

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).

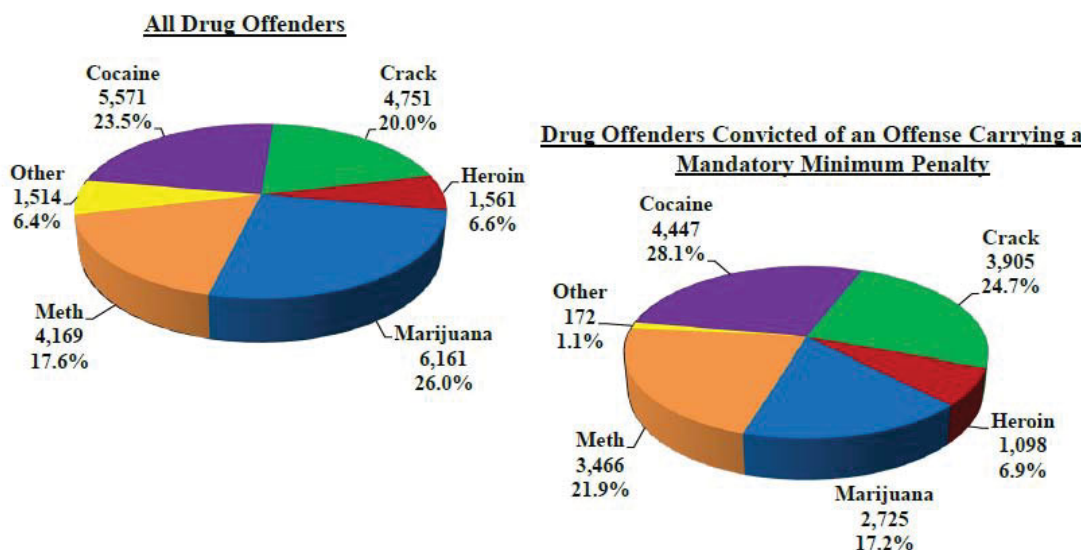
⁶²² The Commission's method for calculating the quantity of a drug for purposes of the guidelines sometimes differs from the statutes. *See* Appendix E(A)(2) of this Report.

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*

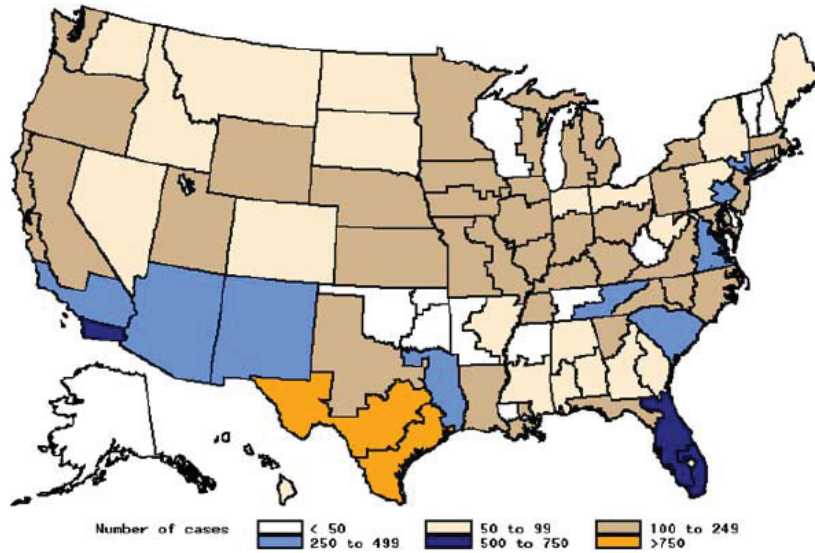
Application of mandatory minimum penalties for drug offenses varied significantly both by circuit and by district, which is largely attributable to differences in the sizes of the relevant caseloads.⁶²⁶ The First Circuit reported the highest percentage (42.8%, n=749) of cases involving a drug mandatory 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

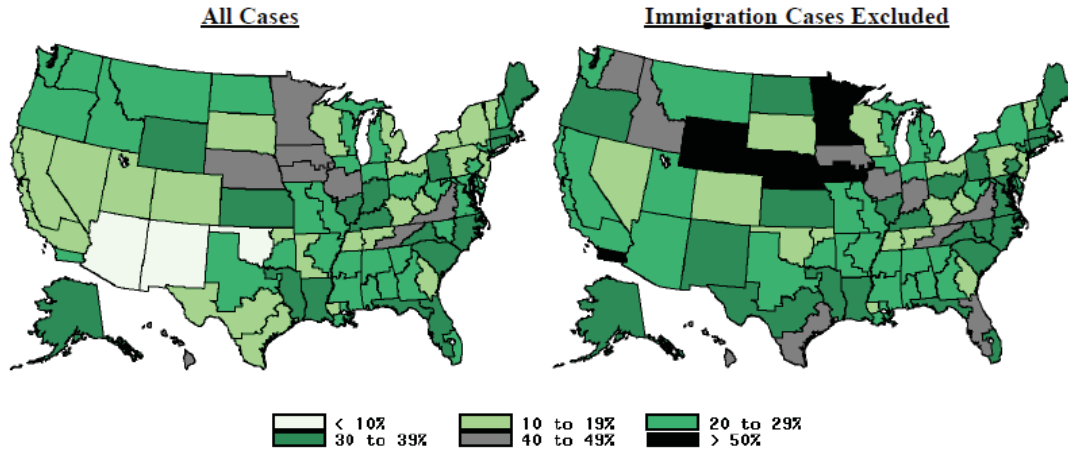


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

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). 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

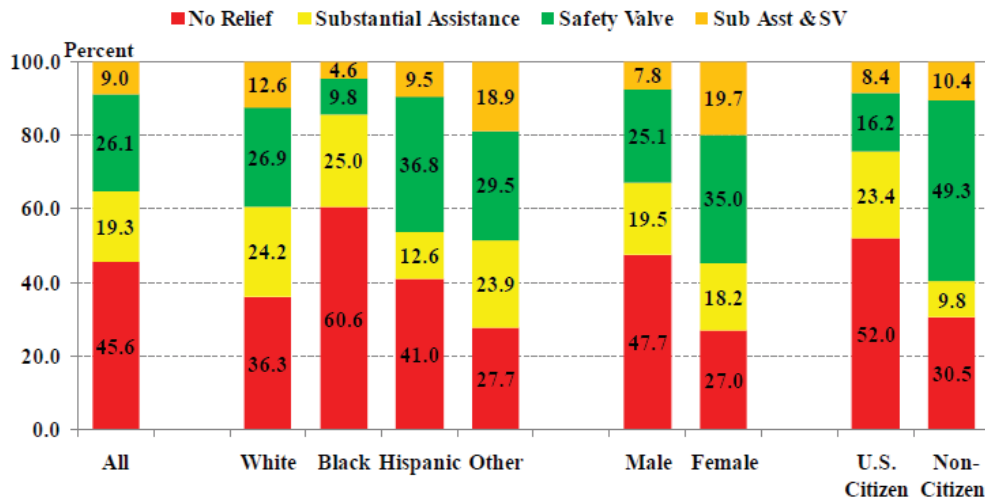


SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

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.

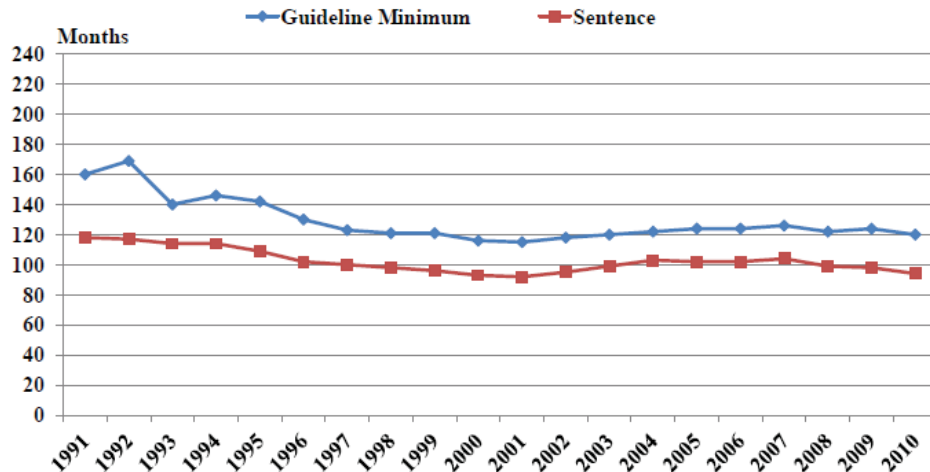
⁶³² It is important to note that the majority of the crack cocaine offenders sentenced in fiscal year 2010 were sentenced prior to August 3, 2010, the date of enactment of the Fair Sentencing Act of 2010.

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.

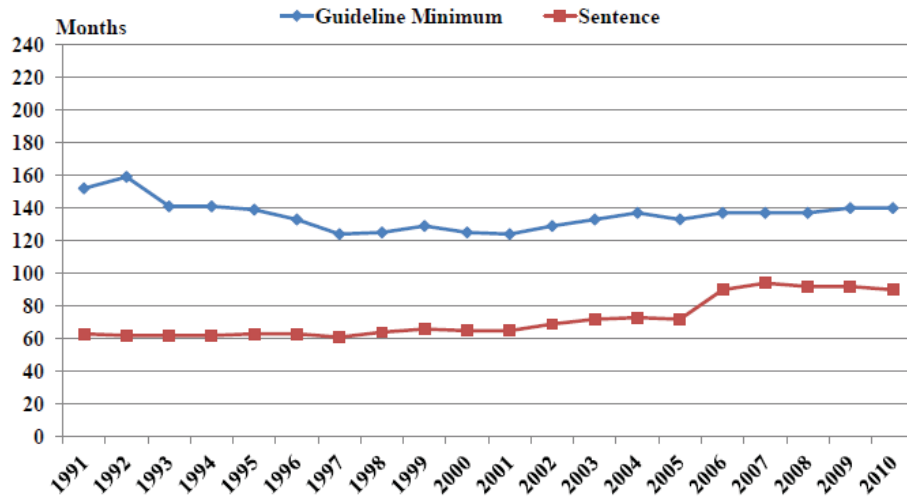
Figure 8-5
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
All Drugs
Fiscal Years 1991 - 2010



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.

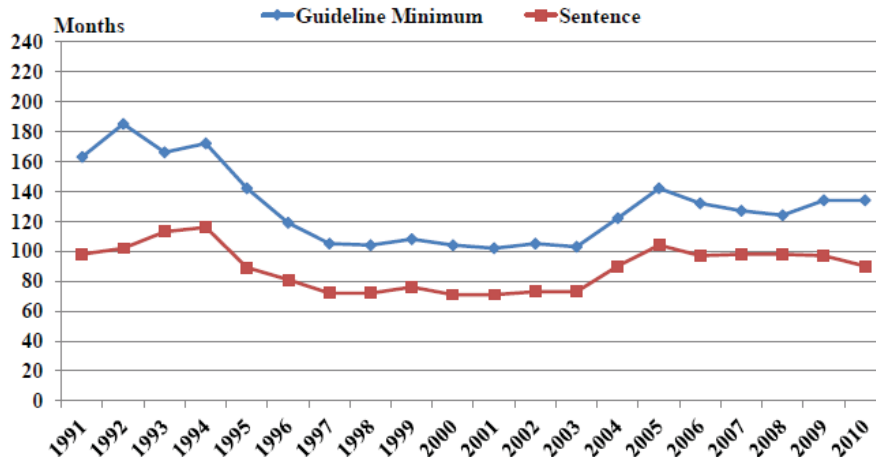
Figure 8-6
Average Guideline Minimum and Average Sentence for Offenders Convicted of an
Offense Carrying a Drug Mandatory Minimum Penalty
Substantial Assistance
All Drugs
Fiscal Years 1991 - 2010



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.

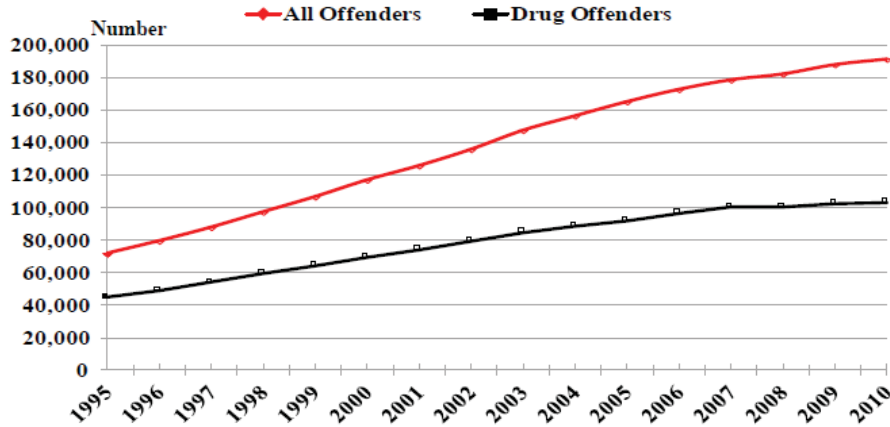
In fiscal year 2010, the average extent of substantial assistance departures in drug offenses was 48.8 percent (67 months) from the minimum of the otherwise applicable guideline range. In fiscal year 2010, the average extent of non-government sponsored below range sentences (*i.e.*, departures and variances 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

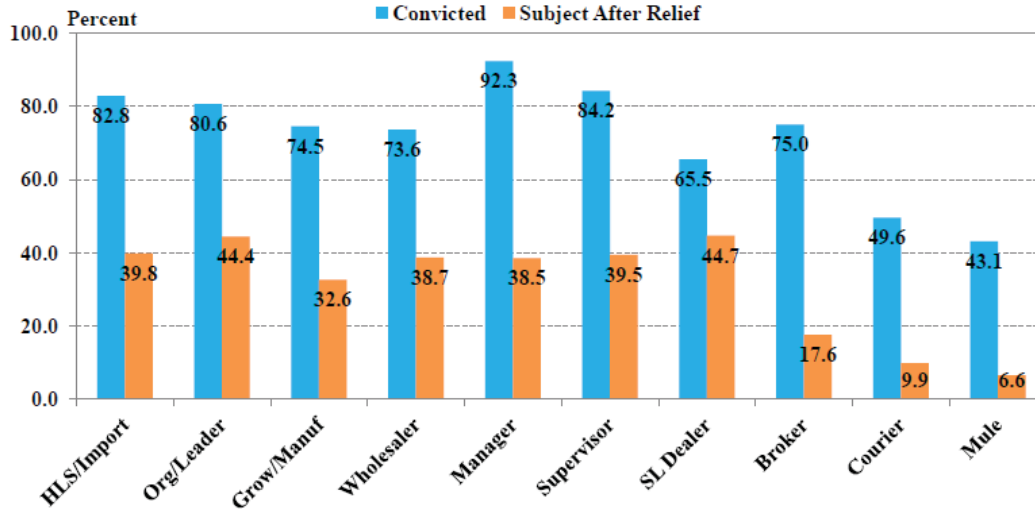
In the cases analyzed, Courier was the most common function, representing 23.0 percent of all offenders, followed by Wholesaler (21.2%), Street-Level Dealer (17.2%), and High-Level Supplier/Importer (10.9%). Manager and Supervisor were the least common functions, with each performed by only 1.1 percent 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

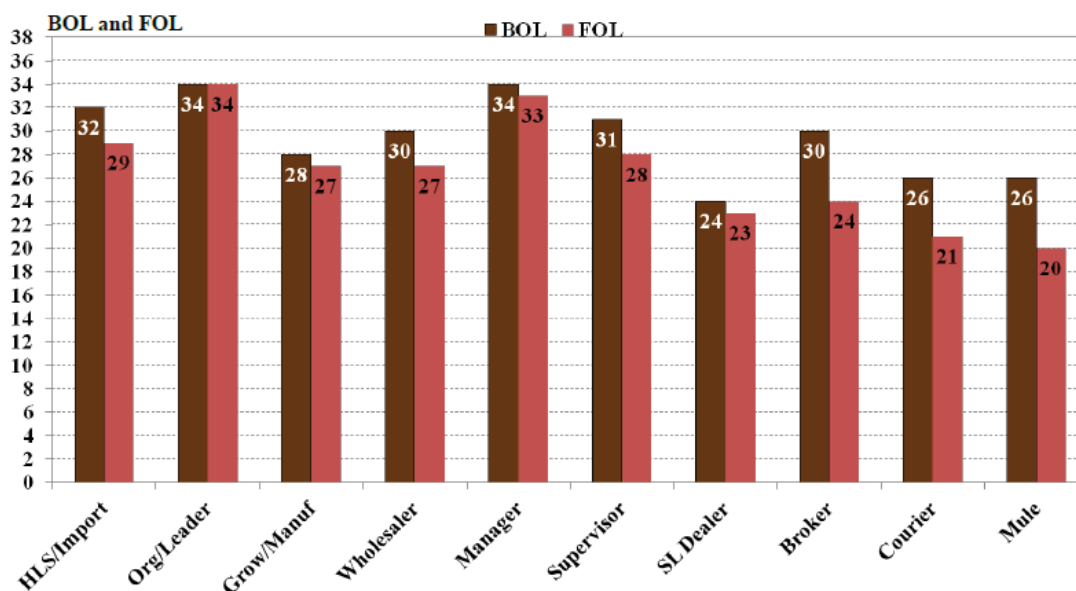


SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

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.

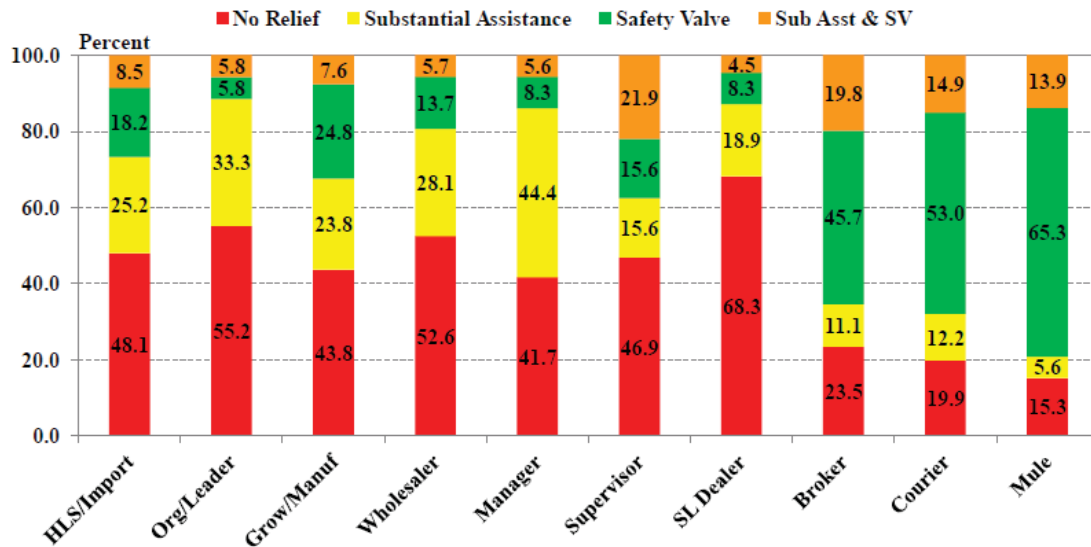
Conversely, offenders who performed less serious function were more likely to receive a mitigating role adjustment under the guidelines⁶⁴⁶ than offenders who performed more serious functions.⁶⁴⁷ Couriers received the mitigating role adjustment in 54.0 percent of the cases, followed next by Mules (47.9%) 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).

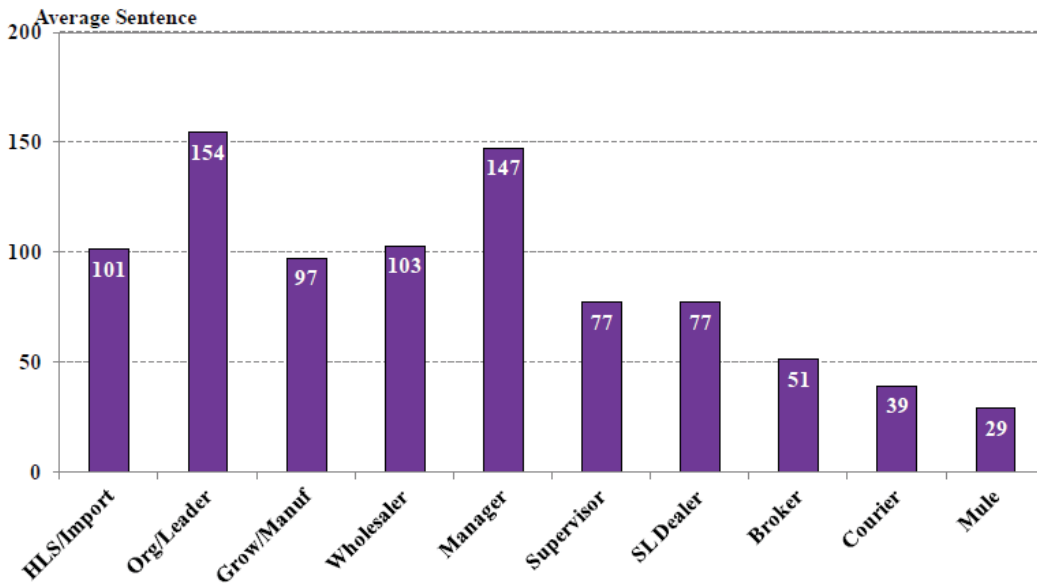
Offenders who performed as Street-Level Dealers remained subject to the mandatory minimum penalty at the highest rate (68.3%) followed by Organizer/Leaders (55.2%) and Wholesalers (52.6%). Offenders who performed low-level functions remained subject to the mandatory minimum penalty at the lowest rates (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

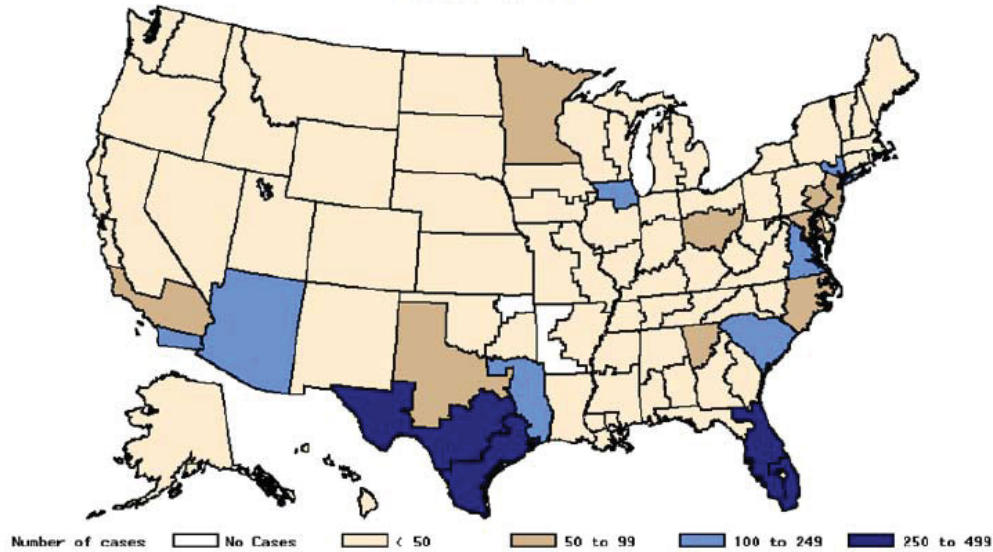
2. *Guilty Pleas and Trials*

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



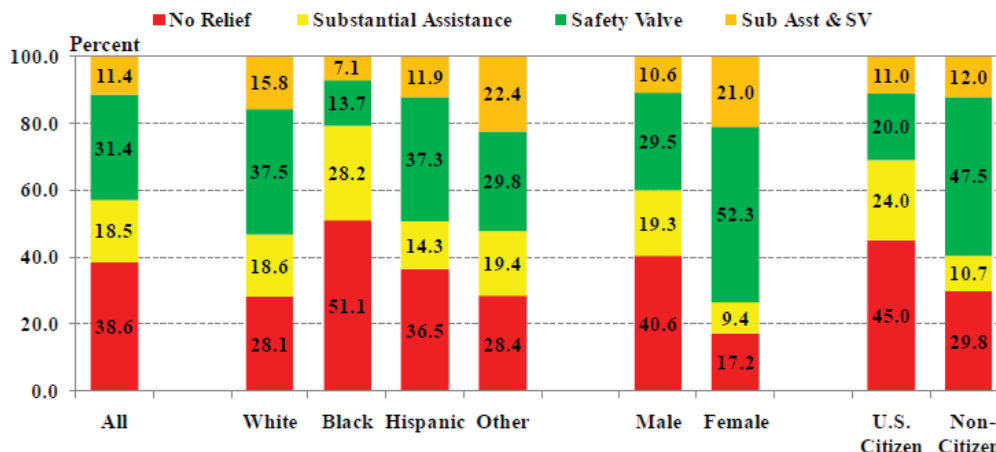
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

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

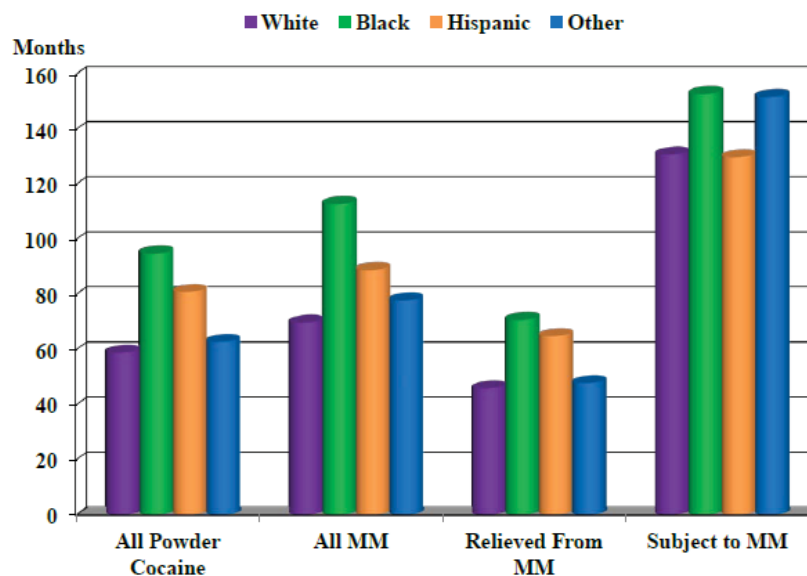
The average sentence for powder cocaine offenders who remained subject to the mandatory minimum penalty (*i.e.*, who did not receive some form of statutory relief) was 138 months, compared to 62 months for those offenders who obtained relief from the mandatory minimum penalty.

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.

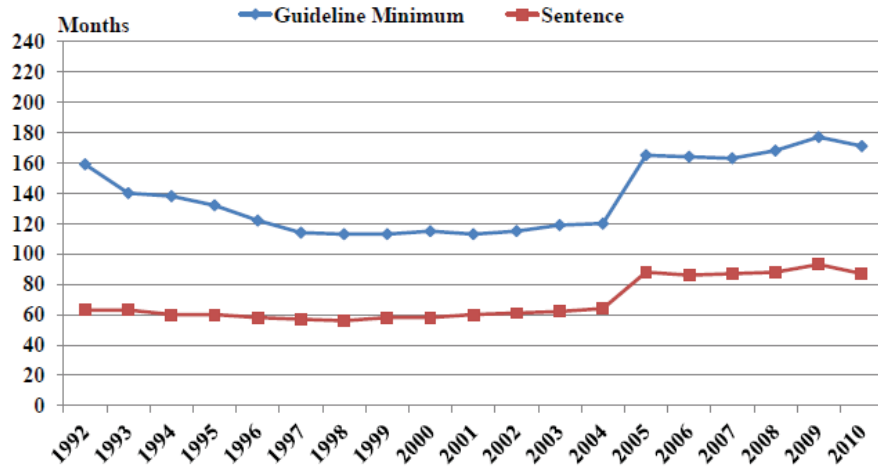
⁶⁵³ See Figure D-13 (Race of Powder Cocaine Offenders by Length of Drug Mandatory Minimum Penalty (Fiscal Year 2010)) in Appendix D of this Report.

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

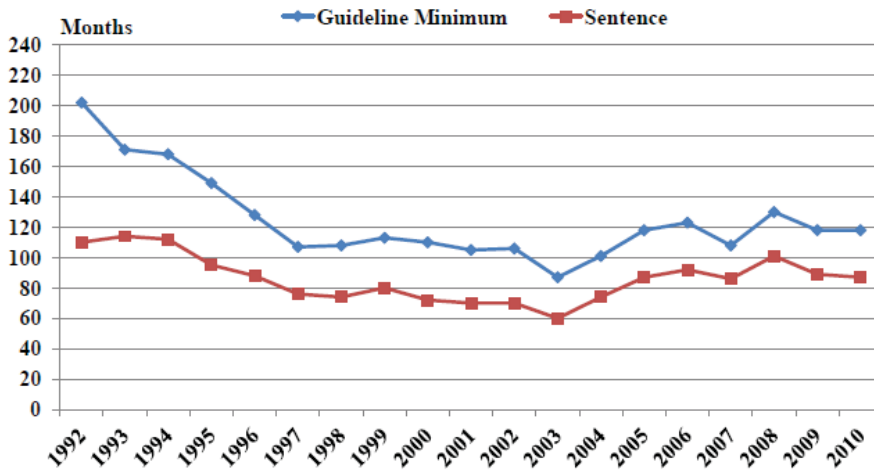
Figures 8-16 and 8-17 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for powder cocaine offenses for offenders sentenced from fiscal year 1995 to 2010. 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*

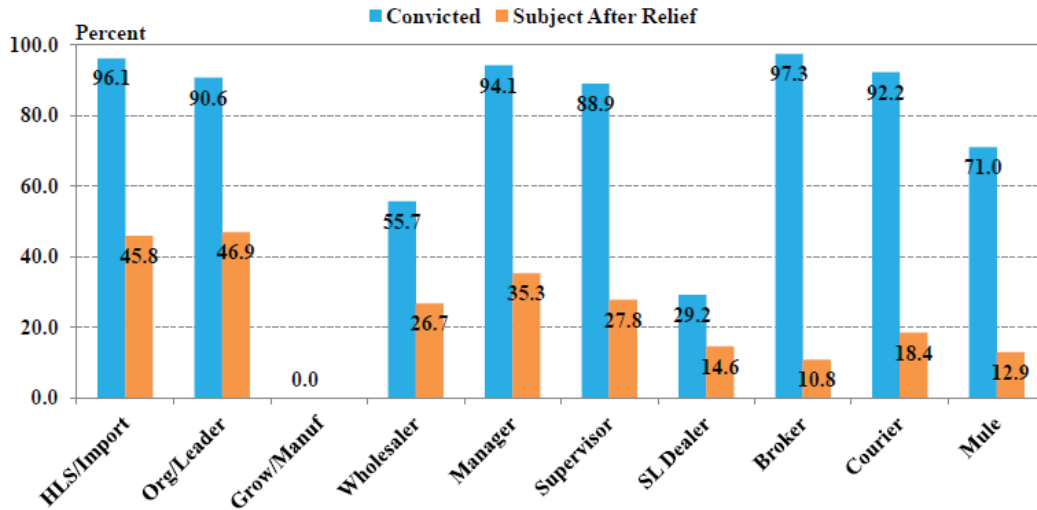
For powder cocaine offenders, the most common functions for offenders were High Level Supplier/Importer (24.1%), Courier (21.1%) and Wholesaler (20.7%). The least common functions were Grower/Manufacturer (0.0%), Manager (2.0%) and Supervisor (2.1%).⁶⁵⁵

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.

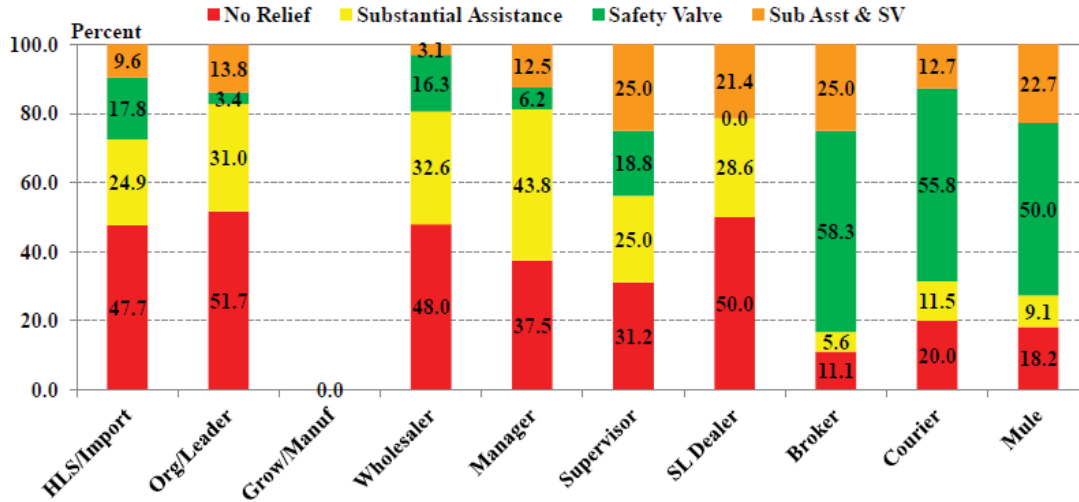
Figure 8-18
Percent of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty and
Subject to a Mandatory Minimum Penalty
By Offender Function and Primary Drug Type
Powder Cocaine Offenders
Fiscal Year 2009 Sample Data



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*

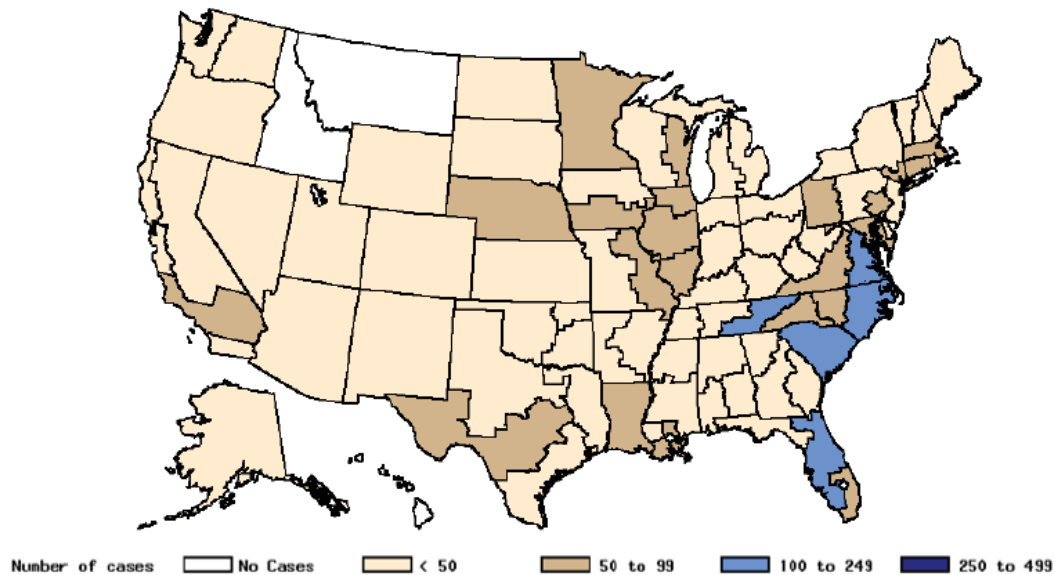
Crack cocaine offenders convicted of an offense carrying a mandatory minimum penalty went to trial at about the same rate as other drug offenders convicted of an offense carrying such a penalty. In fiscal year 2010, 94.6 percent (n=3,695) of crack cocaine offenders convicted of an offense carrying a 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.

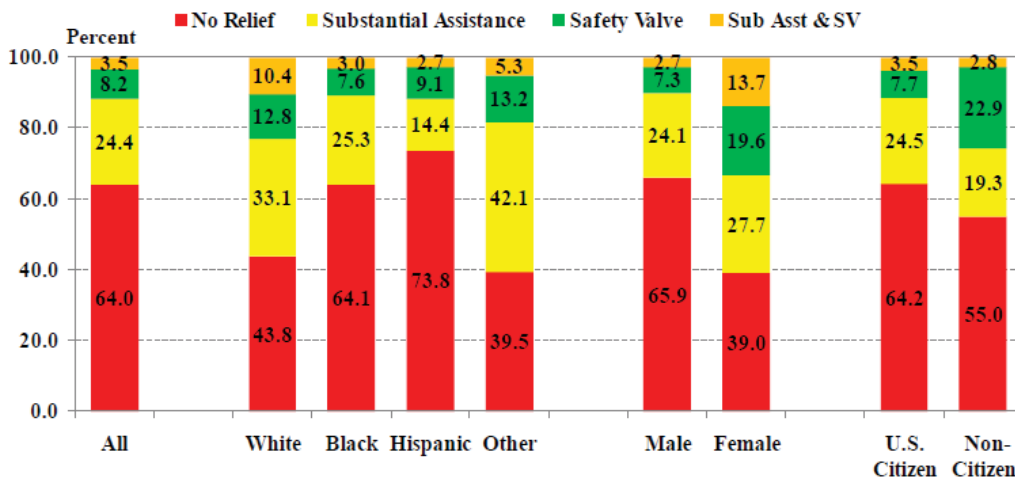
⁶⁶⁰ For example, four of these six districts (Eastern Virginia, Eastern North Carolina, South Carolina, and Middle Florida) are in the top five districts for the largest number of offenders granted retroactive application of the amendments made to the guidelines pursuant to the Fair Sentencing Act. See 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.

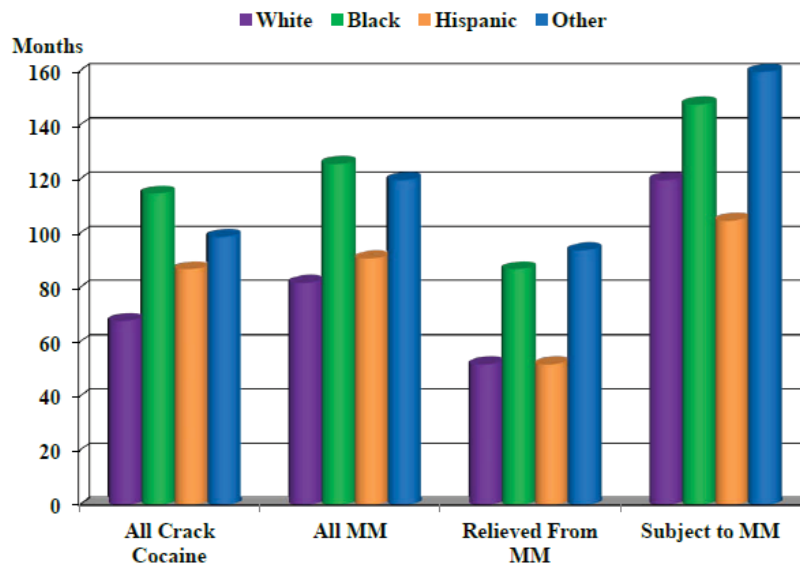
As was the case with the overall drug mandatory minimum population, the different forms of relief received by crack cocaine offenders impacted the applicable average sentence. Crack cocaine offenders who qualified for the safety valve and also provided the government with substantial assistance had the 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.

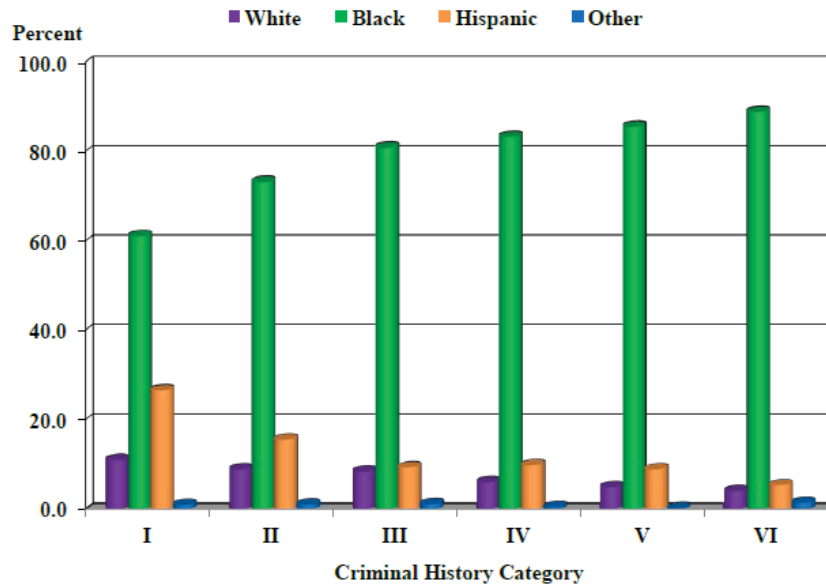
A slightly different pattern emerged when comparing average sentences by race for crack cocaine offenders who remained subject to the mandatory minimum penalty with those who obtained relief from the mandatory minimum penalty. Black offenders still had a higher average sentence than either White or Hispanic 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)).

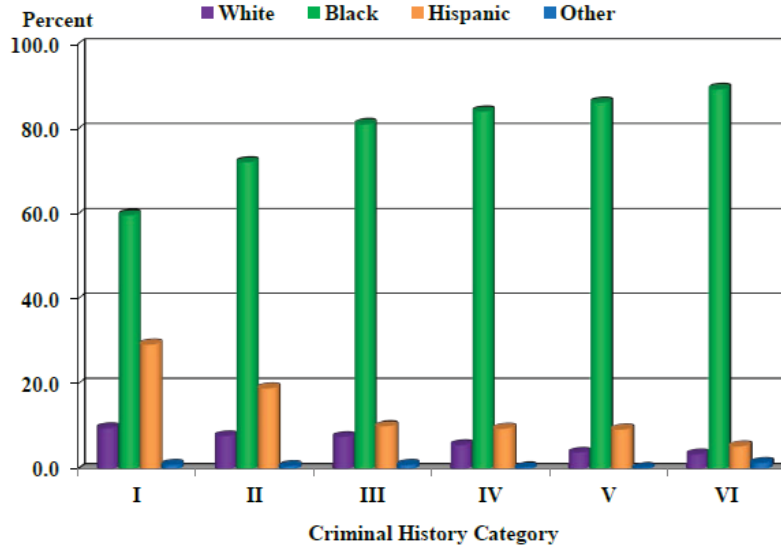
Black increased with the criminal history category. For each of these groups, the proportion of Black offenders in Category Criminal History III and higher was greater than the proportion of Black offenders for that population. See Figures 8-23 through 8-26. For example, Black offenders constituted 78.5 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



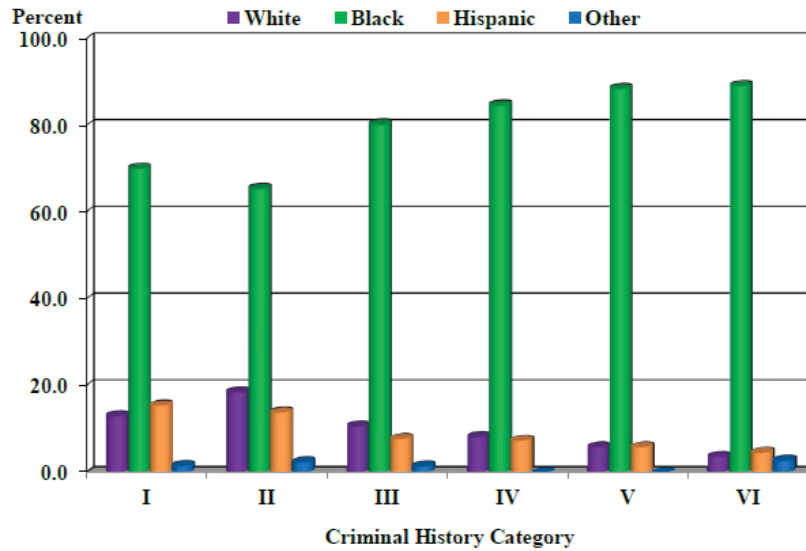
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

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



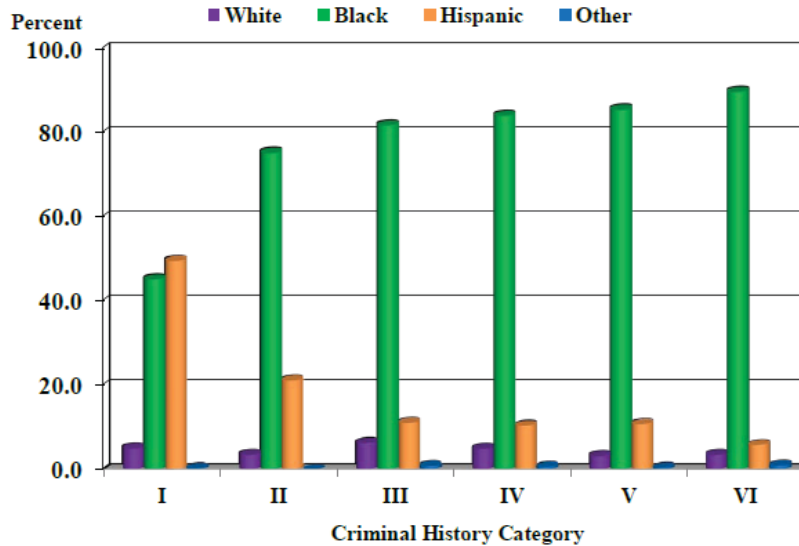
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

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.

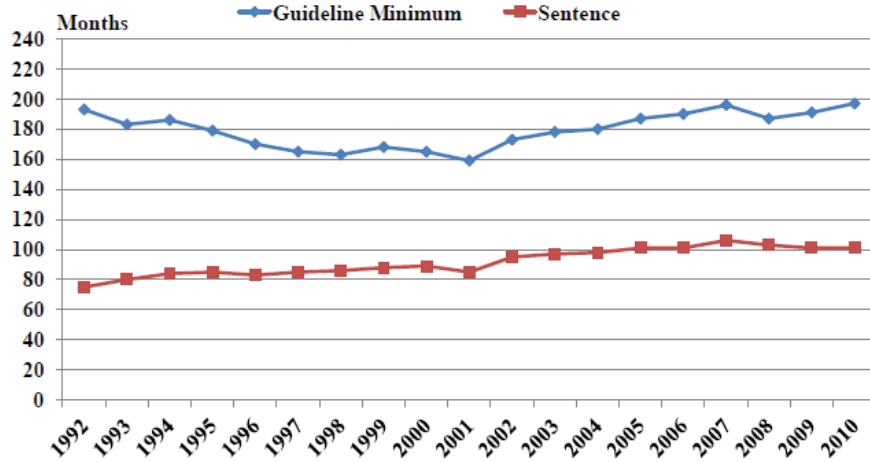
Crack cocaine offenders who remained subject to the mandatory minimum penalty at the time of sentencing received a non-government sponsored below range sentence in 30.3 percent (n=758) of the cases. This is the highest rate of such sentences reported for any drug type. Crack cocaine offenders who remained 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

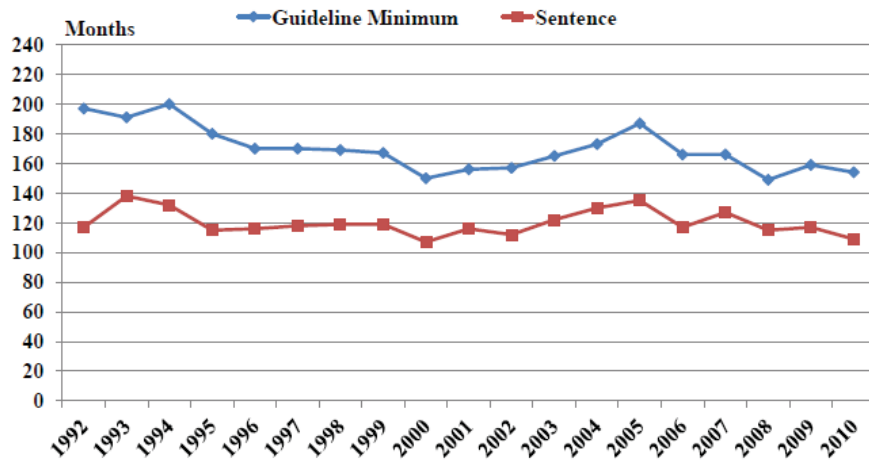
Figures 8-27 and 8-28 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for crack cocaine offenses for offenders sentenced from fiscal year 1992 to 2010. 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*

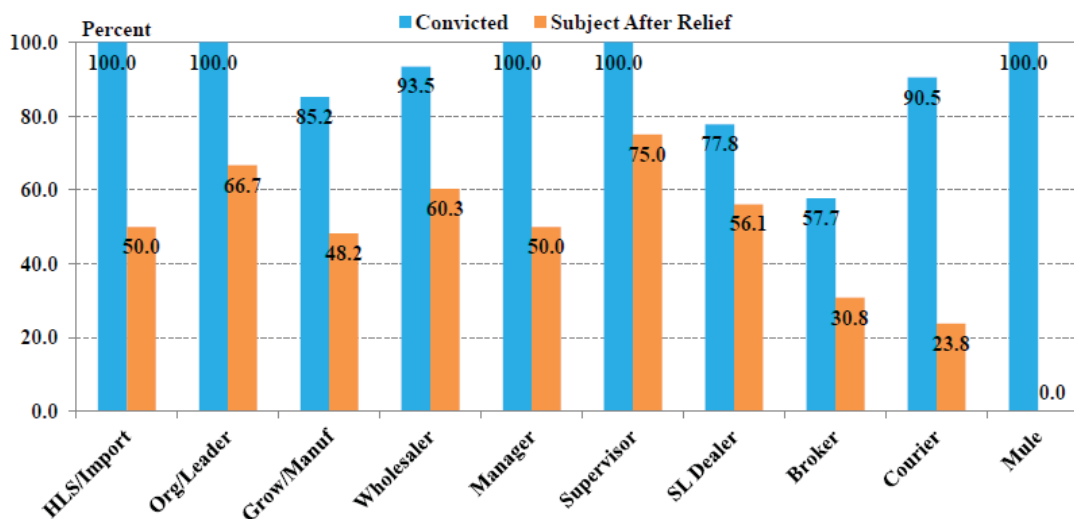
For crack cocaine offenders, the most common functions for offenders were Street-Level Dealer (47.0%) and Wholesaler (27.9%). The least common functions were Mule (0.2%), Supervisor (0.5%), High Level Supplier/Importer (0.5%), and Manager (0.7%).⁶⁶⁷

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

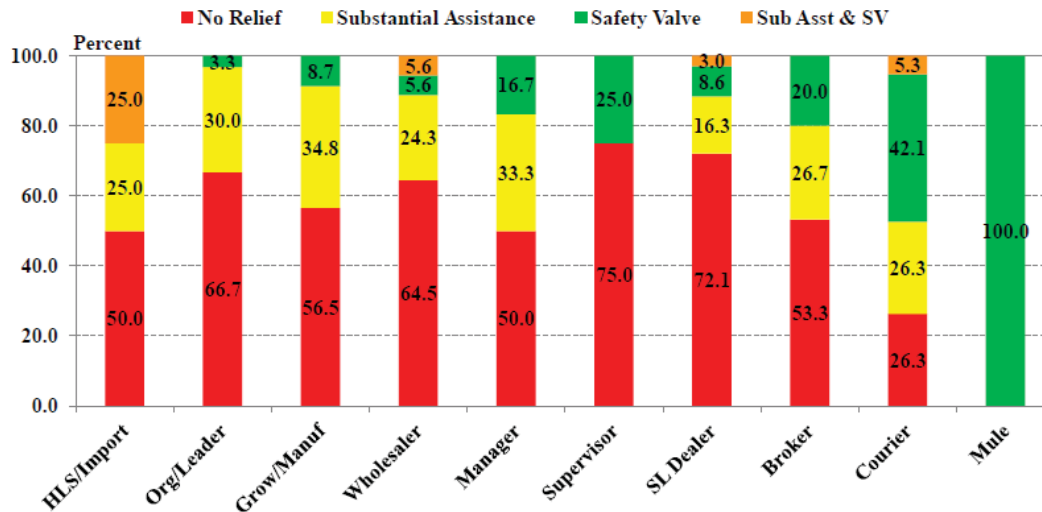


SOURCE: U.S. Sentencing Commission, 2009 Function Datafile.

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*

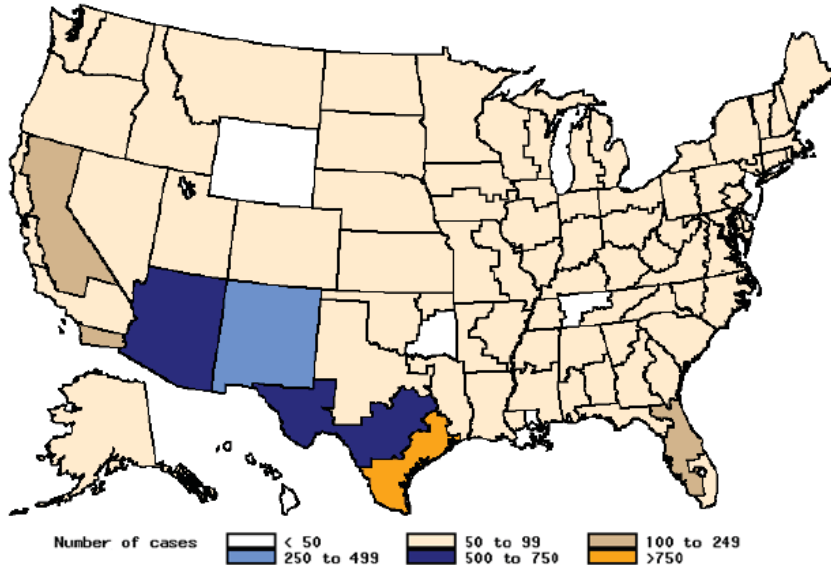
Marijuana offenders convicted of an offense carrying a mandatory minimum penalty sought a trial at about the same rate as all drug offenders convicted of an offense carrying such a penalty. In fiscal year 2010, 95.7 percent (n=2,608) of marijuana offenders convicted of an offense carrying a mandatory 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.

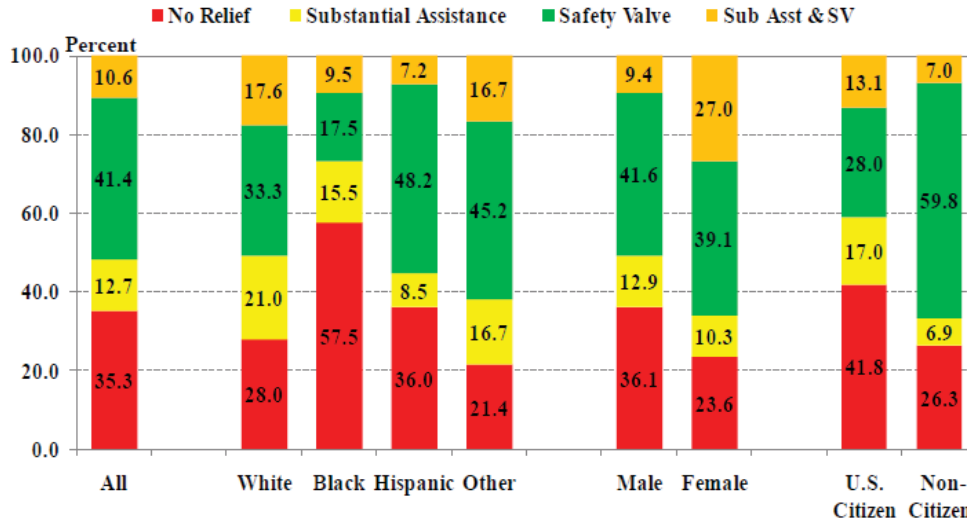
4. *Relief from the Mandatory Minimum Penalty*

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

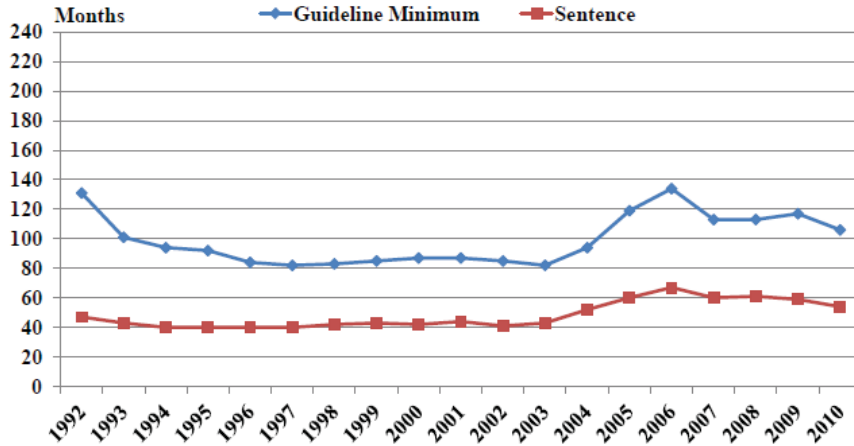
	All Offenders	Convicted of a Statute Carrying a Mandatory Minimum Penalty	Relieved of Application of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	6,161	2,725	1,764	961
Sentence Relative to the Guideline Range (Percent)				
Within Range	56.3	51.6	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.

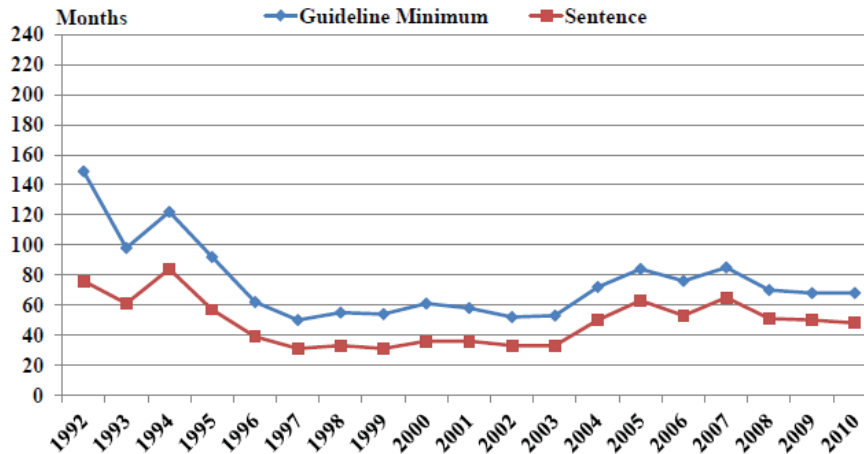
⁶⁷² This finding seems inconsistent with opinions expressed by the district court judges in the survey conducted by the Commission in 2010, in which more than half (54%) of judges responded that mandatory minimum penalties for marijuana offenses were too high. See Commission, *2010 Judges' Survey*.

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

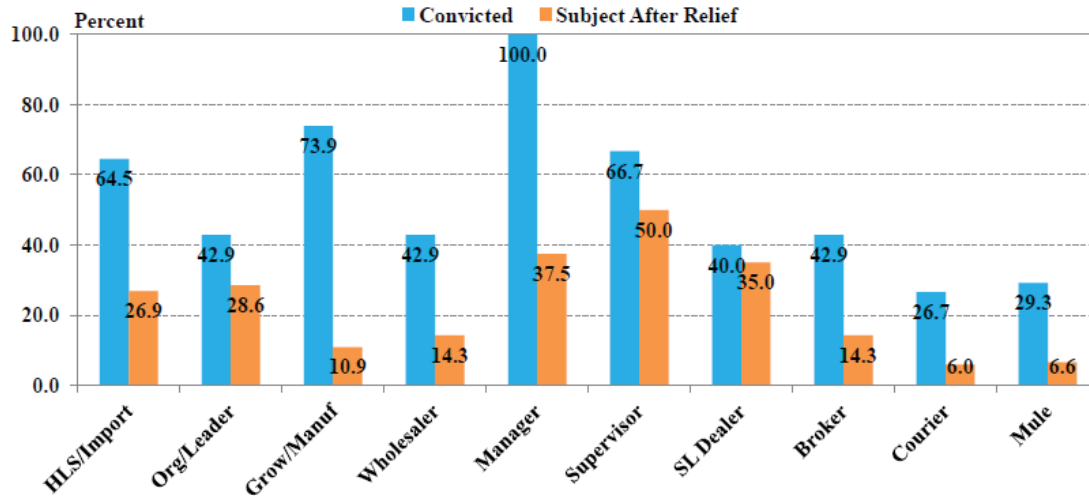
7. *Offender Function*

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.

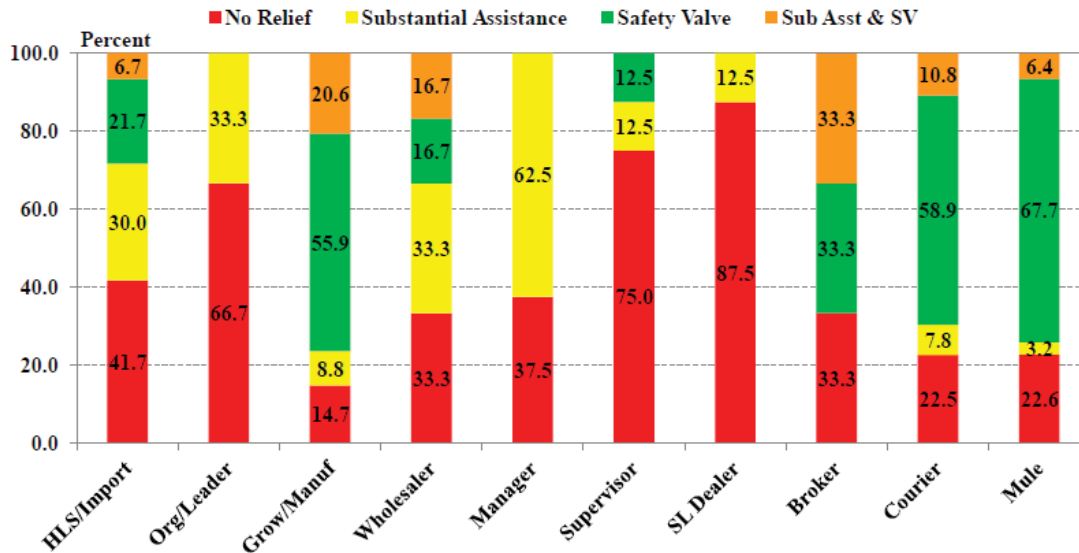
Figure 8-35
Percent of Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty
by Offender Function and Primary Drug Type
Marijuana Offenders
Fiscal Year 2009 Sample Data



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*

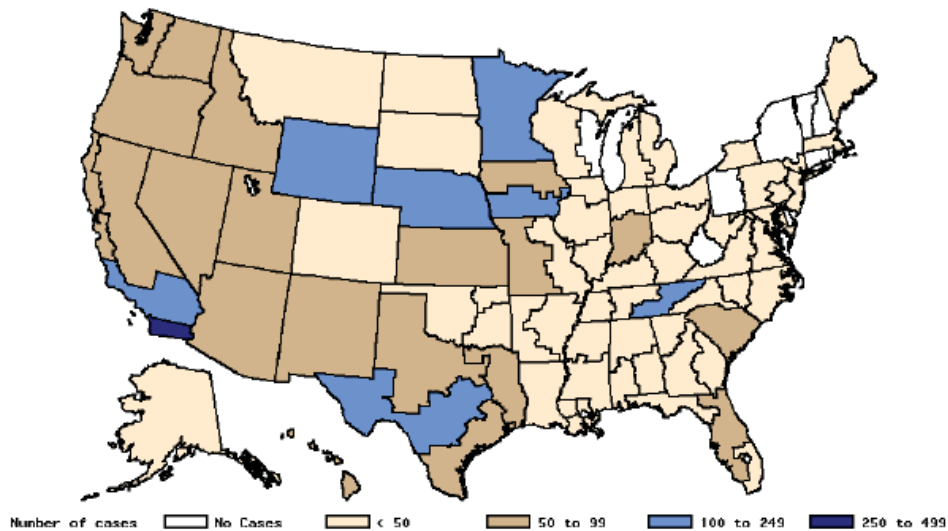
Methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty went to trial at about the same rate as all drug offenders convicted of an offense carrying such a penalty. In fiscal year 2010, 96.9 percent (n=3,358) of methamphetamine offenders convicted of an offense carrying 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



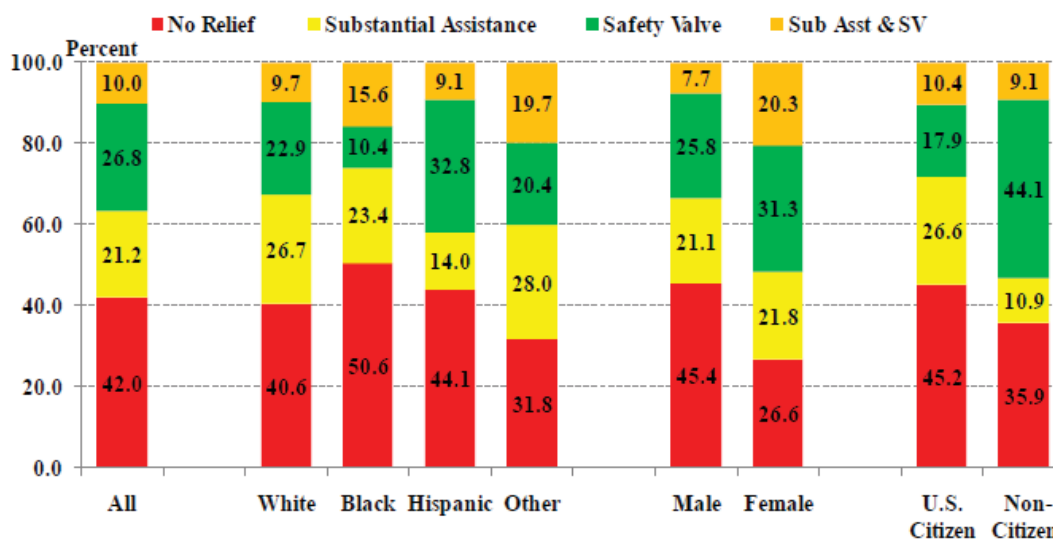
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

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

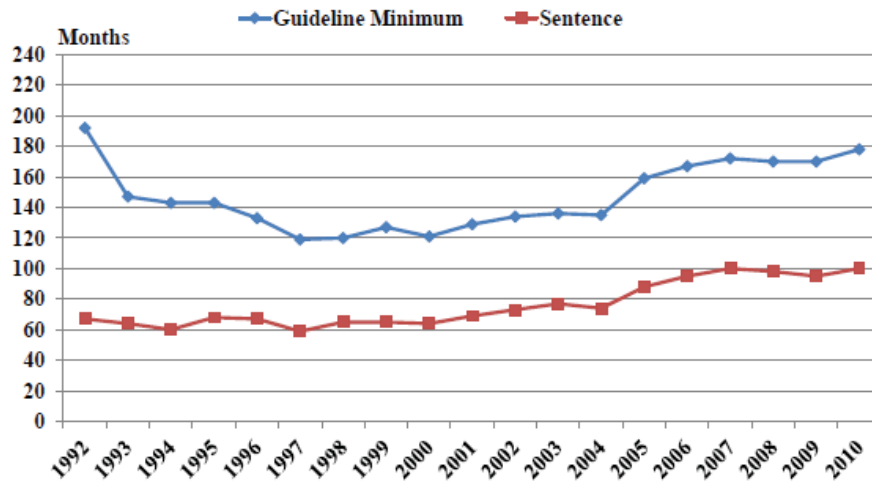
Table 8-15 compares the position of the sentence imposed relative to the guideline range among methamphetamine offenders generally, methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty, methamphetamine offenders convicted of an offense carrying a mandatory minimum penalty 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

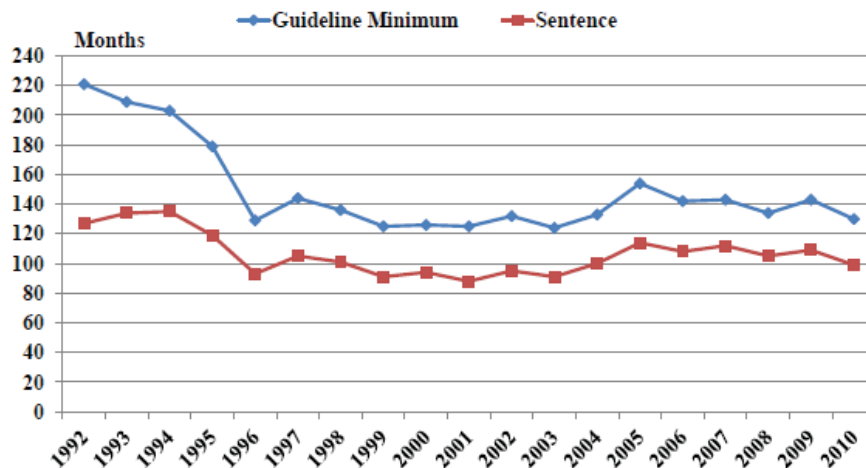
Figures 8-39 and 8-40 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for methamphetamine offenses for offenders sentenced from fiscal year 1992 to 2010. 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*

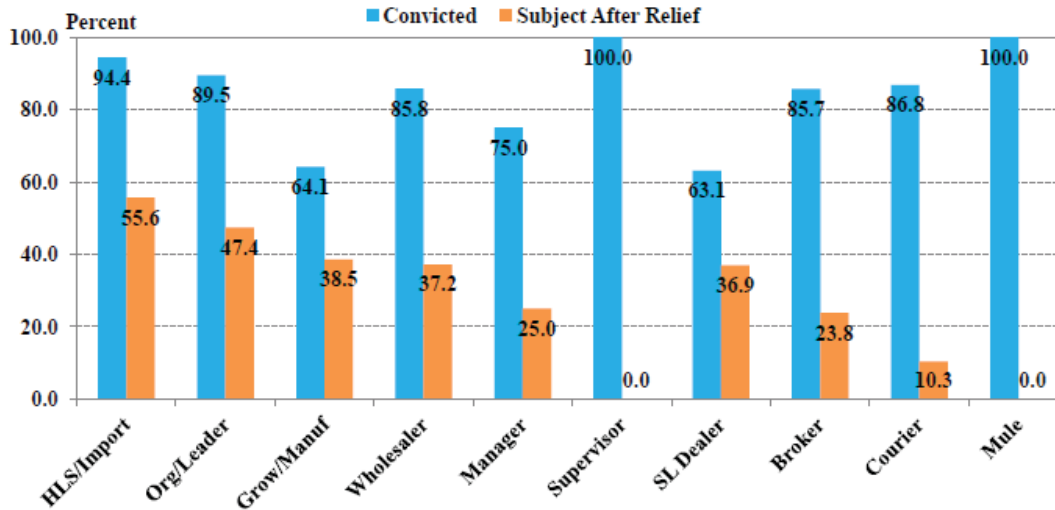
The majority of methamphetamine offenders served in functions that were at least as or more culpable than Supervisor (56.3%). Wholesaler was the most common function (38.5%).⁶⁸⁶ For methamphetamine offenses, more than half of offenders in every function category were convicted of an offense carrying 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.

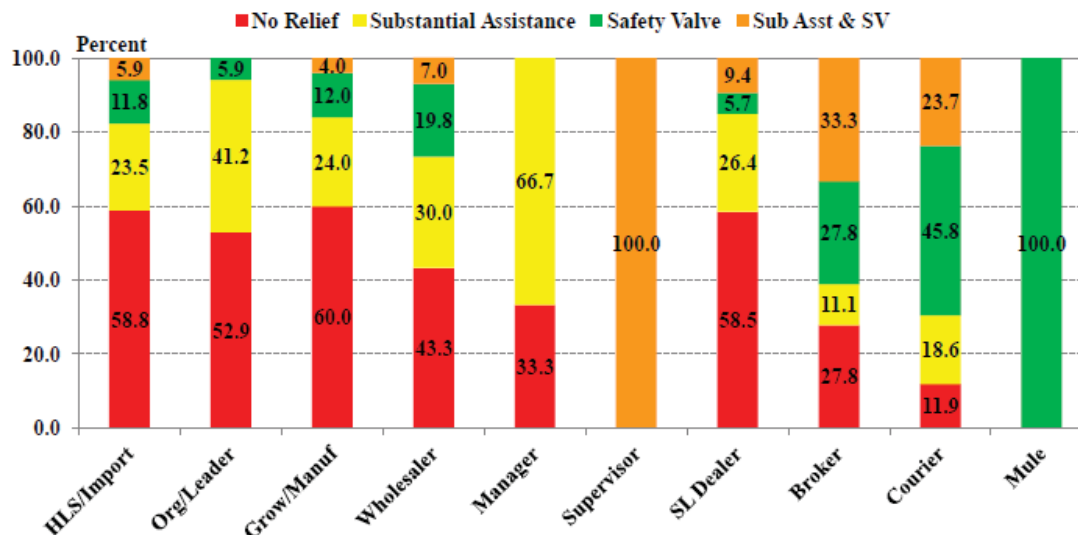
Figure 8-41
Percent of Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty
by Offender Function and Primary Drug Type
Methamphetamine Offenders
Fiscal Year 2009 Sample Data



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*

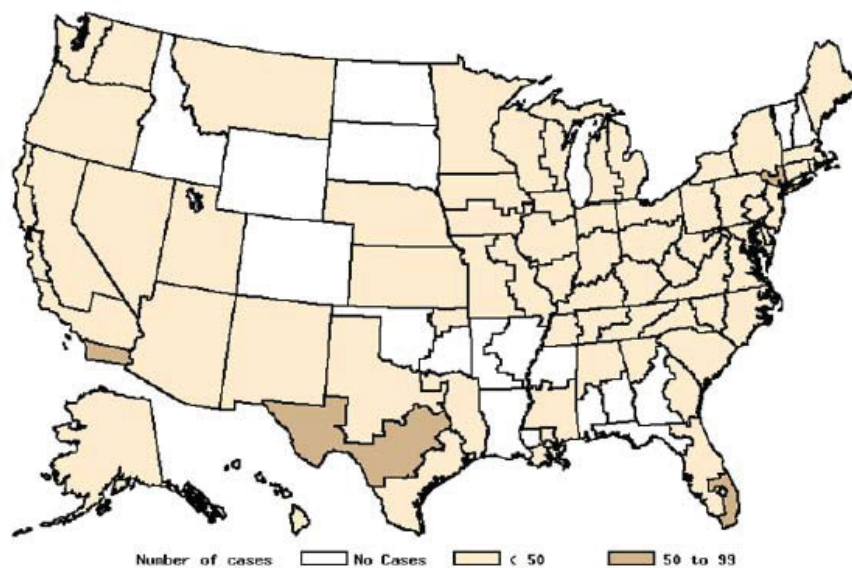
As observed for other drug types, heroin offenders convicted of an offense carrying a mandatory minimum penalty went to trial at about the same rate as all drug offenders convicted of an offense carrying such a penalty. In fiscal year 2010, 96.1 percent (n=1,055) of heroin offenders convicted of an offense 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.

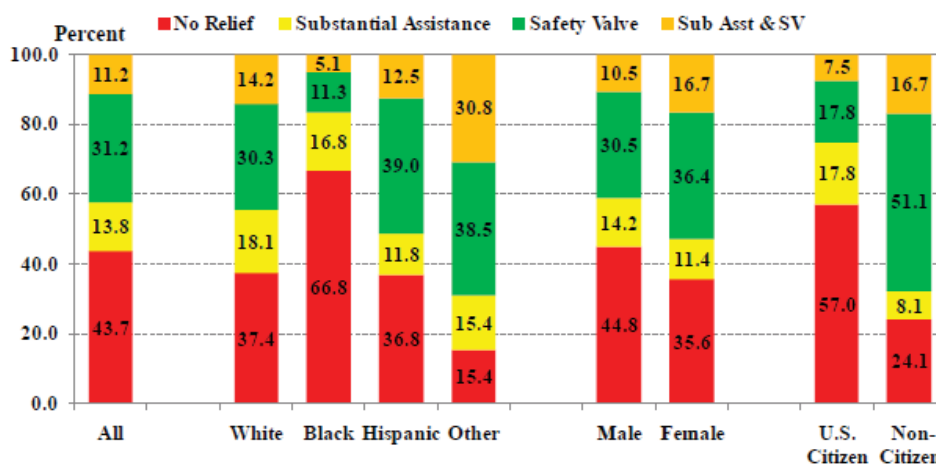
As a percentage of the overall caseload, heroin offenders convicted of an offense carrying a mandatory minimum penalty were most common in the District of Rhode Island, where 12.7 percent of the criminal caseload (n=20 of 157 offenders) involved this type of case, as well as the District of Puerto Rico (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

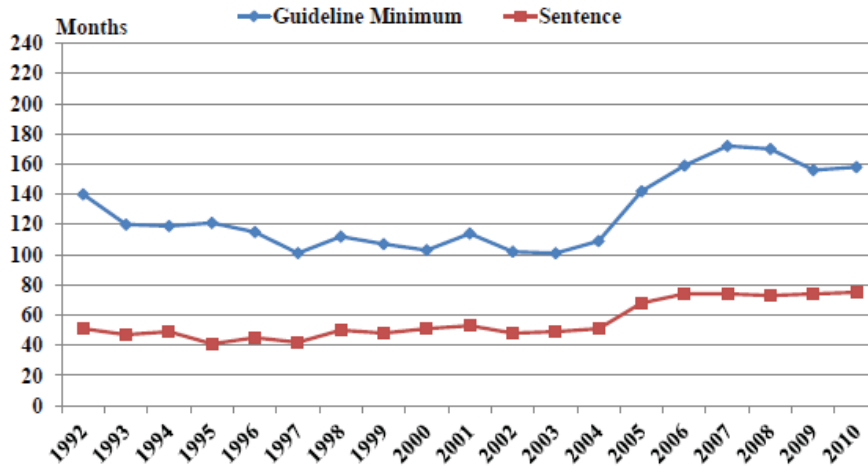
Table 8-18 compares the position of sentences relative to the guideline range among heroin offenders, heroin offenders convicted of an offense carrying a mandatory minimum penalty, heroin offenders convicted of an offense carrying a mandatory minimum penalty and relieved of application of the mandatory 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

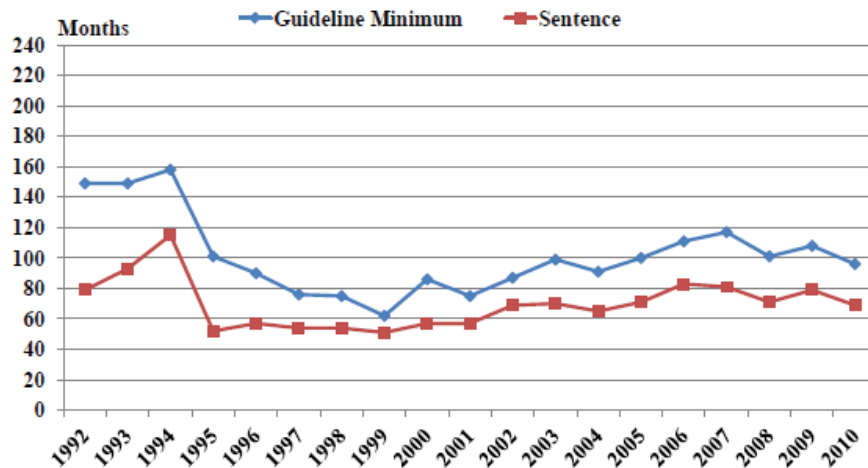
Figures 8-45 and 8-46 show the impact on sentences from substantial assistance departures and from other below range sentences. These figures display the average guideline range minimum and the average sentence imposed for heroin offenses for offenders sentenced from fiscal year 1992 to 2010.

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*

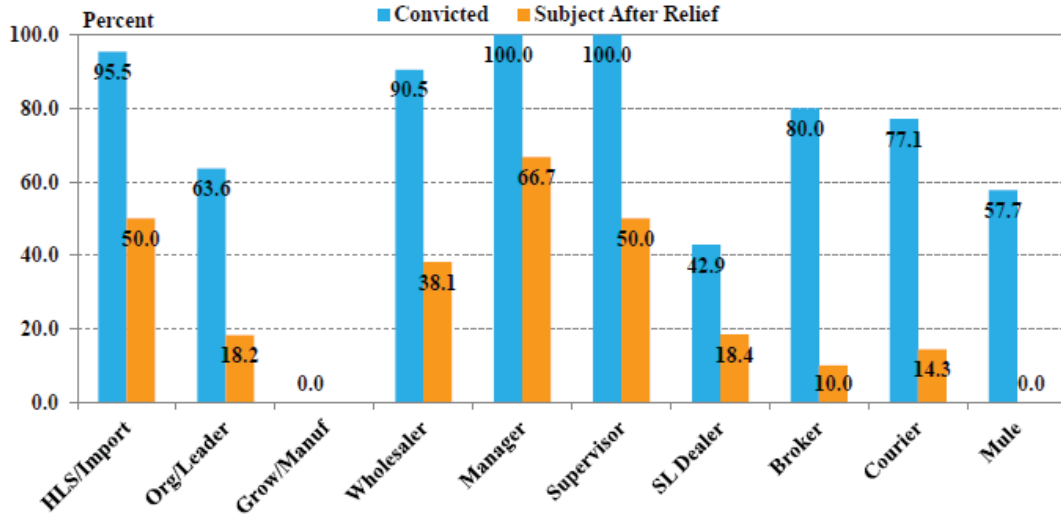
The majority of heroin offenders (52.9%) served in functions that are less culpable than Supervisor. The most common function for heroin offenses was Street-Level Dealer (21.4%).⁶⁹⁰

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.

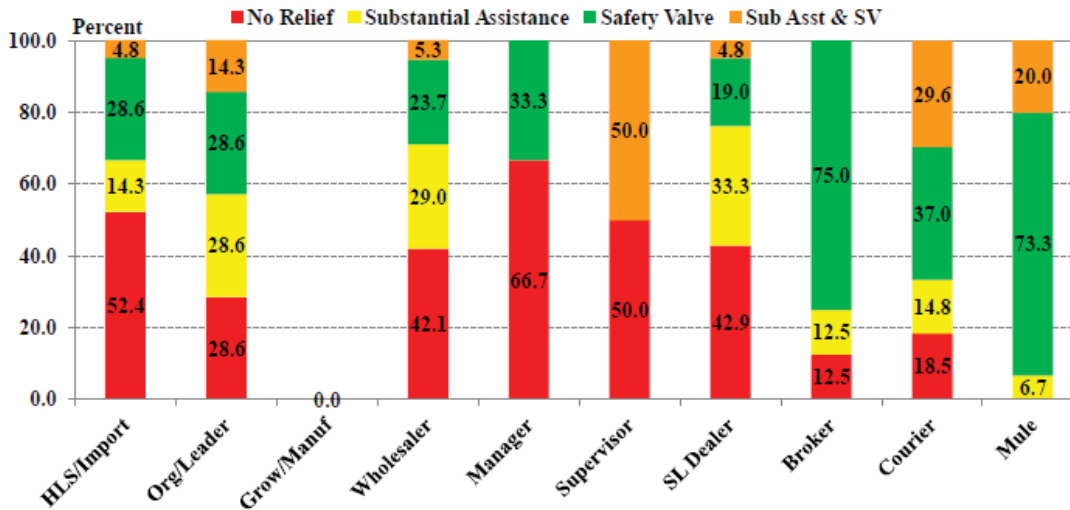
Figure 8-47
Percent of Offenders Convicted of an Offense Carrying a
Drug Mandatory Minimum Penalty and Subject to Mandatory Minimum Penalty
by Offender Function and Primary Drug Type
Heroin Offenders
Fiscal Year 2009 Sample Data



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.

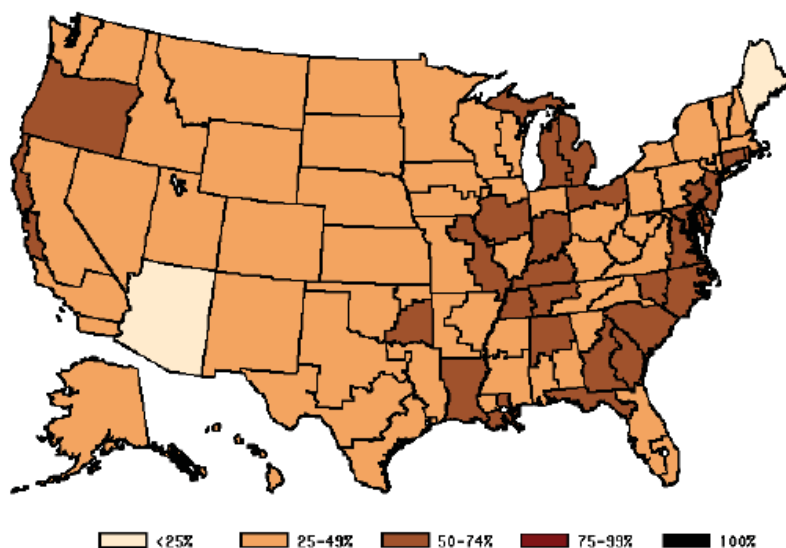
⁶⁹⁹ An important limitation on the Commission's coding project concerning enhancements for prior convictions for felony drug offenses under section 841(b) should be noted. Under 18 U.S.C. § 802(44), a "felony drug offense" includes simple possession of a controlled substance that is punishable in excess 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.

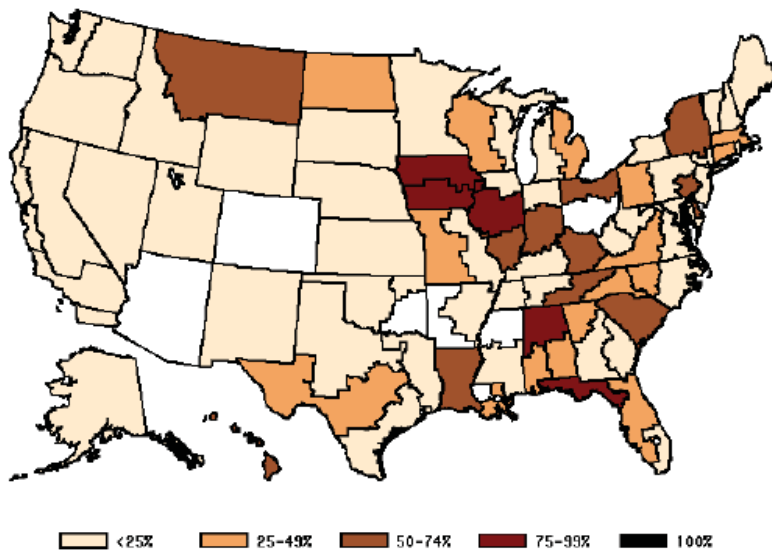
Figure 8-49
Drug Offender Eligibility for 21 U.S.C. § 851 Penalty Enhancement
by District
Fiscal Year 2006, 2008 and 2009 Sample Groups



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

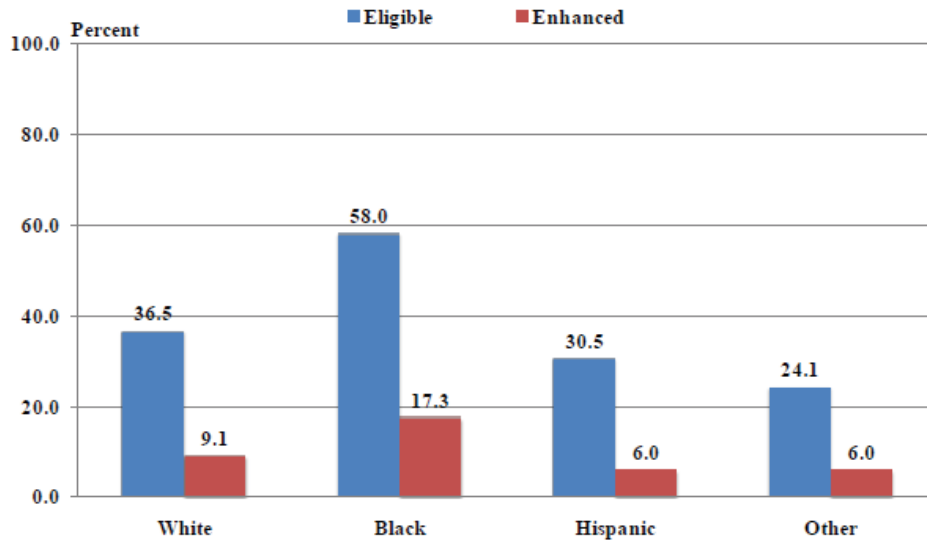


SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

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.

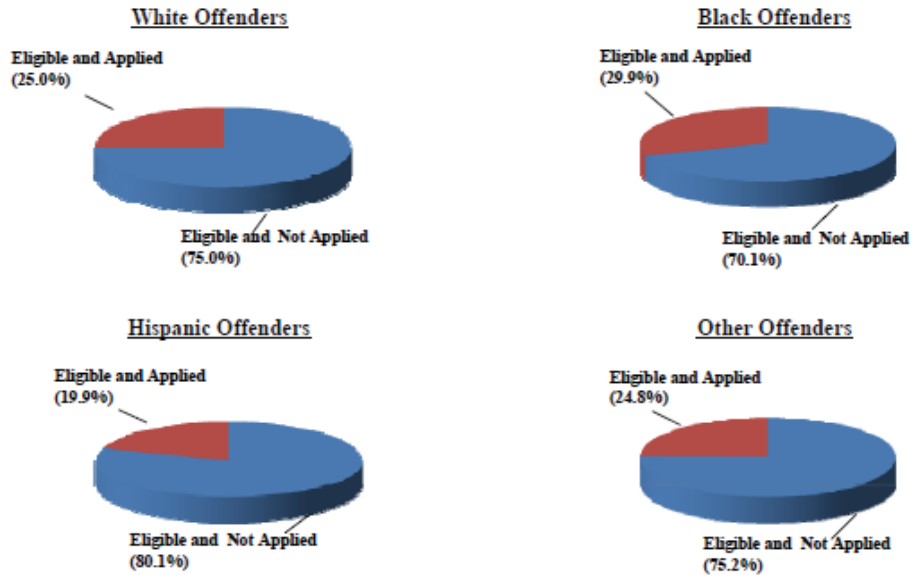
Figure 8-51
Race of Drug Offenders by Exposure to
21 U.S.C. § 851 Penalty Enhancement
Fiscal Year 2006, 2008 and 2009 Sample Groups



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

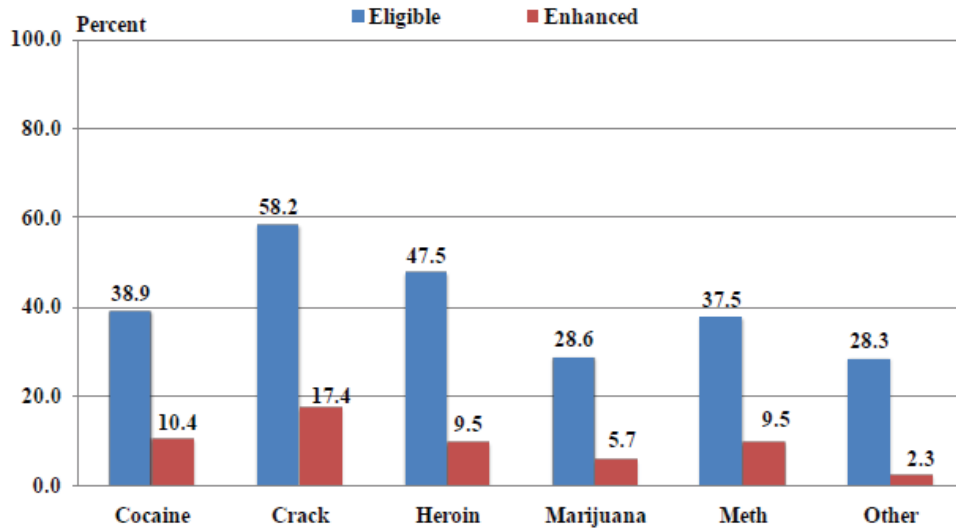


SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

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

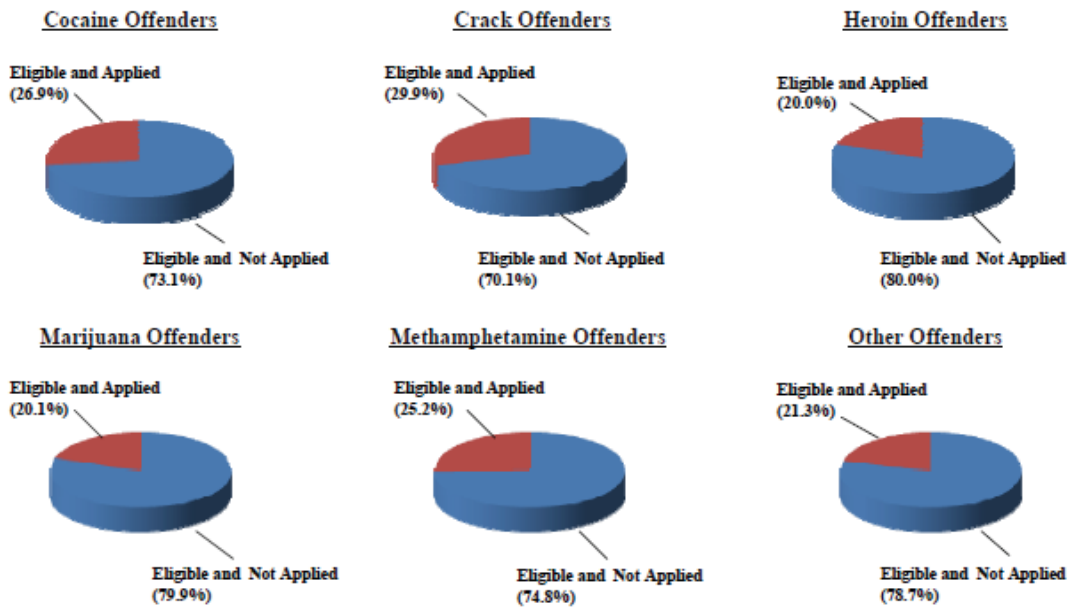


SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

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.