Chapter 6

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

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[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

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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.

penalty[552] 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 ACCA[554] 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

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[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 1028A[562] 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

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[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 others 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

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[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).