the U.S. military	Six months	Three years
5335	Criminal correspondence with a foreign government	Six months	Three years
5389	Circulation of obscene literature	Six months	Five years
4046	Embezzlement of money-order funds	Six months	Ten years
5489	Failure of the Treasurer, etc., to safely keep public moneys	Six months	Ten years
5490	Custodians of public money failing to safely keep	Six months	Ten years
5491	Failure of Government official to render accounts	Six months	Ten years
5492	Failure of Government official to deposit public money as required	Six months	Ten years
2412	Obstructing public land survey	One year	Three years
3306	Using false weight or measure in alcohol distillation	One year	Three years
3311	Tampering with distillation capacity devices	One year	Three years
3268	Breaking seal or lock placed by revenue officers	One year	Three years
3376	Reusing stamped tobacco package	One year	Three years
3924	Removal and re-use of old stamps by postal employee	One year	Three years
5338	Enlisting to serve against the United States	One year	Three years
1736	Consul's neglect of duties to seamen and abuse of power	One year	Five years
2142	Assaults by whites on Indians, and vice versa, with intent to kill	One year	Five years
3324	Failure to obliterate mark or stamp upon emptying cask	One year	Five years
3346	Making, selling, or using false alcohol stamps or dies	One year	Five years
3355	Manufacturing tobacco or snuff without giving bond	One year	Five years
3451	Fraudulently executing documents required by internal revenue laws	One year	Five years

Rev. Stat. §	Description	Mandatory Minimum Term	Statutory Maximum Term
5337	Recruiting individuals to serve against the United States	One year	Five years
5395	Taking false oath for naturalization	One year	Five years
5467	Embezzlement of letters containing monetary enclosures	One year	Five years
5469	Stealing or fraudulently obtaining mail, opening valuable letters	One year	Five years
3170	Requesting or accepting a bribe relating to internal revenue laws	One year	Ten years
5460	Debasement of coinage by officers of the mint	One year	Ten years
2193	False census certification	Two years	No maximum
2202	False certificates by census marshal	Two years	No maximum
5354	Death caused by transporting explosive materials when deemed to be manslaughter	Two years	No maximum
5483	Federal officer receipting for larger sums than paid	Two years	Two years
5380	Hovering on U.S. coast with slaves on board	Two years	Four years
3375	Affixing false tobacco stamps	Two years	Five years
5465	Counterfeiting foreign stamps	Two years	Ten years
5473	Attempting to rob the mail	Two years	Ten years
2143	Arson in Indian country	Two years	Twenty-one years
3784	Fraud by the congressional printer	Three years	Seven years
5377	Bringing into the U.S. or holding or selling persons as slaves	Three years	Seven years
5378	Equipping vessels for the slave trade	Three years	Seven years
5379	Transporting persons to be held as slaves	Three years	Seven years
2471	Forging or counterfeiting land titles in California	Three years	Ten years
2472	Falsely dating evidence of Mexican authority to California lands	Three years	Ten years
2473	Presenting false evidence of title to lands in California	Three years	Ten years
5367	Attempt to destroy a vessel at sea	Three years	Ten years

Rev. Stat. §	Description	Mandatory Minimum Term	Statutory Maximum Term
5420	Forging, counterfeiting, or passing military bounty-land warrants	Three years	Ten years
5472	Robbery of the mail	Five years	Ten years
5415	Counterfeiting national bank notes	Five years	Fifteen years

Table D-1

MANDATORY MINIMUM STATUS OF CASES IN EACH CIRCUIT AND DISTRICT¹
Fiscal Year 2010

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent
TOTAL	73,133	100.0	53,237	72.8	19,896	27.2
D.C. CIRCUIT	355	0.5	203	57.2	152	42.8
District of Columbia	355	0.5	203	57.2	152	42.8
FIRST CIRCUIT	1,752	2.4	896	51.1	856	48.9
Maine	166	0.2	98	59.0	68	41.0
Massachusetts	421	0.6	255	60.6	166	39.4
New Hampshire	228	0.3	153	67.1	75	32.9
Puerto Rico	780	1.1	289	37.1	491	62.9
Rhode Island	157	0.2	101	64.3	56	35.7
SECOND CIRCUIT	4,038	5.5	2,767	68.5	1,271	31.5
Connecticut	407	0.6	259	63.6	148	36.4
New York						
Eastern	1,097	1.5	746	68.0	351	32.0
Northern	439	0.6	319	72.7	120	27.3
Southern	1,332	1.8	872	65.5	460	34.5
Western	588	0.8	437	74.3	151	25.7
Vermont	175	0.2	134	76.6	41	23.4
THIRD CIRCUIT	2,811	3.8	1,898	67.5	913	32.5
Delaware	128	0.2	88	68.8	40	31.3
New Jersey	798	1.1	622	77.9	176	22.1
Pennsylvania						
Eastern	894	1.2	473	52.9	421	47.1
Middle	486	0.7	404	83.1	82	16.9
Western	435	0.6	258	59.3	177	40.7
Virgin Islands	70	0.1	53	75.7	17	24.3
FOURTH CIRCUIT	5,700	7.8	3,299	57.9	2,401	42.1
Maryland	660	0.9	378	57.3	282	42.7
North Carolina						
Eastern	698	1.0	348	49.9	350	50.1
Middle	547	0.7	303	55.4	244	44.6
Western	497	0.7	246	49.5	251	50.5
South Carolina	1,218	1.7	716	58.8	502	41.2
Virginia						
Eastern	1,234	1.7	763	61.8	471	38.2
Western	356	0.5	165	46.3	191	53.7
West Virginia						
Northern	255	0.3	201	78.8	54	21.2
Southern	235	0.3	179	76.2	56	23.8

Table D-1 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	17,976	24.6	14,798	82.3	3,178	17.7
Louisiana						
Eastern	394	0.5	275	69.8	119	30.2
Middle	196	0.3	155	79.1	41	20.9
Western	346	0.5	216	62.4	130	37.6
Mississippi						
Northern	165	0.2	108	65.5	57	34.5
Southern	311	0.4	225	72.3	86	27.7
Texas						
Eastern	835	1.1	530	63.5	305	36.5
Northern	896	1.2	646	72.1	250	27.9
Southern	8,260	11.3	7,131	86.3	1,129	13.7
Western	6,573	9.0	5,512	83.9	1,061	16.1
SIXTH CIRCUIT	5,200	7.1	3,474	66.8	1,726	33.2
Kentucky						
Eastern	606	0.8	434	71.6	172	28.4
Western	394	0.5	236	59.9	158	40.1
Michigan						
Eastern	725	1.0	525	72.4	200	27.6
Western	474	0.6	331	69.8	143	30.2
Ohio						
Northern	627	0.9	486	77.5	141	22.5
Southern	649	0.9	428	65.9	221	34.1
Tennessee						
Eastern	817	1.1	397	48.6	420	51.4
Middle	282	0.4	205	72.7	77	27.3
Western	626	0.9	432	69.0	194	31.0
SEVENTH CIRCUIT	2,887	3.9	1,801	62.4	1,086	37.6
Illinois						
Central	368	0.5	177	48.1	191	51.9
Northern	797	1.1	549	68.9	248	31.1
Southern	302	0.4	171	56.6	131	43.4
Indiana						
Northern	427	0.6	293	68.6	134	31.4
Southern	326	0.4	144	44.2	182	55.8
Wisconsin						
Eastern	467	0.6	318	68.1	149	31.9
Western	200	0.3	149	74.5	51	25.5
EIGHTH CIRCUIT	4,749	6.5	2,977	62.7	1,772	37.3
Arkansas						
Eastern	377	0.5	270	71.6	107	28.4
Western	255	0.3	209	82.0	46	18.0
Iowa						
Northern	343	0.5	178	51.9	165	48.1
Southern	419	0.6	192	45.8	227	54.2
Minnesota	481	0.7	220	45.7	261	54.3
Missouri						
Eastern	1,025	1.4	713	69.6	312	30.4
Western	635	0.9	395	62.2	240	37.8
Nebraska	568	0.8	288	50.7	280	49.3
North Dakota	248	0.3	185	74.6	63	25.4
South Dakota	398	0.5	327	82.2	71	17.8

Table D-1 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	14,578	19.9	11,512	79.0	3,066	21.0
Alaska	128	0.2	81	63.3	47	36.7
Arizona	4,930	6.7	4,390	89.0	540	11.0
California						
Central	1,827	2.5	1,401	76.7	426	23.3
Eastern	966	1.3	724	74.9	242	25.1
Northern	688	0.9	515	74.9	173	25.1
Southern	3,021	4.1	2,311	76.5	710	23.5
Guam	50	0.1	38	76.0	12	24.0
Hawaii	158	0.2	76	48.1	82	51.9
Idaho	291	0.4	199	68.4	92	31.6
Montana	364	0.5	229	62.9	135	37.1
Nevada	589	0.8	473	80.3	116	19.7
Northern Mariana Islands	27	0.0	23	85.2	4	14.8
Oregon	507	0.7	341	67.3	166	32.7
Washington						
Eastern	376	0.5	263	69.9	113	30.1
Western	656	0.9	448	68.3	208	31.7
TENTH CIRCUIT	6,553	9.0	5,448	83.1	1,105	16.9
Colorado	505	0.7	433	85.7	72	14.3
Kansas	676	0.9	403	59.6	273	40.4
New Mexico	3,657	5.0	3,324	90.9	333	9.1
Oklahoma						
Eastern	111	0.2	73	65.8	38	34.2
Northern	155	0.2	121	78.1	34	21.9
Western	283	0.4	231	81.6	52	18.4
Utah	798	1.1	655	82.1	143	17.9
Wyoming	368	0.5	208	56.5	160	43.5
ELEVENTH CIRCUIT	6,534	8.9	4,164	63.7	2,370	36.3
Alabama						
Middle	241	0.3	153	63.5	88	36.5
Northern	405	0.6	242	59.8	163	40.2
Southern	298	0.4	178	59.7	120	40.3
Florida						
Middle	1,660	2.3	1,011	60.9	649	39.1
Northern	372	0.5	213	57.3	159	42.7
Southern	2,164	3.0	1,388	64.1	776	35.9
Georgia						
Middle	275	0.4	192	69.8	83	30.2
Northern	650	0.9	412	63.4	238	36.6
Southern	469	0.6	375	80.0	94	20.0

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-1A

MANDATORY MINIMUM STATUS OF CASES IN EACH CIRCUIT AND DISTRICT¹
Immigration Cases Excluded
Fiscal Year 2010

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent
TOTAL	49,471	100.0	29,720	60.1	19,751	39.9
D.C. CIRCUIT	348	0.7	197	56.6	151	43.4
District of Columbia	348	0.7	197	56.6	151	43.4
FIRST CIRCUIT	1,573	3.2	722	45.9	851	54.1
Maine	146	0.3	78	53.4	68	46.6
Massachusetts	381	0.8	217	57.0	164	43.0
New Hampshire	224	0.5	149	66.5	75	33.5
Puerto Rico	687	1.4	199	29.0	488	71.0
Rhode Island	135	0.3	79	58.5	56	41.5
SECOND CIRCUIT	3,433	6.9	2,186	63.7	1,247	36.3
Connecticut	391	0.8	243	62.1	148	37.9
New York						
Eastern	949	1.9	613	64.6	336	35.4
Northern	314	0.6	198	63.1	116	36.9
Southern	1,139	2.3	680	59.7	459	40.3
Western	514	1.0	363	70.6	151	29.4
Vermont	126	0.3	89	70.6	37	29.4
THIRD CIRCUIT	2,588	5.2	1,679	64.9	909	35.1
Delaware	113	0.2	73	64.6	40	35.4
New Jersey	746	1.5	571	76.5	175	23.5
Pennsylvania						
Eastern	815	1.6	397	48.7	418	51.3
Middle	452	0.9	370	81.9	82	18.1
Western	401	0.8	224	55.9	177	44.1
Virgin Islands	61	0.1	44	72.1	17	27.9
FOURTH CIRCUIT	5,211	10.5	2,814	54.0	2,397	46.0
Maryland	611	1.2	329	53.8	282	46.2
North Carolina						
Eastern	665	1.3	316	47.5	349	52.5
Middle	484	1.0	242	50.0	242	50.0
Western	458	0.9	207	45.2	251	54.8
South Carolina	1,163	2.4	661	56.8	502	43.2
Virginia						
Eastern	1,008	2.0	538	53.4	470	46.6
Western	345	0.7	154	44.6	191	55.4
West Virginia						
Northern	245	0.5	191	78.0	54	22.0
Southern	232	0.5	176	75.9	56	24.1

Table D-1A (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	7,918	16.0	4,755	60.1	3,163	39.9
Louisiana						
Eastern	356	0.7	237	66.6	119	33.4
Middle	173	0.3	132	76.3	41	23.7
Western	313	0.6	183	58.5	130	41.5
Mississippi						
Northern	162	0.3	105	64.8	57	35.2
Southern	294	0.6	208	70.7	86	29.3
Texas						
Eastern	738	1.5	433	58.7	305	41.3
Northern	724	1.5	474	65.5	250	34.5
Southern	2,174	4.4	1,056	48.6	1,118	51.4
Western	2,984	6.0	1,927	64.6	1,057	35.4
SIXTH CIRCUIT	4,779	9.7	3,057	64.0	1,722	36.0
Kentucky						
Eastern	581	1.2	409	70.4	172	29.6
Western	379	0.8	221	58.3	158	41.7
Michigan						
Eastern	683	1.4	484	70.9	199	29.1
Western	368	0.7	225	61.1	143	38.9
Ohio						
Northern	583	1.2	444	76.2	139	23.8
Southern	539	1.1	318	59.0	221	41.0
Tennessee						
Eastern	790	1.6	370	46.8	420	53.2
Middle	259	0.5	183	70.7	76	29.3
Western	597	1.2	403	67.5	194	32.5
SEVENTH CIRCUIT	2,645	5.3	1,559	58.9	1,086	41.1
Illinois						
Central	333	0.7	142	42.6	191	57.4
Northern	680	1.4	432	63.5	248	36.5
Southern	281	0.6	150	53.4	131	46.6
Indiana						
Northern	411	0.8	277	67.4	134	32.6
Southern	313	0.6	131	41.9	182	58.1
Wisconsin						
Eastern	446	0.9	297	66.6	149	33.4
Western	181	0.4	130	71.8	51	28.2
EIGHTH CIRCUIT	4,173	8.4	2,404	57.6	1,769	42.4
Arkansas						
Eastern	338	0.7	231	68.3	107	31.7
Western	152	0.3	106	69.7	46	30.3
Iowa						
Northern	283	0.6	119	42.0	164	58.0
Southern	374	0.8	147	39.3	227	60.7
Minnesota	454	0.9	194	42.7	260	57.3
Missouri						
Eastern	994	2.0	682	68.6	312	31.4
Western	601	1.2	362	60.2	239	39.8
Nebraska	479	1.0	199	41.5	280	58.5
North Dakota	151	0.3	88	58.3	63	41.7
South Dakota	347	0.7	276	79.5	71	20.5

Table D-1A (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	8,292	16.8	5,260	63.4	3,032	36.6
Alaska	120	0.2	74	61.7	46	38.3
Arizona	1,986	4.0	1,449	73.0	537	27.0
California						
Central	1,331	2.7	906	68.1	425	31.9
Eastern	625	1.3	383	61.3	242	38.7
Northern	531	1.1	359	67.6	172	32.4
Southern	1,310	2.6	627	47.9	683	52.1
Guam	48	0.1	36	75.0	12	25.0
Hawaii	153	0.3	71	46.4	82	53.6
Idaho	207	0.4	115	55.6	92	44.4
Montana	338	0.7	204	60.4	134	39.6
Nevada	392	0.8	276	70.4	116	29.6
Northern Mariana Islands	24	0.0	20	83.3	4	16.7
Oregon	441	0.9	275	62.4	166	37.6
Washington						
Eastern	233	0.5	120	51.5	113	48.5
Western	553	1.1	345	62.4	208	37.6
TENTH CIRCUIT	3,157	6.4	2,057	65.2	1,100	34.8
Colorado	359	0.7	287	79.9	72	20.1
Kansas	595	1.2	325	54.6	270	45.4
New Mexico	950	1.9	619	65.2	331	34.8
Oklahoma						
Eastern	111	0.2	73	65.8	38	34.2
Northern	145	0.3	111	76.6	34	23.4
Western	258	0.5	206	79.8	52	20.2
Utah	469	0.9	326	69.5	143	30.5
Wyoming	270	0.5	110	40.7	160	59.3
ELEVENTH CIRCUIT	5,354	10.8	3,030	56.6	2,324	43.4
Alabama						
Middle	226	0.5	138	61.1	88	38.9
Northern	384	0.8	222	57.8	162	42.2
Southern	290	0.6	170	58.6	120	41.4
Florida						
Middle	1,249	2.5	602	48.2	647	51.8
Northern	327	0.7	168	51.4	159	48.6
Southern	1,662	3.4	928	55.8	734	44.2
Georgia						
Middle	253	0.5	170	67.2	83	32.8
Northern	515	1.0	278	54.0	237	46.0
Southern	448	0.9	354	79.0	94	21.0

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 23,672 cases were excluded because the primary guideline was an immigration offense. Of the remaining 49,567 cases, 96 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-2**MANDATORY MINIMUM STATUS IN EACH PRIMARY OFFENSE CATEGORY¹
Fiscal Year 2010**

PRIMARY OFFENSE	Total		No Mandatory Minimum		Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent
TOTAL	73,133	100.0	53,237	72.8	19,896	27.2
Murder	63	0.1	45	71.4	18	28.6
Manslaughter	64	0.1	62	96.9	2	3.1
Kidnapping/Hostage Taking	37	0.1	34	91.9	3	8.1
Sexual Abuse	372	0.5	243	65.3	129	34.7
Assault	530	0.7	527	99.4	3	0.6
Robbery	1,049	1.4	1,036	98.8	13	1.2
Arson	74	0.1	27	36.5	47	63.5
Drugs - Trafficking	22,670	31.0	7,314	32.3	15,356	67.7
Drugs - Communication Facility	489	0.7	489	100.0	0	0.0
Drugs - Simple Possession	215	0.3	180	83.7	35	16.3
Firearms	7,738	10.6	5,373	69.4	2,365	30.6
Burglary/B&E	32	0.0	31	96.9	1	3.1
Auto Theft	87	0.1	86	98.9	1	1.1
Larceny	1,271	1.7	1,225	96.4	46	3.6
Fraud	6,561	9.0	5,927	90.3	634	9.7
Embezzlement	401	0.5	400	99.8	1	0.2
Forgery/Counterfeiting	845	1.2	834	98.7	11	1.3
Bribery	214	0.3	213	99.5	1	0.5
Tax	636	0.9	633	99.5	3	0.5
Money Laundering	738	1.0	735	99.6	3	0.4
Racketeering/Extortion	614	0.8	595	96.9	19	3.1
Gambling/Lottery	75	0.1	75	100.0	0	0.0
Civil Rights	55	0.1	55	100.0	0	0.0
Immigration	23,662	32.4	23,517	99.4	145	0.6
Pornography/Prostitution	1,834	2.5	840	45.8	994	54.2
Prison Offenses	388	0.5	388	100.0	0	0.0
Administration of Justice Offenses	1,064	1.5	1,056	99.2	8	0.8
Environmental/Wildlife	118	0.2	118	100.0	0	0.0
National Defense	68	0.1	68	100.0	0	0.0
Antitrust	11	0.0	11	100.0	0	0.0
Food & Drug	63	0.1	62	98.4	1	1.6
Other Miscellaneous Offenses	1,095	1.5	1,038	94.8	57	5.2

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

Table D-3**NUMBER OF CONVICTIONS AND AVERAGE SENTENCE
FOR MANDATORY MINIMUM STATUTES¹****Fiscal Year 2010**

Statute	Number	Percent	Average
TOTAL	28,261	100.0	119
21 U.S.C. § 846	9,258	32.8	103
21 U.S.C. § 841(b)(1)(B)	3,203	11.3	80
21 U.S.C. § 841(b)(1)(A)	2,685	9.5	120
18 U.S.C. § 924(c)(1)(A)(i)	1,547	5.5	143
18 U.S.C. § 1028A(a)(1)	1,008	3.6	52
18 U.S.C. § 924(c)(1)(A)(ii)	672	2.4	201
21 U.S.C. § 960	602	2.1	56
21 U.S.C. § 860	589	2.1	112
18 U.S.C. § 2252(a)(2)	460	1.6	171
21 U.S.C. § 963	453	1.6	87
21 U.S.C. § 841(b)(1)(A)(viii)	426	1.5	113
21 U.S.C. § 841(b)(1)(B)(vii)	415	1.5	48
18 U.S.C. § 924(e)(1)	401	1.4	193
18 U.S.C. § 2252A(a)(2)	395	1.4	133
21 U.S.C. § 841	375	1.3	97
21 U.S.C. § 841(b)(1)(A)(ii)	365	1.3	143
21 U.S.C. § 841(b)(1)(B)(iii)	363	1.3	101
18 U.S.C. § 2251(a)	313	1.1	340
21 U.S.C. § 851	308	1.1	214
21 U.S.C. § 841(b)(1)(A)(iii)	306	1.1	134
18 U.S.C. § 924(c)(1)(C)(i)	291	1.0	415
21 U.S.C. § 841(b)(1)(B)(viii)	273	1.0	92
21 U.S.C. § 841(b)(1)(B)(ii)	246	0.9	83
21 U.S.C. § 841(b)(1)(C)	194	0.7	122
18 U.S.C. § 1028A(c)	185	0.7	52

Table D-3 (continued)

**NUMBER OF CONVICTIONS AND AVERAGE SENTENCE
FOR MANDATORY MINIMUM STATUTES
Fiscal Year 2010**

Statute	Number	Percent	Average
18 U.S.C. § 924(c)(1)(A)(iii)	159	0.6	257
21 U.S.C. § 841(b)(1)(A)(vii)	152	0.5	95
18 U.S.C. § 2252A(b)(1)	147	0.5	168
21 U.S.C. § 960(b)(1)(B)(ii)	139	0.5	125
21 U.S.C. § 841(b)(1)	129	0.5	116
8 U.S.C. § 1324(a)(2)(B)(ii)	128	0.5	50
18 U.S.C. § 2252(b)(1)	127	0.5	159
18 U.S.C. § 2422(b)	117	0.4	161
21 U.S.C. § 841(b)(1)(A)(ii)(II)	107	0.4	85
21 U.S.C. § 860(a)	106	0.4	89
18 U.S.C. § 2251(e)	96	0.3	306
18 U.S.C. § 2252(a)(1)	96	0.3	149
18 U.S.C. § 2252A(a)(1)	95	0.3	170
21 U.S.C. § 841(b)(1)(B)(i)	89	0.3	69
18 U.S.C. § 924(c)	85	0.3	277
21 U.S.C. § 841(b)(1)(A)(i)	70	0.2	103
18 U.S.C. § 2251(d)(1)	63	0.2	244
18 U.S.C. § 2252A(a)(5)	58	0.2	220
18 U.S.C. § 844(i)	56	0.2	93
21 U.S.C. § 844(a)	51	0.2	49
21 U.S.C. § 841(b)(1)(B)(ii)(II)	49	0.2	76
18 U.S.C. § 2252(a)(4)	39	0.1	177
21 U.S.C. § 859	38	0.1	129
18 U.S.C. § 2423(a)	36	0.1	245
21 U.S.C. § 960(b)(1)(B)	36	0.1	118
21 U.S.C. § 960(b)(1)(H)	36	0.1	81

Table D-3 (continued)

**NUMBER OF CONVICTIONS AND AVERAGE SENTENCE
FOR MANDATORY MINIMUM STATUTES
Fiscal Year 2010**

Statute	Number	Percent	Average
21 U.S.C. § 960(b)(2)(G)	33	0.1	36
21 U.S.C. § 960(b)(2)(B)	29	0.1	40
21 U.S.C. § 960(b)(2)(B)(ii)	24	0.1	76
21 U.S.C. § 960(b)(1)(A)	23	0.1	64
18 U.S.C. § 2252A(b)(2)	22	0.1	199
21 U.S.C. § 848(e)(1)	22	0.1	411
18 U.S.C. § 924(c)(1)(C)(ii)	21	0.1	Life
21 U.S.C. § 841(c)	21	0.1	130
21 U.S.C. § 960(b)(2)(A)	21	0.1	37
18 U.S.C. § 844(h)	19	0.1	280
18 U.S.C. § 924	19	0.1	185
8 U.S.C. § 1324(a)(2)(B)(iii)	18	0.1	66
18 U.S.C. § 2252(b)(2)	18	0.1	193
21 U.S.C. § 960(b)(1)	17	0.1	105
18 U.S.C. § 924(c)(1)(B)(i)	16	0.1	163
18 U.S.C. § 1591(b)(2)	15	0.1	179
18 U.S.C. § 2113(e)	15	0.1	254
18 U.S.C. § 2241(c)	15	0.1	406
18 U.S.C. § 924(c)(1)(B)(ii)	14	0.1	355
18 U.S.C. § 2251(d)	14	0.1	374
18 U.S.C. § 924(j)(1)	13	0.1	448
18 U.S.C. § 1591(b)(1)	13	0.1	218
21 U.S.C. § 841(b)	13	0.1	195
18 U.S.C. § 1111(a)	12	0.0	452
21 U.S.C. § 848(a)	12	0.0	289
21 U.S.C. § 861(a)	12	0.0	77

Table D-3 (continued)**NUMBER OF CONVICTIONS AND AVERAGE SENTENCE
FOR MANDATORY MINIMUM STATUTES
Fiscal Year 2010**

Statute	Number	Percent	Average
18 U.S.C. § 1958(a)	11	0.0	428
18 U.S.C. § 844(n)	10	0.0	118
18 U.S.C. § 3559(c)	10	0.0	Life
21 U.S.C. § 861	10	0.0	142
18 U.S.C. § 1959(a)(1)	9	0.0	371
21 U.S.C. § 960(b)(2)	9	0.0	72
18 U.S.C. § 924(j)	8	0.0	367
21 U.S.C. § 841(b)(1)(B)(IV)	8	0.0	59
21 U.S.C. § 848(b)	7	0.0	392
18 U.S.C. § 2251(b)	6	0.0	273
21 U.S.C. § 848	6	0.0	269
18 U.S.C. § 844(f)	5	0.0	77
18 U.S.C. § 2252(a)	5	0.0	137
18 U.S.C. § 2260A	5	0.0	352
21 U.S.C. § 841(b)(1)(A)(iv)	5	0.0	39
18 U.S.C. § 1512(a)(1)	4	0.0	Life
18 U.S.C. § 2251(c)	4	0.0	258
21 U.S.C. § 960(b)(1)(B)(iii)	4	0.0	103
21 U.S.C. § 960(b)(1)(G)	4	0.0	98
18 U.S.C. § 1201(a)(1)	2	0.0	295
18 U.S.C. § 1201(g)(1)	2	0.0	415
18 U.S.C. § 3559(d)	2	0.0	415
18 U.S.C. § 3559(e)	2	0.0	Life
18 U.S.C. § 2252A(a)(3)	2	0.0	171
21 U.S.C. § 841(b)(1)(A)(v)	2	0.0	120
46 U.S.C. § 1903(j)	2	0.0	143

Table D-3 (continued)

**NUMBER OF CONVICTIONS AND AVERAGE SENTENCE
FOR MANDATORY MINIMUM STATUTES
Fiscal Year 2010**

Statute	Number	Percent	Average
8 U.S.C. § 1324(a)(2)(B)(i)	1	0.0	36
18 U.S.C. § 371	1	0.0	240
18 U.S.C. § 1512(a)(3)(A)	1	0.0	Life
18 U.S.C. § 1962(d)	1	0.0	Life
18 U.S.C. § 3559(f)	1	0.0	360
21 U.S.C. § 960(b)(1)(C)	1	0.0	50
21 U.S.C. § 960(b)(2)(B)(iii)	1	0.0	24
21 U.S.C. § 960(b)(2)(H)	1	0.0	21
46 U.S.C. § 1903(g)	1	0.0	151

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878 cases. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 53,237 cases (72.7 percent) did not involve a mandatory minimum sentence. Of the remaining 20,002 offenders, 106 were excluded due to missing sentence length information. In some instances, the offender was convicted of more than one mandatory minimum statute, thus the number of mandatory minimum statutes of conviction are greater than the number of offenders convicted of a mandatory minimum.

Life sentences are included in these calculations as 470 months. Average sentences that are 470 months or greater are designated as "Life" in the "Average" column.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-4

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
21 U.S.C. § 846	9,258		103
	8671	2D1.1	101
	347	2D1.2	102
	183	2S1.1	163
	30	2A1.1	320
	6	2D1.11	147
	5	2K2.1	128
	3	2A1.2	280
	3	2A2.1	369
	3	2B3.1	166
	2	2B1.1	63
	1	2A1.5	306
	1	2D1.10	210
	1	2D1.5	324
	1	2G2.1	235
	1	2G2.2	185

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
21 U.S.C. § 841(b)(1)(B)	3,203		80
	3,073	2D1.1	78
	69	2D1.2	85
	25	2S1.1	179
	23	2K2.1	155
	3	2A2.1	373
	2	2A1.1	240
	2	2A4.1	88
	2	2D1.11	90
	1	2A1.5	306
	1	2B1.1	108
	1	2D1.10	210
	1	2G2.2	185
21 U.S.C. § 841(b)(1)(A)	2,685		120
	2,548	2D1.1	117
	66	2S1.1	205
	50	2D1.2	115
	9	2A1.1	Life
	8	2D1.11	102
	3	2A2.1	369
	1	2C1.1	135

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 924(c)(1)(A)(i)	1,547		143
	1,081	2D1.1	145
	194	N/A	75
	103	2K2.1	174
	91	2B3.1	203
	28	2D1.2	148
	9	2S1.1	215
	7	2A1.1	421
	6	2A1.5	184
	4	2A4.1	250
	3	2A2.1	108
	3	2X3.1	202
	2	2A1.2	359
	2	2A6.1	90
	2	2B3.2	101
	2	2D1.11	102
	2	2X1.1	57
	1	2A2.2	75
	1	2B1.1	34
	1	2E1.1	93
	1	2E1.4	300
	1	2H1.1	181
	1	2J1.4	0
	1	2K1.4	120
	1	2L1.2	150

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 1028A(a)(1)	1,008		52
	764	2B1.1	41
	107	N/A	24
	59	2L2.2	28
	26	2L2.1	48
	12	2L1.2	67
	11	2K2.1	76
	10	2D1.1	78
	6	2S1.1	138
	2	2T3.1	51
	2	2G2.2	140
	2	2T1.1	77
	1	2A2.2	133
	1	2A3.5	42
	1	2B5.1	34
	1	2D1.2	Life
	1	2J1.2	61
	1	2L1.1	30
	1	2T1.4	36

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹**

Fiscal Year 2010

Statute	Number	Guideline	Average
18 U.S.C. § 924(c)(1)(A)(ii)	672		201
	512	2B3.1	204
	60	N/A	156
	44	2D1.1	142
	21	2K2.1	278
	12	2A4.1	251
	7	2A1.1	306
	3	2A2.2	136
	2	2A1.5	Life
	2	2A2.1	427
	2	2A6.1	182
	2	2B3.2	122
	2	2S1.1	396
	1	2B1.1	34
	1	2D1.11	168
	1	2D1.2	Life
21 U.S.C. § 960	602		56
	600	2D1.1	56
	2	2D1.2	67
21 U.S.C. § 860	589		112
	561	2D1.2	110
	11	2K2.1	179
	9	2D1.1	51
	3	2B3.1	15
	3	2S1.1	373
	1	2A1.2	248
	1	2G2.1	235

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 2252(a)(2)	460		171
	445	2G2.2	169
	15	2G2.1	256
21 U.S.C. § 963	453		87
	441	2D1.1	84
	11	2S1.1	177
	1	2A1.1	Life
21 U.S.C. § 841(b)(1)(A)(viii)	426		113
	409	2D1.1	111
	9	2D1.2	115
	7	2S1.1	145
	1	2A1.1	Life
21 U.S.C. § 841(b)(1)(B)(vii)	415		48
	403	2D1.1	47
	8	2S1.1	100
	3	2K2.1	80
	1	2B1.1	5
18 U.S.C. § 924(e)(1)	401		193
	345	2K2.1	188
	35	2D1.1	220
	9	2B3.1	262
	5	N/A	182
	3	2A4.1	235
	2	2A2.1	125
	1	2A1.3	200
	1	2E1.4	300

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 2252A(a)(2)	395		133
	370	2G2.2	122
	24	2G2.1	303
	1	2X1.1	60
21 U.S.C. § 841	375		97
	364	2D1.1	96
	6	2D1.2	85
	4	2S1.1	211
	1	2K2.1	126
21 U.S.C. § 841(b)(1)(A)(ii)	365		143
	339	2D1.1	137
	20	2S1.1	216
	5	2A1.1	320
	1	2D1.2	17
21 U.S.C. § 841(b)(1)(B)(iii)	363		101
	349	2D1.1	100
	7	2D1.2	102
	5	2K2.1	133
	1	2A1.1	110
	1	2A2.1	360
18 U.S.C. § 2251(a)	313		340
	297	2G2.1	339
	16	2G2.2	354

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
21 U.S.C. § 851	308		214
	286	2D1.1	215
	11	2D1.2	202
	4	2K2.1	153
	3	2D2.1	20
	3	2S1.1	350
	1	2A1.1	Life
21 U.S.C. § 841(b)(1)(A)(iii)	306		134
	278	2D1.1	134
	23	2D1.2	119
	3	2S1.1	203
	2	2K2.1	191
18 U.S.C. § 924(c)(1)(C)(i)	291		415
	198	2B3.1	429
	19	2A4.1	Life
	19	2D1.1	249
	15	N/A	320
	12	2A2.1	463
	11	2A1.1	370
	7	2K2.1	417
	7	2S1.1	Life
	3	2A2.2	Life

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
21 U.S.C. § 841(b)(1)(B)(viii)	273		92
	262	2D1.1	89
	3	2D1.11	188
	3	2D1.2	137
	3	2S1.1	127
	1	2K2.1	188
	1	2L1.1	188
21 U.S.C. § 841(b)(1)(B)(ii)	246		83
	244	2D1.1	81
	1	2A1.1	Life
	1	2D1.2	151
21 U.S.C. § 841(b)(1)(C)	194		122
	109	2D1.1	152
	78	2D1.2	78
	5	2S1.1	163
	2	2K2.1	146
18 U.S.C. § 1028A(c)	185		52
	154	2B1.1	56
	12	2L2.2	29
	9	N/A	23
	4	2D1.1	57
	4	2L2.1	48
	1	2L1.2	36
	1	2T1.1	48

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 924(c)(1)(A)(iii)	159		257
	51	2B3.1	219
	32	2A1.1	402
	31	2D1.1	171
	13	2A2.1	338
	11	N/A	200
	8	2A2.2	213
	5	2K2.1	245
	2	2A4.1	272
	2	2B3.2	281
	2	2J1.2	118
	1	2A1.2	Life
	1	2A1.3	198
21 U.S.C. § 841(b)(1)(A)(vii)	152		95
	131	2D1.1	90
	13	2S1.1	134
	7	2D1.2	86
	1	2D1.5	324
18 U.S.C. § 2252A(b)(1)	147		168
	137	2G2.2	155
	10	2G2.1	290
21 U.S.C. § 960(b)(1)(B)(ii)	139	2D1.1	125
21 U.S.C. § 841(b)(1)	129		116
	121	2D1.1	96
	8	2S1.1	426

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
8 U.S.C. § 1324(a)(2)(B)(ii)	128		50
	122	2L1.1	45
	2	2A3.1	292
	2	2C1.1	86
	1	2D1.1	58
	1	2L1.2	51
18 U.S.C. § 2252(b)(1)	127		159
	124	2G2.2	155
	3	2G2.1	322
18 U.S.C. § 2422(b)	117		161
	90	2G1.3	142
	13	2G2.1	280
	13	2G2.2	177
	1	2G1.1	78
21 U.S.C. § 841(b)(1)(A)(ii)(II)	107		85
	105	2D1.1	85
	2	2S1.1	102
21 U.S.C. § 860(a)	106		89
	82	2D1.2	83
	18	2D1.1	104
	4	2K2.1	128
	2	2S1.1	154

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 2251(e)	96		306
	91	2G2.1	303
	5	2G2.2	345
18 U.S.C. § 2252(a)(1)	96		149
	90	2G2.2	141
	6	2G2.1	271
18 U.S.C. § 2252A(a)(1)	95		170
	86	2G2.2	160
	9	2G2.1	262
21 U.S.C. § 841(b)(1)(B)(i)	89	2D1.1	69
18 U.S.C. § 924(c)	85		277
	32	2B3.1	252
	15	2A1.1	428
	11	N/A	137
	9	2D1.1	186
	6	2A1.2	Life
	4	2K2.1	236
	3	2A2.1	357
	2	2A1.3	225
	1	2A4.1	420
	1	2L1.1	150
	1	2S1.1	42
21 U.S.C. § 841(b)(1)(A)(i)	70	2D1.1	103
18 U.S.C. § 2251(d)(1)	63		244
	61	2G2.2	242
	2	2G2.1	292

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹**

Fiscal Year 2010

Statute	Number	Guideline	Average
18 U.S.C. § 2252A(a)(5)	58		220
	53	2G2.2	214
	5	2G2.1	274
18 U.S.C. § 844(i)	56		93
	51	2K1.4	87
	2	2B1.1	162
	1	2A2.1	188
	1	2K2.1	78
	1	2M1.1	162
21 U.S.C. § 844(a)	51		49
	21	2D2.1	14
	19	2D1.1	70
	9	2K2.1	88
	1	2A2.2	36
	1	2A6.1	18
21 U.S.C. § 841(b)(1)(B)(ii)(II)	49	2D1.1	76
18 U.S.C. § 2252(a)(4)	39		177
	37	2G2.2	168
	2	2G2.1	345
21 U.S.C. § 859	38		129
	35	2D1.2	136
	3	2D1.1	68
18 U.S.C. § 2423(a)	36		245
	22	2G1.3	172
	9	2A3.1	366
	4	2G2.1	385
	1	2G1.1	180

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
21 U.S.C. § 960(b)(1)(B)	36	2D1.1	118
21 U.S.C. § 960(b)(1)(H)	36		81
	35	2D1.1	81
	1	2D1.2	75
21 U.S.C. § 960(b)(2)(G)	33	2D1.1	36
21 U.S.C. § 960(b)(2)(B)	29	2D1.1	40
21 U.S.C. § 960(b)(2)(B)(ii)	24	2D1.1	76
21 U.S.C. § 960(b)(1)(A)	23	2D1.1	64
18 U.S.C. § 2252A(b)(2)	22		199
	18	2G2.2	177
	4	2G2.1	298
21 U.S.C. § 848(e)(1)	22		411
	17	2A1.1	394
	5	2S1.1	Life
18 U.S.C. § 924(c)(1)(C)(ii)	21		Life
	13	2A1.1	Life
	8	2S1.1	Life
21 U.S.C. § 841(c)	21		130
	11	2D1.1	156
	7	2D1.11	104
	3	2D1.2	94
21 U.S.C. § 960(b)(2)(A)	21	2D1.1	37

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 844(h)	19		280
	7	2A1.1	Life
	7	2K1.4	179
	2	2K1.3	181
	1	2B1.1	150
	1	2B3.2	144
	1	2K2.1	120
18 U.S.C. § 924	19	2K2.1	185
8 U.S.C. § 1324(a)(2)(B)(iii)	18	2L1.1	66
18 U.S.C. § 2252(b)(2)	18		193
	17	2G2.2	177
	1	2G2.1	Life
21 U.S.C. § 960(b)(1)	17	2D1.1	105
18 U.S.C. § 924(c)(1)(B)(i)	16		163
	6	2D1.1	155
	5	2B3.1	146
	4	N/A	123
	1	2A1.1	Life
18 U.S.C. § 1591(b)(2)	15		179
	11	2G1.3	154
	2	2A3.1	287
	2	2G1.1	210
18 U.S.C. § 2113(e)	15		254
	14	2B3.1	238
	1	2K2.1	Life

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 2241(c)	15		406
	14	2A3.1	402
	1	2G2.2	456
18 U.S.C. § 924(c)(1)(B)(ii)	14		355
	5	2D1.1	264
	4	2B3.1	360
	1	N/A	360
	1	2A1.1	Life
	1	2A1.5	Life
	1	2K2.1	444
	1	2S1.1	Life
18 U.S.C. § 2251(d)	14		374
	12	2G2.1	404
	2	2G2.2	198
18 U.S.C. § 924(j)(1)	13		448
	6	2A1.1	452
	6	2A1.2	Life
	1	N/A	300
18 U.S.C. § 1591(b)(1)	13		218
	9	2G1.3	207
	2	2A3.1	292
	1	2G1.1	210
	1	2G2.1	180
21 U.S.C. § 841(b)	13	2D1.1	195

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 1111(a)	12		452
	9	2A1.1	Life
	2	2A1.2	360
	1	2S1.1	Life
21 U.S.C. § 848(a)	12		289
	7	2D1.5	216
	3	2S1.1	393
	2	2D1.1	385
21 U.S.C. § 861(a)	12		77
	11	2D1.2	67
	1	2D1.1	180
18 U.S.C. § 1958(a)	11		428
	9	2A1.1	419
	2	S21.1	Life
18 U.S.C. § 844(n)	10		118
	8	2K1.4	74
	1	2A1.1	Life
	1	2M5.3	112
18 U.S.C. § 3559(c)	10		Life
	7	2B3.1	Life
	3	2K2.1	Life
21 U.S.C. § 861	10		142
	8	2D1.2	61
	2	2S1.1	Life
18 U.S.C. § 1959(a)(1)	9	2A1.1	371

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
21 U.S.C. § 960(b)(2)	9		72
	8	2D1.1	48
	1	2G2.1	264
18 U.S.C. § 924(j)	8		367
	7	2A1.1	377
	1	2A1.3	300
21 U.S.C. § 841(b)(1)(B)(IV)	8	2D1.1	59
21 U.S.C. § 848(b)	7		392
	6	2S1.1	432
	1	2D1.5	156
18 U.S.C. § 2251(b)	6		273
	5	2G2.1	292
	1	2G2.2	180
21 U.S.C. § 848	6		269
	3	2D1.5	213
	3	2S1.1	324
18 U.S.C. § 844(f)	5		77
	2	2K1.4	72
	2	2K2.1	60
	1	2A2.1	120
18 U.S.C. § 2252(a)	5		137
	4	2G2.2	119
	1	2G2.1	210

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 2260A	5		352
	2	2G1.3	400
	1	2A3.1	300
	1	2A4.1	360
	1	2G2.2	300
21 U.S.C. § 841(b)(1)(A)(iv)	5	2D1.1	39
18 U.S.C. § 1512(a)(1)	4		Life
	3	2A1.1	Life
	1	2S1.1	Life
18 U.S.C. § 2251(c)	4	2G2.1	258
21 U.S.C. § 960(b)(1)(B)(iii)	4	2D1.1	103
21 U.S.C. § 960(b)(1)(G)	4		98
	3	2D1.1	109
	1	2S1.1	66
18 U.S.C. § 1201(a)(1)	2		295
	1	2A1.1	120
	1	2A4.1	Life
18 U.S.C. § 1201(g)(1)	2	2A4.1	415
18 U.S.C. § 3559(d)	2	2A1.3	415
18 U.S.C. § 3559(e)	2	2G2.1	Life
18 U.S.C. § 2252A(a)(3)	2	2G2.2	171
21 U.S.C. § 841(b)(1)(A)(v)	2	2D1.1	120
46 U.S.C. § 1903(j)	2	2D1.1	143
8 U.S.C. § 1324(a)(2)(B)(i)	1	2L1.1	36
18 U.S.C. § 371	1	2B3.1	240
18 U.S.C. § 1512(a)(3)(A)	1	2S1.1	Life

Table D-4 (continued)

**SPECIFIC GUIDELINE APPLIED AND AVERAGE SENTENCE BY GUIDELINE FOR
EACH MANDATORY MINIMUM STATUTE¹
Fiscal Year 2010**

Statute	Number	Guideline	Average
18 U.S.C. § 1962(d)	1	2A1.1	Life
18 U.S.C. § 3559(f)	1	2G2.1	360
21 U.S.C. § 960(b)(1)(C)	1	2D1.1	50
21 U.S.C. § 960(b)(2)(B)(iii)	1	2D1.1	24
21 U.S.C. § 960(b)(2)(H)	1	2D1.1	21
46 U.S.C. § 1903(g)	1	2D1.1	151

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878 cases. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 53,237 cases (72.7 percent) did not involve a mandatory minimum sentence. Of the remaining 20,002 offenders, 106 were excluded due to missing sentence length information. In some instances, the offender was convicted of more than one mandatory minimum statute, thus the number of mandatory minimum statutes of conviction are greater than the number of offenders convicted of a mandatory minimum.

Life sentences are included in these calculations as 470 months. Average sentences that are 470 months or greater are designated as "Life" in the "Average" column.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-5

MANDATORY MINIMUM STATUS IN EACH CRIMINAL HISTORY CATEGORY¹
Fiscal Year 2010

CRIMINAL HISTORY CATEGORY	No Mandatory Minimum		Mandatory Minimum	
	Number	Percent	Number	Percent
TOTAL	53,237	100.0	19,813	100.0
Category I	22,390	42.1	9,702	49.0
Category II	6,861	12.9	2,219	11.2
Category III	9,460	17.8	2,674	13.5
Category IV	6,132	11.5	1,523	7.7
Category V	3,565	6.7	911	4.6
Category VI	4,829	9.1	2,784	14.1

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 189 were excluded due to missing values for one or both of the following reasons: missing criminal history category (83) or missing statutory information (106).

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-6

**MANDATORY MINIMUM STATUS FOR DRUG OFFENDERS
IN EACH CIRCUIT AND DISTRICT¹
Fiscal Year 2010**

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Drug Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	73,133	100.0	53,237	72.8	19,896	27.2	15,783	21.6
D.C. CIRCUIT	355	0.5	203	57.2	152	42.8	123	34.6
District of Columbia	355	0.5	203	57.2	152	42.8	123	34.6
FIRST CIRCUIT	1,752	2.4	896	51.1	856	48.9	749	42.8
Maine	166	0.2	98	59.0	68	41.0	59	35.5
Massachusetts	421	0.6	255	60.6	166	39.4	128	30.4
New Hampshire	228	0.3	153	67.1	75	32.9	47	20.6
Puerto Rico	780	1.1	289	37.1	491	62.9	464	59.5
Rhode Island	157	0.2	101	64.3	56	35.7	51	32.5
SECOND CIRCUIT	4,038	5.5	2,767	68.5	1,271	31.5	1,019	25.2
Connecticut	407	0.6	259	63.6	148	36.4	137	33.7
New York								
Eastern	1,097	1.5	746	68.0	351	32.0	285	26.0
Northern	439	0.6	319	72.7	120	27.3	69	15.7
Southern	1,332	1.8	872	65.5	460	34.5	397	29.8
Western	588	0.8	437	74.3	151	25.7	106	18.0
Vermont	175	0.2	134	76.6	41	23.4	25	14.3
THIRD CIRCUIT	2,811	3.8	1,898	67.5	913	32.5	667	23.7
Delaware	128	0.2	88	68.8	40	31.3	33	25.8
New Jersey	798	1.1	622	77.9	176	22.1	147	18.4
Pennsylvania								
Eastern	894	1.2	473	52.9	421	47.1	261	29.2
Middle	486	0.7	404	83.1	82	16.9	62	12.8
Western	435	0.6	258	59.3	177	40.7	149	34.3
Virgin Islands	70	0.1	53	75.7	17	24.3	15	21.4
FOURTH CIRCUIT	5,700	7.8	3,299	57.9	2,401	42.1	1,708	30.0
Maryland	660	0.9	378	57.3	282	42.7	194	29.4
North Carolina								
Eastern	698	1.0	348	49.9	350	50.1	232	33.2
Middle	547	0.7	303	55.4	244	44.6	149	27.2
Western	497	0.7	246	49.5	251	50.5	180	36.2
South Carolina	1,218	1.7	716	58.8	502	41.2	393	32.3
Virginia								
Eastern	1,234	1.7	763	61.8	471	38.2	319	25.9
Western	356	0.5	165	46.3	191	53.7	153	43.0
West Virginia								
Northern	255	0.3	201	78.8	54	21.2	51	20.0
Southern	235	0.3	179	76.2	56	23.8	37	15.7

Table D-6 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Drug Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	17,976	24.6	14,798	82.3	3,178	17.7	2,862	15.9
Louisiana								
Eastern	394	0.5	275	69.8	119	30.2	105	26.6
Middle	196	0.3	155	79.1	41	20.9	31	15.8
Western	346	0.5	216	62.4	130	37.6	115	33.2
Mississippi								
Northern	165	0.2	108	65.5	57	34.5	46	27.9
Southern	311	0.4	225	72.3	86	27.7	68	21.9
Texas								
Eastern	835	1.1	530	63.5	305	36.5	273	32.7
Northern	896	1.2	646	72.1	250	27.9	188	21.0
Southern	8,260	11.3	7,131	86.3	1,129	13.7	1,074	13.0
Western	6,573	9.0	5,512	83.9	1,061	16.1	962	14.6
SIXTH CIRCUIT	5,200	7.1	3,474	66.8	1,726	33.2	1,220	23.5
Kentucky								
Eastern	606	0.8	434	71.6	172	28.4	107	17.7
Western	394	0.5	236	59.9	158	40.1	127	32.2
Michigan								
Eastern	725	1.0	525	72.4	200	27.6	143	19.7
Western	474	0.6	331	69.8	143	30.2	102	21.5
Ohio								
Northern	627	0.9	486	77.5	141	22.5	91	14.5
Southern	649	0.9	428	65.9	221	34.1	163	25.1
Tennessee								
Eastern	817	1.1	397	48.6	420	51.4	330	40.4
Middle	282	0.4	205	72.7	77	27.3	39	13.8
Western	626	0.9	432	69.0	194	31.0	118	18.8
SEVENTH CIRCUIT	2,887	3.9	1,801	62.4	1,086	37.6	826	28.6
Illinois								
Central	368	0.5	177	48.1	191	51.9	149	40.5
Northern	797	1.1	549	68.9	248	31.1	199	25.0
Southern	302	0.4	171	56.6	131	43.4	112	37.1
Indiana								
Northern	427	0.6	293	68.6	134	31.4	89	20.8
Southern	326	0.4	144	44.2	182	55.8	127	39.0
Wisconsin								
Eastern	467	0.6	318	68.1	149	31.9	117	25.1
Western	200	0.3	149	74.5	51	25.5	33	16.5
EIGHTH CIRCUIT	4,749	6.5	2,977	62.7	1,772	37.3	1,463	30.8
Arkansas								
Eastern	377	0.5	270	71.6	107	28.4	89	23.6
Western	255	0.3	209	82.0	46	18.0	37	14.5
Iowa								
Northern	343	0.5	178	51.9	165	48.1	140	40.8
Southern	419	0.6	192	45.8	227	54.2	199	47.5
Minnesota	481	0.7	220	45.7	261	54.3	239	49.7
Missouri								
Eastern	1,025	1.4	713	69.6	312	30.4	224	21.9
Western	635	0.9	395	62.2	240	37.8	175	27.6
Nebraska	568	0.8	288	50.7	280	49.3	245	43.1
North Dakota	248	0.3	185	74.6	63	25.4	55	22.2
South Dakota	398	0.5	327	82.2	71	17.8	60	15.1

Table D-6 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Drug Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	14,578	19.9	11,512	79.0	3,066	21.0	2,578	17.7
Alaska	128	0.2	81	63.3	47	36.7	42	32.8
Arizona	4,930	6.7	4,390	89.0	540	11.0	492	10.0
California								
Central	1,827	2.5	1,401	76.7	426	23.3	353	19.3
Eastern	966	1.3	724	74.9	242	25.1	169	17.5
Northern	688	0.9	515	74.9	173	25.1	133	19.3
Southern	3,021	4.1	2,311	76.5	710	23.5	666	22.0
Guam	50	0.1	38	76.0	12	24.0	11	22.0
Hawaii	158	0.2	76	48.1	82	51.9	71	44.9
Idaho	291	0.4	199	68.4	92	31.6	83	28.5
Montana	364	0.5	229	62.9	135	37.1	92	25.3
Nevada	589	0.8	473	80.3	116	19.7	78	13.2
Northern Mariana Islands	27	0.0	23	85.2	4	14.8	4	14.8
Oregon	507	0.7	341	67.3	166	32.7	135	26.6
Washington								
Eastern	376	0.5	263	69.9	113	30.1	99	26.3
Western	656	0.9	448	68.3	208	31.7	150	22.9
TENTH CIRCUIT	6,553	9.0	5,448	83.1	1,105	16.9	888	13.6
Colorado	505	0.7	433	85.7	72	14.3	61	12.1
Kansas	676	0.9	403	59.6	273	40.4	211	31.2
New Mexico	3,657	5.0	3,324	90.9	333	9.1	303	8.3
Oklahoma								
Eastern	111	0.2	73	65.8	38	34.2	28	25.2
Northern	155	0.2	121	78.1	34	21.9	20	12.9
Western	283	0.4	231	81.6	52	18.4	27	9.5
Utah	798	1.1	655	82.1	143	17.9	100	12.5
Wyoming	368	0.5	208	56.5	160	43.5	138	37.5
ELEVENTH CIRCUIT	6,534	8.9	4,164	63.7	2,370	36.3	1,680	25.7
Alabama								
Middle	241	0.3	153	63.5	88	36.5	66	27.4
Northern	405	0.6	242	59.8	163	40.2	89	22.0
Southern	298	0.4	178	59.7	120	40.3	86	28.9
Florida								
Middle	1,660	2.3	1,011	60.9	649	39.1	504	30.4
Northern	372	0.5	213	57.3	159	42.7	118	31.7
Southern	2,164	3.0	1,388	64.1	776	35.9	536	24.8
Georgia								
Middle	275	0.4	192	69.8	83	30.2	69	25.1
Northern	650	0.9	412	63.4	238	36.6	142	21.8
Southern	469	0.6	375	80.0	94	20.0	70	14.9

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-7

**MANDATORY MINIMUM STATUS AND AVERAGE SENTENCE BY DRUG TYPE
FOR DRUG OFFENDERS¹
Fiscal Year 2010**

DRUG TYPE	TOTAL	No Mandatory Minimum			Mandatory Minimum		
		Number	Percent	Mean Sentence (months)	Number	Percent	Mean Sentence (months)
TOTAL	23,687	7,874	33.2	33	15,813	66.8	93
Cocaine	5,557	1,110	20.0	38	4,447	80.0	92
Crack	4,743	838	17.7	61	3,905	82.3	118
Heroin	1,559	461	29.6	43	1,098	70.4	81
Marijuana	6,151	3,426	55.7	18	2,725	44.3	55
Methamphetamine	4,164	698	16.8	54	3,466	83.2	102
Other	1,513	1,341	88.6	37	172	11.4	94

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 23,964 (32.7 percent) involved a guideline under Chapter 2, Part D (Offenses involving Drugs and Narco-Terrorism). Of the 23,964 offenders, 277 were excluded due to missing values on one or both of the following reasons: missing statutory information (40) or missing drug type (237).

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-8

**APPLICATION OF SAFETY VALVE AND AVERAGE SENTENCE BY DRUG TYPE FOR DRUG
OFFENDERS CONVICTED OF AN OFFENSE CARRYING A DRUG MANDATORY MINIMUM¹
Fiscal Year 2010**

DRUG TYPE	TOTAL	SAFETY VALVE STATUS					
		NO SAFETY VALVE APPLIED			SAFETY VALVE APPLIED		
		Number	Percent	Mean	Number	Percent	Mean
TOTAL	15,805	10,249	64.8	120	5,556	35.2	45
Cocaine	4,443	2,536	57.1	122	1,907	42.9	52
Crack	3,904	3,449	88.3	129	455	11.7	37
Heroin	1,098	632	57.6	109	466	42.4	44
Marijuana	2,722	1,305	47.9	83	1,417	52.1	30
Methamphetamine	3,466	2,192	63.2	129	1,274	36.8	56
Other	172	135	78.5	109	37	21.5	40

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 23,964 (32.7 percent) involved a guideline under Chapter 2, Part D (Offenses involving Drugs and Narco-Terrorism). Of the 23,964 offenders, 15,831 were convicted of a statute carrying a mandatory minimum penalty. Of the remaining 15,831 offenders, 26 were excluded due to missing values for one or both of the following reasons: missing type of drug (18) or missing safety valve status (13).

Table D-9

**RACE OF OFFENDER BY LENGTH OF DRUG MANDATORY MINIMUM
FOR DRUG OFFENDERS¹
Fiscal Year 2010**

LENGTH OF MANDATORY MINIMUM	TOTAL	RACE OF OFFENDER							
		WHITE		BLACK		HISPANIC		OTHER	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	15,412	3,546	23.0	4,581	29.7	6,894	44.7	391	2.5
Less than One Year	23	11	47.8	8	34.8	2	8.7	2	8.7
One Year	143	32	22.4	60	42.0	50	35.0	1	0.7
Five Years	6,698	1,559	23.3	1,794	26.8	3,175	47.4	170	2.5
10 Years	7,702	1,731	22.5	2,247	29.2	3,519	45.7	205	2.7
20 Years	692	178	25.7	372	53.8	130	18.8	12	1.7
Life	153	34	22.2	100	65.4	18	11.8	1	0.7

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 23,964 (32.7 percent) involved a guideline under Chapter 2, Part D (Offenses involving Drugs and Narco-Terrorism). Of the 23,964 offenders, 15,831 were convicted of a statute carrying a mandatory minimum penalty. Of the remaining 15,831 offenders, 392 were convicted of a mandatory minimum other than one for a drug offense. Of the remaining 15,439 offenders, 27 were excluded due to missing information on the race of the offender. One case was excluded due to inconsistent guideline application.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-10

**GENDER OF OFFENDER AND AVERAGE SENTENCE BY DRUG TYPE FOR DRUG OFFENDERS
CONVICTED OF AN OFFENSE CARRYING A DRUG MANDATORY MINIMUM¹
Fiscal Year 2010**

DRUG TYPE	TOTAL	GENDER OF OFFENDER					
		MALE			FEMALE		
		Number	Percent	Mean	Number	Percent	Mean
TOTAL	15,813	14,204	89.8	97	1,609	10.2	61
Cocaine	4,447	4,076	91.7	95	371	8.3	53
Crack	3,905	3,620	92.7	122	285	7.3	66
Heroin	1,098	966	88.0	85	132	12.0	53
Marijuana	2,725	2,551	93.6	56	174	6.4	38
Methamphetamine	3,466	2,839	81.9	109	627	18.1	72
Other	172	152	88.4	99	20	11.6	57

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 23,964 (32.7 percent) involved a guideline under Chapter 2, Part D (Offenses involving Drugs and Narco-Terrorism). Of the 23,964 offenders, 15,831 were convicted of a statute carrying a mandatory minimum penalty. Of the remaining 15,831 offenders, 18 were excluded due to missing information on type of drug.

Table D-11

**GENDER OF OFFENDER BY LENGTH OF DRUG MANDATORY MINIMUM
FOR DRUG OFFENDERS¹
Fiscal Year 2010**

LENGTH OF MANDATORY MINIMUM	TOTAL	GENDER OF OFFENDER			
		MALE		FEMALE	
		Number	Percent	Number	Percent
TOTAL	15,439	13,839	89.6	1,600	10.4
Less than One Year	23	19	82.6	4	17.4
One Year	143	122	85.3	21	14.7
Five Years	6,711	5,989	89.2	722	10.8
10 Years	7,716	6,914	89.6	802	10.4
20 Years	692	648	93.6	44	6.4
Life	153	146	95.4	7	4.6

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 23,964 (32.7 percent) involved a guideline under Chapter 2, Part D (Offenses involving Drugs and Narco-Terrorism). Of the 23,964 offenders, 15,831 were convicted of a statute carrying a mandatory minimum penalty. Of the 15,831 remaining offenders, 392 were convicted of a mandatory minimum other than one for a drug offense. One case was excluded due to inconsistent guideline application.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-12

**CITIZENSHIP OF OFFENDER AND AVERAGE SENTENCE BY DRUG TYPE FOR DRUG
OFFENDERS CONVICTED OF AN OFFENSE CARRYING A DRUG MANDATORY MINIMUM¹
Fiscal Year 2010**

DRUG TYPE	TOTAL	CITIZENSHIP STATUS					
		UNITED STATES CITIZEN			NON-UNITED STATES CITIZEN		
		Number	Percent	Mean	Number	Percent	Mean
TOTAL	15,809	11,063	70.0	100	4,746	30.0	78
Cocaine	4,445	2,597	58.4	96	1,848	41.6	85
Crack	3,905	3,796	97.2	119	109	2.8	98
Heroin	1,097	653	59.5	93	444	40.5	63
Marijuana	2,724	1,576	57.9	59	1,148	42.1	49
Methamphetamine	3,466	2,290	66.1	105	1,176	33.9	98
Other	172	151	87.8	98	21	12.2	72

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 23,964 (32.7 percent) involved a guideline under Chapter 2, Part D (Offenses involving Drugs and Narco-Terrorism). Of the 23,964 offenders, 15,831 were convicted of a statute carrying a mandatory minimum penalty. Of the remaining 15,831 offenders, 22 were excluded due to missing values for one or both of the following reasons: missing type of drug (18) or missing citizenship status of the offender (4).

Table D-13

**CITIZENSHIP OF OFFENDER BY LENGTH OF DRUG MANDATORY MINIMUM
FOR DRUG OFFENDERS¹
Fiscal Year 2010**

LENGTH OF MANDATORY MINIMUM	TOTAL	CITIZENSHIP OF OFFENDER			
		U.S. Citizen		Non-U.S. Citizen	
		Number	Percent	Number	Percent
TOTAL	15,435	10,726	69.5	4,709	30.5
Less than One Year	23	23	100.0	0	0.0
One Year	143	136	95.1	7	4.9
Five Years	6,708	4,754	70.9	1,954	29.1
10 Years	7,715	5,026	65.1	2,689	34.9
20 Years	692	638	92.2	54	7.8
Life	153	148	96.7	5	3.3

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 23,964 (32.7 percent) involved a guideline under Chapter 2, Part D (Offenses involving Drugs and Narco-Terrorism). Of the 23,964 offenders, 15,831 were convicted of a statute carrying a mandatory minimum penalty. Of the 15,831 remaining offenders, 392 were convicted of a mandatory minimum other than one for a drug offense. Of the remaining 15,439 offenders, four were excluded due to missing information on the citizenship status of the offender. One case was excluded due to inconsistent guideline application.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-14

**MANDATORY MINIMUM STATUS FOR 18 U.S.C. § 924(c) OFFENDERS
IN EACH CIRCUIT AND DISTRICT¹
Fiscal Year 2010**

CIRCUIT District	Total		No Mandatory Minimum		All Mandatory Minimum		18 U.S.C. § 924(c)	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	73,133	100.0	53,237	72.8	19,896	27.2	2,294	3.1
D.C. CIRCUIT	355	0.5	203	57.2	152	42.8	14	3.9
District of Columbia	355	0.5	203	57.2	152	42.8	14	3.9
FIRST CIRCUIT	1,752	2.4	896	51.1	856	48.9	58	3.3
Maine	166	0.2	98	59.0	68	41.0	2	1.2
Massachusetts	421	0.6	255	60.6	166	39.4	2	0.5
New Hampshire	228	0.3	153	67.1	75	32.9	19	8.3
Puerto Rico	780	1.1	289	37.1	491	62.9	32	4.1
Rhode Island	157	0.2	101	64.3	56	35.7	3	1.9
SECOND CIRCUIT	4,038	5.5	2,767	68.5	1,271	31.5	158	3.9
Connecticut	407	0.6	259	63.6	148	36.4	5	1.2
New York								
Eastern	1,097	1.5	746	68.0	351	32.0	51	4.6
Northern	439	0.6	319	72.7	120	27.3	6	1.4
Southern	1,332	1.8	872	65.5	460	34.5	62	4.7
Western	588	0.8	437	74.3	151	25.7	29	4.9
Vermont	175	0.2	134	76.6	41	23.4	5	2.9
THIRD CIRCUIT	2,811	3.8	1,898	67.5	913	32.5	171	6.1
Delaware	128	0.2	88	68.8	40	31.3	2	1.6
New Jersey	798	1.1	622	77.9	176	22.1	14	1.8
Pennsylvania								
Eastern	894	1.2	473	52.9	421	47.1	134	15.0
Middle	486	0.7	404	83.1	82	16.9	8	1.6
Western	435	0.6	258	59.3	177	40.7	12	2.8
Virgin Islands	70	0.1	53	75.7	17	24.3	1	1.4
FOURTH CIRCUIT	5,700	7.8	3,299	57.9	2,401	42.1	520	9.1
Maryland	660	0.9	378	57.3	282	42.7	40	6.1
North Carolina								
Eastern	698	1.0	348	49.9	350	50.1	126	18.1
Middle	547	0.7	303	55.4	244	44.6	60	11.0
Western	497	0.7	246	49.5	251	50.5	47	9.5
South Carolina	1,218	1.7	716	58.8	502	41.2	104	8.5
Virginia								
Eastern	1,234	1.7	763	61.8	471	38.2	105	8.5
Western	356	0.5	165	46.3	191	53.7	31	8.7
West Virginia								
Northern	255	0.3	201	78.8	54	21.2	1	0.4
Southern	235	0.3	179	76.2	56	23.8	6	2.6

Table D-14 (continued)

CIRCUIT District	Total		No Mandatory Minimum		All Mandatory Minimum		18 U.S.C. § 924(c)	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	17,976	24.6	14,798	82.3	3,178	17.7	173	1.0
Louisiana								
Eastern	394	0.5	275	69.8	119	30.2	16	4.1
Middle	196	0.3	155	79.1	41	20.9	9	4.6
Western	346	0.5	216	62.4	130	37.6	11	3.2
Mississippi								
Northern	165	0.2	108	65.5	57	34.5	10	6.1
Southern	311	0.4	225	72.3	86	27.7	5	1.6
Texas								
Eastern	835	1.1	530	63.5	305	36.5	20	2.4
Northern	896	1.2	646	72.1	250	27.9	35	3.9
Southern	8,260	11.3	7,131	86.3	1,129	13.7	16	0.2
Western	6,573	9.0	5,512	83.9	1,061	16.1	51	0.8
SIXTH CIRCUIT	5,200	7.1	3,474	66.8	1,726	33.2	263	5.1
Kentucky								
Eastern	606	0.8	434	71.6	172	28.4	40	6.6
Western	394	0.5	236	59.9	158	40.1	8	2.0
Michigan								
Eastern	725	1.0	525	72.4	200	27.6	18	2.5
Western	474	0.6	331	69.8	143	30.2	14	3.0
Ohio								
Northern	627	0.9	486	77.5	141	22.5	14	2.2
Southern	649	0.9	428	65.9	221	34.1	51	7.9
Tennessee								
Eastern	817	1.1	397	48.6	420	51.4	69	8.4
Middle	282	0.4	205	72.7	77	27.3	12	4.3
Western	626	0.9	432	69.0	194	31.0	37	5.9
SEVENTH CIRCUIT	2,887	3.9	1,801	62.4	1,086	37.6	130	4.5
Illinois								
Central	368	0.5	177	48.1	191	51.9	9	2.4
Northern	797	1.1	549	68.9	248	31.1	38	4.8
Southern	302	0.4	171	56.6	131	43.4	8	2.6
Indiana								
Northern	427	0.6	293	68.6	134	31.4	35	8.2
Southern	326	0.4	144	44.2	182	55.8	12	3.7
Wisconsin								
Eastern	467	0.6	318	68.1	149	31.9	18	3.9
Western	200	0.3	149	74.5	51	25.5	10	5.0
EIGHTH CIRCUIT	4,749	6.5	2,977	62.7	1,772	37.3	124	2.6
Arkansas								
Eastern	377	0.5	270	71.6	107	28.4	4	1.1
Western	255	0.3	209	82.0	46	18.0	2	0.8
Iowa								
Northern	343	0.5	178	51.9	165	48.1	1	0.3
Southern	419	0.6	192	45.8	227	54.2	20	4.8
Minnesota	481	0.7	220	45.7	261	54.3	7	1.5
Missouri								
Eastern	1,025	1.4	713	69.6	312	30.4	35	3.4
Western	635	0.9	395	62.2	240	37.8	29	4.6
Nebraska	568	0.8	288	50.7	280	49.3	16	2.8
North Dakota	248	0.3	185	74.6	63	25.4	4	1.6
South Dakota	398	0.5	327	82.2	71	17.8	6	1.5

Table D-14 (continued)

CIRCUIT District	Total		No Mandatory Minimum		All Mandatory Minimum		18 U.S.C. § 924(c)	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	14,578	19.9	11,512	79.0	3,066	21.0	214	1.5
Alaska	128	0.2	81	63.3	47	36.7	7	5.5
Arizona	4,930	6.7	4,390	89.0	540	11.0	35	0.7
California								
Central	1,827	2.5	1,401	76.7	426	23.3	53	2.9
Eastern	966	1.3	724	74.9	242	25.1	37	3.8
Northern	688	0.9	515	74.9	173	25.1	21	3.1
Southern	3,021	4.1	2,311	76.5	710	23.5	3	0.1
Guam	50	0.1	38	76.0	12	24.0	1	2.0
Hawaii	158	0.2	76	48.1	82	51.9	3	1.9
Idaho	291	0.4	199	68.4	92	31.6	6	2.1
Montana	364	0.5	229	62.9	135	37.1	6	1.6
Nevada	589	0.8	473	80.3	116	19.7	12	2.0
Northern Mariana Islands	27	0.0	23	85.2	4	14.8	0	0.0
Oregon	507	0.7	341	67.3	166	32.7	5	1.0
Washington								
Eastern	376	0.5	263	69.9	113	30.1	5	1.3
Western	656	0.9	448	68.3	208	31.7	20	3.0
TENTH CIRCUIT	6,553	9.0	5,448	83.1	1,105	16.9	131	2.0
Colorado	505	0.7	433	85.7	72	14.3	6	1.2
Kansas	676	0.9	403	59.6	273	40.4	41	6.1
New Mexico	3,657	5.0	3,324	90.9	333	9.1	24	0.7
Oklahoma								
Eastern	111	0.2	73	65.8	38	34.2	6	5.4
Northern	155	0.2	121	78.1	34	21.9	8	5.2
Western	283	0.4	231	81.6	52	18.4	9	3.2
Utah	798	1.1	655	82.1	143	17.9	17	2.1
Wyoming	368	0.5	208	56.5	160	43.5	20	5.4
ELEVENTH CIRCUIT	6,534	8.9	4,164	63.7	2,370	36.3	338	5.2
Alabama								
Middle	241	0.3	153	63.5	88	36.5	17	7.1
Northern	405	0.6	242	59.8	163	40.2	35	8.6
Southern	298	0.4	178	59.7	120	40.3	17	5.7
Florida								
Middle	1,660	2.3	1,011	60.9	649	39.1	123	7.4
Northern	372	0.5	213	57.3	159	42.7	18	4.8
Southern	2,164	3.0	1,388	64.1	776	35.9	66	3.0
Georgia								
Middle	275	0.4	192	69.8	83	30.2	9	3.3
Northern	650	0.9	412	63.4	238	36.6	42	6.5
Southern	469	0.6	375	80.0	94	20.0	11	2.3

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-15

**MANDATORY MINIMUM STATUS FOR ARMED CAREER CRIMINAL OFFENDERS
IN EACH CIRCUIT AND DISTRICT¹
Fiscal Year 2010**

CIRCUIT District	Total		No Mandatory Minimum		All Mandatory Minimum		Armed Career Criminal	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	73,133	100.0	53,237	72.8	19,896	27.2	592	0.8
D.C. CIRCUIT	355	0.5	203	57.2	152	42.8	1	0.3
District of Columbia	355	0.5	203	57.2	152	42.8	1	0.3
FIRST CIRCUIT	1,752	2.4	896	51.1	856	48.9	16	0.9
Maine	166	0.2	98	59.0	68	41.0	1	0.6
Massachusetts	421	0.6	255	60.6	166	39.4	16	3.8
New Hampshire	228	0.3	153	67.1	75	32.9	0	0.0
Puerto Rico	780	1.1	289	37.1	491	62.9	0	0.0
Rhode Island	157	0.2	101	64.3	56	35.7	1	0.6
SECOND CIRCUIT	4,038	5.5	2,767	68.5	1,271	31.5	9	0.2
Connecticut	407	0.6	259	63.6	148	36.4	3	0.7
New York								
Eastern	1,097	1.5	746	68.0	351	32.0	1	0.1
Northern	439	0.6	319	72.7	120	27.3	1	0.2
Southern	1,332	1.8	872	65.5	460	34.5	2	0.2
Western	588	0.8	437	74.3	151	25.7	0	0.0
Vermont	175	0.2	134	76.6	41	23.4	2	1.1
THIRD CIRCUIT	2,811	3.8	1,898	67.5	913	32.5	35	1.2
Delaware	128	0.2	88	68.8	40	31.3	1	0.8
New Jersey	798	1.1	622	77.9	176	22.1	0	0.0
Pennsylvania								
Eastern	894	1.2	473	52.9	421	47.1	27	3.0
Middle	486	0.7	404	83.1	82	16.9	1	0.2
Western	435	0.6	258	59.3	177	40.7	6	1.4
Virgin Islands	70	0.1	53	75.7	17	24.3	0	0.0
FOURTH CIRCUIT	5,700	7.8	3,299	57.9	2,401	42.1	161	2.8
Maryland	660	0.9	378	57.3	282	42.7	26	3.9
North Carolina								
Eastern	698	1.0	348	49.9	350	50.1	17	2.4
Middle	547	0.7	303	55.4	244	44.6	40	7.3
Western	497	0.7	246	49.5	251	50.5	17	3.4
South Carolina	1,218	1.7	716	58.8	502	41.2	34	2.8
Virginia								
Eastern	1,234	1.7	763	61.8	471	38.2	12	1.0
Western	356	0.5	165	46.3	191	53.7	15	4.2
West Virginia								
Northern	255	0.3	201	78.8	54	21.2	0	0.0
Southern	235	0.3	179	76.2	56	23.8	0	0.0

Table D-15 (continued)

CIRCUIT District	Total		No Mandatory Minimum		All Mandatory Minimum		Armed Career Criminal	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	17,976	24.6	14,798	82.3	3,178	17.7	21	0.1
Louisiana								
Eastern	394	0.5	275	69.8	119	30.2	2	0.5
Middle	196	0.3	155	79.1	41	20.9	3	1.5
Western	346	0.5	216	62.4	130	37.6	1	0.3
Mississippi								
Northern	165	0.2	108	65.5	57	34.5	0	0.0
Southern	311	0.4	225	72.3	86	27.7	1	0.3
Texas								
Eastern	835	1.1	530	63.5	305	36.5	3	0.4
Northern	896	1.2	646	72.1	250	27.9	5	0.6
Southern	8,260	11.3	7,131	86.3	1,129	13.7	3	0.0
Western	6,573	9.0	5,512	83.9	1,061	16.1	3	0.0
SIXTH CIRCUIT	5,200	7.1	3,474	66.8	1,726	33.2	92	1.8
Kentucky								
Eastern	606	0.8	434	71.6	172	28.4	5	0.8
Western	394	0.5	236	59.9	158	40.1	8	2.0
Michigan								
Eastern	725	1.0	525	72.4	200	27.6	7	1.0
Western	474	0.6	331	69.8	143	30.2	6	1.3
Ohio								
Northern	627	0.9	486	77.5	141	22.5	5	0.8
Southern	649	0.9	428	65.9	221	34.1	2	0.3
Tennessee								
Eastern	817	1.1	397	48.6	420	51.4	23	2.8
Middle	282	0.4	205	72.7	77	27.3	11	3.9
Western	626	0.9	432	69.0	194	31.0	25	4.0
SEVENTH CIRCUIT	2,887	3.9	1,801	62.4	1,086	37.6	39	1.4
Illinois								
Central	368	0.5	177	48.1	191	51.9	8	2.2
Northern	797	1.1	549	68.9	248	31.1	4	0.5
Southern	302	0.4	171	56.6	131	43.4	3	1.0
Indiana								
Northern	427	0.6	293	68.6	134	31.4	5	1.2
Southern	326	0.4	144	44.2	182	55.8	8	2.5
Wisconsin								
Eastern	467	0.6	318	68.1	149	31.9	6	1.3
Western	200	0.3	149	74.5	51	25.5	5	2.5
EIGHTH CIRCUIT	4,749	6.5	2,977	62.7	1,772	37.3	55	1.2
Arkansas								
Eastern	377	0.5	270	71.6	107	28.4	6	1.6
Western	255	0.3	209	82.0	46	18.0	1	0.4
Iowa								
Northern	343	0.5	178	51.9	165	48.1	3	0.9
Southern	419	0.6	192	45.8	227	54.2	1	0.2
Minnesota	481	0.7	220	45.7	261	54.3	5	1.0
Missouri								
Eastern	1,025	1.4	713	69.6	312	30.4	22	2.1
Western	635	0.9	395	62.2	240	37.8	11	1.7
Nebraska	568	0.8	288	50.7	280	49.3	4	0.7
North Dakota	248	0.3	185	74.6	63	25.4	2	0.8
South Dakota	398	0.5	327	82.2	71	17.8	0	0.0

Table D-15 (continued)

CIRCUIT District	Total		No Mandatory Minimum		All Mandatory Minimum		Armed Career Criminal	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	14,578	19.9	11,512	79.0	3,066	21.0	12	0.1
Alaska	128	0.2	81	63.3	47	36.7	0	0.0
Arizona	4,930	6.7	4,390	89.0	540	11.0	1	0.0
California								
Central	1,827	2.5	1,401	76.7	426	23.3	0	0.0
Eastern	966	1.3	724	74.9	242	25.1	0	0.0
Northern	688	0.9	515	74.9	173	25.1	0	0.0
Southern	3,021	4.1	2,311	76.5	710	23.5	0	0.0
Guam	50	0.1	38	76.0	12	24.0	0	0.0
Hawaii	158	0.2	76	48.1	82	51.9	0	0.0
Idaho	291	0.4	199	68.4	92	31.6	0	0.0
Montana	364	0.5	229	62.9	135	37.1	1	0.3
Nevada	589	0.8	473	80.3	116	19.7	1	0.2
Northern Mariana Islands	27	0.0	23	85.2	4	14.8	0	0.0
Oregon	507	0.7	341	67.3	166	32.7	5	1.0
Washington								
Eastern	376	0.5	263	69.9	113	30.1	3	0.8
Western	656	0.9	448	68.3	208	31.7	1	0.2
TENTH CIRCUIT	6,553	9.0	5,448	83.1	1,105	16.9	30	0.5
Colorado	505	0.7	433	85.7	72	14.3	2	0.4
Kansas	676	0.9	403	59.6	273	40.4	6	0.9
New Mexico	3,657	5.0	3,324	90.9	333	9.1	5	0.1
Oklahoma								
Eastern	111	0.2	73	65.8	38	34.2	2	1.8
Northern	155	0.2	121	78.1	34	21.9	2	1.3
Western	283	0.4	231	81.6	52	18.4	9	3.2
Utah	798	1.1	655	82.1	143	17.9	0	0.0
Wyoming	368	0.5	208	56.5	160	43.5	4	1.1
ELEVENTH CIRCUIT	6,534	8.9	4,164	63.7	2,370	36.3	119	1.8
Alabama								
Middle	241	0.3	153	63.5	88	36.5	0	0.0
Northern	405	0.6	242	59.8	163	40.2	10	2.5
Southern	298	0.4	178	59.7	120	40.3	3	1.0
Florida								
Middle	1,660	2.3	1,011	60.9	649	39.1	35	2.1
Northern	372	0.5	213	57.3	159	42.7	10	2.7
Southern	2,164	3.0	1,388	64.1	776	35.9	30	1.4
Georgia								
Middle	275	0.4	192	69.8	83	30.2	2	0.7
Northern	650	0.9	412	63.4	238	36.6	21	3.2
Southern	469	0.6	375	80.0	94	20.0	8	1.7

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-16

**MANDATORY MINIMUM STATUS FOR SEXUAL ABUSE OFFENDERS
IN EACH CIRCUIT AND DISTRICT¹
Fiscal Year 2010**

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Sexual Abuse Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	73,133	100.0	53,237	72.8	19,896	27.2	336	0.5
D.C. CIRCUIT	355	0.5	203	57.2	152	42.8	4	1.1
District of Columbia	355	0.5	203	57.2	152	42.8	4	1.1
FIRST CIRCUIT	1,752	2.4	896	51.1	856	48.9	10	0.6
Maine	166	0.2	98	59.0	68	41.0	1	0.6
Massachusetts	421	0.6	255	60.6	166	39.4	2	0.5
New Hampshire	228	0.3	153	67.1	75	32.9	1	0.4
Puerto Rico	780	1.1	289	37.1	491	62.9	6	0.8
Rhode Island	157	0.2	101	64.3	56	35.7	0	0.0
SECOND CIRCUIT	4,038	5.5	2,767	68.5	1,271	31.5	31	0.8
Connecticut	407	0.6	259	63.6	148	36.4	0	0.0
New York								
Eastern	1,097	1.5	746	68.0	351	32.0	6	0.5
Northern	439	0.6	319	72.7	120	27.3	11	2.5
Southern	1,332	1.8	872	65.5	460	34.5	7	0.5
Western	588	0.8	437	74.3	151	25.7	5	0.9
Vermont	175	0.2	134	76.6	41	23.4	2	1.1
THIRD CIRCUIT	2,811	3.8	1,898	67.5	913	32.5	9	0.3
Delaware	128	0.2	88	68.8	40	31.3	2	1.6
New Jersey	798	1.1	622	77.9	176	22.1	1	0.1
Pennsylvania								
Eastern	894	1.2	473	52.9	421	47.1	2	0.2
Middle	486	0.7	404	83.1	82	16.9	1	0.2
Western	435	0.6	258	59.3	177	40.7	3	0.7
Virgin Islands	70	0.1	53	75.7	17	24.3	0	0.0
FOURTH CIRCUIT	5,700	7.8	3,299	57.9	2,401	42.1	33	0.6
Maryland	660	0.9	378	57.3	282	42.7	9	1.4
North Carolina								
Eastern	698	1.0	348	49.9	350	50.1	6	0.9
Middle	547	0.7	303	55.4	244	44.6	1	0.2
Western	497	0.7	246	49.5	251	50.5	4	0.8
South Carolina	1,218	1.7	716	58.8	502	41.2	1	0.1
Virginia								
Eastern	1,234	1.7	763	61.8	471	38.2	8	0.6
Western	356	0.5	165	46.3	191	53.7	2	0.6
West Virginia								
Northern	255	0.3	201	78.8	54	21.2	1	0.4
Southern	235	0.3	179	76.2	56	23.8	1	0.4

Table D-16 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Sexual Abuse Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	17,976	24.6	14,798	82.3	3,178	17.7	30	0.2
Louisiana								
Eastern	394	0.5	275	69.8	119	30.2	0	0.0
Middle	196	0.3	155	79.1	41	20.9	0	0.0
Western	346	0.5	216	62.4	130	37.6	6	1.7
Mississippi								
Northern	165	0.2	108	65.5	57	34.5	3	1.8
Southern	311	0.4	225	72.3	86	27.7	2	0.6
Texas								
Eastern	835	1.1	530	63.5	305	36.5	2	0.2
Northern	896	1.2	646	72.1	250	27.9	8	0.9
Southern	8,260	11.3	7,131	86.3	1,129	13.7	4	0.0
Western	6,573	9.0	5,512	83.9	1,061	16.1	5	0.1
SIXTH CIRCUIT	5,200	7.1	3,474	66.8	1,726	33.2	43	0.8
Kentucky								
Eastern	606	0.8	434	71.6	172	28.4	1	0.2
Western	394	0.5	236	59.9	158	40.1	7	1.8
Michigan								
Eastern	725	1.0	525	72.4	200	27.6	9	1.2
Western	474	0.6	331	69.8	143	30.2	8	1.7
Ohio								
Northern	627	0.9	486	77.5	141	22.5	3	0.5
Southern	649	0.9	428	65.9	221	34.1	5	0.8
Tennessee								
Eastern	817	1.1	397	48.6	420	51.4	5	0.6
Middle	282	0.4	205	72.7	77	27.3	0	0.0
Western	626	0.9	432	69.0	194	31.0	5	0.8
SEVENTH CIRCUIT	2,887	3.9	1,801	62.4	1,086	37.6	29	1.0
Illinois								
Central	368	0.5	177	48.1	191	51.9	9	2.4
Northern	797	1.1	549	68.9	248	31.1	4	0.5
Southern	302	0.4	171	56.6	131	43.4	2	0.7
Indiana								
Northern	427	0.6	293	68.6	134	31.4	3	0.7
Southern	326	0.4	144	44.2	182	55.8	6	1.8
Wisconsin								
Eastern	467	0.6	318	68.1	149	31.9	5	1.1
Western	200	0.3	149	74.5	51	25.5	0	0.0
EIGHTH CIRCUIT	4,749	6.5	2,977	62.7	1,772	37.3	38	0.8
Arkansas								
Eastern	377	0.5	270	71.6	107	28.4	3	0.8
Western	255	0.3	209	82.0	46	18.0	1	0.4
Iowa								
Northern	343	0.5	178	51.9	165	48.1	6	1.7
Southern	419	0.6	192	45.8	227	54.2	4	1.0
Minnesota	481	0.7	220	45.7	261	54.3	2	0.4
Missouri								
Eastern	1,025	1.4	713	69.6	312	30.4	8	0.8
Western	635	0.9	395	62.2	240	37.8	8	1.3
Nebraska	568	0.8	288	50.7	280	49.3	2	0.4
North Dakota	248	0.3	185	74.6	63	25.4	4	1.6
South Dakota	398	0.5	327	82.2	71	17.8	0	0.0

Table D-16 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Sexual Abuse Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	14,578	19.9	11,512	79.0	3,066	21.0	43	0.3
Alaska	128	0.2	81	63.3	47	36.7	0	0.0
Arizona	4,930	6.7	4,390	89.0	540	11.0	1	0.0
California								
Central	1,827	2.5	1,401	76.7	426	23.3	4	0.2
Eastern	966	1.3	724	74.9	242	25.1	10	1.0
Northern	688	0.9	515	74.9	173	25.1	1	0.1
Southern	3,021	4.1	2,311	76.5	710	23.5	7	0.2
Guam	50	0.1	38	76.0	12	24.0	0	0.0
Hawaii	158	0.2	76	48.1	82	51.9	2	1.3
Idaho	291	0.4	199	68.4	92	31.6	2	0.7
Montana	364	0.5	229	62.9	135	37.1	5	1.4
Nevada	589	0.8	473	80.3	116	19.7	4	0.7
Northern Mariana Islands	27	0.0	23	85.2	4	14.8	0	0.0
Oregon	507	0.7	341	67.3	166	32.7	4	0.8
Washington								
Eastern	376	0.5	263	69.9	113	30.1	1	0.3
Western	656	0.9	448	68.3	208	31.7	2	0.3
TENTH CIRCUIT	6,553	9.0	5,448	83.1	1,105	16.9	16	0.2
Colorado	505	0.7	433	85.7	72	14.3	1	0.2
Kansas	676	0.9	403	59.6	273	40.4	3	0.4
New Mexico	3,657	5.0	3,324	90.9	333	9.1	0	0.0
Oklahoma								
Eastern	111	0.2	73	65.8	38	34.2	2	1.8
Northern	155	0.2	121	78.1	34	21.9	1	0.6
Western	283	0.4	231	81.6	52	18.4	2	0.7
Utah	798	1.1	655	82.1	143	17.9	4	0.5
Wyoming	368	0.5	208	56.5	160	43.5	3	0.8
ELEVENTH CIRCUIT	6,534	8.9	4,164	63.7	2,370	36.3	50	0.8
Alabama								
Middle	241	0.3	153	63.5	88	36.5	4	1.7
Northern	405	0.6	242	59.8	163	40.2	7	1.7
Southern	298	0.4	178	59.7	120	40.3	1	0.3
Florida								
Middle	1,660	2.3	1,011	60.9	649	39.1	8	0.5
Northern	372	0.5	213	57.3	159	42.7	3	0.8
Southern	2,164	3.0	1,388	64.1	776	35.9	16	0.7
Georgia								
Middle	275	0.4	192	69.8	83	30.2	1	0.4
Northern	650	0.9	412	63.4	238	36.6	10	1.5
Southern	469	0.6	375	80.0	94	20.0	0	0.0

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878 cases. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-17

**MANDATORY MINIMUM STATUS FOR CHILD PORNOGRAPHY OFFENDERS
IN EACH CIRCUIT AND DISTRICT¹
Fiscal Year 2010**

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Child Pornography Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	73,133	100.0	53,237	72.8	19,896	27.2	840	1.1
D.C. CIRCUIT	355	0.5	203	57.2	152	42.8	9	2.5
District of Columbia	355	0.5	203	57.2	152	42.8	9	2.5
FIRST CIRCUIT	1,752	2.4	896	51.1	856	48.9	12	0.7
Maine	166	0.2	98	59.0	68	41.0	1	0.6
Massachusetts	421	0.6	255	60.6	166	39.4	7	1.7
New Hampshire	228	0.3	153	67.1	75	32.9	3	1.3
Puerto Rico	780	1.1	289	37.1	491	62.9	1	0.1
Rhode Island	157	0.2	101	64.3	56	35.7	0	0.0
SECOND CIRCUIT	4,038	5.5	2,767	68.5	1,271	31.5	59	1.5
Connecticut	407	0.6	259	63.6	148	36.4	1	0.2
New York								
Eastern	1,097	1.5	746	68.0	351	32.0	9	0.8
Northern	439	0.6	319	72.7	120	27.3	24	5.5
Southern	1,332	1.8	872	65.5	460	34.5	6	0.5
Western	588	0.8	437	74.3	151	25.7	15	2.6
Vermont	175	0.2	134	76.6	41	23.4	4	2.3
THIRD CIRCUIT	2,811	3.8	1,898	67.5	913	32.5	33	1.2
Delaware	128	0.2	88	68.8	40	31.3	1	0.8
New Jersey	798	1.1	622	77.9	176	22.1	5	0.6
Pennsylvania								
Eastern	894	1.2	473	52.9	421	47.1	3	0.3
Middle	486	0.7	404	83.1	82	16.9	11	2.3
Western	435	0.6	258	59.3	177	40.7	13	3.0
Virgin Islands	70	0.1	53	75.7	17	24.3	0	0.0
FOURTH CIRCUIT	5,700	7.8	3,299	57.9	2,401	42.1	83	1.5
Maryland	660	0.9	378	57.3	282	42.7	14	2.1
North Carolina								
Eastern	698	1.0	348	49.9	350	50.1	8	1.1
Middle	547	0.7	303	55.4	244	44.6	2	0.4
Western	497	0.7	246	49.5	251	50.5	8	1.6
South Carolina	1,218	1.7	716	58.8	502	41.2	3	0.2
Virginia								
Eastern	1,234	1.7	763	61.8	471	38.2	39	3.2
Western	356	0.5	165	46.3	191	53.7	3	0.8
West Virginia								
Northern	255	0.3	201	78.8	54	21.2	1	0.4
Southern	235	0.3	179	76.2	56	23.8	5	2.1

Table D-17 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Child Pornography Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	17,976	24.6	14,798	82.3	3,178	17.7	75	0.4
Louisiana								
Eastern	394	0.5	275	69.8	119	30.2	5	1.3
Middle	196	0.3	155	79.1	41	20.9	2	1.0
Western	346	0.5	216	62.4	130	37.6	3	0.9
Mississippi								
Northern	165	0.2	108	65.5	57	34.5	2	1.2
Southern	311	0.4	225	72.3	86	27.7	2	0.6
Texas								
Eastern	835	1.1	530	63.5	305	36.5	3	0.4
Northern	896	1.2	646	72.1	250	27.9	20	2.2
Southern	8,260	11.3	7,131	86.3	1,129	13.7	11	0.1
Western	6,573	9.0	5,512	83.9	1,061	16.1	27	0.4
SIXTH CIRCUIT	5,200	7.1	3,474	66.8	1,726	33.2	118	2.3
Kentucky								
Eastern	606	0.8	434	71.6	172	28.4	16	2.6
Western	394	0.5	236	59.9	158	40.1	7	1.8
Michigan								
Eastern	725	1.0	525	72.4	200	27.6	21	2.9
Western	474	0.6	331	69.8	143	30.2	9	1.9
Ohio								
Northern	627	0.9	486	77.5	141	22.5	20	3.2
Southern	649	0.9	428	65.9	221	34.1	17	2.6
Tennessee								
Eastern	817	1.1	397	48.6	420	51.4	14	1.7
Middle	282	0.4	205	72.7	77	27.3	6	2.1
Western	626	0.9	432	69.0	194	31.0	8	1.3
SEVENTH CIRCUIT	2,887	3.9	1,801	62.4	1,086	37.6	73	2.5
Illinois								
Central	368	0.5	177	48.1	191	51.9	17	4.6
Northern	797	1.1	549	68.9	248	31.1	11	1.4
Southern	302	0.4	171	56.6	131	43.4	6	2.0
Indiana								
Northern	427	0.6	293	68.6	134	31.4	5	1.2
Southern	326	0.4	144	44.2	182	55.8	28	8.6
Wisconsin								
Eastern	467	0.6	318	68.1	149	31.9	5	1.1
Western	200	0.3	149	74.5	51	25.5	1	0.5
EIGHTH CIRCUIT	4,749	6.5	2,977	62.7	1,772	37.3	100	2.1
Arkansas								
Eastern	377	0.5	270	71.6	107	28.4	5	1.3
Western	255	0.3	209	82.0	46	18.0	6	2.4
Iowa								
Northern	343	0.5	178	51.9	165	48.1	7	2.0
Southern	419	0.6	192	45.8	227	54.2	12	2.9
Minnesota	481	0.7	220	45.7	261	54.3	5	1.0
Missouri								
Eastern	1,025	1.4	713	69.6	312	30.4	24	2.3
Western	635	0.9	395	62.2	240	37.8	19	3.0
Nebraska	568	0.8	288	50.7	280	49.3	16	2.8
North Dakota	248	0.3	185	74.6	63	25.4	2	0.8
South Dakota	398	0.5	327	82.2	71	17.8	4	1.0

Table D-17 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Child Pornography Mandatory Minimum	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	14,578	19.9	11,512	79.0	3,066	21.0	130	0.9
Alaska	128	0.2	81	63.3	47	36.7	2	1.6
Arizona	4,930	6.7	4,390	89.0	540	11.0	14	0.3
California								
Central	1,827	2.5	1,401	76.7	426	23.3	10	0.5
Eastern	966	1.3	724	74.9	242	25.1	24	2.5
Northern	688	0.9	515	74.9	173	25.1	8	1.2
Southern	3,021	4.1	2,311	76.5	710	23.5	8	0.3
Guam	50	0.1	38	76.0	12	24.0	0	0.0
Hawaii	158	0.2	76	48.1	82	51.9	1	0.6
Idaho	291	0.4	199	68.4	92	31.6	3	1.0
Montana	364	0.5	229	62.9	135	37.1	21	5.8
Nevada	589	0.8	473	80.3	116	19.7	15	2.5
Northern Mariana Islands	27	0.0	23	85.2	4	14.8	0	0.0
Oregon	507	0.7	341	67.3	166	32.7	7	1.4
Washington								
Eastern	376	0.5	263	69.9	113	30.1	7	1.9
Western	656	0.9	448	68.3	208	31.7	10	1.5
TENTH CIRCUIT	6,553	9.0	5,448	83.1	1,105	16.9	26	0.4
Colorado	505	0.7	433	85.7	72	14.3	1	0.2
Kansas	676	0.9	403	59.6	273	40.4	6	0.9
New Mexico	3,657	5.0	3,324	90.9	333	9.1	5	0.1
Oklahoma								
Eastern	111	0.2	73	65.8	38	34.2	0	0.0
Northern	155	0.2	121	78.1	34	21.9	2	1.3
Western	283	0.4	231	81.6	52	18.4	2	0.7
Utah	798	1.1	655	82.1	143	17.9	2	0.3
Wyoming	368	0.5	208	56.5	160	43.5	8	2.2
ELEVENTH CIRCUIT	6,534	8.9	4,164	63.7	2,370	36.3	122	1.9
Alabama								
Middle	241	0.3	153	63.5	88	36.5	6	2.5
Northern	405	0.6	242	59.8	163	40.2	16	4.0
Southern	298	0.4	178	59.7	120	40.3	5	1.7
Florida								
Middle	1,660	2.3	1,011	60.9	649	39.1	34	2.0
Northern	372	0.5	213	57.3	159	42.7	14	3.8
Southern	2,164	3.0	1,388	64.1	776	35.9	30	1.4
Georgia								
Middle	275	0.4	192	69.8	83	30.2	2	0.7
Northern	650	0.9	412	63.4	238	36.6	13	2.0
Southern	469	0.6	375	80.0	94	20.0	2	0.4

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878 cases. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-18

**MANDATORY MINIMUM STATUS FOR IDENTITY THEFT OFFENDERS
IN EACH CIRCUIT AND DISTRICT¹
Fiscal Year 2010**

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Identity Theft Mandatory Minimums	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	73,133	100.0	53,237	72.8	19,896	27.2	797	1.1
D.C. CIRCUIT	355	0.5	203	57.2	152	42.8	3	0.8
District of Columbia	355	0.5	203	57.2	152	42.8	3	0.8
FIRST CIRCUIT	1,752	2.4	896	51.1	856	48.9	35	2.0
Maine	166	0.2	98	59.0	68	41.0	3	1.8
Massachusetts	421	0.6	255	60.6	166	39.4	10	2.4
New Hampshire	228	0.3	153	67.1	75	32.9	7	3.1
Puerto Rico	780	1.1	289	37.1	491	62.9	12	1.5
Rhode Island	157	0.2	101	64.3	56	35.7	3	1.9
SECOND CIRCUIT	4,038	5.5	2,767	68.5	1,271	31.5	58	1.4
Connecticut	407	0.6	259	63.6	148	36.4	4	1.0
New York								
Eastern	1,097	1.5	746	68.0	351	32.0	16	1.5
Northern	439	0.6	319	72.7	120	27.3	8	1.8
Southern	1,332	1.8	872	65.5	460	34.5	27	2.0
Western	588	0.8	437	74.3	151	25.7	3	0.5
Vermont	175	0.2	134	76.6	41	23.4	0	0.0
THIRD CIRCUIT	2,811	3.8	1,898	67.5	913	32.5	51	1.8
Delaware	128	0.2	88	68.8	40	31.3	2	1.6
New Jersey	798	1.1	622	77.9	176	22.1	10	1.3
Pennsylvania								
Eastern	894	1.2	473	52.9	421	47.1	37	4.1
Middle	486	0.7	404	83.1	82	16.9	0	0.0
Western	435	0.6	258	59.3	177	40.7	1	0.2
Virgin Islands	70	0.1	53	75.7	17	24.3	1	1.4
FOURTH CIRCUIT	5,700	7.8	3,299	57.9	2,401	42.1	115	2.0
Maryland	660	0.9	378	57.3	282	42.7	19	2.9
North Carolina								
Eastern	698	1.0	348	49.9	350	50.1	8	1.1
Middle	547	0.7	303	55.4	244	44.6	17	3.1
Western	497	0.7	246	49.5	251	50.5	14	2.8
South Carolina	1,218	1.7	716	58.8	502	41.2	14	1.1
Virginia								
Eastern	1,234	1.7	763	61.8	471	38.2	30	2.4
Western	356	0.5	165	46.3	191	53.7	6	1.7
West Virginia								
Northern	255	0.3	201	78.8	54	21.2	0	0.0
Southern	235	0.3	179	76.2	56	23.8	7	3.0

Table D-18 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Identity Theft Mandatory Minimums	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	17,976	24.6	14,798	82.3	3,178	17.7	60	0.3
Louisiana								
Eastern	394	0.5	275	69.8	119	30.2	0	0.0
Middle	196	0.3	155	79.1	41	20.9	1	0.5
Western	346	0.5	216	62.4	130	37.6	1	0.3
Mississippi								
Northern	165	0.2	108	65.5	57	34.5	0	0.0
Southern	311	0.4	225	72.3	86	27.7	8	2.6
Texas								
Eastern	835	1.1	530	63.5	305	36.5	6	0.7
Northern	896	1.2	646	72.1	250	27.9	5	0.6
Southern	8,260	11.3	7,131	86.3	1,129	13.7	13	0.2
Western	6,573	9.0	5,512	83.9	1,061	16.1	26	0.4
SIXTH CIRCUIT	5,200	7.1	3,474	66.8	1,726	33.2	62	1.2
Kentucky								
Eastern	606	0.8	434	71.6	172	28.4	10	1.7
Western	394	0.5	236	59.9	158	40.1	5	1.3
Michigan								
Eastern	725	1.0	525	72.4	200	27.6	7	1.0
Western	474	0.6	331	69.8	143	30.2	5	1.1
Ohio								
Northern	627	0.9	486	77.5	141	22.5	9	1.4
Southern	649	0.9	428	65.9	221	34.1	5	0.8
Tennessee								
Eastern	817	1.1	397	48.6	420	51.4	6	0.7
Middle	282	0.4	205	72.7	77	27.3	8	2.8
Western	626	0.9	432	69.0	194	31.0	7	1.1
SEVENTH CIRCUIT	2,887	3.9	1,801	62.4	1,086	37.6	16	0.6
Illinois								
Central	368	0.5	177	48.1	191	51.9	1	0.3
Northern	797	1.1	549	68.9	248	31.1	2	0.3
Southern	302	0.4	171	56.6	131	43.4	3	1.0
Indiana								
Northern	427	0.6	293	68.6	134	31.4	3	0.7
Southern	326	0.4	144	44.2	182	55.8	2	0.6
Wisconsin								
Eastern	467	0.6	318	68.1	149	31.9	3	0.6
Western	200	0.3	149	74.5	51	25.5	2	1.0
EIGHTH CIRCUIT	4,749	6.5	2,977	62.7	1,772	37.3	31	0.7
Arkansas								
Eastern	377	0.5	270	71.6	107	28.4	2	1
Western	255	0.3	209	82.0	46	18.0	0	0.0
Iowa								
Northern	343	0.5	178	51.9	165	48.1	7	2.0
Southern	419	0.6	192	45.8	227	54.2	1	0.2
Minnesota	481	0.7	220	45.7	261	54.3	6	1.2
Missouri								
Eastern	1,025	1.4	713	69.6	312	30.4	3	0.3
Western	635	0.9	395	62.2	240	37.8	9	1.4
Nebraska	568	0.8	288	50.7	280	49.3	3	0.5
North Dakota	248	0.3	185	74.6	63	25.4	0	0.0
South Dakota	398	0.5	327	82.2	71	17.8	0	0.0

Table D-18 (continued)

CIRCUIT District	Total		No Mandatory Minimum		Mandatory Minimum		Identity Theft Mandatory Minimums	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	14,578	19.9	11,512	79.0	3,066	21.0	128	0.9
Alaska	128	0.2	81	63.3	47	36.7	2	1.6
Arizona	4,930	6.7	4,390	89.0	540	11.0	2	0.0
California								
Central	1,827	2.5	1,401	76.7	426	23.3	27	1.5
Eastern	966	1.3	724	74.9	242	25.1	7	0.7
Northern	688	0.9	515	74.9	173	25.1	13	1.9
Southern	3,021	4.1	2,311	76.5	710	23.5	5	0.2
Guam	50	0.1	38	76.0	12	24.0	1	2.0
Hawaii	158	0.2	76	48.1	82	51.9	8	5.1
Idaho	291	0.4	199	68.4	92	31.6	3	1.0
Montana	364	0.5	229	62.9	135	37.1	9	2.5
Nevada	589	0.8	473	80.3	116	19.7	11	1.9
Northern Mariana Islands	27	0.0	23	85.2	4	14.8	0	0.0
Oregon	507	0.7	341	67.3	166	32.7	11	2.2
Washington								
Eastern	376	0.5	263	69.9	113	30.1	1	0.3
Western	656	0.9	448	68.3	208	31.7	28	4.3
TENTH CIRCUIT	6,553	9.0	5,448	83.1	1,105	16.9	48	0.7
Colorado	505	0.7	433	85.7	72	14.3	2	0.4
Kansas	676	0.9	403	59.6	273	40.4	12	1.8
New Mexico	3,657	5.0	3,324	90.9	333	9.1	5	0.1
Oklahoma								
Eastern	111	0.2	73	65.8	38	34.2	0	0.0
Northern	155	0.2	121	78.1	34	21.9	1	0.6
Western	283	0.4	231	81.6	52	18.4	3	1.1
Utah	798	1.1	655	82.1	143	17.9	25	3.1
Wyoming	368	0.5	208	56.5	160	43.5	0	0.0
ELEVENTH CIRCUIT	6,534	8.9	4,164	63.7	2,370	36.3	190	2.9
Alabama								
Middle	241	0.3	153	63.5	88	36.5	2	0.8
Northern	405	0.6	242	59.8	163	40.2	20	4.9
Southern	298	0.4	178	59.7	120	40.3	12	4.0
Florida								
Middle	1,660	2.3	1,011	60.9	649	39.1	14	0.8
Northern	372	0.5	213	57.3	159	42.7	11	3.0
Southern	2,164	3.0	1,388	64.1	776	35.9	103	4.8
Georgia								
Middle	275	0.4	192	69.8	83	30.2	0	0.0
Northern	650	0.9	412	63.4	238	36.6	22	3.4
Southern	469	0.6	375	80.0	94	20.0	6	1.3

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-19

**AVERAGE SENTENCE BY GUIDELINE FOR IDENTITY THEFT OFFENDERS
CONVICTED OF 18 U.S.C. § 1028A¹
Fiscal Year 2010**

GUIDELINE	IDENTITY THEFT OFFENDERS		
	Number	Percent	Mean
TOTAL	797	100.0	48
§2B1.6 (Aggravated Identity Theft 18 U.S.C. § 1028A only)	107	13.4	24
§2A2.2 (Aggravated Assault)	1	0.1	NA
§2A3.5 (Failure to Register as a Sex Offender)	1	0.1	NA
§2A6.1 (Threatening or Harassing Communications)	0	0.0	NA
§2B1.1 (Fraud)	567	71.1	51
§2B5.1 (Offenses Involving Counterfeit Bearer Obligations)	1	0.1	NA
§2D1.1 (Drug Trafficking)	9	1.1	83
§2D1.2 (Drug Offenses Near Protected Locations)	1	0.1	NA
§2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes)	0	0.0	NA
§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor)	2	0.3	NA
§2J1.2 (Obstruction of Justice)	1	0.1	NA
§2J1.3 (Perjury)	0	0.0	NA
§2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms)	11	1.4	76
§2L1.1 (Smuggling, Transporting or Harboring an Unlawful Alien)	1	0.1	NA
§2L1.2 (Unlawfully Entering or Remaining in the United States)	10	1.3	57
§2L2.1 (Trafficking in a Document Relating to Citizenship)	19	2.4	40
§2L2.2 (Fraudulently Acquiring Documents Relating to Citizenship)	56	7.0	29
§2S1.1 (Money Laundering)	6	0.8	138
§2T1.1 (Tax Evasion)	2	0.3	NA
§2T1.4 (Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud)	1	0.1	NA
§2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property)	1	0.1	NA

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 797 (1.1 percent) involved identity theft.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table D-20

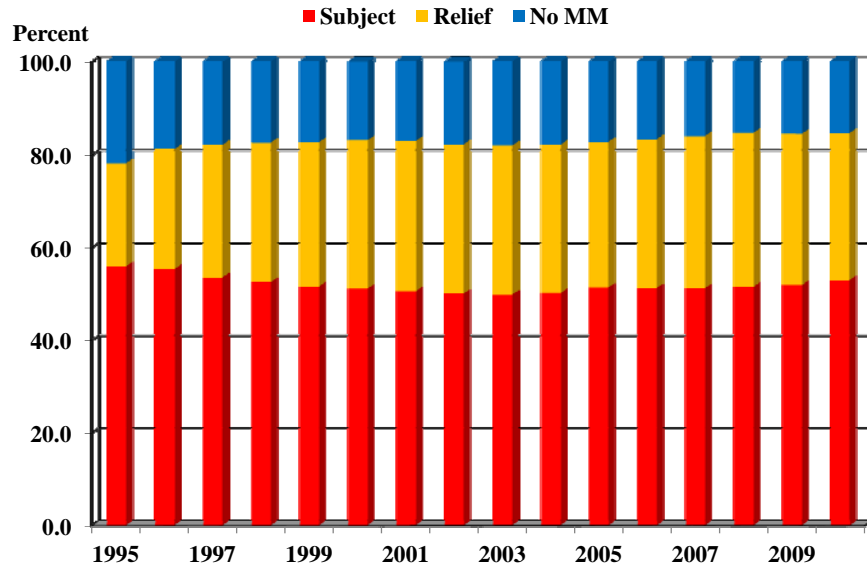
**OFFENDERS AFFECTED BY EXPANSION OF SAFETY VALVE TO
CRIMINAL HISTORY CATEGORY II BY RACE AND DRUG TYPE¹
Fiscal Year 2010**

DRUG TYPE	TOTAL	WHITE		BLACK		HISPANIC		OTHER	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	1,127	298	26.4	319	28.3	485	43.0	25	2.1
Powder Cocaine	301	50	16.6	95	31.5	154	51.2	2	0.7
Crack Cocaine	236	23	9.8	179	75.8	33	14.0	1	0.4
Heroin	62	8	12.9	15	24.2	39	62.9	0	0.0
Marijuana	206	52	25.2	15	7.3	130	63.1	9	4.4
Methamphetamine	305	160	52.5	7	2.3	126	41.3	12	3.9
Other	17	5	29.4	8	47.1	3	17.6	1	5.9

¹ Of the 83,946 cases sentenced in fiscal year 2010, the Commission received complete guideline information in 72,878. The Commission did not receive complete guideline information for another 254 cases in which the only statute of conviction was 18 U.S.C. § 924(c) and 107 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 73,239 cases, 106 were excluded due to missing statutory information.

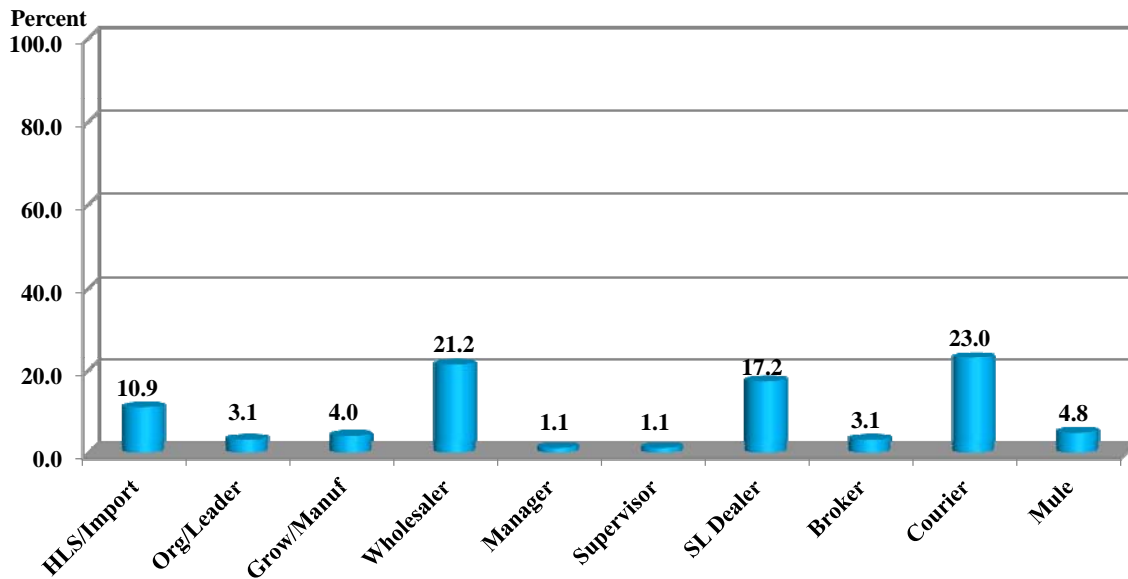
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-1
Percentage of Drug Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty, and Subject to a Mandatory Minimum Penalty at Sentencing 1995 - 2010



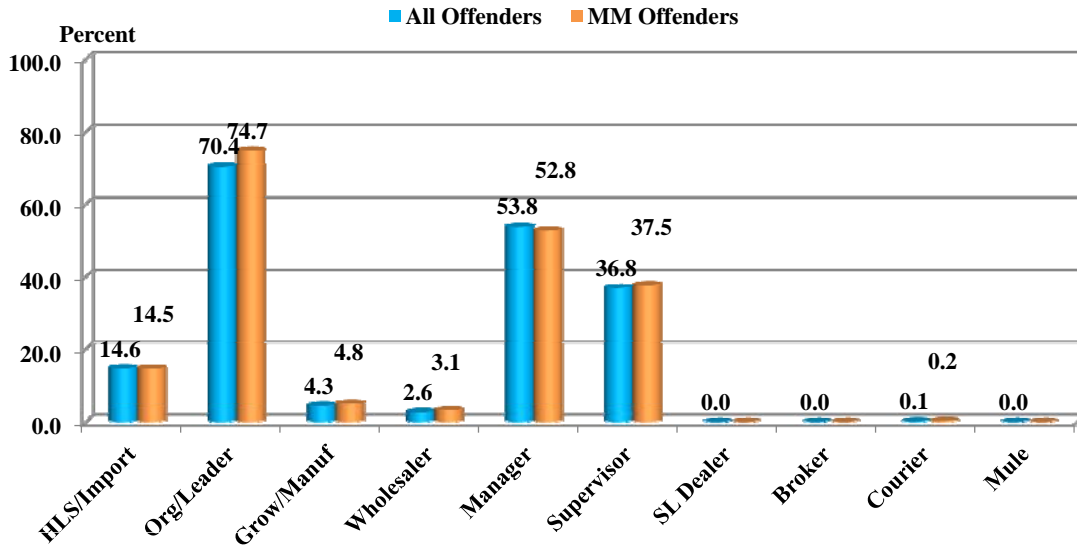
SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Figure D-2
Distribution of Offender Function
Fiscal Year 2009 Sample Data



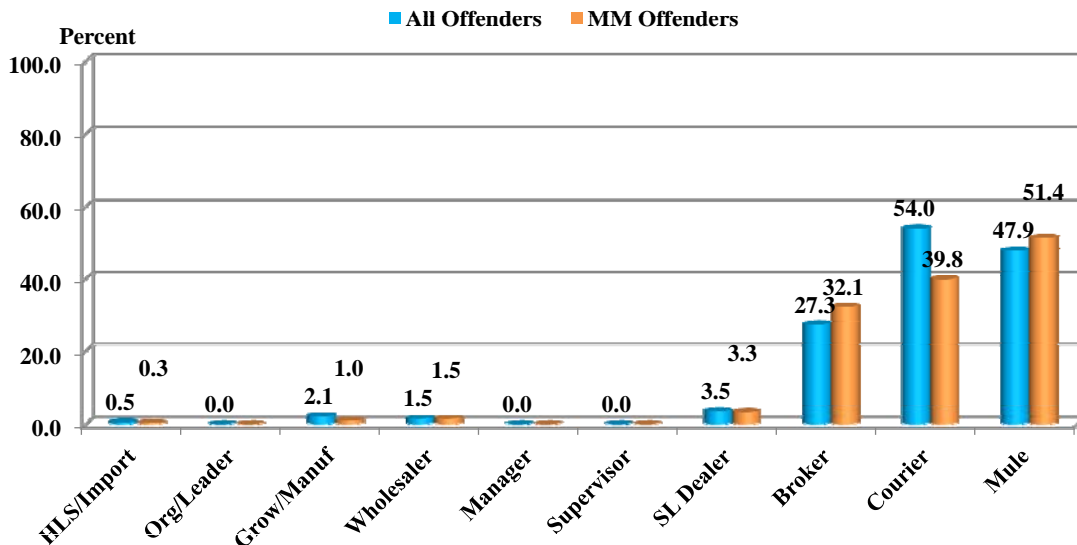
SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Figure D-3
Percent of All Offenders In Which the Aggravating Role Adjustment Applied and
for Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
by Offender Function
Fiscal Year 2009 Sample Data



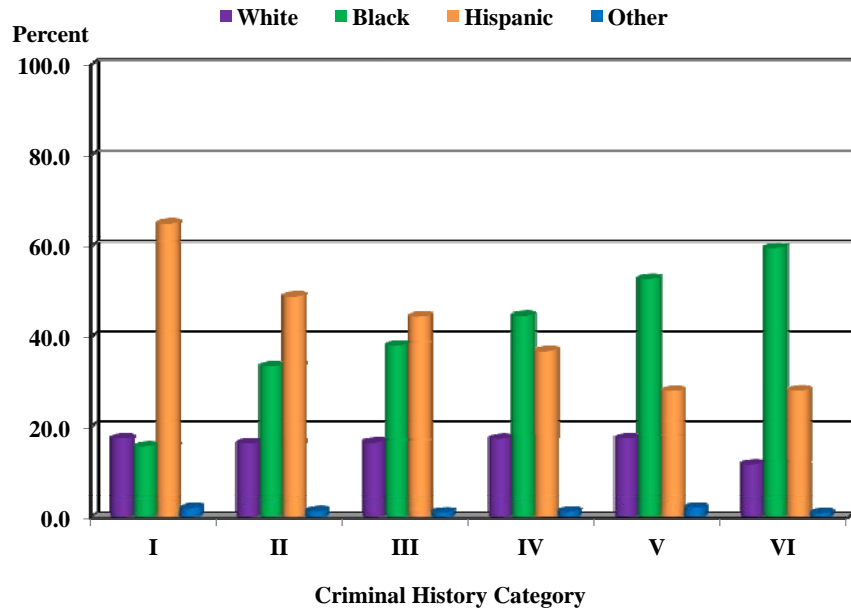
SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Figure D-4
Percent of All Offenders In Which the Mitigating Role Adjustment Applied and
for Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
by Offender Function
Fiscal Year 2009 Sample Data



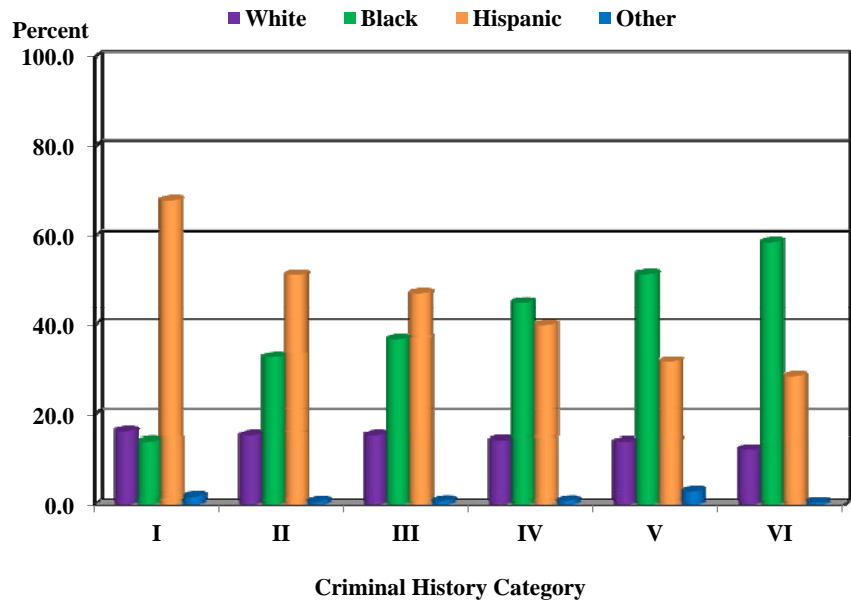
SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Figure D-5
Race of All Powder Cocaine Offenders by Criminal History Category
Fiscal Year 2010



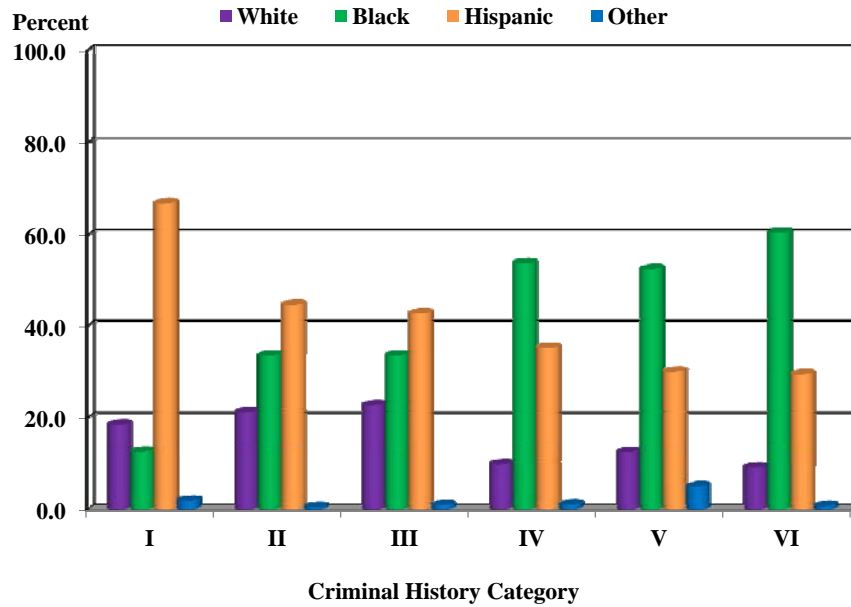
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-6
Race of Powder Cocaine Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



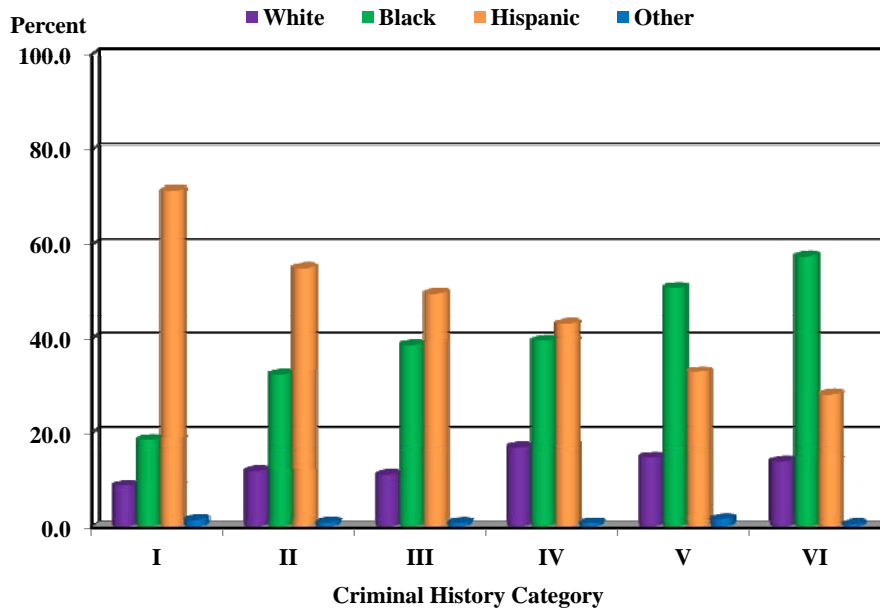
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-7
Race of Powder Cocaine Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



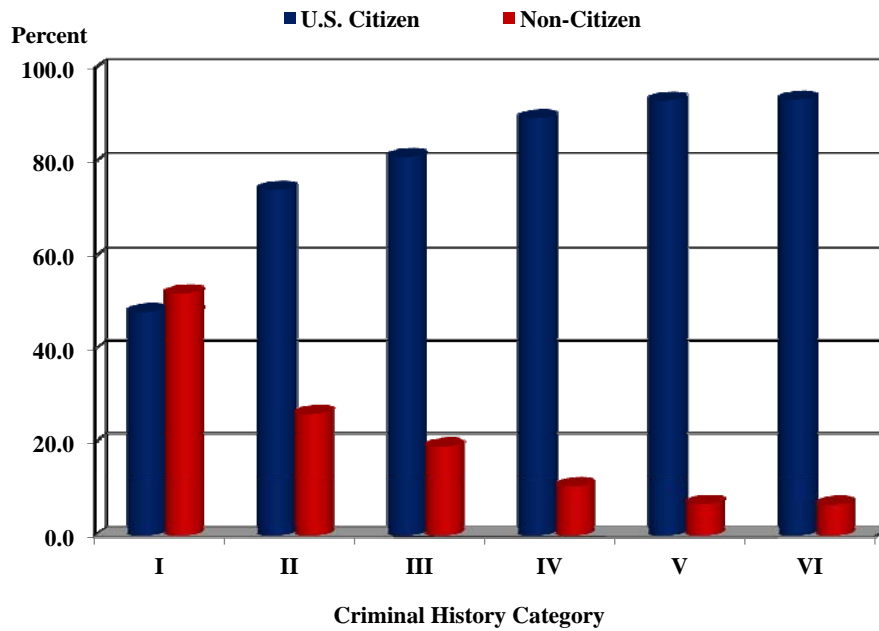
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-8
Race of Powder Cocaine Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



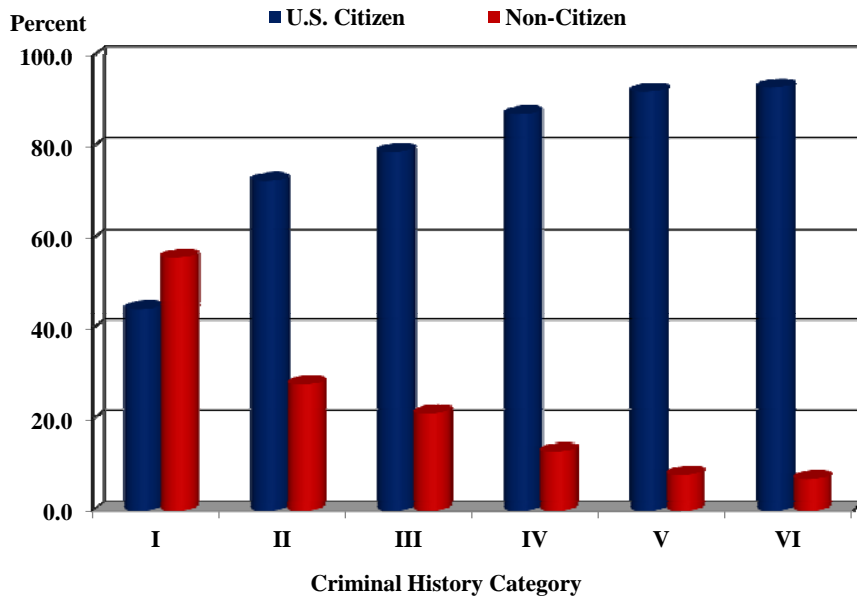
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-9
Citizenship of All Powder Cocaine Offenders by Criminal History Category
Fiscal Year 2010



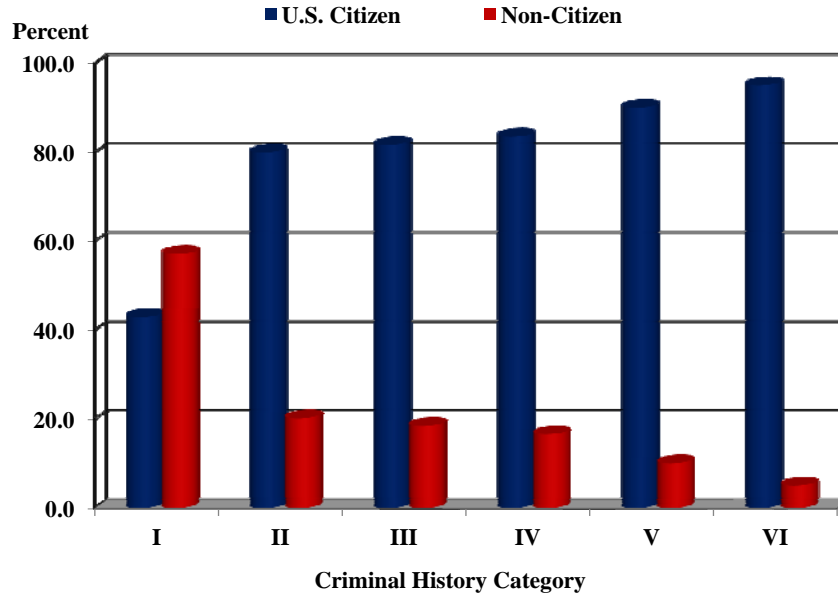
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-10
Citizenship of Powder Cocaine Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



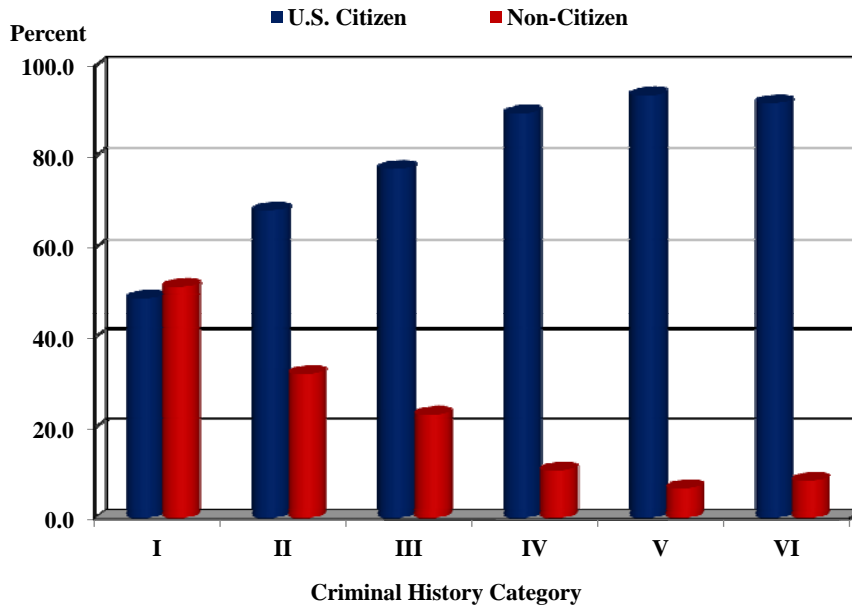
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-11
Citizenship of Powder Cocaine Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



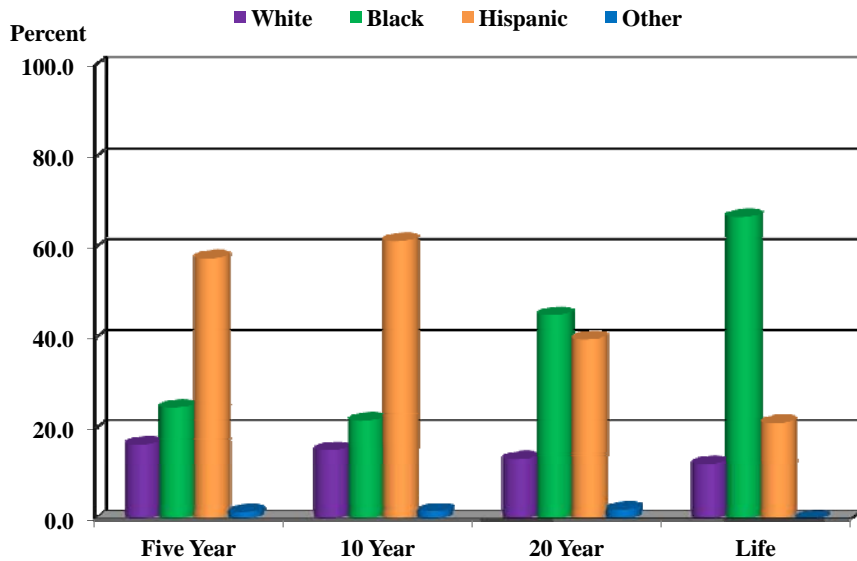
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-12
Citizenship of Powder Cocaine Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



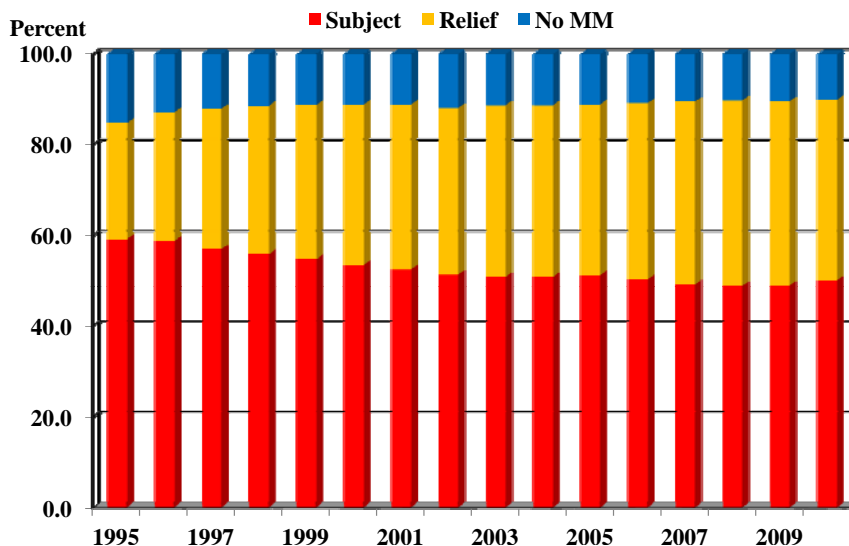
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-13
Race of Powder Cocaine Offenders by Length of Drug Mandatory Minimum Penalty
Fiscal Year 2010



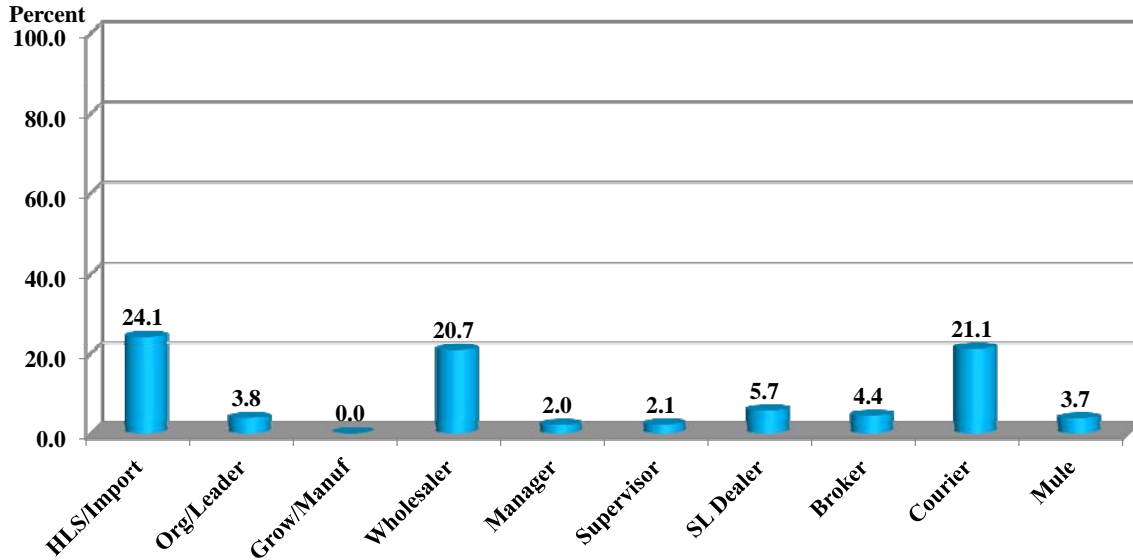
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-14
Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory
Minimum, Convicted of an Offense Carrying a Mandatory
Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing
Powder Cocaine Offenders
1995 - 2010



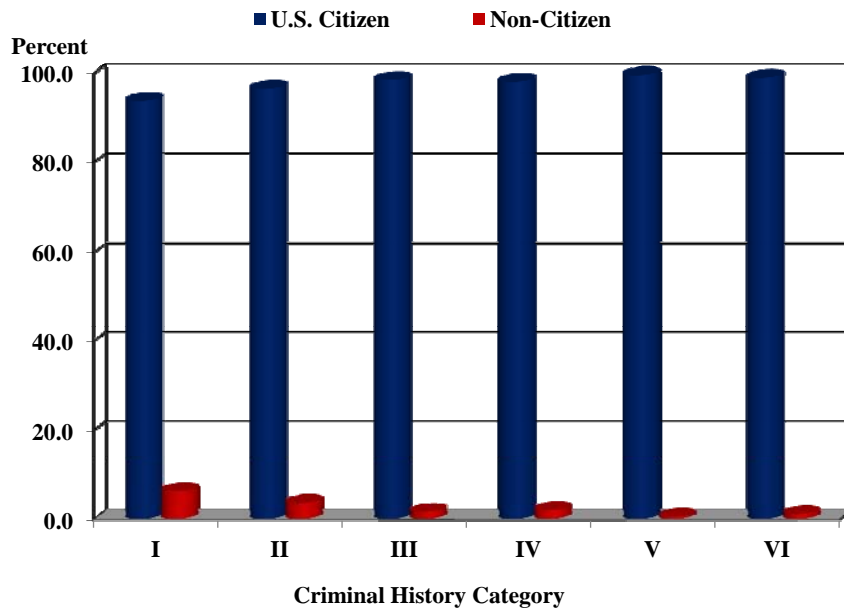
SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Figure D-15
Distribution of Offender Function by Primary Drug Type
Powder Cocaine Offenders
Fiscal Year 2009 Sample Data



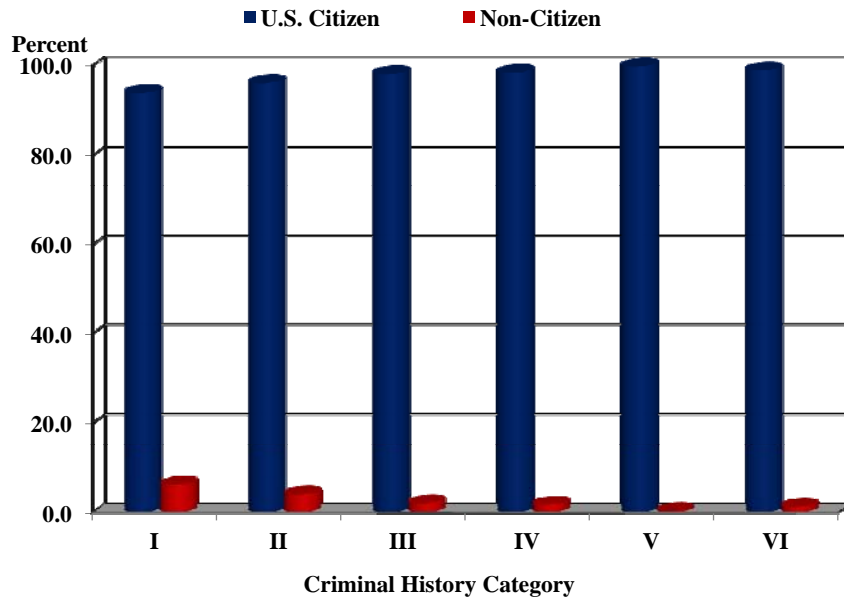
SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Figure D-16
Citizenship of All Crack Cocaine Offenders by Criminal History Category
Fiscal Year 2010



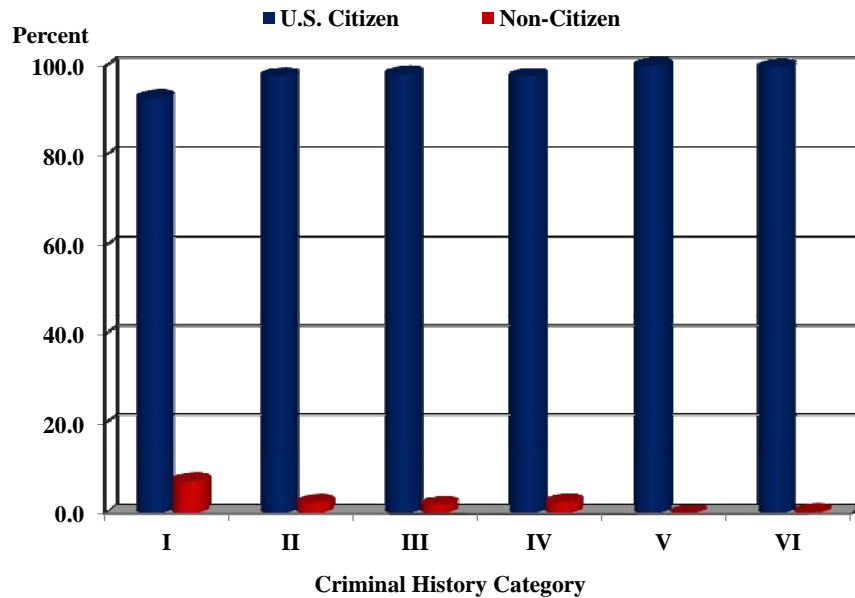
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-17
Citizenship of Crack Cocaine Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



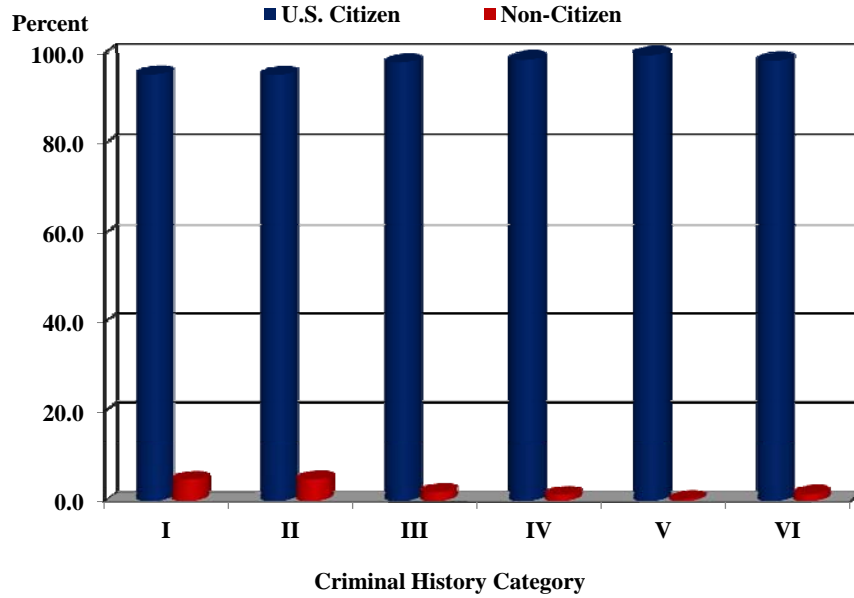
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-18
Citizenship of Crack Cocaine Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



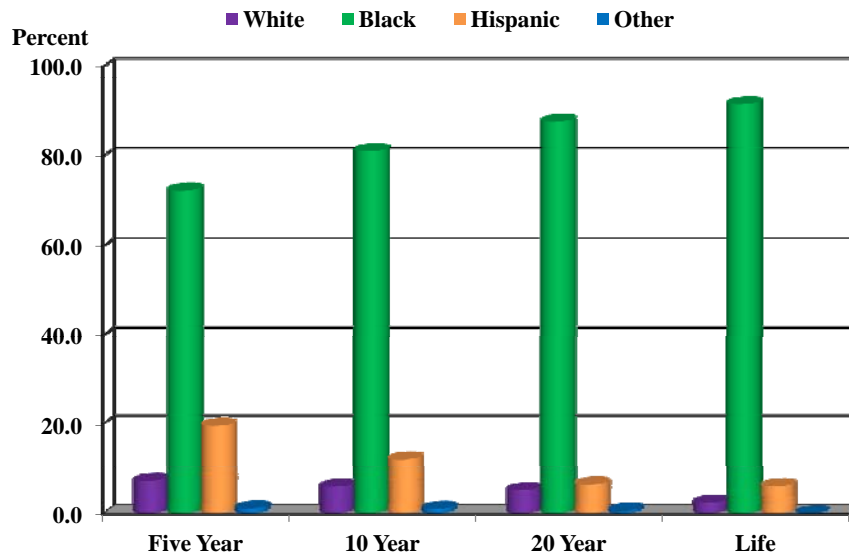
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-19
Citizenship of Crack Cocaine Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



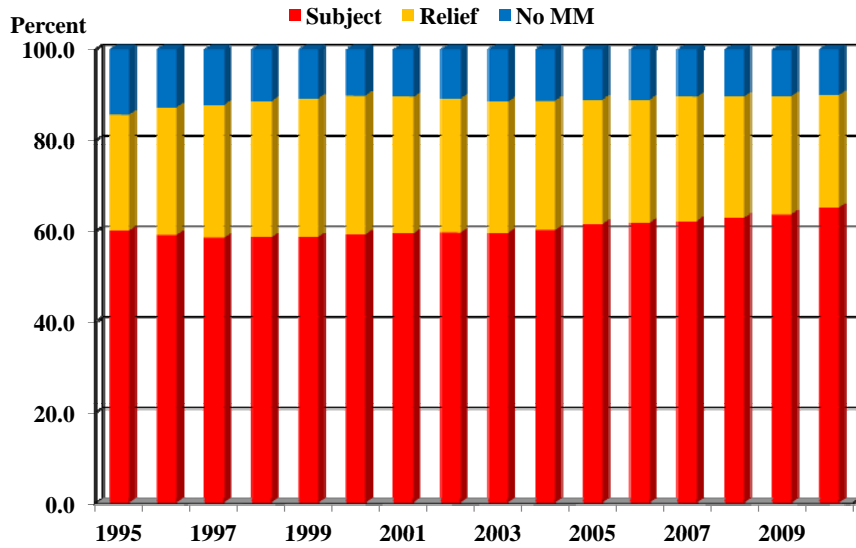
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-20
Race of Crack Cocaine Offenders by Length of Drug Mandatory Minimum Penalty
Fiscal Year 2010



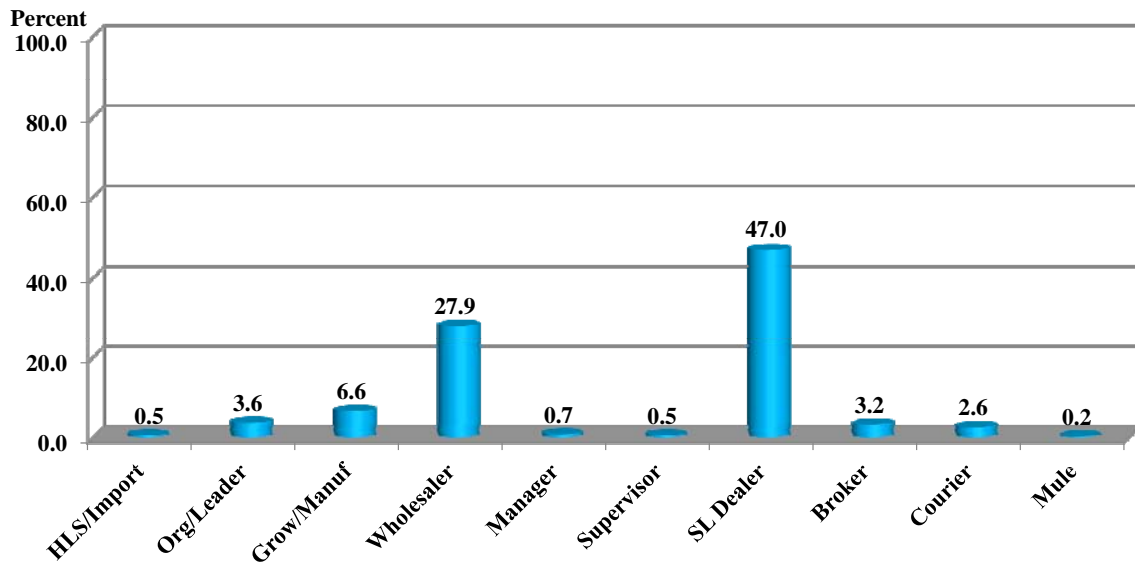
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-21
Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing
Crack Cocaine Offenders
1995 - 2010



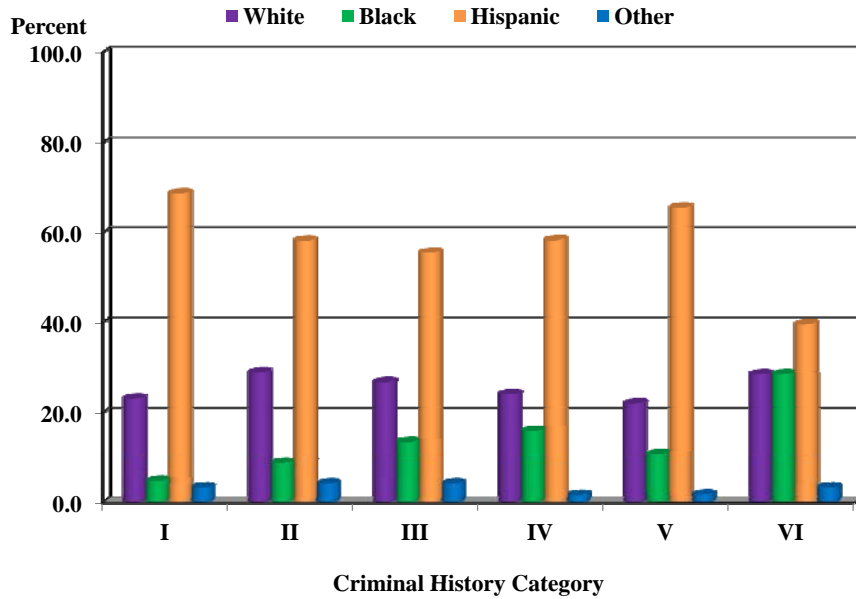
SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Figure D-22
Distribution of Offender Function by Primary Drug Type
Crack Cocaine Offenders
Fiscal Year 2009 Sample Data



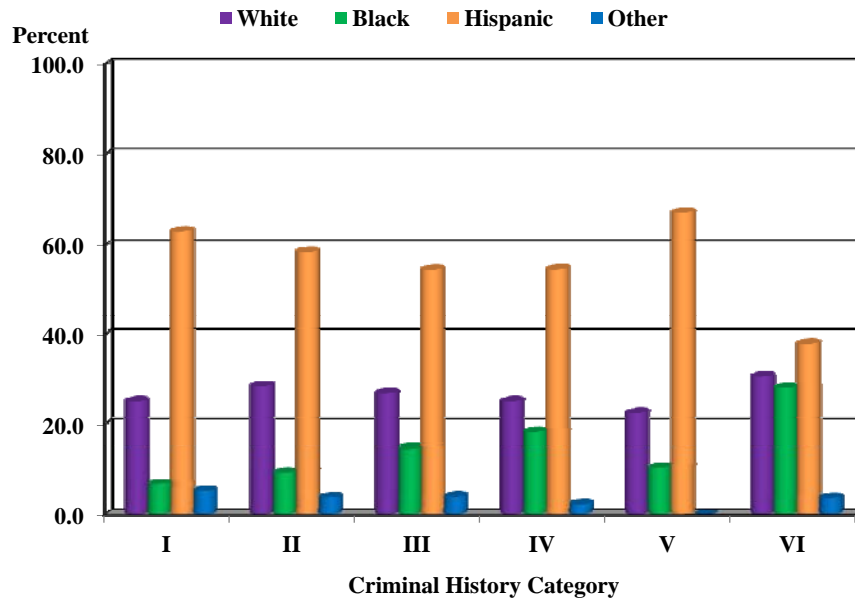
SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Figure D-23
Race of All Marijuana Offenders by Criminal History Category
Fiscal Year 2010



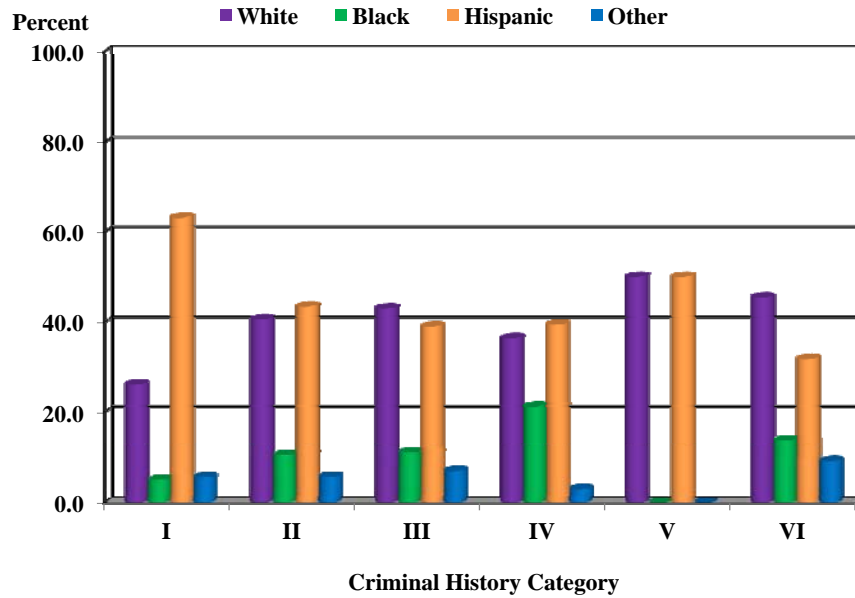
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-24
Race of Marijuana Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



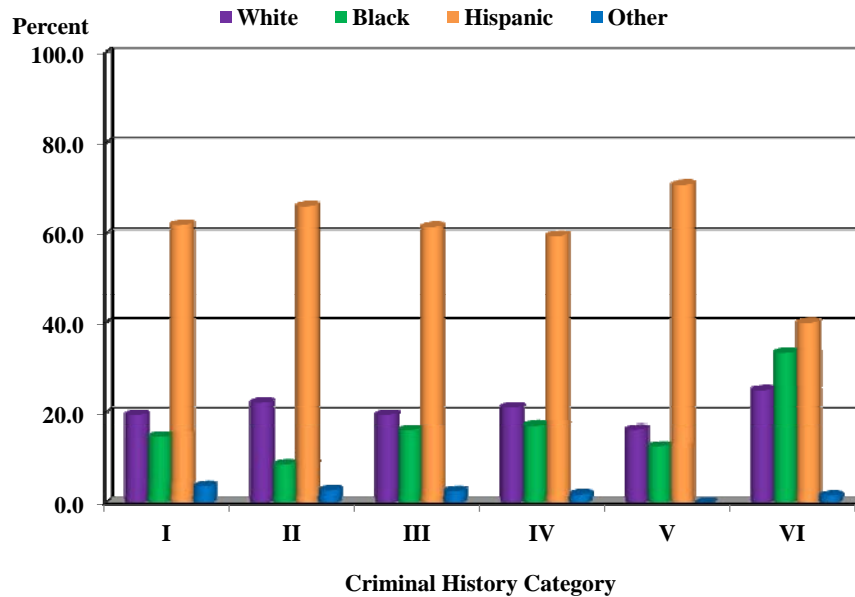
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-25
Race of Marijuana Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



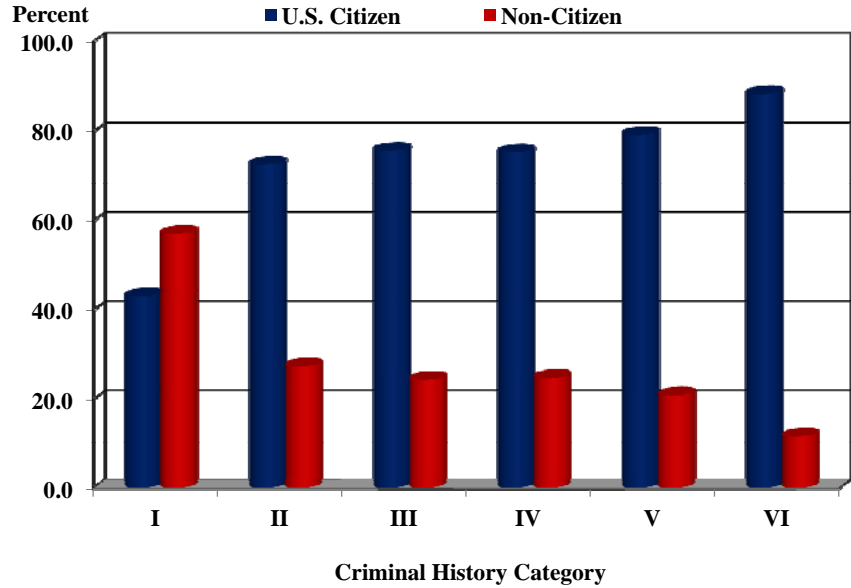
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-26
Race of Marijuana Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



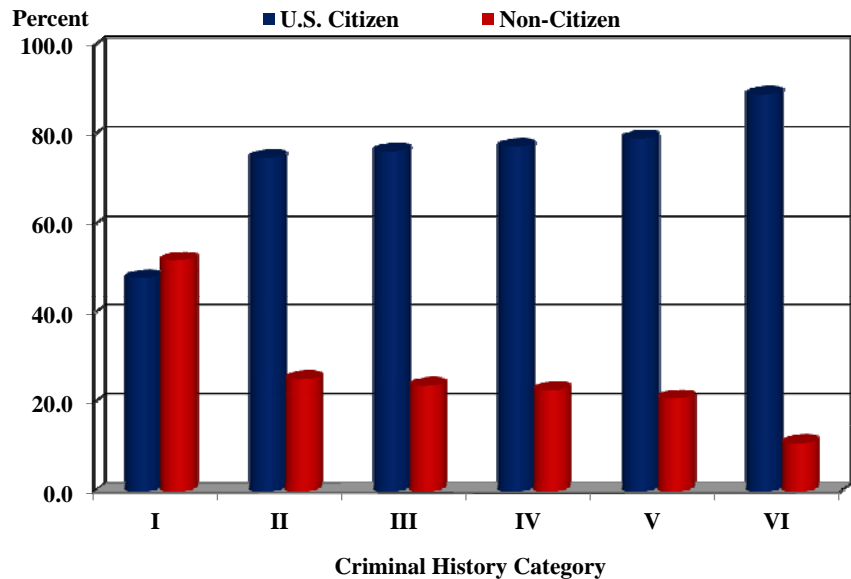
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-27
Citizenship of All Marijuana Offenders by Criminal History Category
Fiscal Year 2010



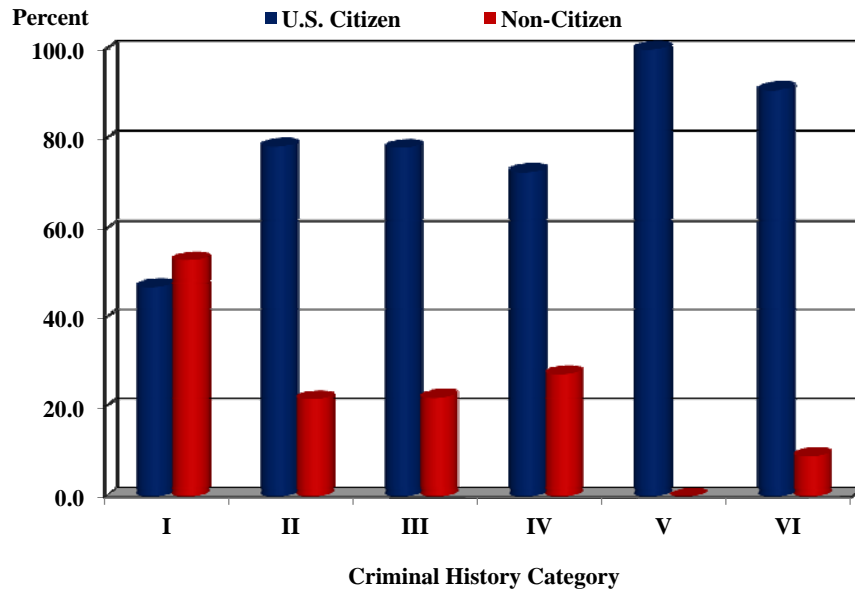
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-28
Citizenship of Marijuana Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



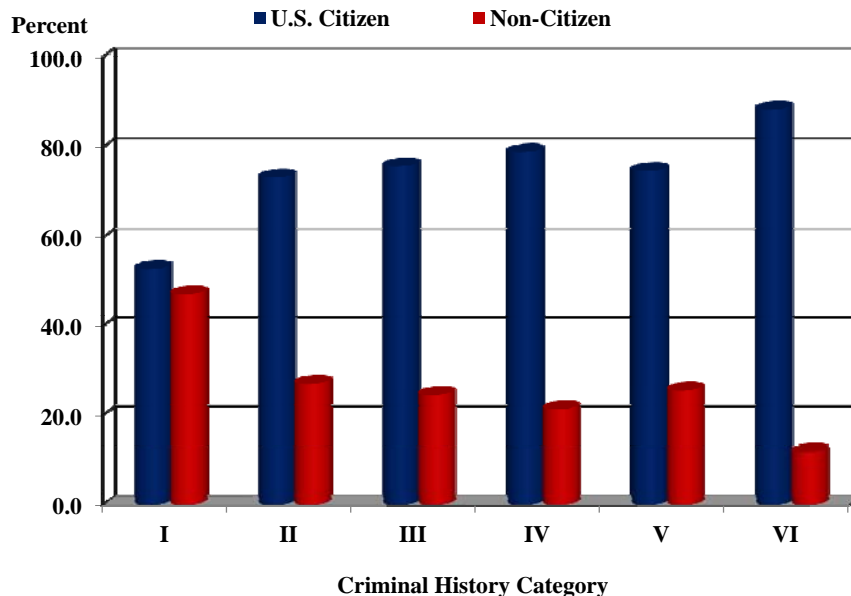
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-29
Citizenship of Marijuana Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



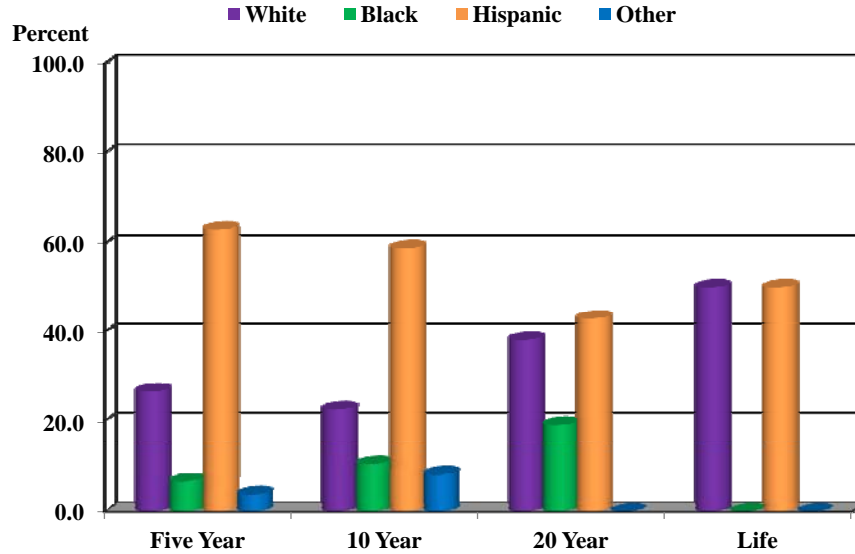
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-30
Citizenship of Marijuana Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



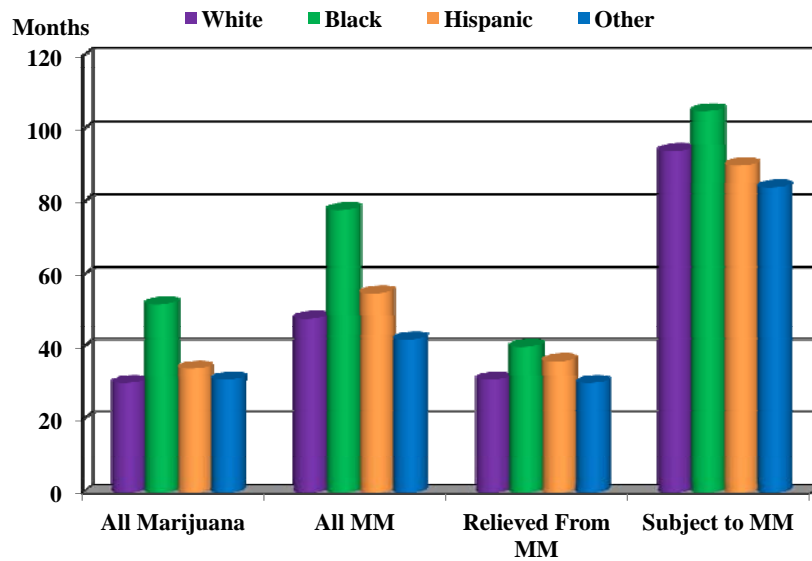
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-31
Race of Marijuana Offenders by Length of Drug Mandatory Minimum Penalty
Fiscal Year 2010



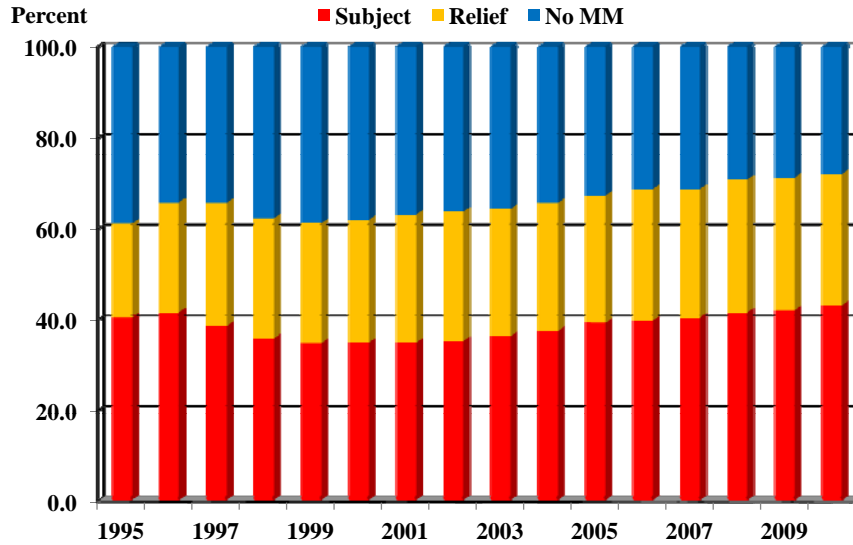
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-32
Average Sentence Length by Race of Marijuana Offenders Convicted of an Offense
Carrying a Drug Mandatory Minimum Penalty
Fiscal Year 2010



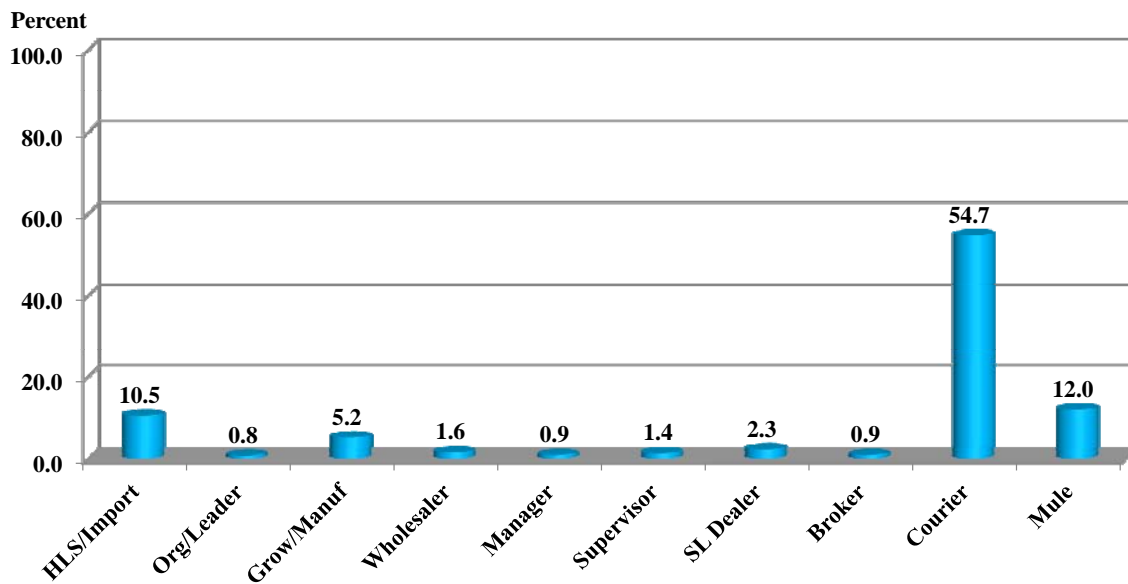
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-33
Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing Marijuana Offenders 1995 - 2010



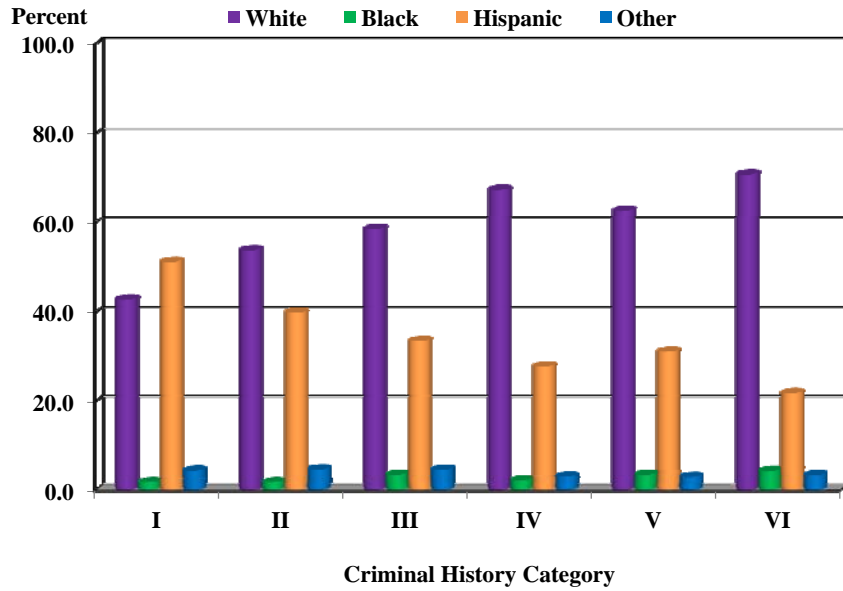
SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Figure D-34
Distribution of Offender Function by Primary Drug Type Marijuana Offenders Fiscal Year 2009 Sample Data



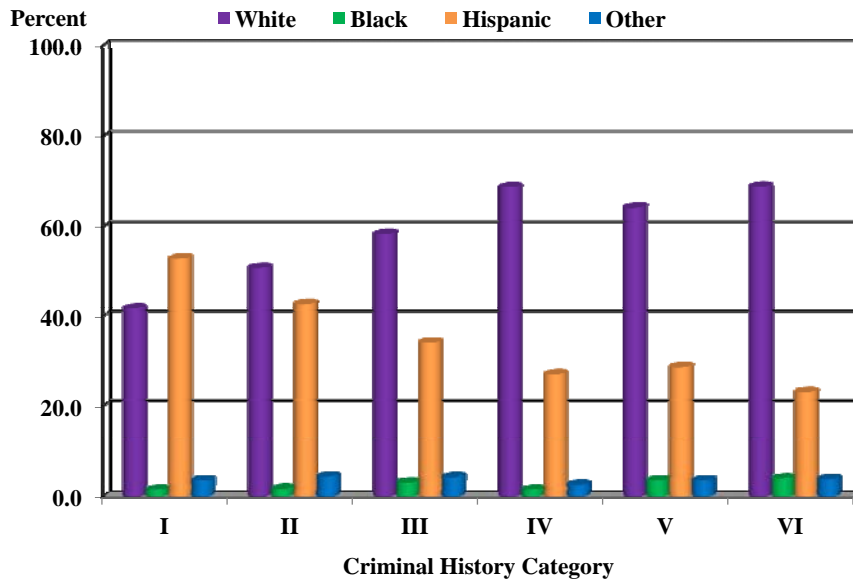
SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Figure D-35
Race of All Methamphetamine Offenders by Criminal History Category
Fiscal Year 2010



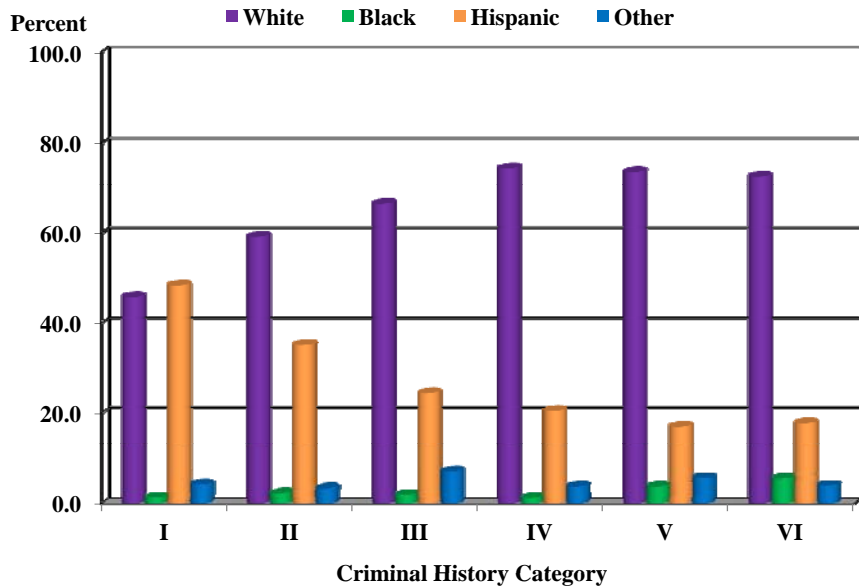
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-36
Race of Methamphetamine Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



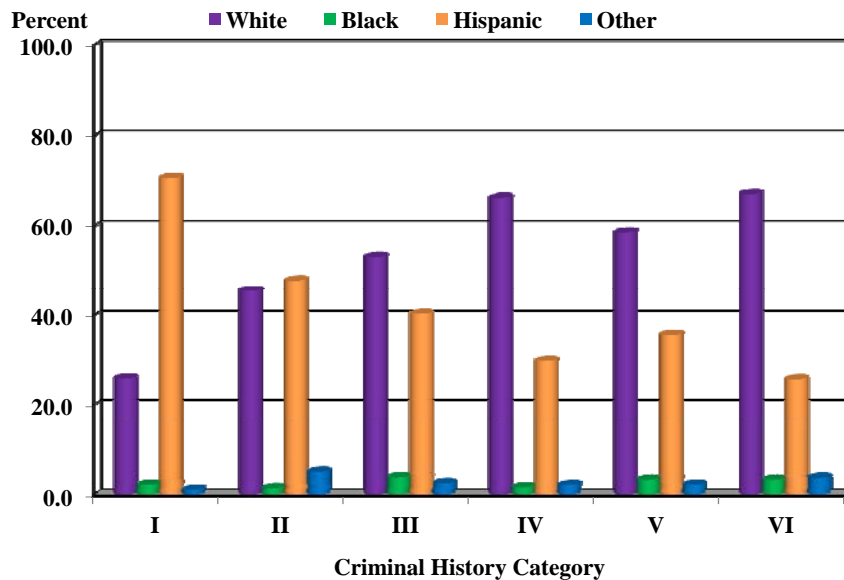
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-37
Race of Methamphetamine Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



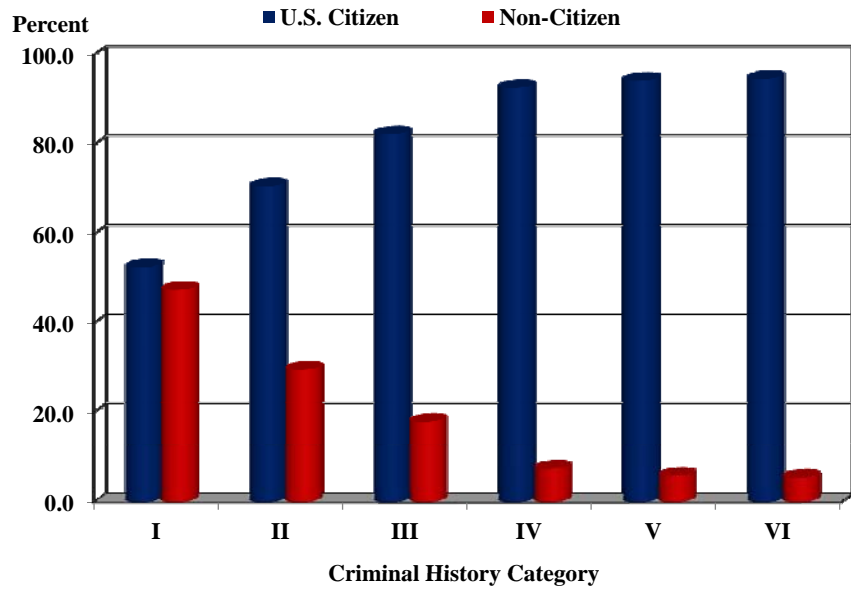
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-38
Race of Methamphetamine Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



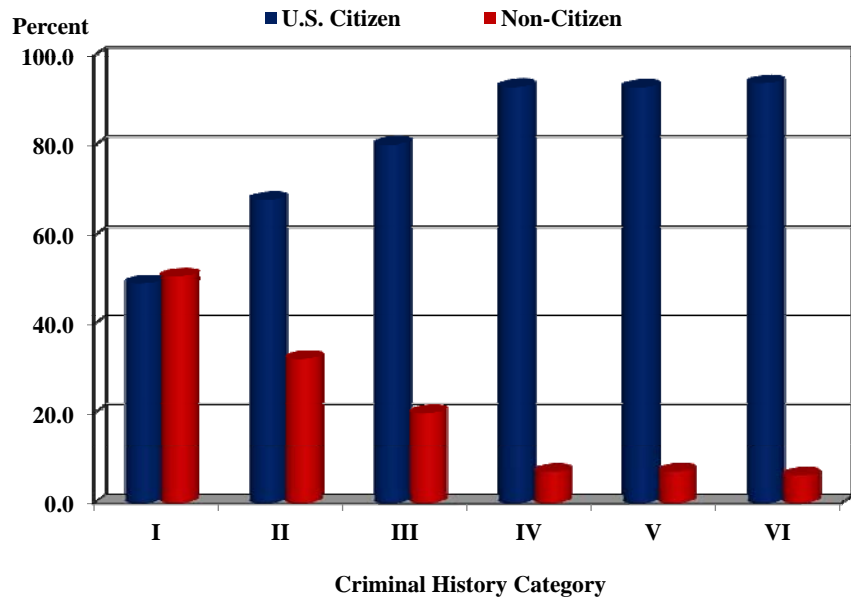
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-39
Citizenship of All Methamphetamine Offenders by Criminal History Category
Fiscal Year 2010



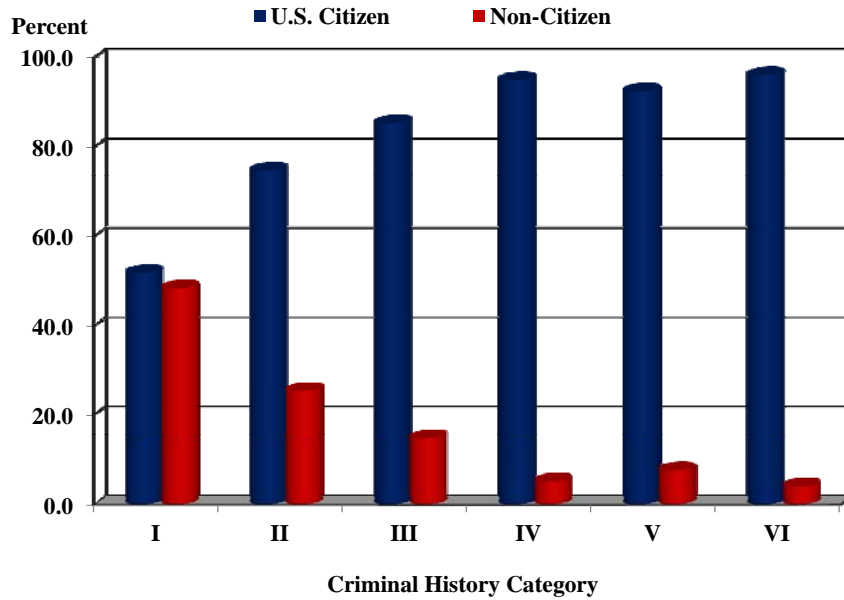
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-40
Citizenship of Methamphetamine Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



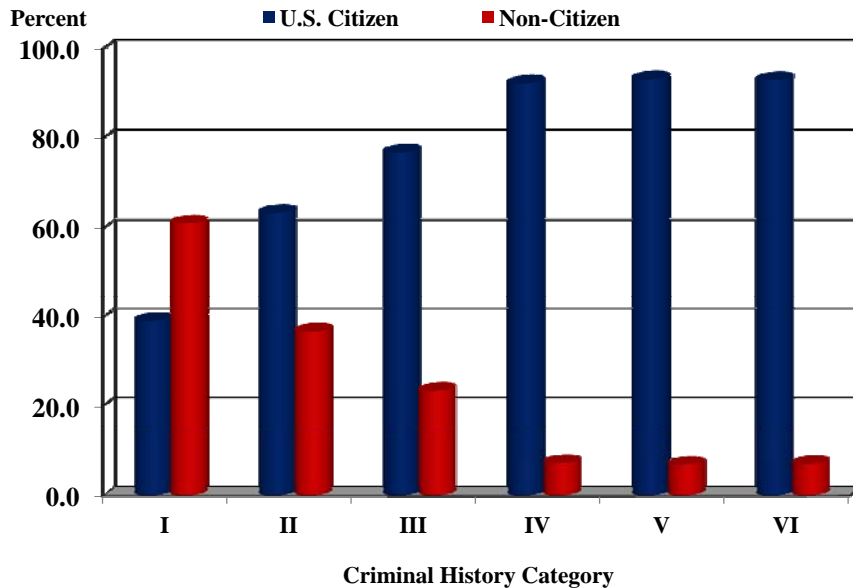
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-41
Citizenship of Methamphetamine Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-42
Citizenship of Methamphetamine Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-43
Race of Methamphetamine Offenders by Length of Drug Mandatory Minimum Penalty
Fiscal Year 2010

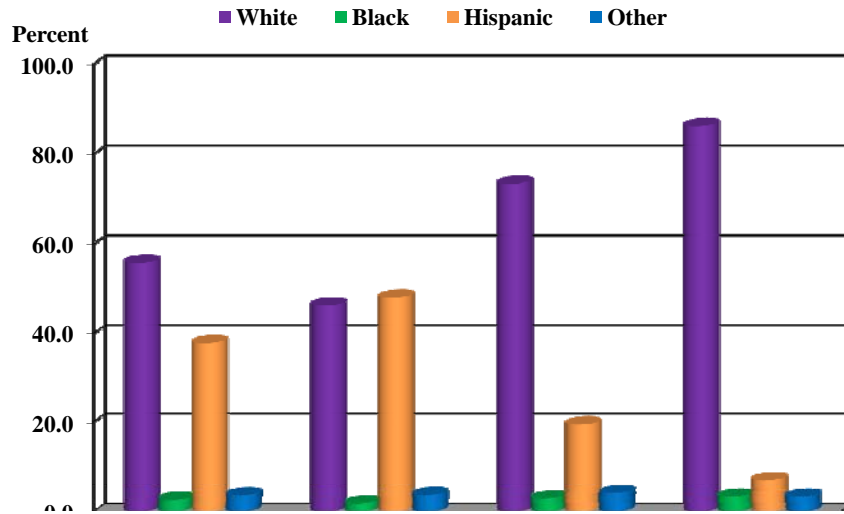
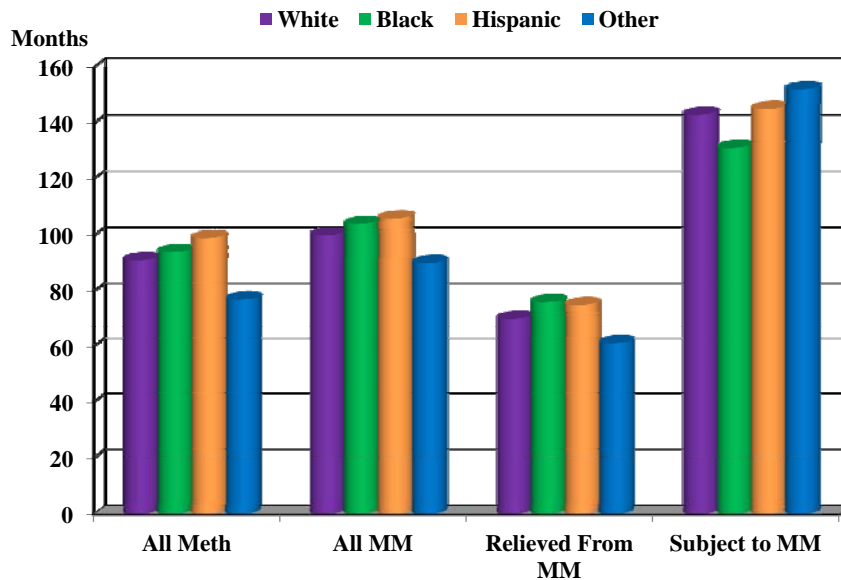
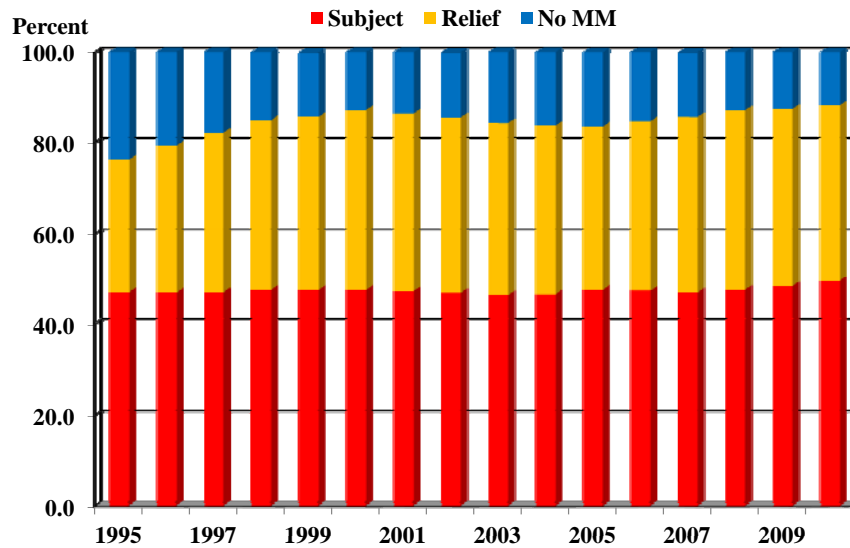


Figure D-44
Average Sentence Length by Race of Methamphetamine Offenders
Convicted of an Offense Carrying a Drug Mandatory Minimum Penalty
Fiscal Year 2010



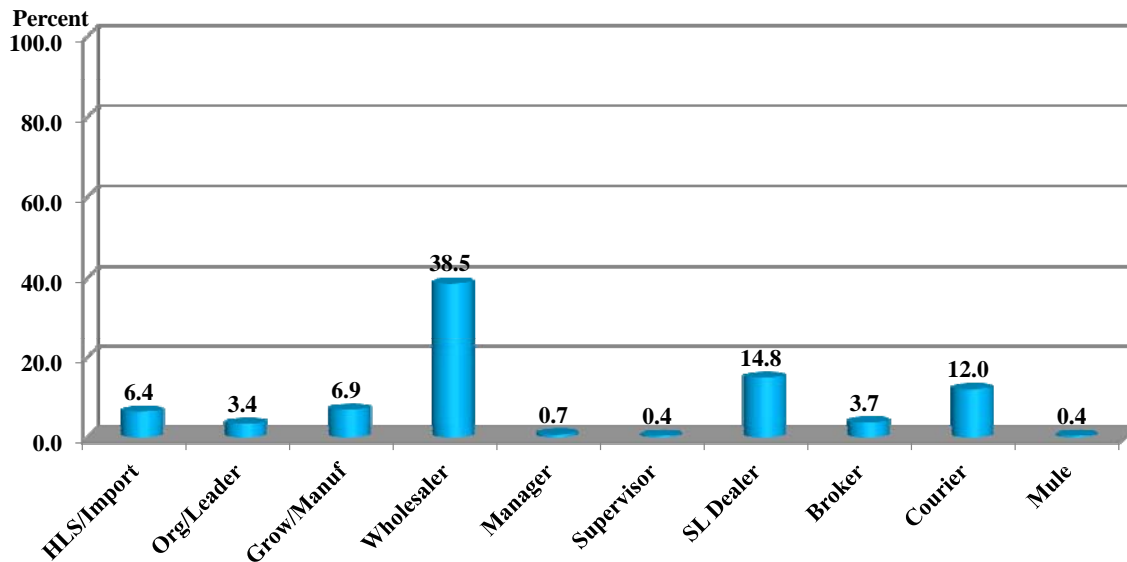
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-45
Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing Methamphetamine Offenders 1995 - 2010



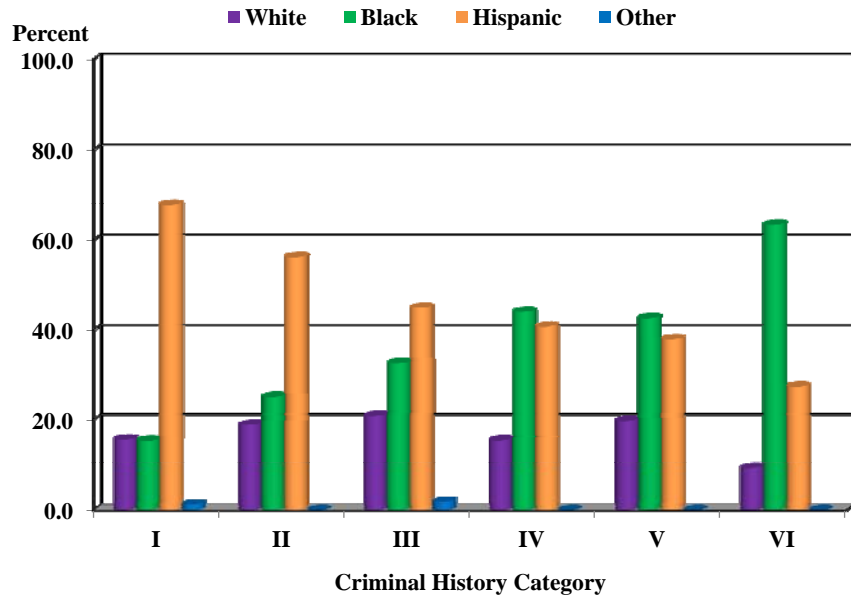
SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Figure D-46
Distribution of Offender Function by Primary Drug Type Methamphetamine Offenders Fiscal Year 2009 Sample Data



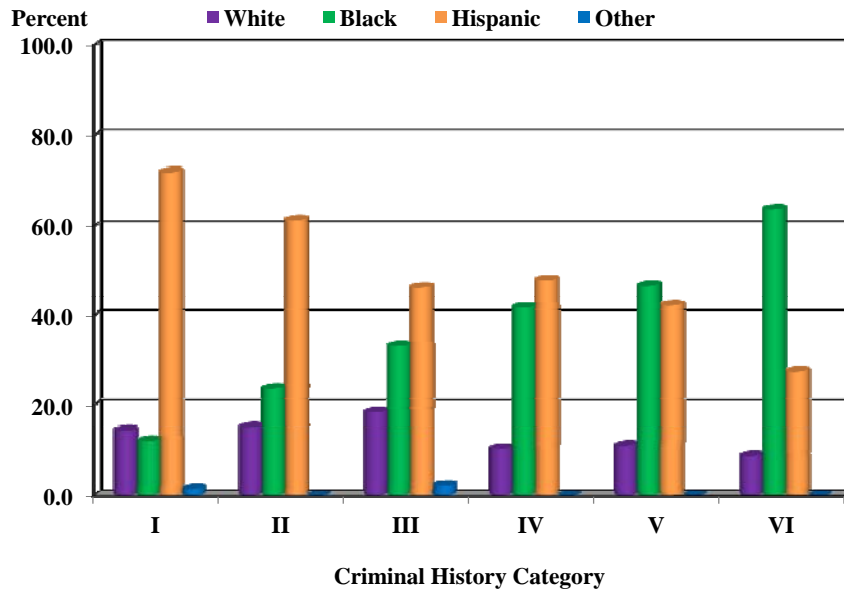
SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

Figure D-47
Race of All Heroin Offenders by Criminal History Category
Fiscal Year 2010



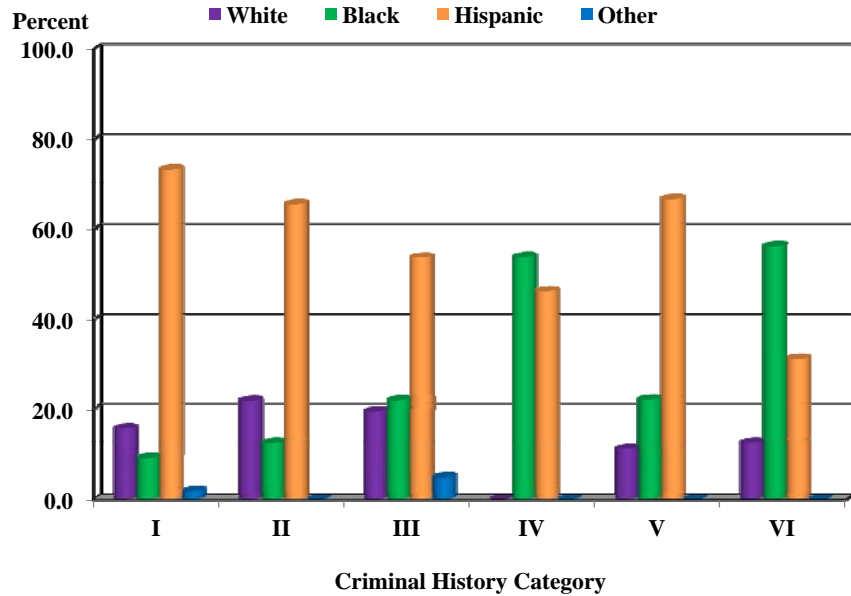
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-48
Race of Heroin Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



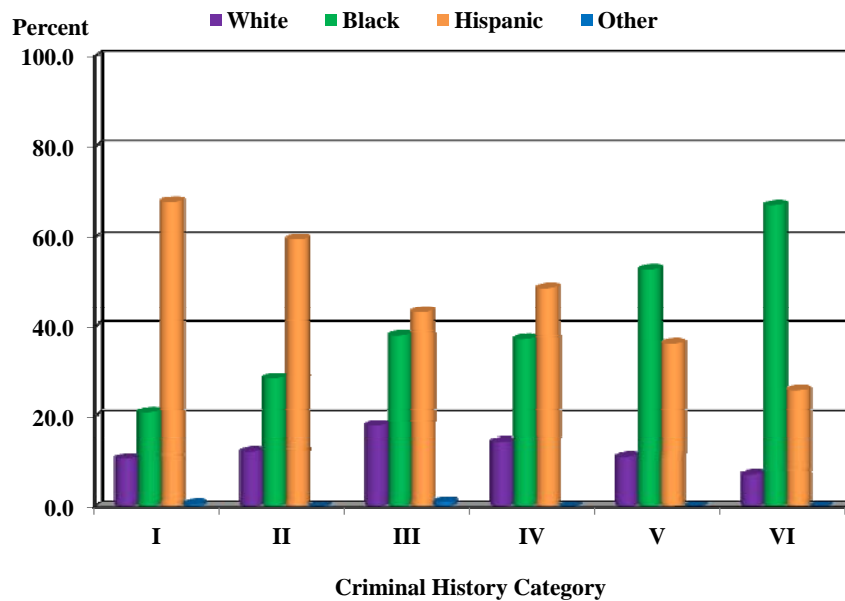
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-49
Race of Heroin Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



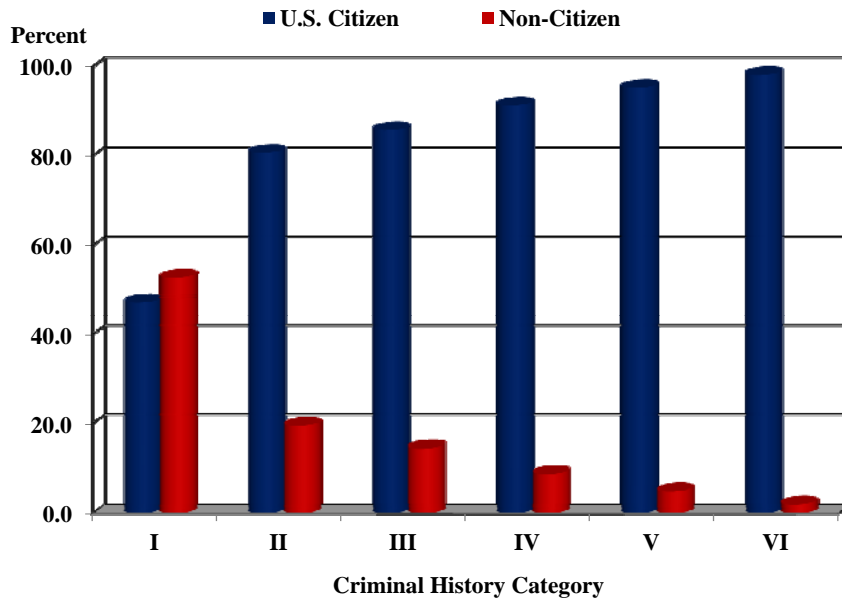
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-50
Race of Heroin Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



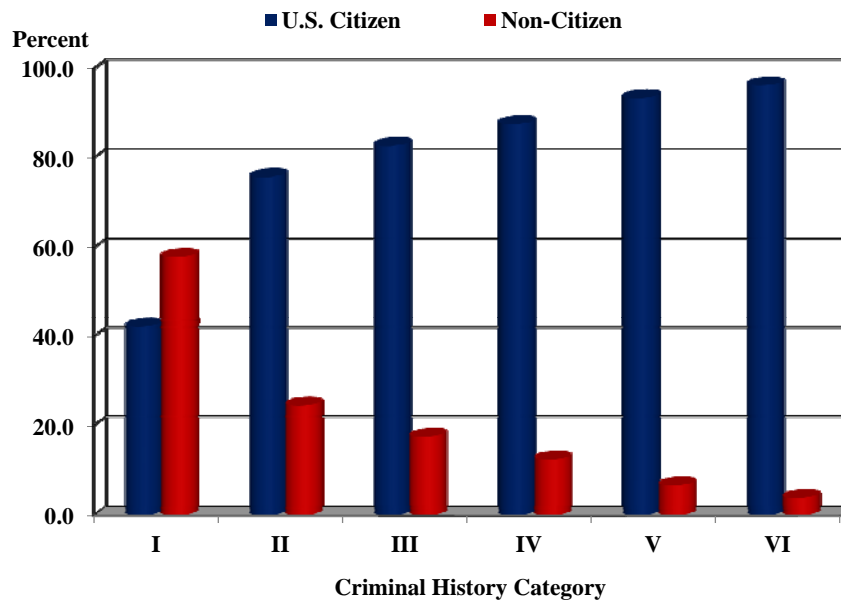
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-51
Citizenship of All Heroin Offenders by Criminal History Category
Fiscal Year 2010



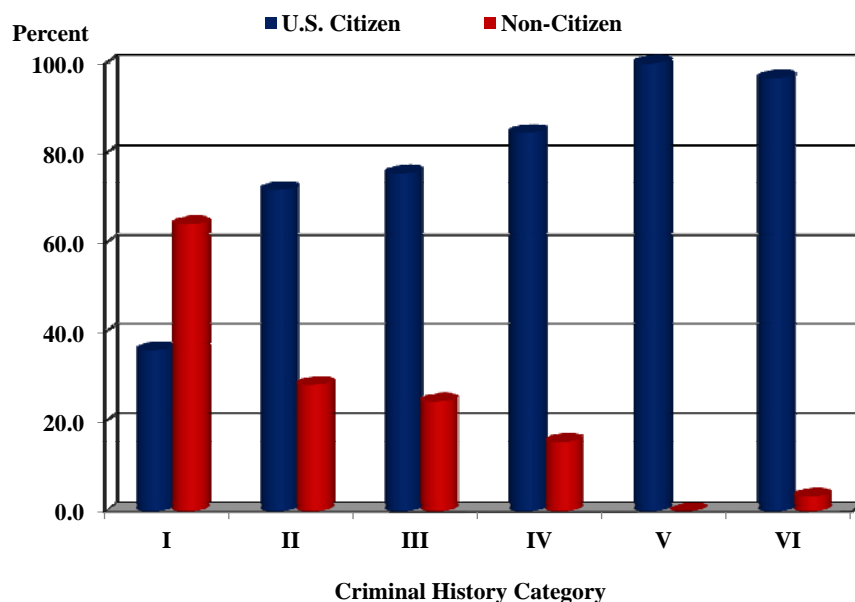
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-52
Citizenship of Heroin Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty
by Criminal History Category
Fiscal Year 2010



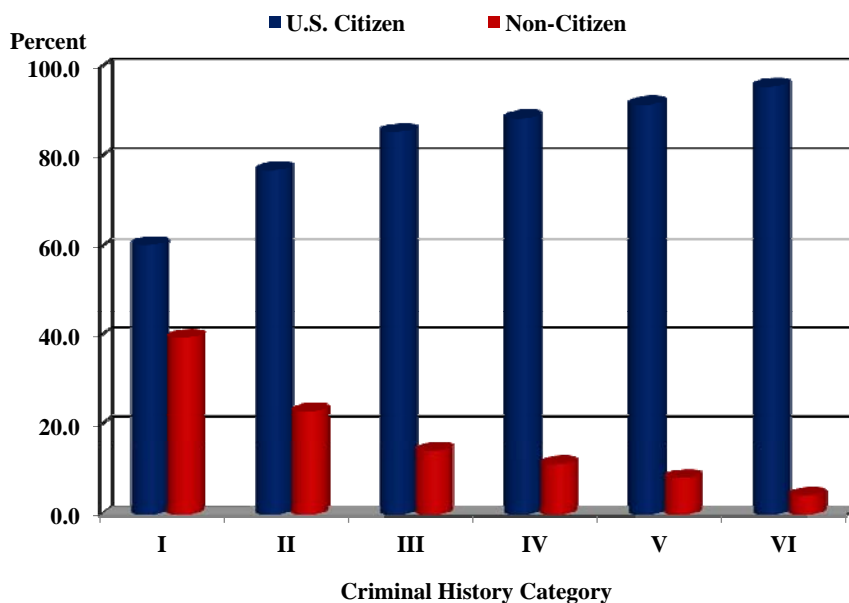
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-53
Citizenship of Heroin Offenders Relieved from a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



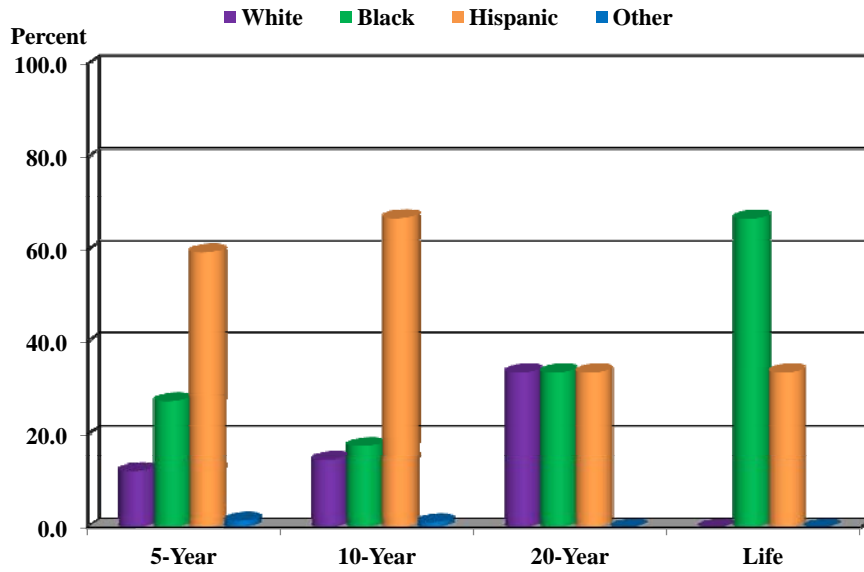
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-54
Citizenship of Heroin Offenders Subject to a
Drug Mandatory Minimum Penalty at Sentencing
by Criminal History Category
Fiscal Year 2010



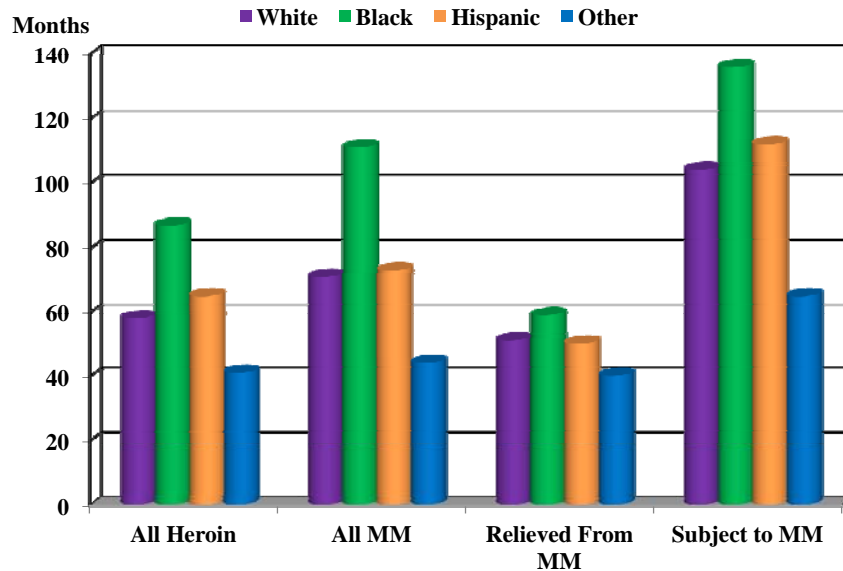
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-55
Race of Heroin Offenders by Length of Drug Mandatory Minimum Penalty
Fiscal Year 2010



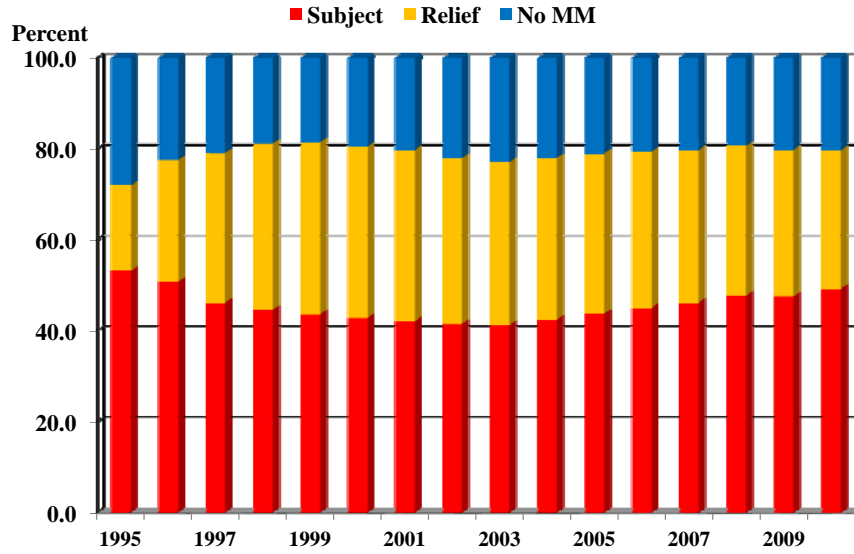
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-56
Average Sentence Length by Race of Heroin Offenders Convicted of an Offense
Carrying a Drug Mandatory Minimum Penalty
Fiscal Year 2010



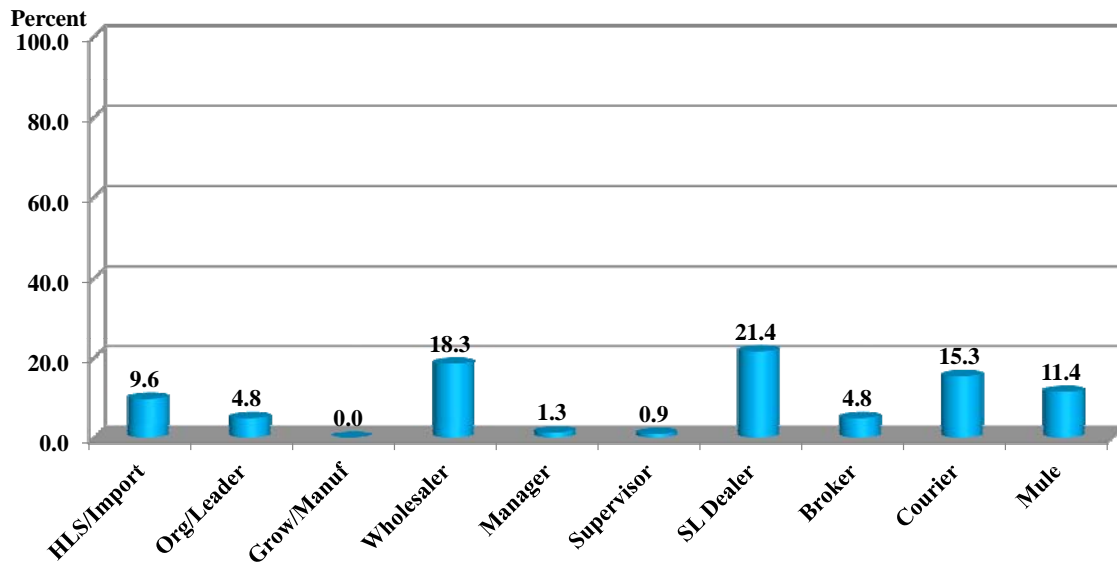
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure D-57
Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing
Heroin Offenders
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Figure D-58
Distribution of Offender Function by Primary Drug Type
Heroin Offenders
Fiscal Year 2009 Sample Data



SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

BRIEF REVIEW OF THE CASE LAW RELATING TO MANDATORY MINIMUM SENTENCING PROVISIONS

Mandatory minimum statutes have produced substantial litigation in the federal courts, ranging from the interpretation of the statutes themselves to cases addressing their constitutionality. Challenges to the constitutionality of mandatory minimum sentencing have generally been unsuccessful, and the Supreme Court has repeatedly affirmed their compliance with due process and the right to a jury trial. The federal courts have also engaged in extensive discussion concerning the application of mandatory minimum penalties as a matter of statutory interpretation, as well the relationship between mandatory minimum statutes and the now-advisory sentencing guidelines. This appendix provides a selected overview of those decisions.

A. SUPREME COURT DECISIONS

1. *Judicially-Determined Sentencing Factors*

It is well-established that the Constitution requires the prosecution to prove every element of a crime beyond a reasonable doubt and guarantees the defendant's right to have a jury determine offense elements unless waived.¹ These related rights, protected by the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments, have been invoked by those challenging mandatory minimum sentencing statutes.

In *In re Winship*,² the Supreme Court held that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”³ Subsequently, in *Mullaney v. Wilbur*,⁴ the Court applied *Winship* to conclude that a state law violated due process by requiring a defendant charged with murder to prove that he killed with adequate justification in order to be convicted of only manslaughter. The state offered a narrow reading of *Winship* that would have limited its holding “to those facts which, if not proved, would wholly exonerate the defendant.”⁵ The Court disagreed with this interpretation, explaining that *Winship* applies not only to those facts that are essential to establishing guilt or innocence, but also to those facts that establish degrees of criminal culpability. The Court saw the differing sentences for murder and manslaughter under the applicable state law (murder carried a mandatory life sentence, but manslaughter could be punished with as little as a nominal fine) as highly relevant. “[W]hen viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction the distinction established by [the state] between murder and manslaughter may be of greater importance than

¹ United States v. Booker, 543 U.S. 220, 230 (2005).

² 397 U.S. 358 (1970).

³ *Id.* at 364.

⁴ 421 U.S. 684 (1975).

⁵ *Id.* at 697.

the difference between guilt or innocence for many lesser crimes.”⁶ Thus, the Court viewed *Winship* as concerned with the function of the facts being proven rather than the formalistic labels applied to them.⁷

Two years later, in *Patterson v. New York*,⁸ the Supreme Court held that requiring defendants to prove affirmative defenses does not violate due process. “Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant.”⁹ The Court distinguished *Mullaney* on grounds that the state legislature treated the relevant facts (in that case, emotional disturbance as a justification for murder) as an affirmative defense rather than a fact necessary to convict the defendant.¹⁰ Unlike the defendant in *Patterson*, the defendant’s conviction in *Mullaney* necessarily depended on a fact (the existence of malice) presumed by the prosecution’s proof of the crime’s other elements. This presumption of a necessary fact violated due process because the government could not require the defendant to negate a “fact which the State deem[ed] so important that it must be either proved or presumed.”¹¹ *Patterson* thus explained that a state does not have to prove every fact that goes to the “blameworthiness of an act or the severity of punishment authorized for its commission” beyond reasonable doubt; rather, due process requires only “that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.”¹²

In *McMillan v. Pennsylvania*,¹³ the Supreme Court applied its earlier decisions to a Pennsylvania mandatory minimum sentencing statute. The statute at issue required five years’ imprisonment for certain crimes if the sentencing judge found by a preponderance of the evidence that the defendant visibly possessed a firearm in the commission of the offense. The Court first noted that *Patterson* controlled because, as the Court “stressed” in that case, “in determining what facts must be proved beyond a reasonable doubt the state legislature’s definition of the elements of the offense is usually dispositive,” and the Pennsylvania statute treated the defendant’s visible possession of a firearm as a “sentencing factor that comes into

⁶ *Id.* at 697–98.

⁷ *See id.* at 699 (“*Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the ‘operation and effect of the law as applied and enforced by the State,’ and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.” (citation omitted) (quoting *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914)).

⁸ 432 U.S. 197 (1977).

⁹ *Id.* at 211.

¹⁰ *See id.* at 210–11 & n.12.

¹¹ *Id.* at 215.

¹² *Id.* at 214–15.

¹³ 477 U.S. 79 (1986).

play only after the defendant has been found guilty of one of the [enumerated] crimes beyond a reasonable doubt.”¹⁴

While the Court acknowledged that “in certain limited circumstances *Winship*’s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged,” it was “persuaded by several factors that Pennsylvania’s Mandatory Minimum Sentencing Act [did] not exceed those limits.”¹⁵ First, the Pennsylvania statute established no presumptions of the kind described in *Patterson* and disapproved of in *Mullaney*. Second, the statute did not establish the range of potential sentences based on judicially-determined sentencing factors, unlike the fact at issue in *Mullaney*, because the Pennsylvania statute “operate[d] solely to limit the sentencing court’s discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm.” Finally, the Court concluded that there was no evidence that the state had enacted the mandatory minimum statute “in order to ‘evade’ the commands of *Winship*.” “The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given to that factor.”¹⁶ Accordingly, the Court held that the mandatory minimum statute did not violate due process.¹⁷

The Supreme Court, in *Castillo v. United States*,¹⁸ again addressed whether a firearm statute contained an offense element requiring proof beyond a reasonable doubt or a sentencing factor that, if found by the trial judge, would trigger a mandatory minimum penalty. The statute, 18 U.S.C. § 924(c)(1), prohibited the use or carrying of a “firearm” in relation to a crime of violence; an increased mandatory penalty applied if the weapon used or carried was a “machinegun.”¹⁹ The Court held that whether a machinegun was used was a separate element of the offense. The Court stated that the statute’s structure strongly favored the “new crime” interpretation: the statute seemed to suggest that the difference between the act of using or carrying a firearm and the act of using or carrying a machinegun is both substantive and substantial.²⁰ The Court also determined that the length and severity of the additional mandatory

¹⁴ *Id.* at 85–86.

¹⁵ *Id.* at 86.

¹⁶ *Id.* at 86–90.

¹⁷ *Id.* at 91. The defendants in *McMillan* also challenged the statute on grounds that it violated their Sixth Amendment right to a jury trial. After concluding the statute did not violate due process, the Court quickly rejected the Sixth Amendment argument, stating that the government used visible possession only as a sentencing factor and “there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.” *Id.* at 93.

¹⁸ 530 U.S. 120 (2000).

¹⁹ *Id.* at 120.

²⁰ *Id.* at 127. The Court examined five factors to determine whether Congress intended the machinegun provision to be an element or a sentencing factor: (1) language and structure; (2) tradition; (3) risk of unfairness; (4) severity of the sentence; and (5) legislative history. *Id.* at 124–31.

sentence dependant on the presence or absence of a machinegun weighed in favor of treating such offense-related words as referring to an element of the statute. The Court concluded that Congress intended the firearm type-related words used in section 924(c)(1) to refer to an element of a separate, aggravated crime.

Two years later, in *Harris v. United States*,²¹ the Supreme Court considered whether and how its intervening decision in *Apprendi v. New Jersey*²² affected *McMillan*. The defendant in *Harris* was convicted of using or carrying a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A). The district court sentenced the defendant to a mandatory minimum seven years' imprisonment under the same statute for having brandished the firearm, a fact the district court found at sentencing by a preponderance of the evidence.²³ The defendant argued that brandishing a firearm was an element of his offense and not merely a sentencing factor, that *Winship* rather than *McMillan* therefore controlled, and that section 924(c) violated due process. Alternatively, the defendant argued that the statute was unconstitutional because *Apprendi* implicitly overruled *McMillan*.

The Court found both arguments unpersuasive. First, construing section 924(c)(1)(A), the Court relied on *Castillo* to conclude that “brandishing” a firearm is a sentencing factor under the statute, and not an element of the offense, because “the required findings constrain, rather than extend, the sentencing judge’s discretion.”²⁴ Stated differently, the sentencing court could have imposed the same seven-year term of imprisonment on the defendant even in the absence of the determination that he brandished a firearm. Second, the Court explained that “*McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases.”²⁵ *Apprendi* involved facts that increase “the defendant’s sentence beyond the maximum authorized by the jury’s verdict,” the Court reasoned, whereas *McMillan* involved facts that increase the mandatory minimum but not beyond the authorized statutory maximum.²⁶ In the latter circumstance, “the jury’s verdict has authorized the judge to impose the minimum with or without the finding [and] a statute may reserve this type of factual finding for the judge without violating the Constitution.”²⁷ “Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury’s verdict, however, the political system may channel judicial

²¹ 536 U.S. 545 (2002).

²² 530 U.S. 466 (2000). The Supreme Court held in *Apprendi* that the Sixth Amendment requires that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490.

²³ *Id.* at 550–51.

²⁴ *Id.* at 552–54.

²⁵ *Id.* at 557.

²⁶ *Id.*

²⁷ *Id.*

discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings.”²⁸

Recently, in *United States v. O’Brien*,²⁹ the Supreme Court once again addressed the mandatory minimum provision of section 924(c) triggered by a defendant using, carrying, or possessing a “machinegun,” this time reconciling congressional amendments to the statute with the *Castillo* and *Harris* decisions. The Court unanimously held that whether a defendant uses a machinegun-type firearm is an element of the offense that must be proved to a jury.³⁰ The Court did not interpret the statute anew; rather, it applied the reasoning of *Castillo* to the amended statute to determine whether Congress intended the machinegun provision to be an offense element or a sentencing factor. The Court held that the principal effect of the statutory changes “was to divide what was once a lengthy principal sentence into separate subparagraphs.”³¹ While, “[t]o be sure, there [were] some arguments in favor of treating the machinegun provision as a sentencing factor,”³² the Court found the changes did not “provide a clear indication that Congress meant to alter its treatment of machineguns as an offense element.”³³

Justice Stevens authored a concurring opinion, in which he wrote that the principles of *Apprendi* should apply with equal force to statutes that trigger mandatory minimums. Stevens contended that a preferable solution to the issue presented “would be to recognize that any fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose should be treated as an element of the offense.”³⁴ Justice Stevens recognized that this would mean overruling the Court’s earlier holdings in *McMillan* and *Harris*.

2. *Interaction Between the Guidelines and Mandatory Minimum Sentences*

The Supreme Court has addressed the relationship between mandatory minimum sentences and the sentencing guidelines on several occasions. These decisions have involved two aspects of that relationship: deviations from the minimum sentence based on the defendant’s substantial assistance and the calculation of drug quantity.

A sentencing court may, upon the government’s motion, deviate from the applicable mandatory minimum sentence or depart from the applicable guidelines range, on grounds that the defendant rendered substantial assistance. Section 3553(e) of title 18, United States Code, establishes the court’s power to deviate from the mandatory minimum sentence in such circumstances and to impose a sentence “in accordance with the guidelines and policy statements

²⁸ *Id.* at 567.

²⁹ 130 S. Ct. 2169 (2010).

³⁰ *Id.* at 2180.

³¹ *Id.* at 2176.

³² *Id.* at 2180.

³³ *Id.*

³⁴ *Id.* at 2183 (Stevens, J., concurring).

issued by the Sentencing Commission.”³⁵ The Commission is in turn charged with “assur[ing] that the guidelines reflect the general appropriateness of imposing a lower sentence that would otherwise be imposed, including a statute as a minimum sentence, to take into account a defendant’s substantial assistance” to the government.³⁶ To that end, USSG §5K1.1 provides for departures from the guidelines on a substantial assistance motion by the government, and also provides direction to courts in fashioning sentences that are lower than the applicable statutory mandatory minimum.³⁷ Importantly, both 18 U.S.C. § 3553(e) and USSG §5K1.1 require, in addition to the defendant rendering substantial assistance, that the government move for the reduction as a prerequisite to lowering the sentence.³⁸ The Supreme Court has held that this prerequisite “gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted,” though the government may not base its refusal to do so “on an unconstitutional motive.”³⁹

In *Melendez v. United States*,⁴⁰ the Supreme Court held that section 3553(e) and §5K1.1 do not establish a “unitary” motion system, meaning that the government may move for a sentence below the statutory mandatory minimum or a departure from the guidelines without necessarily moving for both.⁴¹ In so holding, the Court explained the relationship between the various statutes and articulated the Commission’s role in guiding district courts’ determination of sentences below the statutory mandatory minimum. The Court first stated that §5K1.1 does not displace or merge with section 3553(e) because neither the provisions of the Sentencing Reform Act, specifically 28 U.S.C. § 994(n), nor section 3553(e) “suggest that the Commission itself may dispense with § 3553(e)’s motion requirement or, alternatively, ‘deem’ a motion requesting

³⁵ 18 U.S.C. § 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by a statute as a minimum sentence as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 998 of title 28, United States Code.”).

³⁶ 28 U.S.C. § 994(n) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence that would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

³⁷ *See* USSG §5K1.1 (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”). Section 5K1.1(a) provides a list of five non-exhaustive factors for the court to consider in determining the “appropriate reduction” of the defendant’s sentence.

³⁸ *Wade v. United States*, 504 U.S. 181, 185, 187 (1991); *see also Melendez v. United States*, 518 U.S. 120, 126 n.5 (1996) (“Papers simply ‘acknowledging’ substantial assistance are not sufficient if they do not indicate [the government’s] desire for, or consent to, a sentence below the statutory minimum [T]he Government must in some way indicate its desire or consent that the court depart below the statutory minimum before the court may do so.”).

³⁹ *Wade*, 504 U.S. at 185–86.

⁴⁰ 518 U.S. 120 (1996).

⁴¹ *See id.* at 122.

or authorizing a different action – such as a departure below the Guidelines minimum – to be a motion authorizing the district court to depart below the statutory minimum.”⁴² The Court concluded, however, that the statutes do “charge the Commission with constraining the district court’s discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum.”⁴³ Thus, while §5K1.1 does not dispense with the requirement that the government must move for a sentence below the statutory minimum, “[s]ection 5K1.1 may guide the district court when it selects a sentence below the statutory minimum, as well as when it selects a sentence below the Guidelines range.”⁴⁴

In the controlled substances context, both mandatory minimum statutes and the sentencing guidelines use drug quantity to determine the appropriate sentence. In *Chapman v. United States*,⁴⁵ the Supreme Court addressed how sentencing courts should calculate quantities of LSD for purposes of the statutory mandatory minimum, which required ten years’ imprisonment if the offense involved at least one gram “of a mixture or substance” containing LSD. As the Court explained, LSD is so potent that a single dose has very little weight, and the drug is often distributed using carrier devices, such as blotter paper, gelatin capsules, or sugar cubes.⁴⁶ The defendant challenged the inclusion of those carrier devices in the calculation of LSD quantity for purposes of the mandatory minimum statute. The Court found his argument unpersuasive, concluding that section 841 “requires the weight of the carrier medium to be included when determining the appropriate sentence” because the carrier is itself a “mixture or substance” containing LSD.⁴⁷ Following *Chapman*, the Commission amended the guidelines commentary to provide that, for purposes of calculating quantities of LSD, courts should presume a weight of 0.4 milligrams per dose, thereby tying the calculation of LSD quantities to doses of the drug rather than the weight of any carrier devices.⁴⁸

In *Neal v. United States*,⁴⁹ the Supreme Court held that the Commission’s revised method of calculating LSD quantities for guideline purposes did not also apply to the mandatory minimum statute, a question that had divided the circuit courts of appeals. The Court concluded that that the Commission’s change, while wholly applicable for purposes of the guidelines, could not affect calculations under the mandatory minimum statute.⁵⁰ First, the Court found it “doubtful that the Commission intended the constructive-weight method of the Guidelines to

⁴² *Melendez*, 518 U.S. at 126–127.

⁴³ *Id.* at 129.

⁴⁴ *Id.*

⁴⁵ 500 U.S. 453 (1991).

⁴⁶ *Id.* at 458–59.

⁴⁷ *Id.* at 459, 468.

⁴⁸ *See* USSG App. C amend. 502 (eff. Nov. 1, 1993).

⁴⁹ 516 U.S. 284 (1996).

⁵⁰ *Id.* at 285–86.

displace the actual-weight method that *Chapman* requires for statutory minimum sentences.”⁵¹ Indeed, the Court stated that the Commission’s amendments acknowledged that it could not “override” the congressional statute as construed by the Supreme Court.⁵² In any event, the Court held, the Commission’s method of calculating quantity was inconsistent with *Chapman*’s interpretation of the mandatory minimum statute and could not alter the statute. The Court reasoned that the Commission is entitled to “abandon its old methods in favor of what it has deemed a more desirable ‘approach’” within “its sphere to make policy judgments,” but lacks the power to construe a congressional statute in a manner contrary to the Supreme Court’s interpretation.⁵³

Similarly, disagreement has arisen among the circuits, and between some circuits and the Commission, concerning the definition of “cocaine base” for purposes of controlled substance crimes and sentencing. The mandatory minimum penalties applicable to drug trafficking offenses largely turn on the type and quantity of the narcotics involved, and the statutes (namely, 21 U.S.C. §§ 841(b) and 960) establish differing penalties depending on whether the offense involved cocaine or cocaine base. However, Congress had not specifically defined “cocaine base,” resulting in a circuit split over the definition of the term in the statutes and related guidelines, particularly that term’s relationship to “crack” cocaine. Some circuits embraced a broad interpretation of the term that included more than just crack cocaine, adopting the term’s scientific meaning.⁵⁴ Other circuits concluded that the term included only cocaine base that can be smoked, thereby narrowing its application to crack cocaine.⁵⁵

In 1993, the Commission expressly defined cocaine base for purposes of the guidelines as synonymous with “crack” cocaine, thereby adopting the narrower interpretation of the term and treating all forms of cocaine base other than crack as cocaine.⁵⁶ Subsequently, the circuit split deepened to include the effect of the guidelines change.⁵⁷ The Supreme Court resolved the issue

⁵¹ *Id.* at 293.

⁵² *Id.* at 294.

⁵³ *Id.* at 295–96.

⁵⁴ *See* *United States v. Ramos*, 462 F.3d 329, 333–34 (4th Cir. 2006); *United States v. Medina*, 427 F.3d 88, 92 (1st Cir. 2005); *United States v. Barbosa*, 271 F.3d 438, 467 (3d Cir. 2001); *United States v. Butler*, 988 F.2d 357, 542–43 (5th Cir. 1993); *United States v. Easter*, 981 F.2d 1549, 1558 & n.7 (10th Cir. 1992); *United States v. Jackson*, 968 F.2d 158, 162–63 (2d Cir. 1992).

⁵⁵ *See* *United States v. Higgins*, 557 F.3d 381, 395 (6th Cir. 2009); *United States v. Edwards*, 397 F.3d 680, 576 (7th Cir. 2005); *United States v. Munoz-Realpe*, 21 F.3d 375, 377–78 (11th Cir. 1994); *United States v. Shaw*, 936 F.2d 412 (9th Cir. 1991).

⁵⁶ USSG §2D1.1(c) (Notes to the Drug Quantity Table); USSG App. C, amend. 487 (eff. Nov. 1, 1993).

⁵⁷ For example, the Eleventh Circuit, which had initially adopted the broad interpretation of cocaine base, looked to the Commission’s narrower definition and Congress’s approval of the amendment to reverse course and hold that the statutes’ mandatory minimum penalties applied only to crack cocaine. *See Munoz-Realpe*, 21 F.3d at 377 (“By allowing the amendment to take effect, Congress has given its imprimatur to the new definition of ‘cocaine base’; Congress indicated that it intends the term ‘cocaine base’ to include only crack cocaine.”). Other circuits disagreed that the Commission’s definition affected the statutory definition, resulting in inconsistency between the statutory

in *DiPierre v. United States*⁵⁸ by holding that the term “cocaine base” in 21 U.S.C. § 841(b)(1)(A)(iii) applies to all forms of cocaine base and is not limited to crack cocaine. The Court observed that, because of the significant difference in penalties, Congress intended to distinguish between powder cocaine and cocaine base products; thus, this reading of the term “cocaine base” was consistent with the structure of section 841(b)(1).⁵⁹

3. *Advisory Guidelines and Mandatory Minimums*

Beginning in *Apprendi*,⁶⁰ the Supreme Court held that, under the Sixth Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁶¹ In *Blakely v. Washington*,⁶² the Supreme Court applied *Apprendi* to a state sentencing procedure that, like the federal sentencing guidelines, called for judges to find certain facts and, based on those judge-found facts, to impose a sentence within a prescribed mandatory range.⁶³ As the Court explained, “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.”⁶⁴ The Court held that the state sentencing procedure violated the Sixth Amendment because it required the sentencing court to impose a sentence that it could not have imposed based on the jury’s findings alone.⁶⁵

and guidelines definition of cocaine base. See *Barbosa*, 271 F.3d at 466 (“[S]entences imposed under the sentencing provisions of criminal statutes, specifically the mandatory minimum sentences, cannot be . . . affected simply because of Congress’ silent approval of the Commission’s amendment.”); *United States v. Palacio*, 4 F.3d 150, 154 (2d Cir. 1993) (“Although the Commission’s interpretation of section 2D1.1 in the amended commentary will be authoritative with respect to the Guidelines, the amendment cannot revise the statutory interpretation we have already made . . .”). Therefore, in circuits that had adopted a broad interpretation of cocaine base under the statutes, the Commission’s narrower definition applied only to sentences imposed under the guidelines. See *Barbosa*, 271 F.3d at 467 (“[W]e hold that, while the term ‘cocaine base’ means only crack when a sentence is imposed under the Sentencing Guidelines, ‘cocaine base’ encompasses all forms of cocaine base with the same chemical formula when the mandatory minimum sentences under 21 U.S.C. § 841(b)(1) are implicated.”).

⁵⁸ 131 S. Ct. 2225 (2011).

⁵⁹ *Id.* at 2232, 2237.

⁶⁰ 530 U.S. 466 (2000).

⁶¹ *Id.* at 490.

⁶² 542 U.S. 296 (2004).

⁶³ *See id.* at 300.

⁶⁴ *Id.* at 303.

⁶⁵ *See id.* at 303–04.

Booker applied the principles of *Apprendi* and *Blakely* to the federal sentencing guidelines. The Court saw no material distinction between the guidelines and the sentencing procedure at issue in *Blakely* because both relied on judge-found facts to increase the statutory maximum sentence.⁶⁶ The Court viewed the guidelines' mandatory nature as dispositive: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."⁶⁷ Because the sentencing guidelines required the imposition of a particular sentence, they went beyond the well-established principle that a sentencing judge may, consistent with the Constitution, "impose a sentence within a statutory range" because "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."⁶⁸ The *Booker* Court held that the sentencing guidelines, applied in a mandatory fashion, did not allow for this constitutionally acceptable judicial discretion, and thus violated the Sixth Amendment.⁶⁹

To remedy this defect, the Court excised the statutory provisions that made the sentencing guidelines mandatory, rather than invalidating the entire Sentencing Reform Act or grafting unwritten requirements into the Act.⁷⁰ The government had advocated for a remedy whereby the guidelines would be mandatory in some sentencings, but not in others.⁷¹ The Court chose not to adopt this suggestion because it reasoned that such a remedy was contrary to congressional intent: "For one thing, the Government's proposal would impose mandatory Guidelines-type limits upon a judge's ability to reduce sentences, but it would not impose those limits upon a judge's ability to increase sentences. We do not believe that such 'one-way lever[s]' are compatible with Congress's intent."⁷² The Court also noted that the "administrative complexities" created by such a system would run afoul of Congress's desire to "promot[e] uniformity in sentencing."⁷³ Thus, the Court chose to excise the portions of the Sentencing Reform Act making the guidelines mandatory and stated that, with these sections excised, "the remainder of the Act satisfies the Court's constitutional requirements."⁷⁴

⁶⁶ See *Booker*, 543 U.S. at 243–44.

⁶⁷ *Id.* at 233.

⁶⁸ *Id.*

⁶⁹ See *id.* at 233–34.

⁷⁰ See *id.* at 259.

⁷¹ See *id.* at 266.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 259 (the Court excised sections 3553(b)(1) (requiring sentencing courts to impose a sentence within the applicable guidelines range) and 3742(e) (setting forth standards of review on appeal, including *de novo* review of departures from the applicable guidelines range). Section 3742(g), which prohibited a district court at resentencing from imposing an outside the guidelines range sentence except on a ground relied upon at the prior sentencing, was later excised in *Pepper v. United States*, 131 S. Ct. 1229, 1236 (2011).

Accordingly, after *Booker*, while district courts must properly calculate the defendant's guidelines range, that range is "effectively advisory" and district judges have discretion to impose a sentence within, above, or below the advisory guidelines range.⁷⁵ "[T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence."⁷⁶ A district court's sentencing discretion is, however, subject to reasonableness review.⁷⁷

4. *The Eighth Amendment*

Defendants have also challenged mandatory minimum sentences as violating the Eighth Amendment's protection against cruel and unusual punishment. The Supreme Court in *Solem v. Helm*⁷⁸ held that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted."⁷⁹ The defendant in *Solem* was sentenced to life imprisonment without parole for passing a bad check after having been convicted of three non-violent prior offenses, a sentence permitted by a North Dakota recidivism sentencing statute. The Court held the sentence was unconstitutionally disproportionate to the gravity of the offense.⁸⁰ In so holding, *Solem* established a three-part proportionality analysis for determining whether a sentence is cruel and unusual: the court must (1) consider "the gravity of the offense and harshness of the penalty"; (2) "compare the sentences imposed on other criminals in the same jurisdiction" to determine if more serious crimes are subject to the same or lesser penalties; and (3) "compare the sentences imposed for commission of the same crime in other jurisdictions."⁸¹

In *Harmelin v. Michigan*,⁸² the defendant argued that his mandatory life sentence for a first offense of possessing crack cocaine was cruel and unusual. A majority of the Supreme Court agreed that the sentence's mandatory nature did not render it unconstitutional and that it was not unconstitutionally disproportionate.⁸³ The Court fractured, however, in its treatment and application of *Solem*. Justice Scalia, joined by Chief Justice Rehnquist, concluded that the Eighth Amendment's prohibition of cruel and unusual punishments addressed only the form and

⁷⁵ *See id.* at 245.

⁷⁶ *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007) (citing 18 U.S.C. § 3553(a)).

⁷⁷ *See Gall v. United States*, 552 U.S. 38, 41 (2007); *Rita v. United States*, 551 U.S. 338, 351 (2007).

⁷⁸ 463 U.S. 277 (1983).

⁷⁹ *Id.* at 290.

⁸⁰ *Id.* at 303.

⁸¹ *Id.* at 290–92.

⁸² 501 U.S. 957 (1991).

⁸³ *Id.* at 994–96.

not the severity of the penalty imposed, and therefore would have overruled *Solem*.⁸⁴ Justice Kennedy, joined by Justices O'Connor and Souter, disagreed that *Solem* should be overruled, but narrowly interpreted *Solem* to deemphasize the role of comparative analyses:

[I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality The proper role for comparative analysis of sentences . . . is to validate an initial judgment that a sentence is grossly disproportionate to the crime.⁸⁵

In so holding, Justice Kennedy explained that “the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”⁸⁶ The remaining Justices would have held that the life sentence was unconstitutionally disproportionate under any interpretation of *Solem*.

Following *Harmelin*, a plurality of the Court in *Ewing v. California*,⁸⁷ applied Justice Kennedy’s narrow proportionality interpretation to uphold California’s “three strikes” law.⁸⁸ The plurality held that the defendant’s mandatory term of 25 years-to-life imprisonment after his conviction of grand theft did not violate the Eighth Amendment, because the sentence was not grossly disproportionate to the crime he committed and “his long history of felony recidivism.”⁸⁹ Justices Scalia and Thomas would have overruled *Solem* and held that the Eighth Amendment does not guarantee proportionality.⁹⁰ Justices Stevens, Souter, Ginsburg, and Breyer would have held that the sentence violated the Eighth Amendment, even under Justice Kennedy’s narrow proportionality interpretation (but reserved the question of whether that narrow proportionality standard is correct).⁹¹ Thus, although a majority of the Court in *Harmelin* viewed the Eighth Amendment as establishing a proportionality requirement in mandatory sentencing and a plurality of the Court in *Ewing* analyzed a challenge to the mandatory minimum statute using Justice Kennedy’s concurring opinion in *Harmelin*, the Court has not yet definitively ruled on whether his narrow proportionality interpretation of *Solem* is the correct standard.⁹²

⁸⁴ *Id.* at 965, 985–86.

⁸⁵ *Id.* at 1005.

⁸⁶ *Id.* at 1001.

⁸⁷ 538 U.S. 11 (2003).

⁸⁸ *Id.* at 23–23 (“The proportionality principles in our cases distilled in Justice Kennedy’s concurrence guide our application the Eighth Amendment in the next context that we are called upon to consider.”).

⁸⁹ *Id.* at 29–30 (plurality opinion).

⁹⁰ *Id.* at 31–32 (Scalia, J., dissenting); *id.* at 32 (Thomas, J., dissenting).

⁹¹ *Id.* at 32–33 & n.1 (Stevens, J., dissenting); *id.* at 35 (Breyer, J., dissenting).

⁹² The Court’s decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), may demonstrate a shift away from proportionality review when the defendant challenges, on Eighth Amendment grounds, a “sentencing practice,” as opposed to his or her individual sentence. The issue in *Graham* was whether a Florida statute that permitted (but did

B. CIRCUIT COURT DECISIONS

Mandatory minimum penalties have been the subject of extensive litigation in the circuit courts of appeals. These cases have involved the application and interpretation of Supreme Court decisions addressing mandatory minimum penalties, as well as issues that the Court has not yet considered.

1. *Judicial Factfinding After Booker*

The circuits have uniformly concluded that, after *Booker*, courts may continue to use judicially determined facts when applying mandatory minimum sentences. Defendants have unsuccessfully challenged mandatory minimum sentences by arguing that *Booker* overruled prior precedent, namely *Harris*, and that any fact used to apply a mandatory minimum sentence must be submitted to a jury. As the Seventh Circuit held, “Although *Booker* invalidated the mandatory application of the sentencing guidelines, the decision did not disturb the Supreme Court’s recent precedent regarding the constitutionality of statutory mandatory minimum penalties.”⁹³ These courts have reasoned that *Booker* neither expressly nor implicitly upset *Harris*’s holding that the Sixth Amendment permits using judge-found facts to apply mandatory minimums within the range of imprisonment authorized by the jury’s verdict.⁹⁴ Similarly, the circuit courts have rejected arguments that *Booker*’s remedial opinion rendered mandatory minimum penalties advisory.⁹⁵

not require) a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime violated the Eighth Amendment. *See id.* at 2018. The Court characterized the defendant’s challenge as “implicat[ing] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes” and, “[a]s a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis.” *Id.* at 2022–23. In lieu of conducting a proportionality review, the Court applied its precedents involving similar categorical challenges (though involving capital punishment), including *Atkins*, *Roper*, and *Kennedy*, to conclude that the government may imprison a juvenile offender for life for committing a nonhomicide crime, but it “must provide him or her with some realistic opportunity to obtain release before the end of that term.” *Id.* at 2034. Accordingly, “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” *Id.*

⁹³ *United States v. Jones*, 418 F.3d 726, 731 (7th Cir. 2005); *accord, e.g.*, *United States v. Williams*, 464 F.3d 443, 449 (3d Cir. 2006); *United States v. Estrada*, 428 F.3d 387, 391 (2d Cir. 2005); *United States v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005).

⁹⁴ *See Jones*, 418 F.3d at 732 (“The distinction drawn by the Court in *Harris* appears to have survived – that is, that judicially found facts used to set minimum sentences are not properly deemed ‘elements’ of the offense for Sixth Amendment purposes because the jury’s verdict authorized the judge to impose the minimum sentence with or without the judicial fact-finding.”); *Williams*, 464 F.3d at 449 (“*Harris* remains binding law in the wake of the *Booker* decision. *Booker* did not explicitly overrule *Harris*, and the reasoning in *Booker* does not mandate reversal of *Harris*.”).

⁹⁵ *See United States v. Williams*, 474 F.3d 1130, 1132 (8th Cir. 2007) (concluding that *Booker*’s “remedial holding provided that to cure the constitutional infirmity of the mandatory guidelines system, a district court is authorized to consider the facts set forth in § 3553(a), and to vary from the sentence otherwise indicated by the sentencing guidelines,” not statutory mandatory minimum sentences); *United States v. Castaing-Sosa*, 530 F.3d 1358, 1362 (11th Cir. 2008) (“To avoid infringing on the defendant’s Sixth Amendment right to a jury trial, *Booker* made

The circuits have also held that under *Apprendi* and *Harris*, a judge may not determine any facts that trigger a mandatory minimum penalty in excess of the otherwise applicable sentence.⁹⁶ Accordingly, if the application of a mandatory minimum turns on a particular fact, such as drug quantity, and the mandatory minimum sentence exceeds the sentence supported by the jury’s verdict or the facts admitted by the defendant, that fact is an element of the offense and cannot be judicially determined.⁹⁷ Under this principle, however, courts have concluded that a judge may find facts that trigger a mandatory minimum that is also at the statutory maximum penalty, even though doing so deprives the sentencing court of all discretion to fashion the defendant’s sentence.⁹⁸

Despite uniformity on basic principles, the circuits have disagreed as to the division of factfinding responsibilities for purposes of applying the mandatory minimums related to drug quantities established at 21 U.S.C. § 841(b). Section 841(a) of title 21, United States Code, proscribes the manufacture or possession of controlled substances. Section 841(b) establishes the penalties for committing that offense, beginning with a “default” sentence of up to twenty years’ imprisonment.⁹⁹ The statute also provides for increasingly severe sentencing ranges and mandatory minimums if the offense involved certain quantities of specific drug types.¹⁰⁰ For example, while the default sentence for possessing methamphetamine is up to twenty years’ imprisonment, the defendant is subject to a mandatory five years’ imprisonment and up to forty years’ if the offense involved at least 5 grams of methamphetamine; the defendant faces a mandatory ten years’ and up to life imprisonment if the offense involved at least 50 grams of methamphetamine.¹⁰¹ Thus, section 841(b) uses drug type and quantity findings both to increase the statutory maximum penalty and to trigger mandatory minimum penalties.

advisory the Sentencing Guidelines, not statutory mandatory minimums enacted by Congress. Thus, *Booker*’s instruction to district court to consider the § 3553(a) factors in fashioning a reasonable sentence cannot be read to authorize using the § 3553(a) factors to impose a sentence below the applicable statutory mandatory minimum.”).

⁹⁶ See *United States v. Promise*, 255 F.3d 150, 157 (4th Cir. 2001) (collecting cases).

⁹⁷ See *id.*

⁹⁸ See *United States v. Estrada*, 428 F.3d 387, 390 (2d Cir. 2005) (“While this circumstance [where the mandatory minimum is also the statutory maximum penalty] deprives the judge of sentencing discretion, the finding nonetheless restrains the judge’s power within the outer limits set by the applicable statutory maximum, and the finding thus does not increase the penalty *beyond* the prescribed statutory maximum.” (quotation marks omitted)); *Spero v. United States*, 375 F.3d 1285, 1287 (11th Cir. 2004) (“[T]he amount of the enhancement does not matter, so long as the enhanced minimum does not exceed the pre-enhanced maximum.”).

⁹⁹ See 21 U.S.C. § 841(b)(1)(C).

¹⁰⁰ See *id.* §§ 841(b)(1)(A) & (b)(1)(B).

¹⁰¹ *Id.*

The circuits agree that any finding under section 841(b) that increases the statutory maximum penalty, even if it also triggers a mandatory minimum, must be submitted to a jury consistent with *Apprendi*. However, where the drug quantity or type findings trigger a mandatory minimum penalty within the sentencing range that may be imposed without further judicial factfinding, the circuits are split on whether such findings are elements of the offense that must be submitted to a jury or whether they are sentencing factors that may be judicially determined. On one side, several circuits have concluded that drug quantity and type must be alleged in the indictment and submitted to the jury or admitted by the defendant in all instances – even to impose a mandatory minimum sentence that is within the “default” sentencing range.¹⁰² Conversely, other circuits have held that drug type and quantity are only sentencing factors under section 841(b) that may be judicially determined, unless the fact is also used to increase the statutory maximum penalty.¹⁰³

2. “Stacking” Mandatory Minimum Sentences Under 18 U.S.C. § 924(c)

Section 924(c), of title 21, United States Code, establishes mandatory minimum penalties for committing the offense of using or carrying a firearm during, or possessing a firearm in furtherance of, a crime of violence or a drug trafficking crime.¹⁰⁴ The offense carries a mandatory minimum of five years’ imprisonment, and the statute prescribes increasingly severe mandatory minimums based on the how the firearm was used (seven and ten years), the type of firearm involved (ten and thirty years), and the defendant’s recidivism (twenty-five years and

¹⁰² See, e.g., *United States v. Gonzales*, 420 F.3d 111, 133–34 (2d Cir. 2005) (“The drug quantities specified in 21 U.S.C. § 841 are elements that must be pleaded and proved to a jury or admitted by a defendant to support any conviction on an aggravated drug offense, not simply those result in sentences that exceed the maximum otherwise applicable for an identical unquantified drug crime. . . . [W]here a drug quantity specified in § 814(b)(1)(A) or (b)(1)(B) is neither proved to a jury nor admitted by a defendant, a district court is not *required* to impose the minimum sentence mandated by those sections.”); *United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (en banc) (“We honor the intent of Congress and the requirements of due process by treating drug quantity and type, which fix the maximum sentence for a conviction, as we would any other material fact in a criminal prosecution: it must be charged in the indictment, submitted to the jury subject to the rules of evidence, and proved beyond a reasonable doubt.”). *But see Estrada*, 428 F.3d at 388 (“[P]rior convictions that trigger a mandatory minimum life sentence under § 841(b)(1)(A), but which do not affect the statutory maximum sentence, need not be charged in the indictment or proved to a jury beyond a reasonable doubt.” (emphasis added)).

¹⁰³ See, e.g., *United States v. Goodine*, 326 F.3d 26, 32 (1st Cir. 2003) (“We . . . find that drug quantity for purposes of § 841 is a sentencing factor that may be determined by a preponderance of the evidence.”); *United States v. Williams*, 238 F.3d 871, 877 (7th Cir. 2001) (concluding, in a section 841(b) case, that “if a defendant is sentenced under the statutory maximum, his sentence is not violative of *Apprendi*, regardless of the district court’s consideration of a mandatory minimum sentence”); *United States v. Doggett*, 230 F.3d 160, 165 (5th Cir. 2000) (affirming conviction based on judge-found drug quantities because the defendant’s “sentence was not enhanced beyond the statutory maximum by a factor not contained in the indictment or submitted to the jury.”).

¹⁰⁴ Section 924(c), enacted as part of the Armed Career Criminal Act of 1984 (ACCA), has produced extensive litigation concerning the definitions of “crime of violence” and “drug trafficking crime,” as have other portions of ACCA that impose a mandatory minimum penalty for prior convictions. See 18 U.S.C. § 924(e) (requiring fifteen years’ imprisonment for a defendant with three prior convictions “for a violent felony or a serious drug offense” and who violates 18 U.S.C. § 922(g)); *United States v. Rodriguez*, 553 U.S. 377, 388 (2008) (interpreting “serious drug offense”); *Begay v. United States*, 553 U.S. 137, 148 (2008) (interpreting “violent felony”).

life).¹⁰⁵ Section 924(c) further provides that those mandatory minimum penalties are to be imposed in addition and must run consecutively to “any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the [predicate] crime of violence or drug trafficking crime”¹⁰⁶

The circuits have consistently upheld the constitutionality of “stacking”¹⁰⁷ consecutive mandatory minimum sentences under section 924(c). Defendants have unsuccessfully argued, for example, that stacking sentences under section 924(c) violates the protection against double jeopardy,¹⁰⁸ deprives them of equal protection,¹⁰⁹ and results in cruel and unusual punishment.¹¹⁰ The circuits had previously disagreed in their interpretation of 18 U.S.C. § 924(c)’s “except clause,” which provides that the subsection’s mandatory minimums apply “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law.”¹¹¹ A minority of circuits concluded that the “except” clause made section 924(c)’s mandatory minimums inapplicable where the predicate crime of violence or drug trafficking crime carried a greater mandatory minimum than the mandatory minimum established

¹⁰⁵ See 18 U.S.C. § 924(c)(1)(A)–(C).

¹⁰⁶ *Id.* § 924(c)(1)(A) & (c)(1)(D).

¹⁰⁷ “Stacking” generally refers to the charging of multiple § 924(c) counts within the same indictment and the resulting accumulation of mandatory minimum sentences. Section 924(c) prescribes mandatory minimum penalties for employing firearms in furtherance of a crime of violence or drug trafficking crime, with lengths varying based on whether the defendant used (five years), brandished (seven years), or discharged the firearm (ten years), and certain longer penalties for using specific types of firearms. See 18 U.S.C. § 924(c)(1)(A) & (B). The statute also establishes much more severe mandatory penalties upon a “second or subsequent conviction” under section 924(c), which in most cases results in a twenty-five year mandatory minimum sentence. *Id.* § 924(c)(1)(C). In *Deal v. United States*, the Supreme Court interpreted “second or subsequent convictions” to include other section 924(c) counts charged in the same indictment. 508 U.S. 129, 133–34 (1993). Because section 924(c) requires that its mandatory minimum penalties run consecutively to “any other term of imprisonment imposed on the person,” these terms must be served in addition to any sentence for the underlying offenses *and* other § 924(c) offenses. § 924(c)(1)(D). As a result, an indictment can “stack” mandatory minimum penalties, for example, by charging multiple violations of § 924(c) where the defendant used a firearm in furtherance of multiple predicate offenses – even if those predicate offenses formed part of the same course of criminal conduct. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1249 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006), discussed further in Chapter 12 n.78, *supra*.

¹⁰⁸ See, e.g., *United States v. Mohammed*, 27 F.3d 815, 819–20 (2d Cir. 1994); *United States v. Singleton*, 16 F.3d 1419, 1429 (5th Cir. 1994); *United States v. Overstreet*, 40 F.3d 1090, 1094 (10th Cir. 1994).

¹⁰⁹ See, e.g., *United States v. Walker*, 473 F.3d 71, 76–79 (3d Cir. 2007); *United States v. Khan*, 461 F.3d 477, 495 (4th Cir. 2006); *Angelos*, 433 F.3d at 754.

¹¹⁰ See, e.g., *United States v. Wiest*, 596 F.3d 906, 911–12 (8th Cir. 2010); *Walker*, 473 F.3d at 79–84; *United States v. Beverly*, 369 F.3d 516, 536–37 (6th Cir. 2004).

¹¹¹ See e.g., *United States v. Parker*, 549 F.3d 5 (1st Cir. 2008); *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009); *United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001); *United States v. London*, 568 F.3d 553 (5th Cir. 2009); *United States v. Easter*, 553 F.3d 519 (7th Cir. 2009); *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000); *United States v. Villa*, 589 F.3d 1334 (10th Cir. 2009); *United States v. Tate*, 586 F.3d 936 (11th Cir. 2009).

for the section 924(c) offense.¹¹² But in *Abbott v. United States*,¹¹³ the Supreme Court agreed with the majority of circuits, holding that a defendant is subject to consecutive mandatory minimum sentences for both the predicate offense and the section 924(c) offense, even if the predicate offense carries a greater mandatory minimum than the section 924(c) offense.¹¹⁴ Thus, the “except” clause operates only to ensure that “a § 924(c) offender is not subject to stacked sentences for violating § 924(c),” though a defendant is “subject to the highest mandatory minimum specified for his conduct in § 924(c).”¹¹⁵

3. *Safety Valve*

The circuit courts of appeal have developed a substantial jurisprudence concerning the “safety valve,” 18 U.S.C. § 3553(f) and §5C1.2, which provides that defendants convicted of specific controlled substance offenses and who meet certain criteria may receive a sentence under the guidelines instead of a mandatory minimum sentence.¹¹⁶ Although neither section 3553(f) nor §5C1.2 expressly allocate the burden of proving (or disproving) a defendant’s safety-valve eligibility, the circuits have held that the defendant bears the burden of proving his or her eligibility by a preponderance of the evidence.¹¹⁷ Similarly, the burden falls on the defendant to seek the district court’s application of the safety valve and, when necessary, to take the affirmative steps necessary to obtain eligibility, including the initiation of debriefing sessions with the government.¹¹⁸

¹¹² See e.g., *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009); *United States v. Almany*, 598 F.3d 238 (6th Cir. 2010).

¹¹³ 131 S. Ct. 18 (2010).

¹¹⁴ *Id.* at 23.

¹¹⁵ *Id.*

¹¹⁶ A defendant is eligible for the safety valve if the district court finds: “(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan” 18 U.S.C. § 3553(f). As for the last requirement, “the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude” his or her eligibility. § 3553(f)(5).

¹¹⁷ See *United States v. Montes*, 381 F.3d 631, 634 (7th Cir. 2004); *United States v. Mathis*, 216 F.3d 18, 29 (D.C. Cir. 2000); *United States v. Ajugwo*, 82 F.3d 925, 929 (9th Cir. 1996).

¹¹⁸ See *United States v. Ivester*, 75 F.3d 182, 185 (4th Cir. 1996) (“[D]efendants seeking to avail themselves of downward departures under § 3553(f) bear the burden of affirmatively acting, no later than sentencing, to ensure that the Government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes.”); accord *United States v. Ortiz*, 136 F.3d 882, 884 (2d Cir. 1997); *United States v. Flanagan*, 80 F.3d 143, 146 (5th Cir. 1996).

It is well-established that judicial factfinding for purposes of determining safety valve eligibility complies with the Constitution. As the circuits have reasoned, application of the safety valve cannot increase the defendant's sentence, nor is the court's refusal to reduce a sentence tantamount to a sentence increase. Accordingly, judicial determination of the defendant's safety valve eligibility is not a violation of the Sixth Amendment.¹¹⁹ However, a sentencing court's authority to determine facts relevant to the defendant's safety valve eligibility is not unlimited. Several circuits have held that a district court lacks discretion to deviate from the criminal history score required by the guidelines.¹²⁰ This result follows from the conclusion that *Booker* and other cases "did not alter the requirement that the Guidelines results be determined according to the Guidelines,"¹²¹ nor did they "invalidate the criteria established by Congress for sentencing a defendant below the statutory mandatory minimum sentence."¹²² Similarly, the Ninth Circuit has held that even though the guidelines, including §5C1.2, are advisory after *Booker*, section 3553(f) requires the district court to apply the safety valve when the defendant demonstrates his or her eligibility.¹²³

Upon concluding that the defendant is safety-valve eligible, however, the district court may impose a sentence within, below, or above the advisory guidelines range.¹²⁴ Thus, the district judge "is to treat the guidelines as only advisory even in a safety-valve case," even though he or she "cannot treat as advisory the guideline provisions that are preconditions for safety-valve relief."¹²⁵ As the Eleventh Circuit has explained regarding upward variances, "the guidelines are advisory only, and a court compelled to disregard a mandatory minimum sentence in favor of the guidelines range at the advice-determining stage may vary upward to and even past the mandatory minimum point after considering the § 3553(a) factors – so long as the final sentence is reasonable."¹²⁶ Nonetheless, in determining the appropriate sentence for a safety

¹¹⁹ See *United States v. Bermudez*, 407 F.3d 536, 544–45 (1st Cir. 2005) ("[A] factual finding resulting in the denial of a sentencing reduction, as in the present case, is scarcely an 'enhancement. Moreover, it is clear from the Supreme Court's case law that refusal to reduce a statutory sentence based on judicial factfinding do not violate the defendant's Sixth Amendment rights." (citations omitted)); see also, e.g., *United States v. Holguin*, 436 F.3d 111, 117–18 (2d Cir. 2006); *United States v. Payton*, 405 F.3d 1168, 1173 (10th Cir. 2005).

¹²⁰ *United States v. Branch*, 537 F.3d 582, 594–95 (6th Cir. 2008) (collecting cases).

¹²¹ *United States v. Hunt*, 503 F.3d 34, 35 (1st Cir. 2007).

¹²² *Branch*, 537 F.3d at 595; see also *United States v. Brehm*, 442 F.3d 1291, 1300 (11th Cir. 2006) ("*Booker* does not render application of individual guideline provisions advisory because the district court remains obligated correctly to calculate the Guidelines range pursuant to 18 U.S.C. § 3553(f)(1) Further, we agree that to treat calculation of the safety-valve eligibility as advisory would, in effect, excise 18 U.S.C. § 3553(f)(1).").

¹²³ *United States v. Cardenas-Juarez*, 469 F.3d 1331, 1334–35 (9th Cir. 2006).

¹²⁴ *United States v. Tanner*, 544 F.3d 793, 795 (7th Cir. 2008); *United States v. Quirante*, 486 F.3d 1273, 1276 (11th Cir. 2007); *Cardenas-Juarez*, 469 F.3d at 1334.

¹²⁵ *Tanner*, 544 F.3d at 795.

¹²⁶ *Quirante*, 486 F.3d at 1276.

valve-eligible defendant under the advisory guidelines, the district court may not consider the mandatory minimum that would have applied in the safety valve's absence.¹²⁷

4. *Substantial Assistance*

The circuits have considered *Booker's* effect on reducing sentences based on the defendant's substantial assistance. *Booker's* effect on substantial assistance motions depends, in part, on whether the court is considering a sentence below the statutory mandatory minimum pursuant to 18 U.S.C. § 3553(e) or a departure from the advisory guidelines pursuant to §5K1.1. In either case, it remains clear even after *Booker* that the district court may not impose a sentence below the mandatory minimum without a government motion.¹²⁸ Moreover, under either mechanism, *Booker* does not permit a district court to consider facts that are unrelated to the defendant's assistance in deciding whether and to what extent it should deviate from a mandatory minimum or depart from the guidelines.¹²⁹

However, the applicability of a mandatory minimum determines what factors a court may consider in fashioning the final sentence of a defendant who has rendered substantial assistance. If the defendant is subject to a mandatory minimum, the district court may consider only assistance-related factors in deciding whether and to what extent it should deviate from that mandatory minimum sentence.¹³⁰ By contrast, if the defendant is not subject to a mandatory minimum, the district court may still only consider only assistance-related factors in deciding whether and to what extent it should depart from the guidelines,¹³¹ but in those circumstances, a district court may then proceed to consider the full range of factors provided at section 3553(a) to

¹²⁷ *United States v. Mejia-Pimental*, 477 F.3d 1100, 1109 (9th Cir. 2007) (“[T]he fact that a district court used a mandatory minimum as a reference point requires resentencing if the defendant was in fact safety valve eligible.”); *Quirante*, 486 U.S. at 1276 (“Because a mandatory minimum sentence that must be disregarded under § 3553(f) is not a § 3553(a) factor, it cannot be considered in any part of the sentencing decision when the safety valve applies.”).

¹²⁸ *See United States v. Rivera*, 170 F. App'x 209, 211 (2d Cir. 2006).

¹²⁹ *See United States v. Desselle*, 450 F.3d 179, 182–83 & n.1 (5th Cir. 2006) (collecting cases); *see also United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008) (“When . . . the Guidelines sentence ends up as the statutory minimum, both the decision to depart and the maximum permissible extent of this departure below the statutory minimum may be based only on substantial assistance to the government and on no other mitigating considerations.”); *Williams*, 474 F.3d at 1130–31 (“Where a court has authority to sentence below a statutory minimum only by virtue of a government motion under § 3553(e), the reduction below the statutory minimum must be based exclusively on assistance-related considerations.”); *United States v. Davis*, 407 F.3d 1269, 1271 (11th Cir. 2005) (“While the sentencing court had discretion under § 5K1.1 in deciding whether to depart from the guidelines and the extent of that departure, it did not have discretion to consider factors unrelated to the nature and type of Davis's assistance. Importantly, the sentencing court could not permissibly consider the sentencing factors announced in 18 U.S.C. § 3553(a) when exercising its discretion in deciding whether and how much to depart.”).

¹³⁰ *United States v. Johnson*, 580 F.3d 666, 673 (7th Cir. 2009); *Richardson*, 521 F.3d at 159; *Williams*, 474 F.3d at 1132; *United States v. A.B.*, 529 F.3d 1275, 1285 (10th Cir. 2008).

¹³¹ *See Desselle*, 450 F.3d at 183; *Davis*, 407 F.3d at 1271.

fashion a reasonable sentence.¹³² Indeed, the district court (in the absence of a mandatory minimum) may consider the defendant’s cooperation and assistance pursuant to section 3553(a) even in the absence of a government motion or if the defendant’s assistance was not sufficiently valuable to justify a departure from the guidelines.¹³³

Despite those principles, a district court possesses only narrow authority to reduce a sentence pursuant to Federal Rule of Criminal Procedure 35(b), regardless of whether a mandatory minimum applies. In *United States v. Shelby*,¹³⁴ the Seventh Circuit held that a district judge may not consider the “full range” of section 3553(a) factors when presented with a Rule 35(b) motion, because the rule “contains no suggestion that the filing of the motion allows the defendant to argue for resentencing on the basis of something other than the assistance he gave the government.”¹³⁵ The First and Sixth Circuits have adopted similar readings of Rule 35(b) as permitting “reductions based on substantial assistance rather than other factors.”¹³⁶ The applicability (or absence) of a mandatory minimum penalty does not appear to affect the district court’s discretion under Rule 35(b). The First Circuit in *Poland* explained that, even though the district court could deviate from the applicable mandatory minimum based on the defendant’s assistance, “[i]t could not . . . provide a greater reduction below the mandatory minimum for any other reason.”¹³⁷ And the Seventh Circuit in *Shelby* vacated the new sentence imposed by the district court, which the court fashioned using a base of factors unrelated to the defendant’s assistance, even though the new sentence was higher than the mandatory minimum.¹³⁸

5. *Mandatory Consecutive Sentences as Grounds for Variance*

Finally, following *Booker*, the circuit courts of appeals have considered whether and to what extent a district court may consider any mandatory consecutive sentences in fashioning a sentence for counts to which no mandatory penalty applies. This issue arises when a defendant

¹³² See *United States v. Moore*, 581 F.3d 681, 683 (8th Cir. 2009) (“The district court . . . had authority under *Gall* to vary downward from the advisory guidelines range . . . , as adjusted by the § 5K1.1 departure. We review the resulting sentence, with or without such a variance, for substantive reasonableness.”).

¹³³ *United States v. Blue*, 557 F.3d 682, 686–87 (6th Cir. 2009) (“Because the Guidelines are advisory, even absent a Section 5K1.1 motion the court might have considered Blue’s allegedly substantial assistance in the context of the Section 3553(a) factors.”); *United States v. Fernandez*, 443 F.3d 19, 34 (2d Cir. 2006) (“We agree that in formulating a reasonable sentence a sentencing judge must consider ‘the history and characteristics of the defendant’ within the meaning of 18 U.S.C. § 3553(a)(1), as well as the other factors enumerated in § 3553(a), and should take under advisement any related arguments, including the contention that the defendant made efforts to cooperate, even if those efforts did not yield a Government motion for a downward departure pursuant to U.S.S.G. § 5K1.1.”).

¹³⁴ 584 F.3d 743 (7th Cir. 2009).

¹³⁵ *Id.* at 745, 748–49.

¹³⁶ *United States v. Poland*, 562 F.3d 35, 41 (1st Cir. 2009); *United States v. Grant*, 636 F.3d 803, 815–16 (6th Cir. 2011);

¹³⁷ *Poland*, 562 F.3d at 41.

¹³⁸ See *Shelby*, 584 F.3d at 744–45.

has been convicted of multiple offenses, at least one of which carries a consecutive mandatory minimum penalty. For example, under 18 U.S.C. § 924(c) (using a firearm in relation to a crime of violence) and 18 U.S.C. § 1028A(b)(2) (aggravated identity theft), a defendant is subject to additional mandatory terms of imprisonment for certain acts in addition to the predicate offense, which carries its own sentence that may not be subject to a mandatory penalty. In some cases, district judges have concluded that the mandatory “add on” sentence adequately punishes the offender pursuant to 18 U.S.C. § 3553(a), and thus give a more lenient sentence – sometimes varying from the guidelines range substantially – on other counts for which there is no mandatory penalty.

The courts of appeals have generally held that district courts may not construct sentences in that fashion. In *United States v. Worman*,¹³⁹ the district court had sentenced the defendant to only one month imprisonment for mailing, possessing, and transporting a pipe bomb (guidelines range of 168–210 months) and a consecutive, mandatory 360 months’ imprisonment under section 924(c) for possessing a pipe bomb in furtherance of a crime of violence.¹⁴⁰ The district court reasoned that a total sentence of 361 months’ imprisonment was appropriate under section 3553(a). The Eighth Circuit vacated the sentence as substantively unreasonable, concluding that “[m]andatory consecutive sentences are to be imposed independently of sentences for other counts.”¹⁴¹ The court stated that “[t]he severity of a mandatory consecutive sentence is an improper factor that a district court may not consider when sentencing a defendant on related crimes.”¹⁴² Similarly, in *United States v. Franklin*,¹⁴³ the Sixth Circuit held that a district court may not impose lower sentences on counts to which the guidelines apply to circumvent the application of consecutive section 924(c) mandatory minimum on other counts, reasoning that “[a]lthough *Booker* gave substantial discretion to the sentencing court to impose sentences below a mandatory maximum, nothing in *Booker* allows the court to negate the imposition of a mandatory minimum sentence.”¹⁴⁴ The Seventh Circuit also took the approach in *United States v. Roberson*,¹⁴⁵ concluding that the district court improperly gave the defendant only one month imprisonment for committing bank robbery because of the seven-year consecutive section 924(c) mandatory minimum penalty he also faced for brandishing a firearm during that offense.¹⁴⁶ This sentence was substantively unreasonable, the Seventh Circuit concluded, because it was inconsistent with “Congress’s determination to fix a minimum sentence for using a firearm in a

¹³⁹ 622 F.3d 969 (8th Cir. 2010).

¹⁴⁰ *Id.* at 978.

¹⁴¹ *Id.* (citing *United States v. Guthrie*, 557 F.3d 243, 255 (6th Cir. 2009)).

¹⁴² *Id.* (citing *United States v. Williams*, 599 F.3d 831, 834 (8th Cir. 2010)).

¹⁴³ 499 F.3d 578 (6th Cir. 2007).

¹⁴⁴ *Id.* at 586 (“The sentencing court must determine an appropriate sentence for the underlying crimes without consideration of the § 924(c) sentence.”).

¹⁴⁵ 474 F.3d 432 (7th Cir. 2007).

¹⁴⁶ *Id.* at 433–34.

crime of violence,” and the district court was “required to determine the proper sentence for the bank robbery entirely independently of the section 924(c)(1) add-on.”¹⁴⁷

The First Circuit, however, has taken a broader view of district courts’ discretion to account for mandatory consecutive penalties when sentencing defendants convicted of multiple offenses. The defendant in *United States v. Vidal-Reyes*,¹⁴⁸ pleaded guilty to misrepresentation of a social security account, false representation of citizenship, false statements in a passport application, and aggravated identity theft. The identity theft conviction carried a mandatory consecutive two-year term of imprisonment pursuant to 18 U.S.C. § 1028A. The district court declined to vary from the guidelines range of 15–21 months on the three counts to which no mandatory minimum applied, believing that it lacked authority to depart solely because a within-guidelines range sentence would be too severe when combined with the mandatory consecutive two-year term of imprisonment.¹⁴⁹ The First Circuit initially stated that “to the extent that a mandatory term of imprisonment reasonably bears on [the § 3553(a)] factors, it remains, absent legislation to the contrary, within the sentencing court’s discretion to take it into account.”¹⁵⁰ The court also noted that a mandatory term of imprisonment “certainly bears upon the § 3553(a) factors to a certain extent,” particularly because “the total amount of time a defendant will spend incarcerated . . . implicates the goal of incapacitation.”¹⁵¹ The First Circuit then concluded that nothing in section 1028A prevents the district court from considering the mandatory sentence when fashioning a sentence on other counts, at least to the extent those other counts are not predicate offenses for the add-on mandatory sentence.¹⁵² Because the defendant did not plead guilty to any of section 1028A’s predicate offenses,¹⁵³ the district court could exercise its discretion to consider the mandatory minimum penalty. Finally, the First Circuit concluded that USSG §5G1.2, which requires that consecutive mandatory penalties be “imposed independently” of other counts, means only that counts for which a consecutive mandatory penalty applies should not be grouped together with other counts.¹⁵⁴ The First Circuit thus reversed and remanded for resentencing.¹⁵⁵

¹⁴⁷ *Id.* at 436–37.

¹⁴⁸ 562 F.3d 43 (1st Cir. 2009).

¹⁴⁹ *Id.* at 46–47.

¹⁵⁰ *Id.* at 49.

¹⁵¹ *Id.* at 49 n.4.

¹⁵² *Id.* at 51.

¹⁵³ The defendant did not raise on appeal whether § 1028A required the government to also charge him with a predicate offense, and the First Circuit did not take up that question. *See id.* at 55 n.9.

¹⁵⁴ *Id.* at 55.

¹⁵⁵ *Id.* at 56.

Appendix F

**MANDATORY MINIMUM REPORT FIELD INTERVIEW PROTOCOL
FOR U.S. ATTORNEY REPRESENTATIVE**

Introductory Statement

Hello, we are from the U.S. Sentencing Commission and are visiting your office today as part of a study mandated by Congress on statutory mandatory minimum provisions in federal sentencing. As part of this study, we are gathering information from prosecutors and defense attorneys.

We would like to take no more than _ hour(s) of your time to ask you some questions about the use of mandatory minimums in your district. Before we begin, we wish to emphasize that the report of our evaluation findings will not identify by name the offices we visit nor will individual respondents be identified or identifiable in the Commission's public documents.

Location:

Interviewer:

Date:

Time Began:

Time End:

Respondent:

Background:

1. How long have you been a practicing attorney?
2. How long have you been a federal prosecutor? What is your title?
3. How long have you been in this office?
4. How did you prepare for this interview?

We are going to start by asking about charging, plea, and sentencing practices in your district. We will then end with some general questions about your observations and experiences with mandatory minimums.

Charging Decisions

5. What role do mandatory minimums play in charging decisions?
6. Are there particular factors that influence whether a statutory offense requiring a mandatory minimum penalty is charged? If so, what are those factors? (Does the identity of the judge ever influence the charging decision?)
7. Do those factors change for different offenses types? If so, for which offense types and how do they change?
8. Are there circumstances in which the government declines to charge an offense carrying a mandatory minimum penalty? If so, under what circumstances? For example, is this done when the defendant gives concessions in return? If so, what are those concessions?
9. After *Booker*, has the charging of defendants pursuant to statutes requiring mandatory minimum penalties changed? If so, how has it changed? Do you have a view as to why it has changed? For *those offenses* where the charging of statutes carrying mandatory minimum penalties has increased after *Booker*, what factors encourage the charging of such statutes?
10. Have you ever had a case for which your office declined to file an information for an otherwise applicable section 851 enhancement? If so, why did your office decline to file the information? (*e.g.*, plea negotiations or other concessions by the defendant).
11. Are there policies in your office regarding requirements that must be met before a drug trafficking case may be brought in your district? What are those policies?
12. Are there policies in your office regarding requirements that must be met before multiple counts for charges carrying mandatory minimum penalties may be brought? For example, filing multiple counts for violations of 18 U.S.C. §§ 924(c) or 1028A. If so, what are those policies? If not, what factors influence the filing of multiple counts?
13. Are there policies in your office regarding requirements that must be met before child pornography offenses under a statute carrying a mandatory minimum penalty (*e.g.*, receipt as opposed to possession) may be brought? If so, what are those policies?
14. Are there policies in your office regarding requirements that must be met before identity theft offenses under 18 U.S.C. § 1028A may be brought? If so, what are those policies?
15. Are the practices regarding charging decisions related to mandatory minimums in your office the result of office-wide policies of the U.S. Attorney's office or the result of charging practices of individual prosecutors (or a combination of both)?

16. Are there any mandatory minimum sentencing provisions that you think are particularly effective law enforcement tools? If so, which ones? Are there any mandatory minimum sentencing provisions that you think are especially harsh or particularly detrimental to defendants? If so, which ones?

Guilty Pleas

17. What would you say is the strongest incentive that the government can offer to influence a defendant to plead guilty?
18. Does a mandatory minimum count influence the plea negotiation process? If so, how?
19. Are there circumstances in which counts requiring mandatory minimum penalties get dismissed when the defendant pleaded guilty? If so, what are those circumstances? For example, do counts requiring mandatory minimum penalties (including cumulative consecutive counts) get dismissed while other mandatory counts with shorter minimum terms remain?
20. Does the government use Fed. R. Crim. P. 11(c)(1)(C) plea agreements in this district? If so, has the use of Fed. R. Crim. P. 11(c)(1)(C) plea agreements changed since the date of the decision in *United States v. Booker* (January 12, 2005)? If so, how? Do you have a view as to why it has changed? (Does the identity of the judge ever influence usage of such agreements? If so, how?)
21. Is a waiver of appeal rights a standard provision in written plea agreements in this district? If so, does the government give the defendant any concession in exchange for the waiver? What is the concession? If appeal waivers are not routinely included in plea agreements, why not?

Substantial Assistance

22. Does the fact that a statutory offense with a mandatory minimum penalty could be charged impact a defendant's willingness to provide substantial assistance? If so, what is the impact? How significant is it? Are there circumstances that vary the impact? If so, what are they?
23. Do the guidelines have the same impact on a defendant's willingness to provide substantial assistance in cases where no statutory offense with a mandatory minimum penalty could be charged? If so, what is the impact?
24. Does a defendant's willingness to provide substantial assistance influence the government's decision whether to charge a statutory offense requiring a mandatory minimum penalty? If so, how? What factors influence this decision?
25. In cases where your office filed a substantial assistance motion under 18 U.S.C. § 3553(e), how **often** does your office make a recommendation regarding the extent of the reduction? In such cases, how does your office express that recommendation? In such cases, how often does the court follow your recommendation?

26. Does your office have an office-wide policy about the amount of reduction that should be requested in a case in which a substantial assistance motion is filed? In your district (division), if a prosecutor makes a recommendation about the extent of a downward departure, does the prosecutor typically request a specific amount off the minimum of the guidelines range or a statutory minimum as a general practice (*e.g.*, one-third off) or does the recommendation vary depending on the facts and circumstances of the particular case? Does your office have an office-wide policy about the amount of reduction that should be requested in a case in which a substantial assistance motion is filed? Does it depend on the type of cooperation (*e.g.*, debriefing the government, testifying at trial, wearing a wire)?
27. Does the government move to dismiss counts requiring mandatory minimum when the defendant provided substantial assistance? If so, how often? What factors influence this decision?
28. Critics of mandatory minimum penalties suggest that they lead to false testimony by cooperators seeking relief from those penalties. Have you had any experiences with cooperators offering testimony later found to be false? If so, please describe that experience.
29. Have you ever declined to file a substantial assistance motion because you determined that the cooperator testified falsely? Have you ever declined to use testimony offered by a cooperator because you had concerns about the veracity of the testimony being offered?

Safety Valve

30. Does the fact that a defendant may not qualify for the safety valve influence whether the government charges under a statute that does carry a mandatory minimum penalty? If so, how often? What factors influence this decision?
31. As you know, Congress passed the safety valve to allow relief from mandatory minimum penalties for certain low-level non-violent drug offenders. How well does the safety valve work in your district?

General Questions

32. What is your view of how mandatory minimum penalties currently are used in the federal criminal justice system?
33. What is the reason(s) for your view?
34. Do you think that mandatory minimum penalties play a different role in an advisory guideline system than they did in a mandatory guideline system? If so, how is it different? What are your views on that?

Any additional comments on the topic of mandatory minimum penalty provisions in federal law?

**MANDATORY MINIMUM REPORT FIELD INTERVIEW PROTOCOL
FOR FEDERAL PUBLIC DEFENDER/CJA PANEL REPRESENTATIVE**

Introductory Statement

Hello, we are from the U.S. Sentencing Commission and are visiting your office today as part of a study mandated by Congress on statutory mandatory minimum provisions in federal sentencing. As part of this study, we are gathering information from prosecutors and defense attorneys.

We would like to take no more than _ hour(s) of your time to ask you some questions about the use of mandatory minimums in your district. Before we begin, we wish to emphasize that the report of our evaluation findings will not identify by name the offices we visit nor will individual respondents be identified or identifiable in the Commission's public documents.

Location:

Interviewer:

Date:

Time Began:

Time End:

Respondent:

Background:

1. How long have you been a practicing attorney?
2. How long have you been a federal public defender (defense attorney)?
3. How long have you been in this office (on the CJA panel)?
4. How did you prepare for this interview?
5. How long in your current position?

We are going to start by asking about charging, plea, and sentencing practices in your district. We will then end with some general questions about your observations and experiences with mandatory minimums.

Charging Decisions

6. What role do mandatory minimums play in charging decisions in this district?
7. In your experience, are statutory offenses requiring a mandatory minimum penalty charged consistently? If so, when are they charged? If not, what circumstances appear to influence the determination of whether mandatory minimum statutes are charged? (Does the identity of the judge ever influence the charging decision)
8. Do the circumstances that appear to influence the determination of whether mandatory minimum statutes are charged differ for different offense types? If so, for which offense types and how do they change?
9. Are there circumstances in which the government declines to charge an offense carrying a mandatory minimum penalty? If so, under what circumstances? For example, is this done when the defendant gives concessions in return? If so, what are those concessions?
10. After *Booker*, has the charging of defendants pursuant to statutes requiring mandatory minimum penalties changed? If so, how has it changed? Do you have a view as to why it has changed? For *those* offenses where the charging of statutes carrying mandatory minimum penalties has increased after *Booker*, what factors do you think encourage the charging of such statutes?
11. Have you ever had a case where the government declined to file an information for an otherwise applicable section 851 enhancement? If so, why did the government decline to file the information? (*e.g.*, plea negotiations or other concessions by the defendant).
12. Are there policies known to you in the local U.S. Attorney's office regarding requirements that must be met before a drug trafficking case may be brought in your district? What are those policies?
13. Are there policies known to you in the local U.S. Attorney's office regarding requirements that must be met before multiple counts for charges carrying mandatory minimum penalties may be brought? For example, filing multiple counts for violations of 18 U.S.C. §§ 924(c) or 1028A. If so, what are those policies? If not, what factors do you think influence the filing of multiple counts?
14. Are there policies known to you in the local U.S. Attorney's office regarding requirements that must be met before child pornography offenses under a statute carrying a mandatory minimum penalty (*e.g.*, receipt as opposed to possession) may be brought? If so, what are those policies?
15. Do you know whether the practices regarding charging decisions related to mandatory minimums in the local U.S. Attorney's office are the result of office-wide policies or the result of charging practices of individual prosecutors (or a combination of both)?

16. Are there any mandatory minimum sentencing provisions that you think are especially harsh or particularly detrimental to defendants? If so, which ones? Are there any mandatory minimum sentencing provisions that you think are particularly effective law enforcement tools? If so, which ones?
17. How often are your clients aware of the mandatory minimum penalties applicable to their criminal conduct before their apprehension or other contact with the criminal justice system?

Guilty Pleas

18. What would you say is the strongest incentive that can be offered by the government to influence a defendant to plead guilty?
19. Does a mandatory minimum count influence the plea negotiation process? If so, how?
20. Are there circumstances in which counts requiring mandatory minimum penalties get dismissed when the defendant pleaded guilty? If so, what are those circumstances? For example, do counts requiring mandatory minimum penalties (including cumulative consecutive counts) get dismissed while other mandatory counts with shorter minimum terms remain?
21. Do some defendants choose to go to trial because of charges carrying mandatory minimum penalties when they would otherwise have pleaded guilty if a charge not carrying a mandatory minimum had been brought?
22. Does the government use Fed. R. Crim. P. 11(c)(1)(C) plea agreements in this district? If so, has the use of Fed. R. Crim. P. 11(c)(1)(C) plea agreements changed since the date of the decision in *United States v. Booker* (January 12, 2005)? If so, how? Do you have a view as to why it has changed? (Does the identity of the judge ever influence usage of such agreements? If so, how?)
23. Is a waiver of appeal rights a standard provision in written plea agreements in this district? If so, does the government give the defendant any concession in exchange for the waiver? What is the concession? If appeal waivers are not routinely included in plea agreements, why not?

Substantial Assistance

24. Does the fact that a statutory offense with a mandatory minimum penalty could be charged impact a defendant's willingness to provide substantial assistance? If so, what is the impact? How significant is it? Are there circumstances that vary the impact? If so, what are they?
25. Do the guidelines have the same impact on a defendant's willingness to provide substantial assistance in cases where no statutory offense with a mandatory minimum penalty could be charged? If so, what is the impact?
26. In your experience, does a defendant's willingness to provide substantial assistance influence the government's decision whether to charge a statutory offense requiring a mandatory minimum penalty? If so, how? What factors influence this decision?

27. Which of the following is more common in your district in cases in which a defendant cooperates with the government: (a) a charge carrying a mandatory minimum is brought, the defendant is convicted of it, and the defendant then seeks to win a substantial assistance motion under 18 U.S.C. sec. 3553(e) in order to reduce his sentence below the statutory minimum; or (b) the prosecutor threatens to bring a charge carrying a mandatory minimum unless a defendant provides substantial assistance before he is convicted but does not do so (or, alternatively, dismisses a charge carrying a mandatory minimum) if the defendant sufficiently cooperates and pleads guilty to a charge not carrying a mandatory minimum?
28. To your knowledge, does the local U.S. Attorney's office have an office-wide policy about the amount of reduction that should be requested in a case in which a substantial assistance motion is filed? If a prosecutor makes a recommendation about the extent of a downward departure, does the prosecutor typically request a specific amount off the minimum of the guidelines range or a statutory minimum as a general practice (*e.g.*, one-third off) or does the recommendation vary depending on the facts and circumstances of the particular case? To your knowledge, does the local U.S. Attorney's office have an office-wide policy about the amount of reduction that should be requested in a case in which a substantial assistance motion is filed? Does it depend on the type of cooperation (*e.g.* debriefing the government, testifying at trial, wearing a wire)?
29. In cases where the government filed a substantial assistance motion under 18 U.S.C. § 3553(e), how **often** does the government make a recommendation regarding the extent of the reduction?
- In such cases, how does the government express that recommendation?
- In such cases, how often does the court follow the government's recommendation?
30. Does the government move to dismiss counts requiring mandatory minimum when the defendant provided substantial assistance? If so, how often? What factors influence this decision?
31. Critics of mandatory minimum penalties suggest that they lead to false testimony by cooperators seeking relief from those penalties. Have you had any clients who cooperated with the government and provided testimony that was later found to be false? If so, please describe that experience.
32. Have you ever represented a client for whom the government declined to file a substantial assistance motion because it determined that your client testified falsely? If so, please describe that experience.
33. Have you ever represented a client who offered to testify as a cooperating witness, and the government has refused to accept that offer? If so, please describe that experience.

Safety Valve

34. Does the safety valve factor into charging or plea negotiations? If so, how so? How often?

35. As you know, Congress passed the safety valve to allow relief from mandatory minimum penalties for certain low-level non-violent drug offenders. How well does the safety valve work in your district?

General Questions

36. What is your view of how mandatory minimum penalties currently are used in the federal criminal justice system?
37. What is the reason(s) for your view?
38. Do you think that mandatory minimum penalties play a different role in an advisory guideline system than they did in a mandatory guideline system? If so, how is it different? What are your views on that?

Any additional comments on the topic of mandatory minimum penalty provisions in federal law?

**SUMMARIES OF THE ORAL AND WRITTEN REMARKS OF THE WITNESSES
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING – THURSDAY, MAY 27, 2010
8:30 a.m. – 5:30 p.m.
WASHINGTON, D.C.**

I. Executive Branch

United States Department of Justice

Sally Quillian Yates, United States Attorney for the Northern District of Georgia

On behalf of the United States Department of Justice, Ms. Yates testified that “in an era of advisory guidelines, mandatory minimum sentencing statutes remain important to promote the goals of sentencing and public safety.” Ms. Yates further testified that current mandatory minimum statutes have produced “real and significant excesses in terms of the imprisonment meted out for some offenders,” while there also gaps in mandatory minimum sentencing statutes have resulted in disparate and unduly lenient sentences for other offenders. Thus, she asserted, “some reforms of existing mandatory minimum sentencing statutes are needed and . . . consideration of some new modest mandatory minimum sentencing statutes is appropriate.”

Ms. Yates first explained that her testimony should be viewed in the context of an ongoing Department of Justice study of federal sentencing and corrections policy. The study’s purpose is to evaluate the structure of federal sentencing, including mandatory minimum sentencing statutes, in light of *Booker* and other decisions, the unsustainable growth of the federal prisoner population, and criticisms of federal sentencing policy generally. Ms. Yates testified that the results of the study’s working group have begun to guide Department of Justice policy on sentencing and corrections issues.

Ms. Yates asserted that a reform movement in the late 20th century in favor of determinate sentencing, along with other criminal justice reforms and changes in society generally, reduced crimes rates “dramatically across the country.” She testified that researchers “have found that a significant part of the reductions in crime has been the result of changes to sentencing and corrections policies,” and that the experience of law enforcement officials has shown that mandatory minimum penalties deter crime and increase cooperation.

Despite these benefits, Ms. Yates explained that “mandatory sentencing laws have come with a heavy price,” and she specifically noted excessive terms of imprisonment given to some offenders and overcapacity in the federal prisoner system. But, at the same time, according to Ms. Yates, under the advisory guidelines system, “undue leniency has become more common for certain offenders convicted of certain crimes,” including some white collar and child exploitation

offenses. For these offenses, she claimed the lack of mandatory minimum sentences has led to greater variation in sentences, which in turn undermines uniformity and predictability in sentencing.

Ms. Yates articulated the Department of Justice’s position that mandatory minimum sentences “must go hand in hand with advisory sentencing guidelines,” as they are an essential law enforcement tool and promote public confidence in the sentencing system. Ms. Yates explained, however, “that mandatory minimum penalties should be used judiciously and only for serious offenses and should be set at severity levels that are not excessive.” “We believe there has been excess in the promulgation of federal mandatory minimums” and “reforms of some of the current mandatory minimums are needed to eliminate excess severity in current statutory sentencing laws and to help address the unsustainable growth in the federal prison population.”

Ms. Yates concluded her testimony by urging the Commission, as part of its study of mandatory minimum penalties, to “engage in a review of existing mandatory minimum statutes to identify those that are unnecessarily severe and also to identify crimes for which the goals of sentencing and public safety suggest a new statutory minimum term may be appropriate.”

II. Sentencing Practitioners

Federal Public and Community Defenders

Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia

Mr. Nachmanoff testified that mandatory minimum sentences “continue to be the most serious obstacle to fair, effective, and efficient sentencing today.” He argued that the guideline system has improved since *Booker*, and that the now-advisory guidelines system does not call for the Commission to “back away from its principled stance against mandatory minimums.” “Advisory guidelines do not reduce the problems created by mandatory minimums, nor do they make mandatory minimums any more necessary,” he explained. Mr. Nachmanoff reasoned that while there is no evidence that judges would impose unduly lenient sentences but for a statutory minimum penalty, “[t]here is . . . overwhelming evidence that mandatory minimums require excessive sentences for tens of thousands of less serious offenders who are not dangerous.”

Mr. Nachmanoff testified that mandatory minimum penalties undermine the purposes of sentencing by producing unjust sentences and unwarranted uniformity. This result flows, he argued, from mandatory minimums’ “focus on extreme examples rather than the most mitigated case,” when they “should be set for the least harmful offense that could be committed by the least culpable offender under the statute.” And, because mandatory minimum sentences provide a starting point for the sentencing guidelines, “the more serious offenders for whom the mandatory minimums were intended are subject to guidelines ranges even higher than the mandatory minimum.”

Mr. Nachmanoff further testified that, rather than deterring or reducing crime, mandatory minimums may actually increase crime. He noted that the “scholarly verdict” is that mandatory minimum penalties do not have significant deterrent effects. Additionally, he argued that

mandatory minimum penalties have little deterrent effect because “potential offenders do not know the law, and even if they did, they could not know what the sentence would be. Sentence length is determined by prosecutors through charging decisions, bargaining decisions, and substantial assistance departure recommendations.” Mandatory minimum sentences, he claimed, may increase crime by subjecting nonviolent, low-level offenders to long prison sentences that are likely to increase recidivism. He also noted that mandatory minimums disproportionately affect racial minorities and are the primary cause of the increased prisoner population.

Next, he stated that mandatory minimums transfer sentencing discretion from the judge to the prosecutor, who uses them for tactical advantage and to discourage the exercise of constitutional rights. Mr. Nachmanoff viewed this as “the inevitable result of mandatory minimums. They exist as a potent tool in the hands of prosecutors” who “may be motivated by a wide variety of factors.” Finally, he explained that mandatory minimum sentences interfere with the “robust feedback made possible by advisory guidelines” and require the imposition of sentences with unwarranted disparities, contrary to the goals of the advisory guidelines system.

Mr. Nachmanoff made six policy recommendations:

- (1) The Commission should urge the repeal of all mandatory minimum statutes;
- (2) that, in the event Congress will not completely repeal all mandatory minimums, the Commission should emphasize the need to repeal those statutes that produce the “most egregiously severe sentences”;
- (3) that the Commission should “review the guidelines presently linked to mandatory minimums and set guideline levels based on data and research”;
- (4) that the Commission “should reduce the drug guidelines by two levels across the board”;
- (5) that the Commission should broaden the scope of the “safety valve” because it “excludes many low-level offenders who deserve relief”; and
- (6) that “the Commission should encourage Congress to participate in sentencing policy through directive to study and amend if necessary, and to permit the Commission to function as an independent expert body.”

Practitioners Advisory Group to the U.S. Sentencing Commission

Jeffrey B. Steinback

Mr. Steinback testified in favor of the “abrogation of the vast majority of the mandatory minimum sentences now on the books” and urged the Commission, “in the strongest terms, to continue its long-standing opposition to mandatory minimum sentences.”

Mr. Steinback asserted that the existence of these mandatory minimum drug statutes sometimes makes it impossible for a judge to impose a just and reasonable sentence. Using illustrative cases from his own practice, he argued that mandatory minimum sentences “are inflexible, unresponsive to individual circumstances, and far too often produce unnecessarily harsh punishment.” Mr. Steinback observed that in drug conspiracies the most culpable parties often have information with which to bargain for a light sentence, while far less culpable parties who have nothing to “sell” receive grossly disproportionate sentences – a frustration of Congress’s intention to more severely punish the most culpable offenders. Thus, Mr. Steinback argued, we have a “sentencing inversion” that “allow[s] the big fish to swim away relatively unscathed, while leaving the so-called ‘small fry’ to suffer draconian penalties.”

Mr. Steinback concluded by opining that the sentencing distributions produced by harsh mandatory minimum penalties have resulted in a regime that compromises truth and honesty in sentencing, pressures low-level defendants to provide “false cooperation” in which they “conjure up stories” to make it appear that they have meaningful information, and even tempts trial judges to ignore the law in the interest of rendering justice.

American Bar Association (the “ABA”)

James E. Felman

Mr. Felman testified that the ABA “strongly supports the Commission’s long-standing opposition to the use of mandatory minimum sentences.” He believes that “[s]entencing by mandatory minimums is the antithesis of rational sentencing policy” and “is uniformly indifferent to the valuation of whether the result furthers all or even any of the purposes of punishment.” He urged the Commission to “continue its unwavering opposition to mandatory minimums and to report the many and serious flaws of such statutes to Congress.”

Mr. Felman recounted the ways in which mandatory minimum sentences are inconsistent with the goals that sentences be “both uniform among similarly situated offenders and proportional to the crime that is the basis of the conviction.” First, he explained that mandatory minimums result in excessively severe sentences, even in cases in which there is no mandatory minimum because mandatory minimum statutes cause “the Sentencing Commission to increase many sentences to maintain some consistency in the Guidelines.” Second, according to Mr. Felman, mandatory minimum statutes produce arbitrary sentences by shifting sentencing considerations from “the traditional wide focus on both the crime itself and ‘offender characters’ to an exclusive focus on a single fact – typically drug quantity or the presence of a firearm.” Third, rather than reducing sentencing disparities, they actually increase them by determining sentences based on the prosecutor’s charging decisions, and because the sentencing statutes do not lend themselves to certain and consistent application. Finally, Mr. Felman testified, mandatory minimum sentencing improperly shifts sentencing determinations from judges to prosecutors “who do not have the incentive, training, or even the appropriate information to properly consider a defendant’s mitigating circumstances at the initial charging stage of the case.” Mr. Felman also refuted the claim that mandatory minimum sentences induce cooperation as lacking a “sound empirical basis”; in any event, he testified, “the ABA rejects the very premise that the inducement of cooperation is a legitimate aim of sentencing policy.”

Mr. Felman also noted the “widespread” opposition to mandatory minimums, including criticisms of mandatory minimums made by the Judicial Conference of the United States, jurists, lawmakers, and others – leading him to conclude that “mandatory minimums are so patently irrational as a sentencing policy that virtually no one lauds them after the day of their enactment.”

National Association of Criminal Defense Lawyers (the “NACDL”)

Cynthia Hujar Orr, President

Ms. Orr testified that the NACDL is very concerned about the rate of imprisonment and overall prison population, both of which she directly attributes to overly harsh penalties for non-violent drug offenses that carry mandatory minimum penalties. She cited Federal Bureau of Investigation statistics that demonstrate that the prison population continues to grow despite a decrease in the national crime rate, and she observed that the current federal prison population is 37% above the rated capacity of U.S. Bureau of Prison facilities. She concluded that “a civilized society must find alternatives to imprisonment to deal with conduct that it wishes to prevent, particularly in the case of non-violent offenses.”

Ms. Orr asserted that mandatory minimum sentences “have produced systematic disparity that is incongruous with the goals of the Sentencing Reform Act of 1984” and that the disparities are greatest in the context of drug offenses. She explained that mandatory minimum sentences produce three types of disparities: (1) offender disparity; (2) racial disparity; and (3) gender disparity due to the disparate effect of mandatory minimums on women, which in turn affect their children, who are “collateral victims” of their mothers’ incarceration.

Ms. Orr also explained that mandatory minimums interfere with judicial discretion by “stand[ing] in the way of the grant of appropriate variance” without a reasonable justification for doing so. Additionally, mandatory minimum sentences transfer “discretion, authority, and responsibility” from federal judges to prosecutors, “who are caught up in an adversarial role.” She also testified that mandatory minimum sentences “effectively preclude[]” defendants from exercising their Sixth Amendment right to a trial, given prosecutors’ “unlimited discretion over charging decisions.” “[E]ven if a defendant has minimal culpability or a strong defense, faced with a mandatory minimum sentence of ten or more years, a defendant will almost always forego his right to a trial.” Finally, Ms. Orr testified that with increased guilty pleas, “the manner in which [plea] agreements are established and executed should be transparent,” but that federal prosecutors have actually exercised their power in a “very secretive and effectively unreviewable manner.”

In conclusion, she urged the Commission to oppose mandatory minimums and “to take an active role in educating members of Congress, particularly those who have introduced mandatory minimum legislation, about the negative effects of mandatory minimums and the unique role of the Sentencing Commission in formulating rational and consistent sentencing policies.”

Ms. Orr also urged the Commission to recommend that Congress make only general directives regarding amendments to the Sentencing Guidelines, and that Congress refer any pending bill that adds or alters criminal offenses and penalties to the relevant judiciary committee.

III. Law Enforcement

National Organization of Black Law Enforcement Executives

Jiles H. Ship, Second Vice President

Mr. Ship testified that although mandatory minimum sentences were established “with good intent,” they have not served their purpose. Specifically, Mr. Ship explained that mandatory minimum sentences deprive the trier of fact with discretion in the sentencing process, and prevent the consideration of aggravating and mitigating factors. He asserted that the “most efficient and effective way for the Congress to exercise its powers to direct sentencing policies is through the established process of Sentencing Guidelines, permitting the sophistication of the Guidelines structure to work, rather than through mandatory minimums.”

National Fraternal Order of Police

David Hiller, National Vice President

Mr. Hiller testified that Congress and the states have used mandatory minimum sentences for three reasons: “to deter future offenders, to provide a defined period of separation of the offender from society, and to ensure consistency through the criminal justice system so that individuals convicted of specific crimes receive similar sentences.”

First, he testified that although the “effectiveness of deterrence is difficult to quantify,” the purpose of establishing specific and harsh penalties for serious crime is to deter persons from committing those crimes in the future, resulting in a reduction of crime. He also credited mandatory minimums with deterring crime by encouraging offenders to “provide evidence and information about other members of their illegal operations in exchange for reduced time or dropping certain charges.” Mr. Hiller asserted that this effect makes mandatory minimum sentences “a powerful investigatory and prosecutorial weapon against criminal organizations and conspiracies.”

Second, Mr. Hiller testified that by providing sentences of a specific length, mandatory minimum sentences protect the public and function “as an absolute deterrent against that particular individual during the time of his incarceration.” He pointed to the use of mandatory minimum sentences as “crucial to eliminating gun violence,” and as a reflection of the seriousness of using firearms to commit crimes.

Finally, Mr. Hiller testified that the “third rationale for mandatory minimums is to ensure fairness, consistency, and uniformity so that offenders receive similar sentences through the criminal justice system for committing similar crimes.” He credited mandatory minimum sentences, particularly those enacted in the 1980s and early 1990s, as helping to achieve historically low crime rates.

Mr. Hiller countered arguments that mandatory minimum sentences cause non-violent, first time offenders to receive lengthy prison terms. He testified that this argument is “inconsistent with the available data,” and noted that the statutory safety valve, 18 U.S.C. § 3553(f), “provides for additional protection for non-violent, first-time offenders. “These individuals are not and should not be the targets of our nation’s crime-fighting strategy, of which the use of mandatory minimums is an integral part.”

National Center for Rural Law Enforcement

Maxwell V. Jackson, Chief of Police, Harrisville City, Utah

Chief Maxwell focused his testimony on the problems that methamphetamine abuse cause in rural communities, and particularly on the role of mandatory minimums in the effort to combat this abuse and related crime. Methamphetamine, he explained, disproportionately affects rural communities, damages children whose family members are involved with methamphetamine, and leads to millions of dollars per year in property theft committed by those seeking equipment to manufacture the drug or cash to purchase it.

He noted that state courts deal with the majority of rural methamphetamine prosecutions, utilizing drug courts that require rehabilitation in lieu of incarceration for some offenders (often “common abusers”) or jail for repeat offenders. The initiation of federal prosecutions, he explained, usually turns on the quantity of drug involved and whether a firearm was used in the commission of the offense. As a result, “federal drug prosecutions in rural America are rare,” and “are usually reserved for the ‘worst of the worst’ offenders.”

Chief Maxwell cited two major advantages stemming from prosecuting offenders in federal court. The first advantage is incapacitation because mandatory sentences “remove these most extreme offenders from society for long periods of time.” The second advantage, according to Chief Maxwell, is that the threat of mandatory minimum sentences leads to plea bargain agreements and cooperation at the state level that “can lead law enforcement up the ‘food chain’ to higher level, and even international organized crime figures.” “These are the people who truly need to be prosecuted and incarcerated under federal minimum mandatory guidelines,” he stated.

IV. Academia

Professor Laurie L. Levenson

Loyola Law School Los Angeles

Professor Levenson testified that “[m]andatory minimums do not make us safer, they do not create more equity in sentencing, and they do not create more certainty in sentencing.” Instead, she asserted, “[t]hey are costly, have disproportionate impact on minority defendants and force our judges to impose sentences they do not believe are appropriate in the individual case. They shift power from judges to prosecutors and they work at odds with our post-*Booker* sentencing system.”

Professor Levenson first testified on the problems associated with mandatory minimum sentences. She explained that there is no empirical evidence that they “provide any greater deterrence than sentences impose under a discretionary sentencing scheme,” particularly because the worst offenders know they can “escape” mandatory minimum sentences by providing information to prosecutors. She also testified that mandatory minimums are not fairer than discretionary sentencing, and do not increase certainty in sentencing due to disparities in the application of substantial-assistance benefits. Thus, she contended, “[m]andatory minimum laws remain on the books for those unlucky defendants who cannot trade information with the prosecutor in order to avoid the harsh consequences of the mandatory minimums.” Professor Levenson also testified that mandatory minimums have had harmful effects; have led to overpopulated prisons; “have created two systems of justice – one for white defendants and another for inmates of color”; and “have created a crisis of confidence in our criminal justice system.”

Professor Levenson presented a number of proposals for reform. First, she argued that eliminating all mandatory penalty provisions in the United States Code “would be the most principled approach.” She specifically reasoned that the current system of “guided discretion” in which judges must explain their departures from the guidelines and sentences must withstand appellate review gives sentencing judges “the flexibility to tailor sentences so that they are accurately taking in to account all of the circumstances of the crime and information about the defendant who committed it.” But, if there is concern that judges “will not take seriously enough the nature of the offense or the actions of a repeat offender,” Professor Levenson proposed that crimes currently carrying a mandatory minimum sentence could have “presumptive” sentences, in which district courts carry the burden of justifying a lower sentence and to which the appellate court would not be required to give deference.

Alternatively, in the event that repealing mandatory minimum sentences is not feasible, Professor Levenson advocated for narrowing the categories of crimes eligible for mandatory minimum penalties. In particular, she argued for limiting mandatory minimums sentences “to crimes that cause serious immediate physical harm to others.” Under this approach, according to Professor Levenson, “those crimes that have created the most controversy over mandatory minimums would no longer be a problem,” including non-violent drug offenses, immigration offenses, identity theft, and pornography offenses not involving actual contact with a child.

Professor Levenson finally noted that the piecemeal approach to mandatory minimum sentences undertaken so far has been the least effective approach. She testified that “[m]andatory minimums have been a failed strategy,” and “[t]he goal is to come up with sentencing strategies that actually work.” She concluded that “[i]f we are going to be consistent with Guideline sentencing, the number of mandatory minimum offenses should be drastically reduced or eliminated.”

Professor Stephen A. Saltzburg
George Washington University School of Law

Professor Saltzburg first testified that federal criminal law has expanded significantly since 1970, a trend that coincided with a “profound shift in sentencing policy.” This shift, according to Professor Saltzburg, was a movement away from the rehabilitative model of sentencing. “The result was the determinate sentencing revolution,” which Professor Saltzburg stated was characterized by limitations on judicial discretion through the use of mandatory minimum sentences or sentencing guidelines that narrowed discretion; the elimination or “drastic limitation” of parole and similar devices; and increases in the statutory and guidelines penalties for the most serious crimes, particularly firearms and drug offenses.

After recounting the effect of mandatory minimum sentences on incarceration rates and the “heavy” costs of incarceration, Professor Saltzburg asserted that mandatory minimum sentences “raise serious issues of public policy,” and are “inconsistent” with the commands that sentence be uniform among similarly situated offenders and proportional to the crime committed. He testified that mandatory minimum sentences are a “one-way ratchet upward” because they create a “mandatory floor for sentencing,” and they are arbitrary because the sentence is based solely on offense characteristics and disregard offender characteristics. Finally, mandatory minimum sentences increase disparities because they shift discretion to prosecutors and away from judges.

Professor Saltzburg made two additional “overlooked points” regarding mandatory minimum sentences. First, he explained that mandatory minimum penalties create sentencing “cliffs,” whereby offenders with very similar conduct are treated arbitrarily differently because of the specific facts required to trigger the mandatory minimum sentence. Second, he testified that mandatory minimum sentences “reflect a distrust of judges,” which is unwarranted under the current system of guided discretion in which sentences are subject to appellate review.

Professor Saltzburg testified that he supports the repeal of mandatory minimum laws and urged the Commission to recommend their repeal to Congress. He also advocated for the increased use of “effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, diversionary programs, home confinement, GPS monitoring, and probation.”

Professor Stephen J. Schulhofer
New York University School of Law

Professor Schulhofer testified that mandatory minimum sentences not only fail to achieve, but in fact undermine, the goals that Congress sought to further by enacting them.

Professor Schulhofer asserted that mandatory minimum sentences are not really mandatory at all. Rather, they are discretionary punishments “with many of the very worst consequences that sentencing discretion can imply.” According to Professor Schulhofer, these “mandatory” punishments result from discretion wielded by prosecutors through their charging decisions, which lack transparency and are subject to only modest oversight, rather than by judges in their traditional sentencing role. He stated that these features make “the very idea of a ‘mandatory

minimum sentence' a cruel fiction." And, as a result, so-called mandatory minimum sentences do not comport with Congress's own "truth in sentencing" policy.

Professor Schulhofer identified sentencing cliffs, "misplaced equality," and the "cooperation paradox" as some of the negative effects of mandatory minimum sentences. Sentencing cliffs produce dramatically different sentencing outcomes when an offender's actions barely bring him within the conduct that triggers a mandatory minimum sentence. Cliff effects, he explained, are "especially dramatic in drug cases" where "small quantities have enormous importance, while many other factors bearing on culpability and dangerousness have no importance at all." "Misplaced equality" results from the excessive uniformity demanded by mandatory minimum sentences, whereby "low-level offenders receive the same stringent punishment" as "[d]rug lords and other very serious offenders." He described this excessive uniformity as the product of "two inherent features of statutory sentencing mandates: their oversimplified culpability metrics and the severity mismatch on which they are invariably based." Finally, the "cooperation paradox" results in the most culpable offenders in a criminal organization receiving substantial sentencing reductions because they have the knowledge necessary to "negotiate a big sentencing break" while the people they controlled or directed, who lack such knowledge, receive disproportionately long sentences.

Professor Schulhofer also addressed the argument that mandatory minimum sentences encourage cooperation. He testified that "this seemingly straightforward benefit is in part illusory" because the guidelines-based sentencing reduction at USSG §5K1.1 "offers an alternative that achieves this advantage almost as effectively and in a much more flexible manner." Additionally, any gains from offender cooperation, he explained, "can be offset by increased difficulty in getting cooperation from others; when sentencing practices are viewed as overly severe, many citizens become reluctant to assist law enforcement."

Professor Schulhofer urged the Commission to recommend that Congress pass a "Truth in Sentencing Act of 2010," his proposed theoretical statute, which "would provide that all statutory minimum sentences would become mandates to the Sentencing Commission to set the minimum of the guideline range at a level no lower than that specified by the statute." This, he believes, would further the fundamental congressional objective of achieving "truth in sentencing." If, under this proposal, Congress were concerned about a lack of control over downward departures, it could mandate that departures below the guideline range would be subject to the limitations that were in place before *Booker*. Alternatively, Professor Schulhofer testified that Congress could alter mandatory minimum statutes to, for example, ensure that *Pinkerton's* "reasonable foreseeability" standard and accomplice liability (in the absence of a leadership role) cannot be used to trigger a mandatory minimum sentence. He also recommended that the Commission amend the relevant conduct guideline (USSG §1B1.3) to limit accomplice and co-conspirator liability in cases that involve a mandatory minimum conviction. Additionally, he recommended that the Commission, with regard to quantity-based guidelines, "set its Guidelines to the congressionally set minimum without being obliged to extrapolate beyond the congressionally set level when the applicable quantities are greater" and the Commission should "regard the statutory benchmark as exhausting the normal relevance of quantity alone."

V. Public Policy Analysis

Cory L. Andrews

Washington Legal Foundation, Senior Litigation Counsel

Mr. Andrews testified that mandatory minimum sentences are a “symptom” of the larger problem of the “over-federalization of criminal law in the United States.” This emphasis on federal crimes, he testified, “in part undermines the careful balance that our system struck with Federalism.” This is problematic, according to Mr. Andrews, because the states are “often more flexible, more creative, and more responsive than the Federal government,” can tailor criminal laws to local needs, and function as “laboratories of democracy and experimentation.”

Mr. Andrews testified that district judges should be given more statutory tools that would allow them to sentence offenders below mandatory minimum sentences for nonviolent offenses. He stated that the statutory safety valve should be expanded “to all nonviolent first-time offenders with a Criminal History Category I,” and that permitting district judges to impose a sentence below the mandatory minimum for nonviolent offenses if the court finds that doing so is required under 18 U.S.C. § 3553(a) is an “idea worth considering.” This latter proposal would allow the sentencing court, according to Mr. Andrews, to consider the offense and offender characteristics while also “obligat[ing] the judge to articulate why the minimum mandatory sentence in [the] case violates § 3553(a).” Mr. Andrews also testified that his organization supports “unstacking” penalties under 18 U.S.C. § 924(c) “to permit the statute to operate as a true recidivist statute.” Stacking under § 924(c), he explained, “is an especially harsh result in those instances where the offender merely ‘carries’ but does not brandish or otherwise ‘use’ the firearm to accomplish the crime – in other words, nonviolent offenders.”

With respect to changing mandatory minimum sentences themselves, Mr. Andrews testified against “the sweeping elimination of mandatory minimum penalties in all cases.” Rather, he explained, “[w]e believe that repeat offenders and hardened criminals who fail to learn from sentences and who are true recidivists should receive harsher sentences.” Similarly, “and most importantly, we believe that some crimes are so serious and pose such a pervasive threat to the nascent citizenry that a tough mandatory minimum sentence is entirely appropriate.” Mr. Andrews specifically cited treason and terrorism as examples of offenses that are sufficiently serious to warrant a mandatory penalty.

David B. Mulhausen

The Heritage Foundation, Senior Policy Analyst

Dr. Mulhausen testified, first, that Congress and the Commission “need to place a special emphasis on just deserts and proportionality when considering the use of mandatory minimum statutes.” Specifically, he explained that the moral gravity of the offense should be used to determine the proportionality of punishment, with less emphasis on the utilitarian goal of lowering crime through deterrence and incapacitation. Under this approach, mandatory minimum penalties “should be justified based on the nature of the crime,” and he explained that factors such as the inherent wrongfulness, depravity of the crime, harmfulness to the victim, and

dangers to society “should serve as a guide in setting mandatory minimum sentence lengths.” Dr. Mulhausen asserted that offenses such as forcible rape and premeditated murder should carry mandatory minimum penalties, but that mandatory minimum sentences are “largely incompatible with crimes where the relative severity of the particular acts, and the relative culpability of the individual offenders are difficult to assess.”

Dr. Mulhausen further testified that mandatory minimum sentences are “generally incompatible with the operation of the Sentencing Guidelines,” which have, as one of their core purposes, the creation of a sentencing system characterized by finely calibrated, proportionate sentences. Because of the inability to deviate from mandatory minimum sentences and sentencing cliff effects, mandatory minimum sentences frustrate the guidelines’ goal of proportionate sentences that reflect the relative culpability of offenders.

Mr. Muhlhausen advocated that the Commission and Congress work in concert to ensure that mandatory sentences be imposed only when they reflect the public perception of the offender’s “just deserts.” In keeping with this objective, Mr. Muhlhausen recommended that the Commission conduct a study to determine whether the public’s understanding of just sentencing comports with the sentences actually imposed under the guidelines and specific mandatory minimum statutes.

Professor Eric Luna
Cato Institute, Adjunct Scholar
Washington and Lee University School of Law

Professor Luna testified that he opposes mandatory minimum sentencing for multiple reasons. He asserted that mandatory minimum sentences do not fulfill goals of retribution because they render “case-specific information about the offense and the offender irrelevant” and are therefore “indifferent to proportionality concerns.” He also testified that mandatory minimum sentences fail to deter crime because potential offenders do not know what punishment might result from their offense and, in any event, are not rational actors with a clear idea about their likelihood of being caught. Similarly, according to Professor Luna, mandatory minimum sentences do not effectively incapacitate offenders because they are overly long and incarcerate defendants past the point when they would “typically age out of the criminal lifestyle,” and affect offenders who can be replaced within the criminal organization.

Professor Luna also described what he called a “trial tax” that mandatory minimum sentences place on defendants who proceed to trial: “the tax being the mandatory minimum sentence” that would not have been imposed had the defendant provided information to the government and pleaded guilty. Relatedly, as Professor Luna stated, “the mechanical nature of mandatory minimums can entangle all criminal justice actors in an oxymoronic process where facts are bargainable, from the amount of drugs to the existence of a gun.” These problems “tend to generate different punishments among otherwise similarly situated offenders.”

Professor Luna identified that transfer of discretion inherent in mandatory minimum sentencing from trial judges to prosecutors as the “source” of this problem. He described this shift in power

as both misguided and an infringement on the separation of powers.

Professor Luna asserted that mandatory minimum sentences also implicate federalism concerns because they “represent a federal encroachment on state prerogatives and the implementation of policies that appear to conflict with local choice.” He also explained that mandatory minimum sentences can “overwhelm” pluralistic decisionmaking and local choice on criminal justice issues, “effectively and powerfully nullifying state and local judgments.” Professor Luna conveyed his concern “that law enforcement considers vast sentencing differentials between state and federal systems as some type of unmitigated good, essentially treating the states as the junior varsity.”

Mr. Luna concluded by recommending that federal lawmakers “eliminate mandatory minimums in one-fell swoop.” As an alternative, he advocated that Congress give the Commission authority to de-link mandatory minimum sentences from the guideline ranges and for the creation of broader “safety valve” provisions to afford judges the discretion to avoid mandatory minimums in a wider spectrum of cases. He also described other potential changes “that could build upon a successful minimalist reform,” such as the elimination of “stacking” for purposes of 18 U.S.C. § 924(c) and a “limited revival of the U.S. Parole Commission to review sentences for inmates serving extremely long prison terms.”

VI. Advocacy Groups

The Sentencing Project

Marc Mauer, Executive Director

Mr. Mauer first testified that “there is virtually no data” that demonstrates a direct link between mandatory penalties and declining crime rates. He further stated that there is a “broad range of evidence which suggests that it is unlikely that mandatory penalties for drug offenses have a significant impact on enhancing public safety.” Mr. Mauer attributed this inefficacy to a number of factors, including: that deterrence is a function of the certainty, not the severity, of punishment and mandatory minimums make apprehension and punishment no more certain; that mandatory minimums in the drug context primarily affect low and mid-level offenders who are replaceable within the drug trade; that mandatory minimums adversely affect recidivism because of the long sentences they require; and the lengthier prison terms required by mandatory minimums increase the challenges for successful offender reentry.

Mr. Mauer also explained that mandatory minimum sentences “serve to exacerbate racial disparities within the criminal justice system.” He cited multiple reasons for this result. First, Mr. Mauer testified that mandatory minimums in the federal system most often apply to drug offenses, and “the drug war has had extremely disproportionate effects on African American communities.” Second, according to Mr. Mauer, many mandatory minimum penalties “provide increasingly harsh punishments to offenders based on prior convictions” and “defendants of color are more likely to have a prior record than . . . white defendants.” These lengthier criminal histories also make it less likely that the offender will benefit from safety valve provisions.

In conclusion, Mr. Mauer noted the broad consensus that mandatory sentencing policies “are counterproductive to a fair and effective system of justice” and argued that “[e]liminating mandatory sentencing from the federal court system would represent a significant step toward developing a more rational and fair system of sentencing.”

Families Against Mandatory Minimums

Julie Stewart, President

Ms. Stewart testified that Congress never would have enacted the “safety valve” but for the Commission’s 1991 mandatory minimum report. She expressed her hope that the Commission’s impending report on mandatory minimum sentences “will be as bold and uncompromising” as the 1991 report. She characterized the Commission as having “the bully pulpit” and urged the Commission to express the view that mandatory minimum sentences are just as wrong now under an advisory guidelines system as they were before *Booker*.

Ms. Stewart spoke about several cases to illustrate her content that mandatory minimums produce sentences that undermine respect for the law. In each of these cases, according to Ms. Stewart, the sentencing judges felt obliged to speak against the unjust sentences they were forced to impose. She explained, “Mandatory minimums do not simply result in sentences that are too long. They don’t just wreak havoc on individuals and their families. They destroy faith in the criminal justice system, one sentencing hearing at a time.”

She took issue with the argument that mandatory minimum sentences are necessary under an advisory guidelines system to ensure uniformity of sentences. Ms. Stewart argued that mandatory minimum sentences actually undermine the congressional goal “that sentences should be sufficient but not greater than necessary to ensure the purposes of sentencing” because they too often produce similar sentences for offenders whose relative culpability is starkly different. She concluded her testimony by urging the Commission to recommend that Congress enact a broader safety valve statute and to recognize that variance sentences are not necessarily examples of “wayward judging,” but often constitute a “healthy rejection” of unwarranted uniformity.

American Civil Liberties Union (the “ACLU”)

Jay Rorty, Director, ACLU Drug Law Reform Project

Mr. Rorty testified that the “flaws with mandatory minimums are well-known and well-documented,” and “[i]t is unsurprising, therefore, that a majority of Americans oppose mandatory minimums.” He also explained that mandatory minimum sentences are antithetical to the emphasis on judicial discretion in sentencing expressed in *Booker* and subsequent cases. “Today, in the wake of *Booker*, mandatory minimums are the chief obstacle to a system in which judges can craft rational, individualized sentences that balance public safety with rehabilitation.”

Mr. Rorty expressed the ACLU’s position that the Commission should recommend in its report that Congress abolish all federal mandatory minimum sentences. Recognizing that “Congress may not yet be prepared to abolish all federal mandatory minimums,” he proposed several steps

short of abolition that “Congress and the Commission could take to ameliorate the injustices caused by mandatory minimums.”

He testified, first, that short of repealing mandatory minimum sentences “the best way to fix” them is to lower the sentences. Mr. Rorty proposed that all five-year mandatory penalties could become one year, ten years could become two, and 20 years can become five. He also proposed eliminating stacking under 18 U.S.C. § 924(c) and, either in addition or alternatively to lower sentences, eliminating mandatory minimums for drug offenses. Second, he advocated for the expansion of the “safety valve” by broadening the eligibility criteria, including the types of offenses to which it applies, and the amount of “automatic reduction awarded to those who qualify.” This reform, he explained, “would increase judicial flexibility and fairness by contracting the universe of cases to which mandatory minimums would apply.” Fourth, he argued that both Congress and the Commission could move away from the importance of drug quantities in trigger mandatory minimum sentences and setting the offense level under the guidelines. Instead, according to Mr. Rorty, “[d]rug sentences should be more closely tied to individuals’ roles and the harms they cause.” Finally, he urged the Commission to “eliminate the ripple effects of mandatory minimums throughout the guideline system by abandoning offense levels that are calibrated to mandatory minimums.”

In closing, he asked the Commission to recommend that Congress “eliminate mandatory minimum sentences entirely” and, short of such a result, “recommend a series of corrective measures . . . that would produce substantial and positive change.”

The Constitution Project

Thomas W. Hillier

Mr. Hillier testified that his organization formed an ideologically diverse group to study the effect of mandatory minimum sentences. That group came to a consensus that “mandatory minimum sentences are generally incompatible with the operation of a guideline system” and that they should be available only in extraordinary circumstances.

He explained that, in addition to the concerns expressed by others, “the role mandatory minimum statutes play in inappropriately skewing the balance of power in the sentencing system offers the most compelling reason to forcefully recommend their repeal.” Mr. Hillier stated that although *Booker* and subsequent cases “had the desirable effect of lessening the degree of power government attorneys wield in the sentencing process,” the application of mandatory minimums “continues to contribute to sentencing injustices in every district court in the country.”

Mr. Hillier asserted that mandatory minimum sentences erode confidence in the criminal justice system and obstruct the Sentencing Commission’s goals. “When a courtroom observer hears a judge say that the sentence imposed is unfair, they wonder why. Their confidence in the impartiality of judges and the integrity of our system is necessarily undercut.” He argued that the Commission can improve public confidence in judges by “persuading Congress to repeal mandatory minimum statutes except in the most extraordinary circumstances.” Mr. Hillier further asserted that mandatory minimum sentences “risk . . . public safety because people who

know they have been treated unfairly are more likely to leave prison angry, increasing the possibility of recidivism.”

Mr. Hillier further explained that mandatory minimum sentences unjustly affect charging decisions and plea negotiations. He argued that the “institutional imbalance” created by mandatory minimum sentences “threatens the truth-seeking function of the criminal justice system” because they “create a powerful incentive for informants and cooperators to provide exaggerated or false information” that is “not subjected to the crucible of trial.” And, according to Mr. Hillier, when defendants “don’t capitulate” and proceed to trial, “they may suffer horrific penalties.” He asked the Commission to “recognize such injustices in reporting to Congress on the desirability of maintaining mandatory minimum penalty statutes.”

METHODOLOGY FOR OFFENDER FUNCTION CODING

A. Offender Function Definitions

Table H-1 provides definitions for all 21 offender function categories used for the offender coding project discussed in Chapter 8. Each offender was assigned to one of the 21 categories in the table based on the most *serious* conduct described in the offense conduct section of the Presentence Report. The assignment of offender function category is solely based on the description of the offender’s conduct, not on court findings or guideline criteria for role in the offense. Terms used to describe offender function do not necessarily correlate with guideline definitions of similar terms. For example, the definition of manager/supervisor used to assign offender function does not match the guideline definition of manager or supervisor in USSG §3B1.1. The categories are listed in descending order of culpability, importer/high-level supplier is considered the most serious offender function, and user is considered the least serious offender function.

**Table H-1
Offender Function Categories**

Function	Definition
Importer/high-level supplier	Imports or otherwise supplies large quantities of drugs, is near the top of the distribution chain, has ownership interest in drugs (not merely transporting drugs for another individual), usually supplies drugs to other drug distributors and does not deal in retail amounts; may employ no, or very few subordinates.
Organizer/leader	Organizes, leads, directs, or otherwise runs a drug distribution organization, has the largest share of the profits and the most decision making authority.
Grower/manufacturer	Grows, cultivates, or manufactures a controlled substance, and is the principal owner of the drugs.
Financier/money launderer	Provides money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs; launders proceeds of drug sales or purchases.
Aircraft pilot/vessel captain	Pilots aircraft or other vessel, requires special skill; does not include offenders who are sole participants directing a small boat (<i>e.g.</i> , a go-fast boat) onto which drugs have been loaded from a “mother ship” (<i>See</i> courier/mule below).
Wholesaler	Sells one ounce or more in a single transaction, sells any amount to another dealer, buys two ounces in a single transaction, possesses two ounces or more.

Table H-1
Offender Function Categories

Function	Definition
Manager	Serves as a lieutenant to assist one of the above functions; manages all or a significant portion of a drug manufacturing, importation, or distribution operation; takes instructions from one of the above functions and conveys to subordinates; supervises directly at least one other co-participant in an organization of at least five co-participants.
Bodyguard/strongman/debt collector	Provides physical and personal security for another co-participant in the offense; collects debts owed, or punishes recalcitrant persons.
Chemist/cook/chemical supplier	Produces LSD, methamphetamine, crack, or other drugs, but is not the principal owner of the drugs and therefore does not qualify as a grower/manufacturer. Chemical suppliers do not handle the drugs, but engage in the unlawful diversion, sale, or furnishing of listed chemicals or equipment used in the synthesis or manufacturing of controlled substances.
Supervisor	Supervises at least one other co-participant but has limited authority and does not qualify as a manager.
Street-level dealer	Distributes retail quantities directly to the drug user. Sells less than one ounce in a single transaction.
Broker/steerer/go-between	Arranges for two parties to buy or sell drugs, or directs potential buyers to potential sellers.
Courier	Transports or carries drugs with the assistance of a vehicle or other equipment. Includes offenders, otherwise considered to be crew members, who are the sole participants directing a vessel (<i>e.g.</i> , a go-fast boat) onto which drugs have been loaded from a “mother ship.”
Mule	Transports or carries drugs internally or on his/her person, often by airplane or crossing the border. Includes offenders who only transport or carry drugs in baggage, souvenirs, clothing, or otherwise.
Renter/storer	Provides, for profit or other compensation, a personal residence, structure (barn, building, storage facility), land, or equipment for use in the drug offense. Distinguished from enablers due to compensation received for services.
Money runner	Transports or carries money and/or drugs to and from the street-level dealer.
Off-loader/loader	Performs the physical labor required to put large quantities of drugs into storage, hiding, or onto a mode of transportation.

Table H-1
Offender Function Categories

Function	Definition
Gopher/lookout/deckhand/worker/employee	Performs very limited, low-level function in the offense (one time, or ongoing); including running errands, answering the telephone, receiving packages, packaging drugs, manual labor, acting as a lookout during meetings, exchanges, or off-loading, or acting as a deckhand/crew member on a vessel or aircraft used to transport large quantities of drugs.
Enabler	Plays only a passive role in the offense, knowingly permitting certain unlawful activity to occur without affirmatively acting in any way to further the activity, may be coerced or unduly influenced to participate (<i>e.g.</i> , a parent or grandparent threatened with displacement from home unless they permit the activity to take place), or may do so as a favor without compensation.
User	Possesses a small quantity of drugs apparently for personal use only, performs no apparent function that furthers the overall drug trafficking offense.
Other	Offender does not clearly fit into any of the above function categories.
Missing/indeterminable	Not enough information provided to determine the offender's function.

Appendix I

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**SUMMARIES OF THE ORAL AND WRITTEN REMARKS OF THE WITNESSES
UNITED STATES SENTENCING COMMISSION
SENTENCING REFORM ACT 25th ANNIVERSARY REGIONAL HEARINGS**

**PUBLIC HEARING – MONDAY AND TUESDAY, FEBRUARY 9–10, 2009
9:00 a.m. – 4:45 p.m.
ATLANTA, GA**

I. APPELLATE BENCH

**Fourth Circuit Court of Appeals
*The Honorable Dennis W. Shedd, Circuit Judge***

Judge Shedd suggested that this is a time of “tremendous opportunity” in sentencing and stated that the Commission has two options. The first is that the Commission could continue working within the guideline system as if nothing has changed post-*Booker*. The second option is that the Commission could “really make [the guidelines] usable in today’s sentencing, by “encourag[ing] alternate sentencing,” and “maybe the Commission could consider encouraging mandatory minimums, because that may be one of the only ways there is some kind of uniformity in sentencing on some accounts.” (TR 20). Judge Shedd further stated “I do understand how people saw mandatory minimums as a problem for the guideline sentencing scheme as it existed pre-*Booker*. I’m not sure it’s a problem now. I think it may be one way to get to some uniform sentencing in some dire cases” and “maybe the world has flipped on mandatory minimums” (TR 27). He suggests that post-*Booker*, the center of sentencing is uniformity, and one way to get to uniformity in sentencing in some cases would be through the encouragement of mandatory minimums (TR 28).

**Eleventh Circuit Court of Appeals
*The Honorable Gerald B. Tjoflat, Circuit Judge***

Judge Tjoflat believed that the Commission should provide an explanation of the purpose behind each guideline (TR 14–5). He stated, “Congress has always set norms with mandatory minimums, but the fact that Congress has set those norms, they are just arbitrary. They are not based on anything empirical. But the Commission has access to a lot of empirical information” (TR 24). He further stated “the Commission ought to tell judges, ought to tell the world when they set the norm, here is why we are setting the norm and tie the setting to one of the sentencing factors in 3553(a)” (TR 24). By doing so, judges would have a better idea as to why the particular punishment is required, for example, because of the predominance of the offense or the need for deterrence. Judge Tjoflat indicated that “just having a number, it is a norm but it does not explain the underpinning of the norm” (TR 24). He further stated that the reasoning behind guidelines that are based on mandatory minimums should be provided (TR 26–7). He stated that while statutory minimums and maximums are “arbitrary” and without “empirical

justification,” an explanation as to what purposes an offense level based on a mandatory minimum serves, “would be better than just a flat line” (TR 26–7)

Judge Tjoflat also expressed concern over departure practice under §5K1.1, especially in drug cases, since low level drug defendants “don’t have anything to sell” (TR 15). He also indicated that “one of the problems with mandatory minimums is the prosecutor becomes the sentencer in many cases” (TR 29).

II. DISTRICT COURT BENCH

Western District of North Carolina

The Honorable Robert J. Conrad, Jr., Chief United States District Judge

Chief Judge Conrad stated that the goals of uniformity and proportionality are often in tension, and the achievement of them has been complicated largely by the obligation to impose mandatory minimums sentences in certain cases (WT 3).

Chief Judge Conrad stated that “the guidelines themselves are marred by the obligation to impose mandatory minimum sentences” (TR 129). He noted that “typically guideline ranges increase proportionally with factors in criminal history,” however, “guideline ranges influenced by statutory mandatory minimums . . . contain large jumps in sentence lengths or cliffs based on small differences in offense conduct or a defendant’s criminal record” (WT 4, TR 129). He indicated that he was once forced to impose a mandatory life sentence on a low-level drug conspirator whose role “was essentially that of a chauffeur” (WT 4, TR 129). Chief Judge Conrad also expressed concern with connecting drug guidelines to mandatory minimums, stating “understandably, mandatory minimums are created by the Congress, not the Sentencing Commission. Nonetheless, the Commission’s decision to depart from empirical data to cluster Guideline ranges around the statutory minimums makes them less reliable as a sentencing guide. Ultimately, the goal of uniformity must yield to the imperative of doing justice in individual cases” (WT 4, TR 130).

Chief Judge Conrad’s criticism of mandatory minimums are that “they focus on one or two specific things to the exclusion of other very relevant things” such as drug quantity and prior conviction. Further, the “application of mandatory minimums to the extent it takes away total discretion of the district court” has the tendency, he stated, to lead to an unjust result (TR 151).

In the era of advisory guidelines, Chief Judge Conrad stated that courts are looking to the guideline ranges for persuasive information on how to sentence, and give the empirically-based ranges more credibility. Therefore, “maybe in an era of an advisory guideline system the emphasis should be more on the empirically driven range than the mandatory minimum driven []” (TR 156). Chief Judge Conrad encouraged the Commission to continue to do research and publicize the results with respect to mandatory minimums and disparate impact (TR 160).

Middle District of Florida***The Honorable Gregory A. Presnell, United States District Judge***

Judge Presnell recognized that the crack guideline is “driven by the mandatory minimums” but questioned the “wisdom of promoting guidelines that follow that bad policy and which cause district judges to either impose what they view to be unjust sentences or to comply with the guideline which they know produces an unjust sentence” (TR 133-34).

Judge Presnell stated that mandatory minimums are a problem for the court and for the Commission in doing what it does in trying to structure sentencing ranges. He believes that mandatory minimums are inherently arbitrary but “may be necessary” (TR 152).

Southern District of Georgia***The Honorable William T. Moore, Jr., Chief United States District Judge***

Chief Judge Moore stated that there is a view among some judges that the statutory penalties should be increased, including the enactment of mandatory minimums, for cases involving repeat theft and fraud cases (WT 3). Chief Judge Moore stated that his district has sentenced several fraud defendants where the guidelines “did not adequately address the harm caused by their actions, the seriousness of their criminal histories, or the likelihood that they would continue in such criminal acts” (*Id.*).

Chief Judge Moore stated that he personally does not favor more mandatory minimum sentences (TR 141). In his opinion, the Commission can devise a better way to deal with the perceived problem than the creation of mandatory minimum sentences. (TR 141).

Northern District of Florida***The Honorable Robert L. Hinkle, Chief United States District Judge***

Chief Judge Hinkle stated that he perceives a great deal of disparity in sentencing that goes unmeasured because of practices that vary from district to district. He cited as examples differences in the application of §1B1.8, relating to protection of information disclosed by the defendant while cooperating with the government, differences in the application of the concept of relevant conduct which results in increased or decreased drug weights and the decision as to whether to file a notice of prior conviction under 21 U.S.C. § 851 and seek a mandatory minimum sentence (WT. 2–3). He suggested, however, “that too much attention is given to the issue of disparity. What we should be talking about is not how to reduce disparity but how to improve the quality, the justice, and wisdom of a given sentence” (WT. 3).

Chief Judge Hinkle expressed concern over the Commission’s implementation of at least some congressional policy decisions (WT 4). He stated “Congress adopted minimum mandatory sentences for some drug offenses, and the Commission extrapolated them much more broadly into the guidelines. Congress adopted a career offender provision, and the Commission, with the help of the circuit courts, gave the statute a broad application” (WT 4–5). He advised the Commission “to implement Congress’s decisions, as [it] of course must, but not to expand them, unless in [its] independent judgment [it] conclude[s] that an expansion is appropriate. If [it]

could persuade Congress not to amend the guidelines directly, but instead to let [its] process – including public comments – play out, it would be that much better” (WT 5).

With respect to proportionality concerns, Judge Hinkle stated “I know there are problems with cliffs. Better to have a cliff than to have everybody get an inappropriate sentence” (TR 155).

III. PRACTITIONERS

Federal Public and Community Defenders

Alan Dubois, Senior Appellate Attorney, Eastern District of North Carolina

Nicole Kaplan, Staff Attorney, Northern District of Georgia

Mr. Dubois stated that the Judicial Conference has taken the position to urge the Commission to assess and adjust the guidelines based on principles of parity, proportionality and parsimony, independent of any potentially applicable mandatory minimums. Mr. Dubois stated that the Judicial Conference wrote “[m]andatory minimums interfere with the operation of the Sentencing Reform Act,” and “may, in fact, create unwarranted sentencing disparity.” Thus, in its view, guidelines that are based on mandatory minimums provide no helpful advice in cases in which a mandatory minimum does not apply, and the Commission is therefore “obligated to make an independent assessment of what the appropriate sentence should be” (WT 9).

Mr. Dubois and Ms. Kaplan requested the Commission to recommend that Congress abolish mandatory minimums (WT 22). They stated that in its 1991 Report, “the Commission led the way in showing that mandatory minimums result in unduly severe sentences, transfer sentencing power directly from judges to prosecutors, and result in unwarranted disparity and unwarranted uniformity.” They maintain that since then “only more evidence demonstrating that mandatory minimum statutes require sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense and racially discriminatory, has accumulated” (WT 21). They asked the Commission to “prepare an updated report on mandatory minimums and recommend to Congress that they be abolished” (WT 22).

Mr. Dubois and Ms. Kaplan stated that the “drug guidelines are too severe, and should be amended to reflect empirical data and national experience. If the Commission still feels bound by the mandatory minimums, it can at least reduce all of the drug guidelines by two levels. In promulgating the two-level reduction to the crack guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels . . . This is true of all of the drug guidelines, and should be addressed” (Kaplan WT 26).

Mr. Dubois suggested that the Commission establish drug penalties consistent with its research and expertise rather than tying them into mandatory minimums. He believes that in this way the Commission can have a dialogue with Congress (TR 82).

Ms. Kaplan stated that there is a confluence of mandatory minimums and strict compliance minimums and restrictive \$5K policy in some districts, which she suggested means in a great

majority of the cases there is nothing left for the judge to do “but tote up the mandatory minimum and sentence” (TR 102).

Practitioners Advisory Group

Lyle J. Yurko, North Carolina

Mr. Yurko voiced opposition to mandatory minimum sentences. He stated that “statutory mandatory minimums, co-existent with the guidelines, are flawed because mandatory [minimums] usually rely on a single factor to achieve punishment while the guidelines are multifaceted and rationally based” (WT 5, TR 74). Mr. Yurko believes that grounding guideline punishments in mandatory minimums “results in both under punishment and over punishment of drug offenders” and a better system would factor in both aggravating and mitigating circumstances rather than only two factors which are accounted for in mandatory minimums, *viz.*, drug quantity and criminal history (WT 5, TR 75). He recommended that the Commission advocate the elimination of mandatory minimums “after a carefully designed restructuring of the drug guidelines is effectuated,” demonstrating to Congress that the alternative that would be in place if they abolished the mandatory minimums, so as to make abolition more politically practicable (WT 6, TR 75).

Weil Law Firm

Amy Levin Weil

Ms. Weil stated that defense attorneys believe mandatory sentences are unfair, and it is becoming more unfair with the advisory guideline system. In her opinion, under a mandatory system of the guidelines, with the sentences that were imposed, any cliff between the mandatory sentence and the guideline sentence was less of a cliff because the Commission had taken into consideration what the statutory sentence was going to be and had tried to alleviate the disparity. However, with this new advisory system, sentences can be based on “virtually almost anything, that exacerbates or enhances those cliffs.” Ms. Weil thinks that the Commission could present to Congress the fact that those cliffs have gone a long way toward giving a sense of unfairness in sentencing (TR 106).

IV. PROBATION OFFICE

Thomas W. Bishop

Chief U.S. Probation Officer, Northern District of Georgia

Mr. Bishop noted that some in his office believe that penalties involving cocaine and crack should be lowered and a recommendation should be made to Congress to consider reducing the drug mandatory minimums (TR 54, WT 1).

V. LAW ENFORCEMENT

Miami Police Department

Chief John Timoney, President, Police Executive Research Forum

Chief Timoney stated that he does not think that the high mandatory penalties for federal drug crimes, armed career criminal offenses, or firearm offenses is the operable deterrent for offenders, but rather the certainty of the sentence in the federal system (TR 123).

VI. ACADEMIA

Wake Forest School of Law

Ronald Wright, Executive Dean for Academic Affairs, Professor of Law

Dean Wright stated that although it is not realistic to think the Commission can suggest to Congress that it abolish mandatory minimum sentences, in his view, the information that the Commission provides Congress on mandatory minimums enables judges and prosecutors to “do a better job of improving the system within the current rules” and he believes the Commission can act with these other parties to “bring that forward through [its] portrayals” (TR 183).

North Carolina State University

Rodney L. Engen, Ph.D., Associate Professor of Sociology

Dr. Engen questioned the role that prosecutors play in the sentencing process, the control they exercise over the process and the disparity that results from too great a prosecutorial role (WT 4-7). Specifically, he noted the disparity between districts and between AUSAs in deciding whether to charge mandatory minimums.

Dr. Engen also expressed strong opposition to mandatory minimum sentences. He stated that mandatory minimum sentences result in especially harsh punishment to some offenders while others will escape mandatory sentences by pleading to a lesser charge (WT 9). Dr. Engen believes that application of mandatory sentences is “controlled entirely by U.S. Attorneys whose decisions are not reviewable” and “run counter to the very principle” of guideline sentencing (WT 9). Dr. Engen recalled the results of the Commission’s 1991 report that found only 25 percent of those cases eligible for drug and firearm mandatory minimum sentences were convicted of crimes that did not carry the mandatory sentence, and that “prosecutors granted substantial assistance departures in a third of those cases where they did apply the mandatory minimums, negating the mandatory sentence.” In his view, these statistics give “some sense of the frequency with which [the U.S. Attorneys] exercise” discretion (WT 5, TR 175). He “urge[s] the Commission to encourage Congress to repeal mandatory minimum sentencing statutes in favor of the guidelines provided in the SRA” (WT 9, TR 172). Dr. Engen further revealed that a study by the General Accounting Office estimated that from one-third to half of those offenders eligible for mandatory minimums in the courts avoided them (TR 175).

Dr. Engen cited Michael Tonry, a former President of the American Society of Criminology:

Evaluated in terms of their stated substantive objectives, mandatory penalties do not work. The record is clear from research in the 1950s, the 1970s, the 1980s, and the 1990s that mandatory penalty laws shift power from judges to prosecutors, meet with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh. (1996; p. 135 at WT 9)

VII. COMMUNITY INTEREST GROUPS

Families Against Mandatory Minimums

Monica Pratt Raffanel, Communications Director

Ms. Raffanel testified in an effort to “convey the human face of the sentences imposed by mandatory minimums and the guidelines” (TR 190). She discussed the difficulties encountered by incarcerated individuals and their families and related the stories of two individuals who received lengthy mandatory minimum sentences in drug cases, which, in her view, seemed disproportionate in relation to their conduct (WT 3–5, TR 191–94). Ms. Pratt described the impact of these sentences on the defendants and their families (*Id.*). She made three specific recommendations to the Commission. First, Ms. Raffanel recommended that the Commission recommend to Congress to end mandatory minimums (WT 7–8, 195–196). Ms. Raffanel argued that mandatory minimums often result in unduly long sentences and are a “chief contributor to the undue length of many guideline sentences indexed to them” and they “utterly undermine the mandate of individualized consideration, proportionality and parsimony in 18 U.S.C. § 3553(a)” (WT 8). Ms. Raffanel requested that the Commission update its report on mandatory minimums, stating that it is “still a resource that everyone from advocates like FAMM and other sentencing practitioners refer to on a regular basis.” Second, Ms. Raffanel asked the Commission to extend the two-level reduction for crack offenses to all guidelines anchored in mandatory minimums. And third, Ms. Raffanel asked that the Commission “review the guidelines with an eye to lowering those sentencing ranges that have generated continued concern with their undue length and severity of punishment in certain cases” (WT 8, TR 195–196).

PUBLIC HEARING – THURSDAY AND FRIDAY, MAY 27–28, 2009
8:00 a.m. – 4:45 p.m.
STANFORD, CA

I. APPELLATE BENCH

Ninth Circuit Court of Appeals

The Honorable Richard C. Tallman, United States Circuit Judge

Judge Tallman stated that the court’s ability to vary based upon the crack/powder ratio under *Kimbrough* and *Spears* has led to further appeals as to whether the court abused its discretion by not varying or whether it understood it had the discretion to vary on that basis. Inmates are raising *Kimbrough* issues and Amendment 706 claims where they are not entitled to relief, *i.e.*, career offender and statutory minimums. Another question is “whether a sentence-modification proceeding under 18 U.S.C. § 3582(c)(2) is an appeal pursuant to Section 3742, a collateral attack, or something else entirely.” He stated that the U.S. Attorney’s Office in the Central District of California is permitting agreements to downward variances in crack cases (TR 28-30).

II. DISTRICT COURT BENCH

Western District of Washington

The Honorable Robert S. Lasnik, United States District Judge

In the context of discussing the need for the inclusion of more sentencing alternatives (treatment, diversion, drug courts) in the guidelines, Judge Lasnik stated that “the politicization of crime as an issue” “led to mandatory minimum terms, tougher drug sentencing, tougher sex offender sentencing, et cetera . . .” In this regard, he further opined that “we have a much fairer system with a guideline approach where [the politicization] is somewhat moderated than we would have had we retained the prior system and had mandatory minimum terms one after another imposed by Congress because they were so unhappy or so unaware of what the federal judges were really doing” (TR 93-94).

District of Hawaii

The Honorable Susan Oki Mollway, United States District Judge

Judge Mollway argued mandatory minimums are frequently unreasonable and urged the Commission to work for their elimination, noting mandatory minimums are contrary to the dictates of section 3553(a) (TR 98). She also commended the Commission for its work on the crack/powder disparity and hoped that a 1:1 ratio would be adopted soon (WT 2-3, TR 98). She believes the guideline sentences in child pornography cases under §2G2.2 are too high and in fraud cases are too low because fraud “comes in a greater variety of forms than some of the other crimes do” (WT 3, TR 99). Judge Mollway also asked for clarification of the phrase “referenced to in this guideline” found in §2B1.1: asking whether “reference” includes a listing in Appendix A, and (2) if there are two counts of conviction with only one with a statutory maximum of 20

years or more, whether the base offense level for the second offense is also seven (WT 3, TR 102).

Northern District of California

The Honorable Vaughn R. Walker, Chief United States District Judge

Judge Walker strongly urged the Commission to reevaluate the drug guidelines, stating that drug quantity is not a good indicator of culpability (TR 11-17). Noting that statutory minimums create sentencing cliffs, he stated “the Commission should not aggravate the problematic character of these minimums by conforming sentences not subject to statutory minimums to these same features” (TR 17). He claimed the drug quantity table, with offense levels tied to quantity, is little more than “rank pseudo-social science” (TR 19-21). “What drug quantity should be is simply one of numerous other factors that would be considered in determining the seriousness of the offense and the threat to society, which the offense represents” (TR 25). In regard to mandatory minimums, he noted “I’m not suggesting for a moment that we can do away with the minimums or with the congressional limitations that they place upon us, but that doesn’t mean that we should march lemming-like into the sea where we are convinced that Congress’ determinations are not appropriate” (TR 30). He also stated “the minimum mandatory sentences of course are troubling for all of us in many cases because they don’t necessarily adequately reflect the tremendous variations in the particular facts and circumstances of the case” (TR 42).

District of Idaho

The Honorable B. Lynn Winmill, United States District Judge

Judge Winmill noted that one of his concerns relates to “the continued ability of the prosecutor to affect the application of the guidelines in ways that I think were not envisioned by either Congress or the Commission.” As an example, he noted concern regarding the prosecutor’s discretion to withhold the filing of a section 851 information to seek an enhancement in the mandatory minimums until very late in the game, such that they hold it over the defendant’s head (TR 73-74).

III. PRACTITIONERS

A. DEPARTMENT OF JUSTICE

District of Oregon

Karin J. Immergut, United States Attorney

Ms. Immergut asserted that the increased number of variances on grounds otherwise discouraged by the guidelines has led the government to charge more readily-provable offenses which carry a mandatory minimum and increase its reliance upon binding Rule 11(c)(1)(C) plea agreements (TR 234-35, 239-41, 262-65).

Eastern District of California

Lawrence G. Brown, Acting United States Attorney

Mr. Brown noted that in the Eastern District of California, the use of mandatory minimums and binding plea agreements have increased to prevent large variances by the courts, particularly when appearing before certain judges (TR 265-67). In particular, in the context of child pornography cases, he noted that as judges began to routinely impose below guideline sentences in these cases, the government began to “charge receipt, distribution, manufacturing charges if they are available so as to avail [itself] of a 60-month minimum mandatory sentence,” or to “seek (c)(1)(C) plea agreements on straight possession of child pornography cases” (TR 253).

B. FEDERAL PUBLIC DEFENDERS**Western District of Washington**

Thomas Hillier, Federal Public Defender

Central District of California

Davina Chen, Assistant Federal Public Defender

In Mr. Hillier’s and Ms. Chen’s opinion, the Commission should abandon its policy of mirroring mandatory minimums in the guidelines. Rather than creating proportionality, this policy magnifies the disproportionality of mandatory minimum penalties by spreading them across the board. Similarly, the Commission should not abdicate its independent expert role when responding to congressional directives. Mandatory minimums fail to track either the harms caused or the defendant’s culpability. In their opinion, drug quantity has proven to be a very poor proxy for offense seriousness, and linking the guidelines to the mandatory minimum levels has resulted in unwarranted disparity and excessive uniformity (WT 15-16, TR 306).

Additionally, they recommended that the Commission should issue an updated report on mandatory minimums, and urge their repeal. Current data indicates that prosecutorial control over mandatory minimums results in disparity, including racial disparity, which judges and the Commission are powerless to correct (WT 37-39).

IV. PROBATION OFFICE**District of Idaho**

Marilyn Grisham, Chief U.S. Probation Officer

Ms. Grisham requested that the Commission and Congress review mandatory minimums and the penalties for methamphetamine compared to marijuana, crack, and immigration offenses (TR 156-60). While Ms. Grisham would welcome alternative sentences, she noted the strain it would put on her small and widely dispersed staff (TR 157-59). In responding to questions regarding the extent of a variance the probation officer recommends, Ms. Grisham stated they were “not based on any empirical evidence. So we’re still using — still using the gut” (TR 211). Also, in response to questions from the Commissioners, Ms. Grisham noted that while she had not seen

an increase in the use of § 851 or § 924(c) enhancements, they are “a big bargaining tool” (TR 216).

District of Nevada

Christopher Hansen, Chief U.S. Probation Officer

Mr. Hansen suggested that the guidelines or statutes be amended to (1) allow departures based upon the history and characteristics of the defendant, as such “discouraged” factors may aid the assessment of risk/recidivism; (2) provide for a uniform reduction in all immigration cases to eliminate disparity with those districts with a fast track program; (3) increase the availability of probation to low risk, non-violent offenders; and (4) revise mandatory minimums for defendants convicted of non-violent offenses and who pose a low risk of recidivism (TR 166-173).

V. ACADEMIA

University of San Diego Law School

Kevin Cole, Dean

Dean Cole described the Commission’s decision to calibrate sentences for drug offenses involving smaller drug quantities to the penalties in the mandatory minimum statutes as defensible, but also as “infect[ing] the guidelines with the same malady that so many perceived in the mandatory minimum offenses themselves” (TR 122-123).

VI. COMMUNITY INTEREST GROUPS

Pioneer Human Services

Larry Fehr, Senior Vice President

Mr. Fehr urged the repeal of mandatory minimums or taking an intermediary step of expanding the criteria to qualify for “safety valve” reductions on all mandatory minimums to eliminate disproportionate and overly punitive impacts (TR 186-187).

American Civil Liberties Union

Caroline Fredrickson, Director

Ms. Fredrickson discussed the history of mandatory minimums and the Anti-Drug Abuse Act of 1986. Ms. Fredrickson presented arguments regarding the negative impact on African American communities and the racial disparities arising from mandatory minimums and the crack/powder cocaine ratio. She advocated that the Commission urge Congress to eliminate mandatory minimum sentences for all drug offenders (TR 219-229).

PUBLIC HEARING - THURSDAY AND FRIDAY, JULY 9–10, 2009
8:30 a.m. – 5:15 p.m.
NEW YORK, NY

I. APPELLATE BENCH

Second Circuit Court of Appeals

The Honorable Jon O. Newman, Senior Circuit Judge

Senior Judge Newman stated that he was one of a few federal judges who supported the Sentencing Reform Act, back in 1977 (WT 1). Senior Judge Newman believes the “Commission made a mistake years back in building its guideline table on top of the mandatory minimums” (TR 92). The “country needs [the Commission’s] judgment what the right sentence should be,” whether above or below the mandatory minimum (TR 93). In his opinion, if the Commission’s judgment of what the sentence should be comes out below the mandatory minimum, that will send a message that the mandatory minimum is too high (*Id*).

Third Circuit Court of Appeals

Honorable D. Michael Fisher, Circuit Judge

Judge Fisher believes that judges should have significant discretion and that mandatory minimums sentences “do nothing more than set down arbitrary guidelines that don’t fit the particular cases” (TR 67).

Fourth Circuit Court of Appeals

The Honorable Jeffrey R. Howard, Circuit Judge

Judge Howard recounted his history as a state and federal prosecutor and a judge and argued that mandatory minimums are unnecessary and too many times makes the case unjust. In his opinion, judges know what they are doing and he therefore does not support them (TR 46).

II. DISTRICT COURT BENCH

District of Maine

The Honorable John A. Woodcock, Jr., Chief United States District Judge

Chief Judge Woodcock believes the mandatory minimums are too high in child pornography cases and asked the Commission to work with Congress to review those penalties (TR 139-41). In his opinion, Congress has a constitutionally imposed responsibility to do what it thinks is in the best interest of the country in terms of mandatory minimums, and judges may wish they did not exist because when looking at individual defendants it seems they are not fair or just. However, he cautioned the Commission to avoid a confrontation with Congress over congressional authority. Instead, Judge Woodcock recommended the Commission open lines of communication with the appropriate congressional committee to avoid “the imposition of congressional mandates that [the Commission] know[s], because of [its] empirical determination,

are not in accordance with the best sentencing practices.” In that way, he suggested, the Commission might be able to deflect Congress from exercising its authority (TR 141).

Southern District of New York

The Honorable Denny Chin, United States District Judge

Judge Chin believes that “mandatory minimums sometimes result in unjust sentences, as they often require judges to ignore sentencing factors that usually are an important part of the mix” (WT 2, TR 129). However, Judge Chin stated that with the additional flexibility through the safety valve and the §5K1.1 departures, “a mandatory system isn’t so bad” (WT 2, TR 129).

Eastern District of New York

The Honorable Raymond Dearie, Chief United States District Judge

Chief Judge Dearie, recounting statistics, discussed the “culture of incarceration” and the need to rethink mandatory minimums and simplify the guidelines (TR 344-46). In Chief Judge Dearie’s opinion, the Commission’s decision to dovetail the guidelines to the mandatory minimums was a mistake because “no other decision has had such a profound impact on the federal prison population” (TR 345).

District of Puerto Rico

The Honorable Gustavo A. Gelpi, Jr., United States District Judge

Judge Gelpi stated that Congress needs to reexamine mandatory minimums, and the crack-powder cocaine disparity (TR 353-55). Judge Gelpi stated that the Commission should consider a recommendation to Congress for a review of mandatory minimums for minor participants (TR 353).

District of Massachusetts

The Honorable Nancy Gertner, United States District Judge

In Judge Gertner’s view, in this time of advisory guidelines, there are certain statutory provisions that are so rigorously applied that they create cliffs and unfair distinctions between similarly situated defendants. Thus, Judge Gertner recommends that Congress and the Commission should address the relationship between the safety valve and the mandatory minimums in 18 U.S.C. § 3553(f). She stated that either the statute should not refer to “criminal history I,” thereby keying the safety valve to the formal categories of the now advisory guidelines, or the guidelines should redefine criminal history I (WT 11).

Judge Gertner believes that Congress should repeal mandatory minimums and stated that if it does not, the Commission should change the tables so that a guideline sentence does not exacerbate the injustices of the mandatory minimum statutes (WT 12).

In response to questioning, Judge Gertner said she would be skeptical of a deal between Congress and the Commission that says no mandatory minimums in exchange for a broad-based,

mandatory guideline system, because she fears after twenty years of a culture of a mandatory guideline system, “judges are going to wind up going back to where we were.” Thus, she believes the Commission should instead focus only on mandatory minimums, without trying to bargain with mandatory guidelines (TR 383).

III. PRACTITIONERS

A. DEPARTMENT OF JUSTICE

Eastern District of New York

Benton J. Campbell, United States Attorney

Mr. Campbell reported that the Eastern District of New York has not modified its charging practices post-*Booker* and has not increased its use of mandatory minimums, enhanced sentences under 21 U.S.C. § 851, or binding plea agreements, but continues to base its decisions on the law and facts of the particular case (WT 10, TR 301).

Eastern District of Virginia

Dana J. Boente, United States Attorney

Citing examples of large variances by the court, Ms. Boente asserted that the Eastern District of Virginia is now prosecuting cases that qualify for mandatory minimums to avoid significant downward sentencing variances (WT 6, TR 311-14). Ms. Boente also stated that the district is also bringing more child pornography cases where it has proven receipt, rather than possession, because of the mandatory minimum five year sentence. In her estimation, the district has seen a tendency among judges to give reduced sentences in these cases because of the difficulty in providing evidence of contact offenses (WT 6).

B. FEDERAL PUBLIC DEFENDERS

Northern District of New York

Alexander Bunin, Federal Public Defender

Mr. Bunin stated that in most of the thousands of cases he was involved in, the defendants were sentenced under the guidelines and many were controlled by mandatory minimum punishments. During his 23 years of practice under the guidelines, and in different parts of the United States, Mr. Bunin concludes that “a prosecutor’s decision to charge a defendant in federal court, and what federal charges to bring, is vastly more determinative of the sentence than any other factor in the process” (WT 1). In his view, the threat of a mandatory minimum is used by prosecutors to coerce guilty pleas and dictate sentencing outcomes (WT 15). Mr. Bunin stated that the Commission could help eliminate disparity by recommending the elimination of mandatory minimum sentences. Mr. Bunin recommends that “to the extent that statutes, particularly mandatory minimum punishments, skew the system by encouraging and compounding charging disparity, the Commission should recommend to Congress that those statutes be eliminated” (WT 3).

Mr. Bunin further stated that virtually every judge before whom he has appeared “expressed dissatisfaction with mandatory minimum punishments, particularly in drug crimes.” In addition, he claimed that all the judges “appreciated the assistance of the guidelines and only felt unnecessarily constrained when some requirement, whether a mandatory minimum, a prohibition on departure, or a restrictive appellate interpretation, kept them from fairly and individually addressing the defendant before them...” (WT 3).

Mr. Bunin believes that calibrating the drug guidelines to mandatory minimums is contrary to the Commission’s basic responsibilities described in sections 991(b)(1)(A), (B) and (C) and section 994(g). He stated that this is not required by the general provision in section 994(a) that the promulgation of guidelines be “consistent with all pertinent provisions of any Federal statute,” because under §5G1.1(b), a mandatory minimum trumps a lower guideline (WT 12). He disfavors basing guidelines on mandatory minimums but recommends that if the Commission feels bound by mandatories, then all drug guidelines should be reduced by two levels (*Id.*). Mr. Bunin believes that the real check on prosecutors is to give the power back to the courts by getting rid of mandatory minimums and letting the judges use their discretion (TR 272).

Eastern District of Virginia

Michael S. Nachmanoff, Federal Public Defender

Mr. Nachmanoff stated his belief that the Commission can play a vital role in urging Congress to repeal mandatory minimums, and that the time is ripe given the interest of the administration in solving the crack/powder disparity. In his opinion, there is a statutory basis for the Commission to provide Congress its expert opinion on this topic, and the Commission has the responsibility and the capacity to be persuasive (TR 238).

Mr. Nachmanoff strongly opposes mandatory minimums, and stated: “mandatory minimums remain the most serious impediment to justice in federal sentencing and the main cause of over-incarceration.” He does not believe that judges cause unwarranted disparity but rather asserted that prosecutors use mandatory minimums in their sole discretion to control sentencing outcomes (WT 2). Mr. Nachmanoff believes discussing mandatory minimums is important because it “helps to explain where much of the problem lies in our system, and it helps identify where it does not lie. We do not believe the problem lies with increased judicial discretion. To the contrary, we believe that the system has improved as a result of greater discretion.” Instead, he believes the area of focus in looking at the differences in the way people are sentenced is to look at mandatory minimums and decisions by the Department of Justice as to how they charge (TR 230). He urges the Commission to report to Congress “and recommend that it repeal mandatory minimums” (WT 4). Mr. Nachmanoff made the following specific criticisms of mandatory minimums:

“Mandatory minimums are unnecessarily harsh and are the primary cause of over-incarceration in the federal system” (TR 228; WT 4). Mr. Nachmanoff believes that they directly result in greater than necessary sentences and indirectly over-inflate sentences by their incorporation into the guidelines. He believes that Congress’ assumption that only major drug traffickers would be subject to mandatories turned out to be wrong (WT 5-6). He believes that the safety valve does not solve the problem of mandatory minimums in part because of the limitation that the defendant have only one criminal history point to be eligible. He thinks this limitation should be

expanded and that the safety valve should be expanded to cover all crimes.

“Mandatory minimum statutes, whether used according to the Department of Justice charging policy or as inevitably used in practice, result in disproportionately harsh punishment, create unwarranted disparity, and distort the criminal justice process. The first priority of those concerned about unwarranted disparity and disproportionate punishment should be the repeal of mandatory minimum statutes” (TR 235, 260-65). Mr. Nachmanoff maintains that mandatory minimums override the Commission’s judgment and often trump the guidelines. He indicates that the government’s use of mandatory penalties to override the guidelines had an adverse impact on African-American defendants (WT 9). Furthermore, Mr. Nachmanoff asserts that if the Department of Justice followed its charging policies and pursued the most serious charges, “guidelines would be irrelevant in a very large portion of cases and the Bureau of Prisons would be overwhelmed” as a result of the application of mandatory minimums. He believes that mandatory minimums are improperly used as tools to force pleas:

The threat of unduly harsh punishment is used to pressure defendants into cooperating with the government and giving up constitutional rights that are important to the fairness and truth-seeking function of the system. The threat of filing harsher mandatory minimum charges, § 851s, and § 924(c)s is routinely used to induce defendants to plead guilty. (WT 13)

In response to questioning, Mr. Nachmanoff stated the prosecutors should file cases without mandatory minimums in order to allow the courts the flexibility to evaluate offender characteristics, *i.e.*, in cases involving mental illness (TR 268-69), or crack cocaine (TR 269-71). He also stated that the repeal of mandatory minimums, along with advisory guidelines, would give the courts flexibility to impose individualized sentences, and it would go a long way to achieving greater variance in the system, where there would be freedom among the various players to achieve just sentences (TR 264-65).

“The Commission should review and revise, and/or report to Congress regarding the need to revise, all guidelines that are based on mandatory minimums or congressional directives” (WT 15, TR 237). “Even if Congress does not repeal mandatory minimums in the near future, the Commission should amend the drug guidelines. Linking the drug guidelines to mandatory minimums maintains proportionality only with mandatory punishment levels that are arbitrary and overly severe, and then magnifies that disproportionality by spreading it to every offender at every quantity level” (*Id.*). Mr. Nachmanoff indicated that “no statute required or requires the Commission to link the guidelines to mandatory minimums” and recommended that all guidelines based on mandatory minimums be amended (WT 16, TR 239). In his view, to the extent judges believe the drug guidelines are too harsh, they would be more likely to comply with the guidelines if they were lowered “in a way that was based on empirical evidence, that was based on the purpose of sentencing” (TR 241).

“I believe fully that the Department of Justice and law enforcement objectives can be achieved without mandatory minimums, and therefore [believe] that the Commission taking the position that they should be repealed is not the same as saying sentences should be lowered . . . without regard to what the Department of Justice and what law enforcement is trying to achieve” (TR 242).

C. CJA PANEL ATTORNEYS

District of Rhode Island

Robert Mann, CJA Representative

Mr. Mann stated that “federal sentences are too long and alternatives to incarceration are not used enough” (WT 1, TR 251). Mr. Mann attributes what he perceives as too lengthy sentences, in part to the use of prior drug convictions to enhance penalties or trigger mandatory minimums. He stated that: “what the statute does is remove the sentencing decision from the Court and place it in the hands of the prosecutor” (WT 4). In his view, one way to reduce the complexity of the system “would be the repeal of many of the statutes . . . which create mandatory minimums or otherwise require the imposition of sentences without affording the Court discretion to vary” (*Id.*). He stated that he believes the power should be given back to the judge who can sentence the defendant for a long period of time, if required (TR 272).

IV. PROBATION OFFICE

District of Maryland

William Henry, Chief Probation Officer

Mr. Henry stated the disparity in crack and powder cocaine should be eliminated and mandatory minimums should be revisited (WT 5, TR 173).

District of Connecticut

C. Warren Maxwell, Deputy Chief Probation Officer

Mr. Maxwell believes mandatory minimums should be reviewed to determine their effectiveness on deterrence and recidivism, because some of the guidelines are set by the statutory minimum (TR 187). In his view, mandatory minimum sentences seem to have been chosen arbitrarily “without much regard to research in what is most effective” (WT 2, TR 187). He wondered whether Congress should be required to state its reasons for mandatory minimums similarly to the requirement in 18 U.S.C. § 3553 for judges to state their reasons for imposing sentences (WT 2). He also wondered whether the Commission could research whether the gender and racial makeup of Congress leads to harsher penalties for other racial groups (WT 2, TR 188).

Mr. Maxwell believes additional small prisons should be located in urban settings to allow increased use of intermittent confinement (TR 192-94), that the crack/powder cocaine disparity should be eliminated (TR 194), and that mandatory minimums in drug cases should only apply to defendants possessing guns (WT 5).

District of New Jersey
Wilfredo Torres, Senior Deputy Chief Probation Officer

Mr. Torres stated that mandatory minimums are not necessary as drug quantities are adequately reflected in the guidelines which most courts adopt. Mr. Torres stated “our sentencing process continues to rely primarily on the imprisonment range calculated from the advisory sentencing guidelines. As such, the Sentencing Commission is well positioned to approach Congress to remove or amend the statutory mandatory minimum sentences for drug offenses” (WT 3). Probation officers would welcome training and assistance to help determine when variances are appropriate (WT 3).

V. LAW ENFORCEMENT

New York Police Department
Raymond W. Kelly, Police Commissioner

Commissioner Kelly stated that in terms of his partnership with the federal government, he found mandatory minimums were useful (TR 482). He informed that in New York, law enforcement “let[s] anyone arrested for a gun crime know that if they have a prior felony conviction we will do everything we can to have them tried in federal court where penalties are tougher” explaining as an example that the federal mandatory minimum for a first offense while carrying a firearm during a crime of violence or drug trafficking crime is five years compared to three years in the state. In his view, the prospect of a stricter sentence has convinced a number of offenders to give up information, “illustrat[ing] the deterrent role of federal sentencing, even with the vast majority of the cases being prosecuted in state and city courts.” In this way, federal sentencing is “an additional, powerful tool to support” the local law enforcement (WT 4). In response to questioning, he further stated that the certainty of punishment is just as important as the severity of punishment because “certainty and severity go hand in hand” and that “practical application of the fact that it may go to federal court helps us” because there is a perceived likelihood of a conviction in federal court than in the local courts (TR 484-85).

VI. ACADEMIA

New York University School of Law
Rachel Barkow, Professor of Law

Professor Barkow stated over the last 25 years, Congress has been responsible for eliminating judicial discretion through the 25 percent rule and the enactment of mandatory minimums. While benefitting from the Commission’s data and the advisory guidelines, *Booker* has given “judges some room to account for relevant individual differences in setting punishments.”

Professor Barkow reminded the Commission that:

when it developed its initial set of sentencing guideline ranges for drug trafficking, it incorporated statutory mandatory minimum sentences into the grid so that the trafficking guidelines, like mandatory minimum laws, are driven largely by quantity. Moreover, the

sentences for all quantities have been set based on the sentences Congress selected for mandatory minimums. (WT 15)

Professor Barkow stated that the Commission has recognized in its Fifteen Year Report that “[N]o other decision of the Commission has noted, ‘has had such a profound impact on the federal prison population.’ This decision accounts for much of the rise in the federal prison population and for a large measure of the racial disparities in its composition. Judges have almost universally condemned these Guidelines as too harsh. And yet, Professor Barkow claimed that the Commission has not offered much of a defense for this choice. In her view, ‘the most likely explanation is that the Commission appears to have done this to avoid ‘cliffs’ in sentencing, where offenders would find themselves with very different penalties, depending on whether they reached the mandatory minimum threshold or fell just below it” (WT 15-16). Professor Barkow claims the use of mandatory minimums to establish guideline ranges violates the purposes of sentencing set out in section 3553(a)(2) that the guidelines provide a punishment that will reflect the seriousness of the offense, promote respect for the law, and provide just punishment (*Id*). Professor Barkow asserts the Commission should establish guidelines based upon its own empirical research. Any disparity due to “cliffs” in punishment by application of mandatory minimums would warranted as that disparity “would be commanded by statute” (WT 18). The Commission’s research could provide valuable data for Congress to consider in determining the value of mandatory minimums. Professor Barkow stated “in the absence of a congressional directive to [the Commission] that the guidelines should be built around mandatory minimums, I think the Commission should reconsider those sentences and look to see whether empirical evidence supports them” (WT 3, TR 412-15).

Professor Barkow asserted that Congress did not consult the Commission in setting the mandatory minimums, and “[w]hile those mandatory minimums have the force of law whenever they are triggered, there is nothing in the statutes themselves or the legislative history to suggest that Congress intended that they would undercut the operation of the expert agency in the field to set punishments for all other quantities not specified in the statute.” She stated that “Congress knows how to provide such a directive, and its failure to do so in mandatory minimum laws indicates that it left it to the Commission to set the sentences for other quantities” (WT 18).

In her opinion, “now that judges have more freedom after *Booker*, it is likely that they will give more respect to Guidelines that are the product of the Commission’s expert evaluation than those that were set based on nothing more than a mandatory minimum” (WT 19). Professor Barkow recommends the following statutory changes: a) Repeal mandatory minimums and allow the Commission to set sentencing ranges on the basis of empirically-grounded knowledge (WT 4), and b) eliminate the disparate treatment between crack and powder cocaine (TR 416-17).

University of Massachusetts Lowell

James Byrne, Ph.D., Professor, Department of Criminal Justice and Criminology

In Dr. Byrne’s view, although alternative sanctions can improve public safety and save taxpayers money, greater gains may be achieved, in part, by (1) revising mandatory minimum sentencing laws (WT 2).

PUBLIC HEARING – WEDNESDAY AND THURSDAY, SEPTEMBER 9–10, 2009
8:30 a.m. – 5:15 p.m.
CHICAGO, IL

I. DISTRICT COURT BENCH

Northern District of Illinois

The Honorable James F. Holderman, Jr., Chief United States District Judge

Chief Judge Holderman stated that the Commission should 1) “continue to take a hard look at lowering penalties for low-end, nonviolent drug offenders,” because the mandatory penalties that apply to drug offenses is a continuing concern for judges in his district; and 2) update its prior work “on the appropriateness of eliminating mandatory minimums for nonviolent, less serious offenses” (TR 19-20, WT 2).

Northern District of Ohio

The Honorable James G. Carr, Chief United States District Judge

In response to questioning, Chief Judge Carr stated that approximately 20 to 25 percent of his docket is controlled by mandatory minimums, however he stated that through the §5K1.1 mechanism, the affect they have is such that “it’s not the predominant factor” (TR 77).

Eastern District of Michigan

The Honorable Gerald E. Rosen, Chief United States District Judge

In response to questioning, Chief Judge Rosen said he did not believe linking the pornography guidelines to mandatory minimums was working (TR 69), and that the Commission should not be concerned with linkage in determining appropriate sentencing policy for drug or pornography cases (TR 70-71). He further stated that in his view, there are relatively few sentences as a percentage that are driven by mandatory minimums, and that even in those cases that are so driven, there is a large percentage of cases in which offenders cooperate and therefore receive the benefit of a §5K1.1 departure. Thus, on his docket, he said the number of mandatory minimum sentences is relatively small - possibly 20 to 25 percent (TR 75).

Western District of Tennessee

The Honorable Jon P. McCalla, Chief United States District Judge

Citing, as an example, the addition of mandatory section 924 (c) charges as a result of a plea or a jury verdict, Chief Judge McCalla noted that “[s]entences that appear to be disproportionate run the risk of undermining confidence that the judiciary is acting in a deliberate, disinterested, and impartial way even though the judge is only imposing the consecutive sentence required by statute” (WT 4). In this regard, Chief Judge McCalla urged the Commission to prepare for Congress a review and analysis of the impact of consecutive mandatory minimums and “the corrosive effect on public confidence when sentences are perceived as unjust or arbitrary” (TR 89-90).

Eastern District of Kentucky
The Honorable Karen K. Caldwell, District Judge

Judge Caldwell believed that most of the criticism directed toward the length of federal sentences “is actually aimed at applicable minimum mandatory statutory penalties rather than the guideline ranges themselves” (TR 98; WT 2). She noted that the advisory nature of the guidelines and “safety valve and downward departure motions have served to mitigate unduly harsh results that might otherwise have resulted from statutory penalties” (TR 99; WT 2). Judge Caldwell encouraged the Commission to 1) “consider empirical data along with congressional mandates as it re-evaluates and revises guidelines with corresponding statutory minimum sentences” and 2) “eliminate disparities derived solely from the forum rather than the offense or offenders,” such as disparities occurring in illegal re-entry cases where fast-track programs are not available (TR 98-99; WT 2).

Northern District of Indiana
The Honorable Philip Peter Simon, United States District Judge

Judge Simon believed: 1) crack should be treated 1:1 with powder cocaine, and that the powder cocaine guidelines should be increased (TR 107; WT 6); 2) first time offenders should have increased opportunities for probation (TR 107-08; WT 7-8); 3) where Congress increases mandatory minimums which trump the guidelines, the guidelines should be amended quickly to incorporate those changes to encourage pleas rather than trials where a defendant has nothing to lose (TR 108-10; WT 8-9); and 4) increase the guidelines for large scale fraud cases (TR 110; WT 9-10).

Judge Simon had a criticism for the process used by the Commission when a mandatory minimum is increased by statute, because it takes so long for the guideline to reflect that statutory increase. In the meantime, judges have trials on these cases “simply because there [is] no incentive for the defendant to plead guilty.” Judge Simon stated that some defense lawyers had reported that the defendants would have pled guilty had the guidelines been amended earlier (TR 109-110, WT 8-9).

II. PRACTITIONERS

A. DEPARTMENT OF JUSTICE

Northern District of Illinois
The Honorable Patrick J. Fitzgerald, United States Attorney

Mr. Fitzgerald discussed the value of mandatory minimums in the prosecution of violent offenders, encouraging defendants to cooperate against more culpable individuals, and the deterrent effect mandatory minimums have on defendants in general. In his view, the threat of mandatory minimums has caused many charged with these offenses to become cooperative witnesses, testifying against those with greater responsibility, and has also caused some people to not commit such offenses (TR 248; WT 7). In addition, Mr. Fitzgerald stated that the safety valve is a good relief because it ameliorates the harshness of mandatory minimums (TR 249; WT 7).

Mr. Fitzgerald suggested that anecdotally, when judges are given discretion in the child pornography guidelines, they often vary substantially from the guideline range, but “a prosecutor is far less willing to forgo charging a mandatory minimum sentence when prior experience shows that the defendant will ultimately be sentenced to a mere fraction of what the guideline range is” (TR 252; WT 8-9). In his experience, when prosecutors see a mandatory minimum that might be too harsh and a guideline sentence might be more appropriate, and they forgo the mandatory minimum sentence, instead of getting a guideline sentence they get “little or no sentence at all.” And when they believe a guideline sentence is called for, they are less likely to forgo a mandatory minimum if they think the resulting sentence will be probation or a light sentence (TR 253).

Middle District of Tennessee

The Honorable Edward M. Yarbrough, United States Attorney

Mr. Yarbrough noted that the one way to provide a level of structure to the system and to avoid unwarranted disparities “might be to add to the mandatory minimum sentencing statutes already present in federal statutes.” While acknowledging that “the Commission and others have suggested in the past that this may not be the best way of achieving the goals and purposes of sentencing,” he noted that “[m]andatory minimums have had a place in the federal criminal justice system for some time” (WT 7).

B. FEDERAL PUBLIC DEFENDERS

Northern District of Illinois

Carol Brook, Federal Public Defender

Ms. Brook opined that the drug guidelines also contribute to racial disparity because they are tied to the quantity-based mandatory minimums and do not accurately reflect the seriousness of the offense (WT 7). She asked the Commission to “de-link the drug guidelines from mandatory minimums” (*Id.*).

Ms. Brook voiced opposition to mandatory minimum sentences which she believes contribute to racial and other forms of disparity (WT 9-10). She maintained that “mandatory minimums require sentences that are longer than necessary to satisfy any purpose of sentencing” and that they “rarely reflect the seriousness of the offense” (WT 10). Ms. Brook believed that mandatory minimum sentences are applied arbitrarily and do not effectively prevent crime through deterrence or incapacitation (WT 11). She does not believe that the safety valve solves the problem because it “does not distinguish between high- and low-level offenders based on role in the offense, but instead distinguishes amount low-level offenders who differ little from each other” (WT 11).

She requested the Commission to “continue to research and speak out against mandatory minimum sentencing statutes” (WT 12). She also asked “that the Commission abandon its policy of mirroring mandatory minimums, a policy not required by Congress, and recommend to Congress that it immediately expand eligibility for the safety valve in 18 U.S.C. § 3553(f) to all mandatory minimums” (*Id.*).

Northern District of Ohio

Jacqueline Johnson, First Assistant Federal Public Defender

Ms. Johnson stated that “empirical evidence shows that the guidelines recommend, and mandatory minimums require, punishment that is greater than fully informed members of the public believe is just” (WT 12). Ms. Johnson cited a study along these lines from Judge Gwin:

Judge Gwin’s study indicates that the guidelines do not accurately reflect community views regarding just punishment. It shows that informed members of the public are considerably less harsh than Congress and the Commission assume them to be, and less harsh than judges applying advisory guidelines. It is consistent with the feedback the Commission has been receiving from judges, and with the Commission’s empirical research indicating that certain guidelines and mandatory minimums are greater than necessary to achieve the purposes of punishment. (WT 15)

She further noted that “[s]urveys conducted by the Commission show that both the public and judges believe that guidelines that are based on mandatory minimums and congressional directives are overly harsh” (WT 15).

Ms. Johnson urged “the Commission to de-link the drug guidelines from the arbitrary quantity-based punishment levels in the mandatory minimum statute . . . [and to] create a set of drug guidelines based primarily on functional role in the offense, with quantity given lesser weight” (TR 16). She stated that if the Commission felt bound to reference mandatory minimums, it should “at least reduce all of the drug guidelines by two levels” (WT 17).

Ms. Johnson said that the Commission can improve the sentencing system by revising the guidelines and advising Congress based on feedback from judges and empirical data and research, and should take the opportunity to educate Congress about how and why its mandatory minimums have resulted in sentences that are unnecessarily severe (TR 320-321).

Miller Canfield, Paddock and Stone, P.L.C.

Thomas W. Cranmer, Principal

Mr. Cranmer voiced strong opposition to mandatory minimum sentences, and discussed “four principle problems” with mandatory minimums that he identified as follows:

First, there is simply no rhyme or reason to the designation of offenses for mandatory minimum penalties. Mandatory minimum sentences have been enacted in piecemeal fashion without any consistent policy objective or forethought. Second, rather than enhance uniformity in sentencing by treating similarly-situated offenders alike, mandatory minimums create sentences that are patently unfair by imposing unwarranted uniformity on markedly different offenders. Third, mandatory minimums are disproportionately applied to punish underprivileged individuals in vulnerable segments of society. Fourth, mandatory minimums have been used as a vehicle to transfer the power of sentencing from an impartial judge to a prosecutor whose single-minded pursuit of convictions all-

too-easily overtakes any concern for proportionality in punishment. It is only when these four problems become part of the regular national discourse that the realities of mandatory minimums can be fully understood and the tide of public opinion turned against a device that is crippling the criminal justice system.
(WT 2)

He further noted that “[m]andatory minimums appear to have taken root solely as a consequence of political expedience based upon the intersection of criminal law with whatever topic may have captured the attention of the media of the day.” (WT 3). He went on to state that “[a]nother unfortunate impact of mandatory minimum sentences is that the individuals who pay the heaviest price are often those who have the smallest voice in the process by which the penalties are set” (WT 5). Mr. Cranmer reiterated his opposition to mandatory minimums during his oral testimony (TR 336-37).

PUBLIC HEARING – TUESDAY AND WEDNESDAY, OCTOBER 20–21, 2009
8:30 a.m. – 4:30 p.m.
DENVER, CO

I. APPELLATE BENCH

Tenth Circuit Court of Appeals
The Honorable Deanell Reece Tacha, Circuit Judge

In response to questioning, Judge Tacha referred to the linkage between the mandatory minimums and the drug table made by the original Commission as the “great compromise,” and “one of the linchpins to acceptance of the guidelines.” Judge Tacha further emphasized the importance of the Commission urging Congress to revisit these mandatory minimums and the “crack-cocaine disparity” (TR 48-51).

Eight Circuit Court of Appeals
The Honorable James B. Loken, Chief Circuit Judge

In the context of sentencing ranges that are above the mandatory minimum, Chief Judge Loken opined that, in the absence of a section 3553(e) motion or a tenable safety valve issue that may call for a further reduction, district judges should just go down to the mandatory minimum (TR 52).

II. DISTRICT COURT BENCH

Southern District of Iowa
The Honorable Robert W. Pratt, Chief United States District Judge

While noting that he believed the guidelines are better post-*Booker*, Chief Judge Pratt noted “instances of incredible injustice continue to arise, at least in my court from my personal experience, almost all of them related to either mandatory minimum sentences or even, more importantly, sentencing enhancements where I’m not in charge of this sentence” (TR 258). Chief Judge Pratt stated that “the very first thing the Sentencing Commission should do is to advise Congress to eliminate all mandatory sentences” (WT 2). He believed that the “overly punitive” guidelines and mandatory minimums “all have their origins in the mistrust of judges” (WT 2; TR 260). He further stated that “[t]his mistrust of life-tenured judges does not find a similar mistrust of executive branch actions by politically appointed United States Attorneys serving at the pleasure of the President. . .” yet, he stated, “mandatory minimum sentences have the effect of letting the prosecutor determine the sentence” (WT 2).

Chief Judge Pratt “emphasize[d] the necessity of eliminating all mandatory minimum statutes and sentencing enhancement statutes” (WT 7). He believed that these statutes “unfairly and improperly shift the sentencing function of government from the judicial branch to the executive branch” (WT pp. 7-8).

Western District of Missouri

The Honorable Fernando Gaitan, Jr., Chief United States District Judge

Chief Judge Gaitan stated that “[s]tatutory minimums do not allow the trial judge to exercise his/her role in the sentencing process” (WT 2), and believes that “statutory minimums in some cases continue to result in sentences greater than necessary and fail to meet the statutory mandates of sentencing” (TR 266). He requested the Commission to “use its considerable influence with Congress to eliminate such injustices” (TR 267).

III. PRACTITIONERS

A. DEPARTMENT OF JUSTICE

District of Minnesota

Mr. B. Todd Jones, United States Attorney

Mr. Jones stated that as a result of the change in practices due to *Booker*, “Assistant United States Attorneys have become greater sentencing experts, conversant in the § 3553(a) factors, in addition to becoming greater sentencing advocates” (WT 8). He also indicated that “we now mentor AUSAs as to charging alternatives in cases where below-range sentences are otherwise likely” and cited the increased use of charges carrying mandatory minimums in firearms and pornography cases (WT 8; TR 135). Mr. Jones stated:

On the flip side, regular deviations from the guidelines by the government and the courts may cause Congress to legislate more mandatory minimum sentences. After all, Congress reacts to constituent groups, which often lobby for enhancements to the criminal code following a horrific act, particularly if that act is not redressed with stiff, consistent penalties. In an effort to address those concerns as well as those constituents, who often are grieving or angry, Congress may enact extremely harsh and unforgiving mandatory minimums. (WT 9, TR 156-157).

B. FEDERAL PUBLIC DEFENDERS

Districts of Colorado and Wyoming

Mr. Raymond B. Moore, Federal Public Defender

Mr. Moore noted that the Commission’s decision to cap the mitigating role adjustment does not appear to be the product of empirical evidence regarding culpability, but instead is “another casualty of the Commission’s decision to link the drug guideline to the mandatory minimums” (WT 29). He further questioned whether the linkage between the use of mandatory minimums as an effective law enforcement tool and the purpose of sentencing has “been overemphasized” (TR 353).

Northern and Southern Districts of Iowa
Mr. Nick Drees, Federal Public Defender

Mr. Drees suggested that the “Commission should urge Congress to expand the safety valve to all mandatory minimums to prevent [prosecutorial] manipulation, and also because there is no rational basis for excluding offenses not currently on the list” (WT 9). He believes that the “safety valve should also be expanded to include defendants at least in Criminal History Category II, if not higher” (WT 9; TR 339).

He stated that “the guidelines recommend that low-level, nonviolent defendants be sentenced to prison for substantial periods” (WT 21). He believes that “this is not based on empirical evidence, but on the Commission's policy of tying most, but not all, drug guidelines to mandatory minimums” (*Id.*). In this regard, he noted:

The comments the Commission has received in these hearings appear to be unanimous: The drug guidelines are “arbitrary,” “not based on anything empirical,” and should be de-linked from the mandatory minimums. The Commission should not wait for Congress to repeal mandatory minimums, but should take the lead by untying the guidelines from mandatory minimums and promulgating new guidelines based on empirical data and research. Or, if the Commission still believes that it must tie the drug guidelines to mandatory minimums, it should educate Congress by preparing a report and proposal for a new set of drug guidelines. The Commission should give serious consideration and study to a set of drug guidelines based primarily on functional role in the drug trade with quantity as a secondary factor.

In any event, the Commission should reduce all of the drug guidelines by two levels, as it did with crack cocaine. As the Commission acknowledged then, the drug guideline ranges are set two levels above that necessary to include the mandatory minimum penalties at the two statutory quantity levels. (WT 24-25, TR 338).

He stated that “the guidelines for child pornography offenses, driven by congressional directives and also mandatory minimums, are simply too severe . . . most judges who have testified before the Commission share this view” (WT 25).

Mr. Drees expressed a hope that the Commission will recommend that Congress eliminate mandatory minimums (WT 27). Mr. Drees opined that “mandatory minimum sentences transfers sentencing authority from judges to prosecutors, and that this creates unwarranted disparity” (*Id.*). He believes that eliminating mandatory minimums and basing sentences on section 3553(a) factors would increase respect for the law (WT 27-28). He asked the Commission “to educate Congress, to urge Congress to repeal or at least reduce them, to de-link the guidelines from mandatory minimums or seek permission to do so, and to seek expansion of the safety valve” (WT 28-29).

In response to questioning, Mr. Dress also expressed doubt that the elimination of mandatory minimums would significantly reduce cooperation by defendants (TR 350-351).

C. CJA PANEL ATTORNEYS

District of Kansas

Mr. Thomas Telthorst, CJA Panel Representative

Mr. Telthorst believes that certain statutes and guidelines “shift sentencing power toward the prosecution, and create opportunities for misuse” (WT 2). He indicated that the requirement that the government move for the third point for acceptance of responsibility gives the government the ability to “wield its authority over the third point in ways that stretch the spirit of acceptance of responsibility” (*Id.*). He believes that mandatory minimums have a similar effect (*Id.*).

He requested the Commission to “encourage Congress to repeal mandatory minimum laws” and “decouple” guidelines that are linked to mandatory minimums (WT 2-3, TR 345-346).

Like his fellow federal defenders on the panel, in response to questioning, he also expressed doubt that the elimination of mandatory minimums would significantly reduce cooperation by defendants (TR 352-353).

IV. PROBATION OFFICE

District of Minnesota

Mr. Kevin Lowry, Chief Probation Officer

Mr. Lowry recommended that “the Sentencing Commission continue to pursue the elimination of mandatory minimums to remove the conflict that exists between the statutory goals of sentencing contained in 18 [U.S.C. §] 3553 and the mandatory minimum sentences that exclude the consideration of any of the many offense and offender characteristics” (TR 99). He believes that “mandatory minimums tie the hands of the court and contradict the need for appropriately tailored punishment that will deter, protect and provide corrective treatment” (*Id.*). Mr. Lowry favors amending the safety valve to capture “a larger category of offenders” (TR 100-101, 122-125).

V. ACADEMIA

University of Utah

Mr. Paul Cassell, Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law

Professor Cassell discussed the increasing number of outside guideline sentences. He stated that we are “going to start seeing racial disparities, geographic disparities, judge-to-judge disparities, which was the whole reason for the system to start with” (TR 234). He believed the “grand bargain” to solve this problem “might be to see if we could somehow relax the mandatory

minimums and make the guidelines a bit more binding” (*Id.*). In this regard, he further noted: “We live in the weirdest of worlds where if you’re charged with a mandatory minimum offense, the judge has zero discretion; but if you’re charged with anything else, the judge essentially has close to unlimited discretion. It seems to me there ought to be some way to meet in the middle on that” (TR 234-235).

VI. COMMUNITY INTEREST GROUPS
Squire, Sanders & Dempsey LLP
Ms. Diane Humetewa, Principal, Public Advocacy

In discussing potential sentencing disparities in the application of federal laws in Indian Country, Ms. Humetewa observed that mandatory minimums have discouraged guilty pleas and resulted in more trials. She noted, by way of example, that a defendant is bound to a 30-year mandatory minimum once charged under the Aggravated Sexual Abuse statute, which has resulted in “a surge of defendants going to trial.” She explained:

Relatively no consideration was given to the potential that instituting severe sentences, including mandatory minimums, would have on limiting a prosecutor’s ability to resolve these sex cases. Yet the discretion to resolve these extremely difficult cases without trial is a necessary tool to balance the need to spare child victims from having to testify to his/her emotional detriment and ensuring that the defendant received just punishment. Prosecutors now find it extremely difficult to exercise discretion to resolve cases based on the facts, the defendant’s background, and the impact of testifying at trial to very young and often traumatized children. This challenging set of circumstances is not occurring nationwide, but rather primarily occurring in Indian Country and to Indian defendants and Indian victims. (WT 8, TR 198-199)

PUBLIC HEARING – THURSDAY AND FRIDAY, NOVEMBER 19–20, 2009
8:30 a.m. – 3:00 p.m.
AUSTIN, TX

I. APPELLATE BENCH

Fifth Circuit Court of Appeals
The Honorable Fortunato P. Benavides, Circuit Judge

Judge Benavides stated that he “would not spend too much time” with the issue of mandatory minimums because he views “that as kind of the will of the Congress, and it's a political decision” (TR 212).

II. DISTRICT COURT BENCH

Western District of Oklahoma
The Honorable Robin J. Cauthron, United States District Judge

Judge Cauthron urged the Commission to “work for fewer statutory minimums.” In his view, too often the discretion is given to the prosecutor to charge bargain these mandatory minimums away (TR 14). More specifically, he noted his belief that there are cases in which mandatory minimums are excessive, and that “too often the discretion is given to the prosecutor who can charge bargain to avoid the mandatory minimums, while the sentencing judge has no such ability” (WT 5).

Eastern District of Louisiana
The Honorable Jay C. Zainey, United States District Judge

Judge Zainey suggested that the Commission recommend the elimination of mandatory minimums to Congress (WT 2-3, TR 27). He believed that district court judges are in the best position to determine the appropriate sentence (TR 27-28). Judge Zainey stated that currently the only way that a court can impose a sentence below the mandatory minimum is on motion of the government:

The Government can do this because it is completely in the discretion of the Government to file a motion for downward departure or a recommendation to the Court to impose a sentence below the statutory minimum in cases where the safety valve applies. And even though the Court can impose a sentence below the mandatory statutory minimum when the safety valve applies, this too is contingent on the Government's input as to whether the defendant has provided truthful information. (WT 1-2).

He believed “it should not be the ultimate responsibility or power of the government to [allow judges] to go below the statutory minimum” (TR 29). He stated “it just doesn't seem right” (TR 29). He further opined that “[g]iven that Congress authorizes the courts to impose a sentence

below the statutory minimum in certain instances, Congress should have enough confidence in the courts to forego a statutory minimum in any case, and certainly not leave it to the discretion of the Government” (WT 2).

Judge Zainey discussed the “risk of unfairness associated with mandatory minimums” which “has been recognized by Justice Breyer, in particular” (WT 2, TR 30). He discussed mandatory minimums as they relate to drug offenses and child pornography offenses (WT 2-3, TR 31-34). Judge Zainey noted that while judges may consider the crack/powder disparity when imposing sentence, such consideration is foreclosed if a mandatory minimum is applicable (TR 31).

Judge Zainey stated that there is a difference between a “user, slash, viewer” of child pornography and “the person who actually exploits children” (TR 32). He discussed the argument that punishing viewers will reduce the market for child pornography and the exploitation of children (TR 32; WT 3). While he stated that it is a “very good argument” he noted it applies equally to the drug market and mandatory minimums generally do not apply to drug users (TR 32.). He stated “there’s no statutory minimum for . . . the [drug] user, then why should there be a statutory minimum for the user of pornography” (*Id.*).

III. PRACTITIONERS

A. FEDERAL PUBLIC DEFENDERS

Northern District of Texas

Jason Hawkins, Supervisory Assistant Federal Public Defender

Mr. Hawkins stated that he looked “forward to the Commission’s report on mandatory minimums” and joined “all of the Defenders and other witnesses who have urged the Commission to recommend that Congress repeal, or at least significantly reduce, mandatory minimums, and that Congress expand the safety valve to all offenses subject to mandatory minimums and to defendants in Criminal History Categories II and III” (WT 3). He stated that “mandatory minimums result in inhumane punishment in some cases and extreme unwarranted disparity” (WT 4). Mr. Hawkins believes that in his district “the decision to charge a § 924(c), with rare exceptions, does not depend on the seriousness of the conduct” (*Id.*). He stated that inexperienced prosecutors charge section 924(c) counts whenever possible while experienced prosecutors only threaten such a charge when the defendant is going to trial (*Id.*). Mr. Hawkins believes that “placing this potent weapon in the hands of fallible human beings, whose decisions are not subject to judicial review, results in sentences the courts have described as ‘irrational, inhumane and absurd,’ ‘immensely cruel, if not barbaric,’ ‘unjust, cruel and even irrational,’ and ‘abusive’” (*Id.*).

Mr. Hawkins opined that “mandatory minimums are not necessary to obtain cooperation,” despite some prosecutors belief that they are (WT 7). In this regard, he noted that for many of his clients, “[i]t does not matter how high or low the initial sentence is, whether it is subject to a mandatory minimum, how uncertain it is that the prosecutor will move for a departure at all, or

the fact that the most they can expect to receive is a 2-3 level reduction” (*Id.*).

He stated: “In drug trafficking cases, where mandatory minimums are widely available, substantial assistance departures were granted in 25.9 percent of cases in 2008. In many kinds of cases without mandatory minimums, the rate was comparable or higher: 79.2 percent in antitrust cases, 20 percent in arson cases, 28 percent in bribery cases, 26.1 percent in civil rights cases, 28.6 percent in kidnapping cases, 25.9 percent in money laundering cases, 25.7 percent in racketeering/extortion cases, and 19.9 percent in tax cases” (WT 7). Additionally, Mr. Hawkins believed that mandatory minimums do not deter crime and create disrespect for the law (WT 8-9). He concluded that “[w]hether a defendant cooperates and receives a departure for substantial assistance depends on many factors that have nothing to do with mandatory minimums” (WT 8).

Mr. Hawkins also opined that “mandatory minimums do not deter crime and create disrespect for law” (WT 8-9). In support of this position, he cited a study that concluded that ““there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects”” (WT 8).

Northern District of Oklahoma
Julia O’Connell, Federal Public Defender

Ms. O’Connell voiced strong opposition to mandatory minimums (WT 11-14). She stated that mandatory minimums are not necessary to encourage defendants to cooperate, as prosecutors contend (WT 11). Ms. O’Connell believes that defendants will “choose to cooperate in an effort to win a reduced sentence, whether or not they are facing a mandatory minimum” (*Id.*). She further stated that because defendants who are facing a term of imprisonment will cooperate regardless of whether the potential sentence is large or small, mandatory minimums “have a corrosive effect on the process” (TR 182). Citing to specific case examples, she stated that she believes there is a serious risk that mandatory minimums will encourage fabricated cooperation and innocent people to plead guilty out of fear of facing a lengthy mandatory sentence (WT 12-14). She also expressed her concerns that mandatory minimums “permit prosecutors to punish the exercise of the right to trial by decades in prison,” and that, as a result, they “reduce[] the number of trials, and the overall accuracy of the outcomes” (WT 12). She urged the Commission to recommend that Congress abolish mandatory minimums. She stated that “judges find mandatory minimums disturbing” (TR 181). In addition, in her view, mandatory minimums are one of the major causes of over-incarceration in the country (TR 182).

Ms. O’Connell urged the “Commission to de-link the drug guidelines from statutory mandatory minimums” (WT 14). She stated that the “Commission should formulate drug guidelines based on empirical data and research, and give serious consideration and study to a set of drug guidelines based primarily on functional role in the drug trade, with quantity as a secondary, less weighty, factor” (*Id.*). Ms. O’Connell believes that drug quantity is not a proper measure of culpability, does not correlate with role in the offense and can easily be manipulated by law enforcement agents (*Id.*). She stated that the Commission is not required to “tie the guidelines to mandatory minimums” and expressed a hope that “the Commission will see its way clear to take the lead on this issue, and not wait for Congress to repeal mandatory minimums” (WT 15). She

requested the Commission to “educate Congress by including a proposal for a new set of drug guidelines in its mandatory minimum report” (*Id.*). Ms. O’Connell also urged “the Commission to expand the safety valve currently available in the guidelines under USSG §2D1.1(b)(11) and USSG §5C1.2 to all defendants who meet the criteria, regardless of the offense of conviction, and to expand the criteria to include defendants in Criminal History Categories II and III” (WT 16).

B. CJA PANEL ATTORNEYS

Eastern District of Louisiana

William Gibbens, CJA Panel Attorney District Representative

Mr. Gibbens expressed an appreciation that the “Commission has made it a priority to study mandatory minimums” (WT 4). He stated “mandatory minimums are another way that vast sentencing authority has been placed in the hands of prosecutors rather than judges, and . . . it is important for the Commission to report on the impact of mandatory minimums and urge Congress to repeal or reduce them” (*Id.*). Mr. Gibbens also requested the Commission to “urge Congress to expand the safety valve to all mandatory minimums and include defendants at least in Criminal History Category II, if not higher” because “by allowing no more than one criminal history point, many non-violent offenders with minor roles in an offense are excluded from the safety valve” (*Id.*).

Mr. Gibbens stated that he believed the government is the party least interested in sentencing, because “the reality of it is that the decisions that they make at the inception of the case are what’s dictating the outcome.” He did not believe that in his district, the government really wants mandatory minimums, instead he suggested “a lot of times I don’t think they really care” because by the time of sentencing, they already have the conviction, and they don’t “have a real strong belief” in what the sentence is (TR 175-176).

PUBLIC HEARING – WEDNESDAY, JANUARY 20, 2010
8:30 a.m. – 3:00 p.m.
PHOENIX, AZ

I. DISTRICT COURT BENCH

Central District of California

The Honorable Audrey B. Collins, Chief United States District Judge

Chief Judge Collins explained her district’s whole-hearted support for the idea that the Commission should work, in whatever capacity it can, to encourage the elimination of statutory mandatory minimum sentences. In this regard, she noted her belief that much of the progress represented by *Booker* expanded sentencing discretion for judges, the renewed focus on the sentencing goals and factors of 18 U.S.C. § 3553(a), the ability of judges to impose truly just and reasonable sentences, tailored to a defendant’s individual circumstances is undercut in cases involving mandatory minimum sentences. She further believed that “[m]andatory minimums sweep so broadly that they often result in the imposition of extremely disproportionate sentences, preventing judges from carrying out one of the most basic goals of sentencing: that sentences imposed be sufficient, but not greater than necessary, to carry out the goals of punishment, deterrence, protection, and rehabilitation” set forth in 18 U.S.C. § 3553(a)(2), and noted that “[m]andatory minimums often result in sentences that are far greater than necessary to meet any of these goals.”

Chief Judge Collins also suggested that mandatory minimums lead to unwarranted disparity in sentences:

Mandatory minimums are most often imposed due to criminal history and drug type/quantity. Thus, despite the theory that mandatory minimums lead to greater proportionality in sentencing, the reverse is often the case. Defendants whose conduct was in fact quite similar may receive widely divergent sentences, if one is subject to a mandatory minimum and the other is not. Likewise, a defendant whose role or conduct is much less culpable than that of his co-defendants may receive a sentence as severe, or even more so, if he triggers the minimum and his co-defendants do not. (WT 3-4).

District of New Mexico

The Honorable Martha Vazquez, Chief United States District Judge

Chief Judge Vazquez stated that “it seems incongruent that under the sentencing scheme, our great country which was founded under the principles of liberty and freedom could have earned the shameful distinction of imprisoning more of our own people for longer periods of time than any other nation in the world” (TR 49). She pointed to “harsh sentencing Guidelines as well as statutory mandatory minimums” as an explanation (*Id*). She believes that while the “goal to eliminate sentencing disparity is a laudable one and one that is definitely worth pursuing . . . we have incarcerated our people for too long” (TR 50). Chief Judge Vasquez believed that the guidelines are “too harsh, especially in the context of drug cases” (*Id*). She pointed to comments

by Justice Kennedy that characterized mandatory minimums as unfair, unjust and unwise" and a survey that indicated that 70 percent of District Court judges and 83 percent of Circuit judges "thought that the punishment for drug offenses called for in the Guidelines was greater than appropriate to reflect the seriousness of the offense" (*Id.*).

She stated that she has "been applying the Sentencing Guidelines and the mandatory minimums to these very common scenarios without being able to avoid the tragic results when the particular circumstances cried out for a different result" (TR 54).