

MANDATORY MINIMUM PENALTIES FOR IDENTITY THEFT OFFENSES

A. INTRODUCTION

This chapter analyzes the application of mandatory minimum penalties for identity theft offenses. First, this chapter provides an overview of the aggravated identity theft statute,⁷⁸³ related offenses, and the applicable sentencing guideline provisions. Second, this chapter provides a statistical overview of identity theft offenses and the application of section 1028A. Third, this chapter analyzes the effect of section 1028A on sentencing outcomes, including sentence length and rates of relief from the mandatory penalty. Finally, this chapter presents findings with respect to mandatory minimum penalties and identity theft offenses.

As used in this chapter, the term “identity theft offenses” refers to the offenses established at 18 U.S.C. § 1028 (general identity theft) and 18 U.S.C. § 1028A (aggravated identity theft), as well as any other offense sentenced under the fraud guideline, §2B1.1,⁷⁸⁴ that received the 2-level enhancement for identity theft conduct.⁷⁸⁵ The term “identity theft offender” means a person who committed an identity theft offense.

There are other offense types, particularly immigration offenses, in which an offender may have engaged in identity theft or similar conduct but was not convicted of identity theft under section 1028 or aggravated identity theft under section 1028A. Those cases are not included in the Commission’s analyses because such an offender was not convicted of an identity theft offense, and the guideline provisions applicable to immigration offenses do not include identity theft enhancements.⁷⁸⁶ As a result, there is no reliable way to identify such cases. The Commission’s analysis of identity theft offenses therefore may be under-inclusive.

⁷⁸³ 18 U.S.C § 1028A.

⁷⁸⁴ USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).

⁷⁸⁵ The enhancement for identity theft is found at USSG §2B1.1(b)(10)(C). Effective November 1, 2011, this provision will be redesignated as §2B1.1(b)(11)(C).

⁷⁸⁶ *See, e.g.*, USSG §§2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).

B. OFFENSES AND RELATED GUIDELINES

1. *Identity Theft Offenses*

Congress created the offense of aggravated identity theft, codified at 18 U.S.C. § 1028A, in 2004.⁷⁸⁷ That section provides, “Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.”⁷⁸⁸ The enumerated felony offenses include theft offenses,⁷⁸⁹ offenses involving false statements and fraud,⁷⁹⁰ offenses related to nationality and citizenship,⁷⁹¹ offenses related to passports and visas,⁷⁹² and immigration offenses.⁷⁹³

Section 1028A requires that the mandatory two-year term of imprisonment be imposed consecutively to “any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the

⁷⁸⁷ See Identity Theft Penalty Enhancement Act, Pub. L. No. 108–275, § 2, 118 Stat. 831 (2004).

⁷⁸⁸ “[T]he term ‘means of identification’ means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual,” and includes names, social security numbers, dates of birth, driver’s licenses, taxpayer identification numbers, biometric data, and access devices. 18 U.S.C. § 1028(d)(7). In turn, the term “access device” means “any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number . . . or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value” 18 U.S.C. § 1029(e)(1), incorporated by reference in 18 U.S.C. § 1028(d)(7).

⁷⁸⁹ See 18 U.S.C. § 1028A (c)(1) (“[18 U.S.C. §] 641 (relating to theft of public money, property, or rewards), [] 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or [] 664 (relating to theft from employee benefit plans”).

⁷⁹⁰ § 1028A (c)(3) (“[Title 18, United States Code,] section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm”); § 1028A(c)(4) (“any provision contained in [chapter 47 of title 18, United States Code] (relating to fraud and false statements), other than this section or section 1028(a)(7)”; § 1028A(c)(5) (“any provision contained in chapter 63 [of Title 18, United States Code] (relating to mail, bank, and wire fraud)”; § 1028A(c)(8) (“section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. § 6823) (relating to obtaining customer information by false pretenses”); § 1028A(c)(11) (“section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. §§ 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act”).

⁷⁹¹ § 1028A (c)(2) (“[Title 18, United States Code,] section 911 (relating to false personation of citizenship)”; § 1028A(c)(6) (“any provision contained in chapter 69 [of title 18, United States Code] (relating to nationality and citizenship”).

⁷⁹² § 1028A (c)(7) (“any provision contained in chapter 75 [of title 18, United States Code] (relating to passports and visas”).

⁷⁹³ § 1028A (c)(9) (“section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. §§ 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card)”; § 1028A(c)(10) (“any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. § 1321 *et seq.*) (relating to various immigration offenses”).

means of identification was transferred, possessed, or used.”⁷⁹⁴ Moreover, the statute directs the court not to reduce any sentence for the underlying felony, assuming the defendant is convicted separately of the underlying felony, to “compensate for, or otherwise take into account, any separate term of imprisonment”⁷⁹⁵ to be imposed for a violation of section 1028A.

The statute has a feature by which sentences for multiple violations of section 1028A may be “stacked.” As described above, the sentencing court must impose the mandatory two-year penalty for the first section 1028A count and must run that sentence consecutively to any sentence imposed for the underlying felony. However, the court may in its discretion run the sentence for any additional 1028A counts “concurrently, in whole or in part, [] with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of [section 1028A].”⁷⁹⁶ Thus, section 1028A does not require that multiple counts of conviction be served consecutively, or “stacked,” with one another.

Other statutes penalize conduct that is similar to aggravated identity theft; however, unlike section 1028A, those statutes do not carry mandatory minimum penalties. The general identity theft statute, 18 U.S.C. § 1028, which does not carry a mandatory minimum,⁷⁹⁷ proscribes a broader range of identity theft activities than section 1028A. Thus, all conduct that violates section 1028A also violates section 1028.⁷⁹⁸ Conduct that violates section 1028 often will also violate section 1028A (depending primarily on the underlying offense), though not necessarily.⁷⁹⁹ Additionally, in some circumstances, conduct covered by the aggravated identity theft statute may be punishable under various fraud offense statutes, which do not carry mandatory minimum penalties.⁸⁰⁰ These overlapping statutes thus provide multiple charging options for offenders who engage in identity theft.

⁷⁹⁴ § 1028A(b)(2).

⁷⁹⁵ § 1028A(b)(3).

⁷⁹⁶ § 1028A(b)(4).

⁷⁹⁷ *See* 18 U.S.C. § 1028(b).

⁷⁹⁸ A person violates section 1028 if he or she, among other acts, “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit . . . or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.” 18 U.S.C. § 1028(a)(7). *See* *United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009) (concluding that the defendant’s indictment and conviction of both identity theft in violation of section 1028(a)(7) and aggravated identity theft in violation of section 1028A(a)(1) violated the double jeopardy clause).

⁷⁹⁹ For example, in addition to using a means of identification in connection with certain offenses, section 1028 proscribes the unlawful production or transfer of an identification document, authentication feature, or a false identification document. *See* 18 U.S.C. § 1028(a)(1) & (2). This conduct does not necessarily give rise to criminal liability for aggravated identity theft under section 1028A.

⁸⁰⁰ *See, e.g.*, 18 U.S.C. § 1029 (access device fraud), 18 U.S.C. § 1343 (wire fraud), and 42 U.S.C. § 408 (a)(7) (fraudulent use of a social security account number).

The exercise of prosecutorial discretion in charging identity theft offenses is limited to some degree by the differing proof requirements of the aggravated identity theft offense, compared to identity theft offenses that do not carry a mandatory minimum penalty. In *Flores-Figueroa v. United States*,⁸⁰¹ the Supreme Court held that to establish the section 1028A element that the defendant “knowingly” transferred, possessed, or used a means of identity of another person, the government must prove that the defendant both knew that he or she was transferring, possessing, or using a means of identification *and* knew that the means of identification in fact belonged to another person.⁸⁰² Although a similar proof requirement may exist under the general identity theft statute insofar as the government alleges the defendant violated section 1028(a)(7) (“knowingly transfers, possesses or uses, without lawful authority, a means of identity of another person”)⁸⁰³ other sections of the general identity theft offense, other fraud statutes, and the guidelines identity-theft enhancement impose less stringent proof requirements than section 1028A.

2. *Related Guidelines*

The guideline applicable to fraud and other offenses (including non-aggravated identity theft), USSG §2B1.1 applies to identity theft offenders generally, as it establishes a 2-level enhancement if the offense involved certain identity theft conduct. As relevant here, an offender is subject to the enhancement pursuant to §2B1.1(b)(10)(C) if the offense involved “the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification” or “the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification.”⁸⁰⁴ Conduct that triggers the guideline enhancement is also generally punishable under section 1028A. First, the guideline enhancement requires the commission of an underlying offense, that is, an offense covered by the §2B1.1 guideline. Those offenses include many of the enumerated felonies in section 1028A, such as mail fraud, wire fraud, bank fraud, and various social security frauds. Second, many, though not all,⁸⁰⁵ of the acts that trigger the guideline enhancement may also violate section 1028A, such as using another’s name and social security number to obtain a bank loan or a credit card.⁸⁰⁶ The guideline also provides incremental enhancements based on

⁸⁰¹ 129 S. Ct. 1886 (2009).

⁸⁰² *See id.* at 1894.

⁸⁰³ *See id.* at 1891 (explaining that “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element”).

⁸⁰⁴ *See* USSG §2B1.1(b)(10).

⁸⁰⁵ The enhancement and section 1028A are not entirely coextensive. For example, if the offender used the means of identification only to purchase consumer goods or merely forged a signature to cash a stolen check, he or she may have committed aggravated identity theft, but §2B1.1(b)(10)(C) likely would not apply. *See* USSG §2B1.1, comment. (n.9(C)(iii)).

⁸⁰⁶ *See* USSG §2B1.1, comment. (n.9(C)(ii)).

the amount of loss incurred in the offense⁸⁰⁷ and an enhancement of two, four, or six levels based on the number of victims involved.⁸⁰⁸

The guideline provision applicable to convictions of an offense under section 1028A reflects the statute's fixed, mandatory penalty by providing that "the guideline sentence is the term of imprisonment required by statute."⁸⁰⁹ In addition, the guidelines provide a non-exhaustive list of factors for the court to consider in exercising its discretion concerning multiple section 1028A counts. Those factors are: (1) the nature and seriousness of the underlying offenses (*e.g.*, whether the underlying offenses are crimes of violence); (2) whether the underlying offenses are able to be grouped for guidelines purposes and, if so, specifying that multiple section 1028A counts in that case "should run concurrently with one another"; and (3) whether the purposes of sentencing as specified at 18 U.S.C. § 3553(a)(2) "are better achieved by imposing a concurrent or a consecutive sentence" for the multiple section 1028A counts.⁸¹⁰

C. STATISTICAL OVERVIEW

Identity theft offenses constitute a small percentage of federal criminal cases. Of the 73,239 offenders sentenced in fiscal year 2010 and included in this analysis, 2.6 percent (n=1,870) were convicted of identity theft offenses. Of the 1,870 cases involving identity theft offenses, 42.6 percent (n=797) involved a conviction of an offense under section 1028A. *See* Figure 11-1. Cases involving a conviction of an offense under section 1028A were only 0.9 percent of all federal criminal cases.

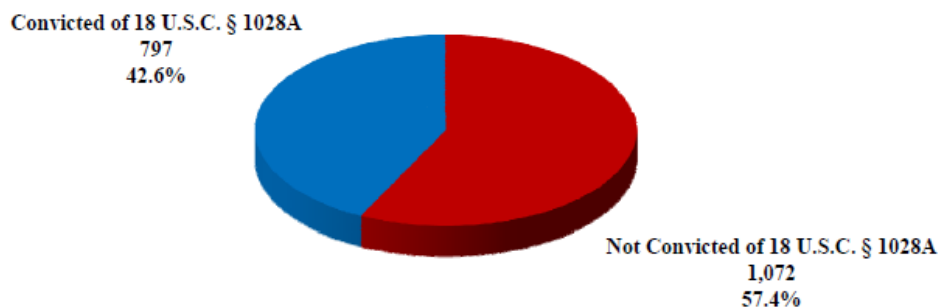
⁸⁰⁷ *See* USSG §2B1.1(b)(1).

⁸⁰⁸ *See* USSG §2B1.1(b)(2). Ten is the minimum number of victims triggering an increase.

⁸⁰⁹ *See* USSG §2B1.6 (Aggravated Identity Theft).

⁸¹⁰ *See* USSG §5G1.2, comment. (n.2(B)).

Figure 11-1
Percent of Identity Theft Offenders Convicted of an Offense Under
18 U.S.C § 1028A
Fiscal Year 2010



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

Although identity theft offenses are only a small percentage of the federal criminal docket, the number of offenders convicted of section 1028A has increased since the Commission began collecting data concerning those offenders.⁸¹¹ Of all offenders for whom the Commission received sentencing information in fiscal year 2006, less than one percent (0.4%, n=309) were convicted of an offense under section 1028A.⁸¹²

Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 690 (86.6%) were also convicted of at least one additional felony offense. The type of additional felony offenses in these cases can be determined by reference to the primary guideline provision applicable at sentencing. Of the 797 offenders convicted of an offense under section 1028A, 71.1 percent (n=567) were sentenced pursuant to USSG §2B1.1; 13.4 percent (n=107) were sentenced pursuant to USSG §2B1.6 because they were convicted only of violating section 1028A; and 10.8 percent (n=86) were sentenced pursuant to guidelines relating to immigration offenses. The remaining offenders were sentenced under other guidelines.⁸¹³

A discussion of several statistical analyses of identity theft offenses – using Commission data from fiscal year 2010 – is set forth below.

⁸¹¹ The Commission began identifying offenders convicted of violating 18 U.S.C. § 1028A beginning with the data for fiscal year 2006 (Congress created the offense in July 2004). In order to assess the prison impact of the mandatory penalty, Commission data files were combined with a Bureau of Prisons data file to determine how many offenders were in prison, what percentage of offenders at the end of each fiscal year were in prison due to conviction of an offense under section 1028A, and what percentage of prisoners were subject to the mandatory penalty at sentencing. All statistics are based on what offenders are in prison as of September 30 of the respective year (the end of the fiscal year).

⁸¹² There were 575 convictions of offenses under section 1028A in fiscal year 2007 (0.8% of all offenders), 904 in fiscal year 2008 (1.2% of all offenders); and 935 in fiscal year 2009 (1.1% of all offenders).

⁸¹³ See Table D-19 (Average Sentence by Guideline for Identity Theft Offenders (Fiscal Year 2010)) in Appendix D of this Report.

1. *Demographic Characteristics of Identity Theft Offenders*

Table 11-1 presents the demographic characteristics of all identity theft offenders in fiscal year 2010. This information is then compared to the demographic characteristics of identity theft offenders convicted of an offense under section 1028A; identity theft offenders convicted of an offense under section 1028A but relieved from its mandatory penalty because they rendered substantial assistance; and identity theft offenders convicted of an offense under section 1028A and subject to the mandatory penalty at sentencing. Table 11-2 presents information about the criminal histories of those groups of offenders.

**Table 11-1
Demographic Characteristics of Identity Theft Offenders
Fiscal Year 2010**

	All Identity Theft Offenders	Convicted of 18 U.S.C. § 1028A	Relieved of Application of 18 U.S.C. § 1028A	Subject to 18 U.S.C. § 1028A at Sentencing
Total (# of offenders)	1,870	797	124	673
Race of Offender (Percent)				
White	29.9	32.8	27.6	33.7
Black	39.7	40.2	44.7	39.4
Hispanic	25.7	22.3	21.1	22.5
Other	4.7	4.7	6.5	4.3
Citizenship of Offender (Percent)				
United States Citizen	70.3	74.4	83.1	72.8
Non-Citizen	29.7	25.6	16.9	27.2
Gender of Offender (Percent)				
Male	72.7	71.8	62.9	73.4
Female	27.3	28.2	37.1	26.6

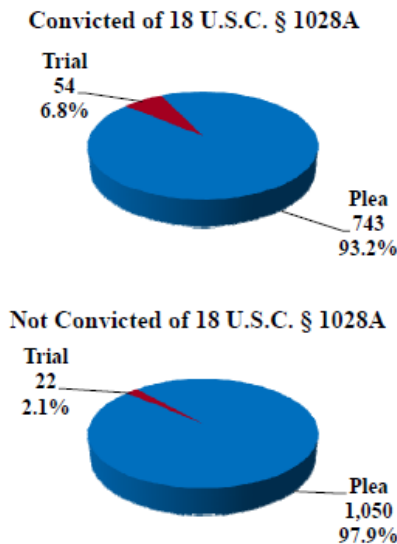
Table 11-2
Criminal History of Identity Theft Offenders
Fiscal Year 2010

Criminal History Category	All Offenders	Convicted of 18 U.S.C. § 1028A	Relieved of Application of 18 U.S.C. § 1028A	Subject to 18 U.S.C. § 1028A at Sentencing
Total (# of offenders)	1,870	797	124	673
Criminal History Category (Percent)				
I	52.2	45.4	49.6	44.6
II	9.9	10.5	9.2	10.8
III	13.1	12.2	7.6	13.1
IV	7.0	8.8	10.1	8.6
V	6.0	8.0	6.7	8.3
VI	11.9	15.0	16.8	14.7

2. *Guilty Pleas and Trials*

Identity theft offenders convicted of an offense under section 1028A went to trial more often than identity theft offenders who were not convicted of an offense under section 1028A. Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 6.8 percent (n=54) proceeded to trial. By contrast, of the 1,072 identity theft offenders not convicted of an offense under section 1028A, 2.1 percent (n=22) proceeded to trial. *See* Figure 11-2.

Figure 11-2
Plea and Trial Rates of Identity Theft Offenders by Mandatory Minimum Status
Fiscal Year 2010



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

3. *Geographic Variations*

Cases involving a conviction of an offense under section 1028A were primarily concentrated in three circuits. Of the 797 cases in fiscal year 2010 that involved a conviction of an offense under section 1028A, 23.8 percent (n=190) were from district courts in the Eleventh Circuit, 16.1 percent (n=128) were from district courts in the Ninth Circuit, and 14.4 percent (n=115) were from district courts in the Fourth Circuit. Thus, over half (54.3%, n=433) of the 797 cases involving the aggravated identity theft mandatory penalty came from district courts in those three circuits.⁸¹⁴ By way of comparison, 36.6 percent of all federal cases sentenced in fiscal year 2010 came from district courts in those three circuits.⁸¹⁵

Cases involving a conviction of an offense under 1028A were more geographically dispersed at the district level than at the circuit level. Nonetheless, a disproportionately large number of cases involving a conviction of an offense under section 1028A came from only three judicial districts. The Southern District of Florida had significantly more cases involving a conviction of an offense under section 1028A than other districts. Of the 797 cases in fiscal year 2010 that involved a conviction of section 1028A, 103 (12.9%) were from the Southern District of Florida. By way of comparison, only 3.0 percent of all federal cases sentenced in fiscal year 2010 came from that district.⁸¹⁶ Two other districts reported 30 or more cases that involved a

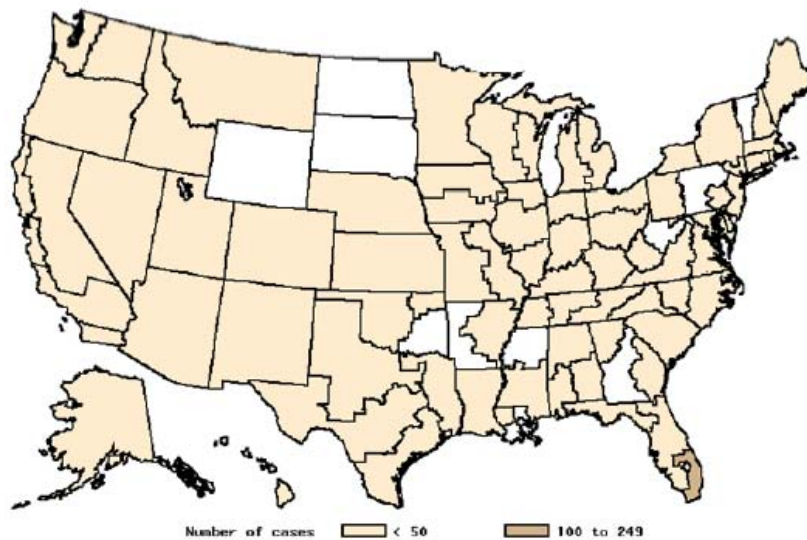
⁸¹⁴ See Table D-18 (Mandatory Minimum Status for Identity Theft Offenders in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁸¹⁵ See Table D-1 (Mandatory Minimum Status of Cases in Each Circuit and District (Fiscal Year 2010)) in Appendix D of this Report.

⁸¹⁶ *Id.*

conviction of an offense under section 1028A: 37 in Eastern Pennsylvania (comprising 4.6% of all cases involving a conviction of section 1028A compared to 1.1% of all federal cases) and 30 in Eastern Virginia (comprising 3.7% of all cases involving a conviction of section 1028A compared to 2.5% of all federal cases). Sixty-six districts reported fewer than ten cases involving a conviction of an offense under section 1028A and 12 reported having no cases involving a conviction of an offense under section 1028A.⁸¹⁷ See Figure 11-3.

Figure 11-3
Number of Offenders Convicted of an Offense Under 18 U.S.C. § 1028A
Fiscal Year 2010



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

Cases involving a conviction of an offense under section 1028A, while geographically concentrated in only a few districts, comprised only a small percentage of any district's criminal case docket. In fiscal year 2010, only five of the 94 federal districts reported that more than four percent of the total criminal case docket involved a conviction of an offense under section 1028A: Hawaii (5.1%, n=8), Northern Alabama (4.9%, n=20), Southern Florida (4.8%, n=103), Western Washington (4.3%, n=28), and Eastern Pennsylvania (4.1%, n=37).

4. *Application of Section 1028A*

Because the statutes punishing identity theft overlap in the conduct they proscribe, and only section 1028A carries a mandatory minimum penalty, the Commission conducted additional analyses to determine whether any specific offense or offender characteristics are associated with convictions of offenses under section 1028A. These analyses indicate that identity theft offenders who commit more severe identity theft offenses or who have more significant criminal

⁸¹⁷ See Table D-18 In Appendix D of this Report.

histories are generally more likely to be convicted of an offense under section 1028A than identity theft offenders with less severe offenses or who have less significant criminal histories.

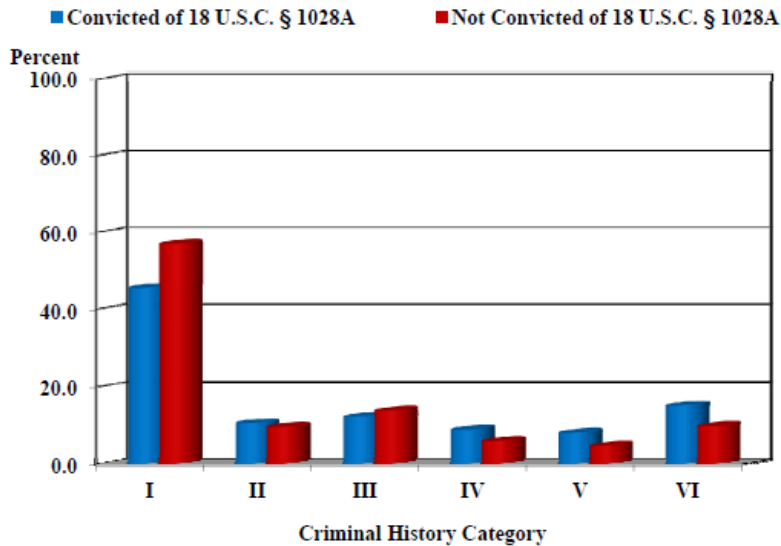
As an initial matter, it does not appear that offender demographic characteristics are associated with the application of section 1028A. In fiscal year 2010, there are only minimal demographic differences between identity theft offenders convicted of an offense under section 1028A and identity theft offenders who were not. *See* Table 11-1.

With respect to offense severity, it appears that identity theft offenders who committed somewhat more severe offenses, as measured by the amount of the loss and the number of victims involved in the offense, were more likely to be convicted of an offense under section 1028A. The Commission compared the amount of loss and the number of victims among identity theft offenders sentenced pursuant to USSG §2B1.1 by mandatory minimum status.⁸¹⁸ Identity theft cases involving a conviction of an offense under section 1028A had a median loss amount (\$75,836) that was 28.2 percent higher than the median loss amount in identity theft cases not involving a conviction of an offense under section 1028A (\$54,400). Additionally, identity theft cases involving a conviction of an offense under section 1028A were more likely to have ten or more victims (in 39.5% of the cases) than identity theft cases not involving a conviction of an offense under section 1028A (in 31.5% of the cases).

With respect to criminal history, it appears that identity theft offenders with somewhat more significant criminal histories also were more likely to be convicted of an offense under section 1028A. *See* Figure 11-4. For example, a higher percentage of identity theft offenders convicted of an offense under section 1028A were in Criminal History VI (15.0%, n=114) than identity theft offenders not convicted of an offense under section 1028A (9.7%, n=104). Conversely, a lower percentage of identity theft offenders convicted of an offense under section 1028A were in Criminal History Category I (45.4%, n=345) than identity theft offenders not convicted of section 1028A (56.9%, n=610).

⁸¹⁸ USSG §2B1.1 contains specific offense characteristics that enhance the defendant's offense level based on the amount of loss and the number of victims involved in the offense. *See* USSG §2B1.1(b)(1) & (2).

Figure 11-4
Criminal History Category of Identity Theft Offenders by Mandatory Minimum Status
Fiscal Year 2010



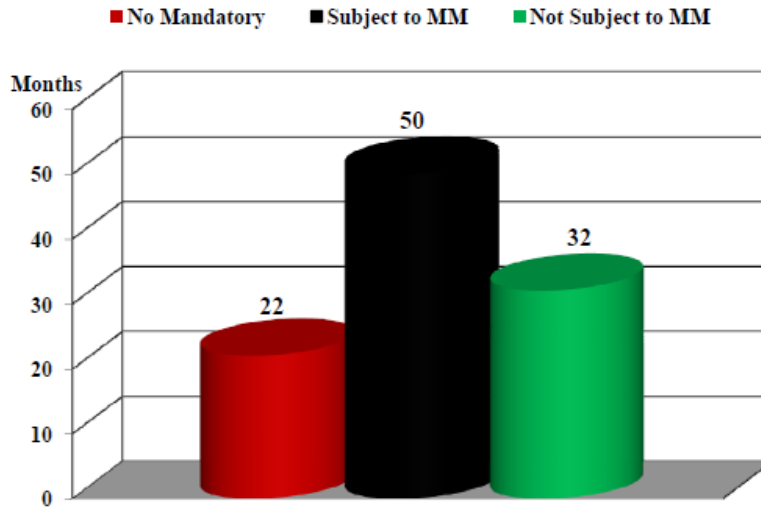
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

D. SENTENCING OUTCOMES

1. Sentence Length

Identity theft offenders convicted of an offense under section 1028A received longer sentences, regardless of whether they received relief from the mandatory penalty at sentencing, than identity theft offenders not convicted of an offense under section 1028A. In fiscal year 2010, identity theft offenders not convicted of an offense under section 1028A received an average sentence of 22 months. Identity theft offenders convicted of an offense under section 1028A and who were subject to the mandatory penalty at sentencing received an average sentence of 50 months. Identity theft offenders convicted of an offense under section 1028A but who were relieved of the mandatory penalty at sentencing received an average sentence of 32 months. *See* Figure 11-5.

Figure 11-5
Average Sentence Length for Identity Theft Offenders by
Mandatory Minimum Status
Fiscal Year 2010



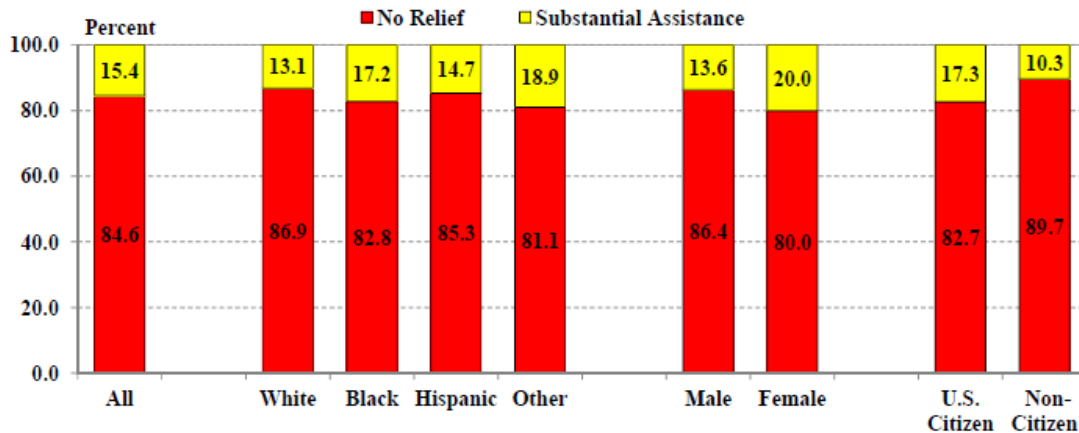
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

2. *Relief from the Mandatory Minimum Penalty*

Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 15.4 percent (n=123) were relieved of its mandatory penalty at sentencing pursuant to 18 U.S.C. § 3553(e) because they rendered substantial assistance to the government. *See* Figure 11-6. Of the 123 offenders who were relieved of the mandatory minimum penalty, 44.7 percent (n=55) received a sentence that was less than the mandatory minimum penalty (*i.e.*, less than two years). Offenders relieved of the mandatory minimum penalty received, on average, sentences that were 48.7 percent below the guideline minimum.

Figure 11-6 presents the demographic characteristics of offenders convicted of an offense under section 1028A and the rates of relief from the mandatory minimum penalty.

Figure 11-6
Percent of Identity Theft Offenders Convicted of an Offense Under
18 U.S.C. § 1028A
Who Were Relieved of the Penalty
Fiscal Year 2010



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

There were only slight differences in the severity of offenses committed by offenders who were relieved of the mandatory penalty and offenses committed by those who were not relieved of the mandatory penalty. The Commission compared the amount of the loss and the number of victims for identity theft offenders convicted of an offense under section 1028A and sentenced pursuant to §2B1.1 because of another count of conviction.⁸¹⁹ Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 71.1 percent (n=567) were sentenced pursuant to §2B1.1 and are therefore included in this analysis. Of these 567 offenders, 81.1 percent (n=460) were subject to the mandatory penalty and 18.8 percent (n=107) were relieved of the mandatory penalty. Offenders subject to the mandatory penalty had a median loss amount of \$71,452 and 38.3 percent (n=176) committed an offense involving ten or more victims, while offenders relieved of the mandatory penalty had a median loss amount of \$86,258 and 43.9 percent (n=47) committed an offense involving ten or more victims. *See* Table 11-3.

⁸¹⁹ Accordingly, this analysis of offense severity and rates of relief does not include identity theft offenders whose only count of conviction was of an offense under section 1028A or, by virtue of another count of conviction, were sentenced pursuant to a guideline provision other than §2B1.1. The amount of the loss and number of victims are not available for those offenders because the applicable guideline provisions did not call for the sentencing court to make those calculations to determine the offense level.

Table 11-3
Guideline Sentencing Characteristics of Identity Theft Offenders
Fiscal Year 2010

Specific Offense Characteristics	Convicted of 18 U.S.C. § 1028A	Relieved of Application of 18 U.S.C. § 1028A	Subject to 18 U.S.C. § 1028A at Sentencing
Sentenced Under §2B1.1 (# of offenders)	567	107	460
Characteristics			
More than 10 victims (percent)	39.3	43.9	38.3
Median Loss	\$75,836	\$86,258	\$71,452

There was not an association between criminal history and rates of relief from the mandatory penalty. *See* Table 11-2, *supra*. The proportion of offenders in each criminal history category is generally similar, regardless of whether the offender was relieved of the mandatory penalty.

3. *Stacking of Multiple Counts*

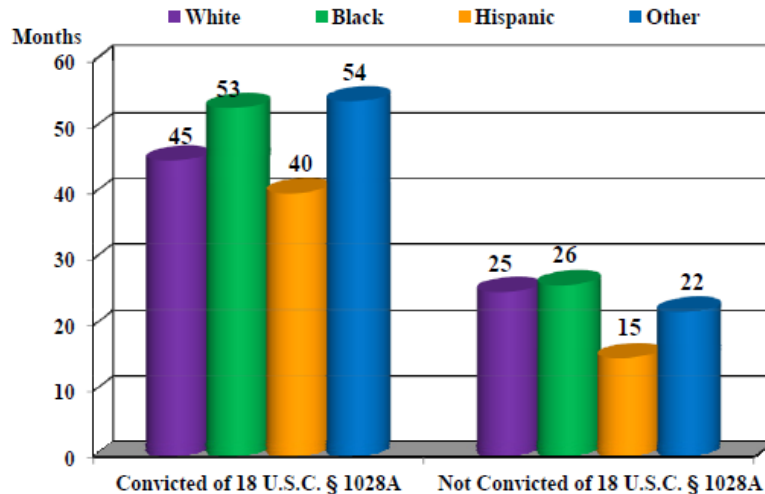
Of the 797 cases in fiscal year 2010 that involved a conviction of an offense under section 1028A, 10.2 percent (n=82) involved convictions of multiple counts of an offense under section 1028A. In 69 of those 82 cases, the court exercised its discretion to impose a concurrent two-year sentence for the multiple counts of conviction of an offense under section 1028A. In the remaining 13 cases, the court imposed consecutive sentences for the multiple counts of conviction of an offense under section 1028A.⁸²⁰

4. *Demographic Characteristics and Average Sentence Length*

As noted above, demographic differences do not appear to affect the application of section 1028A to identity theft offenders. *See* Figure 11-7. Identity theft offenders convicted of an offense under section 1028A received longer average sentences than offenders not convicted of an offense under section 1028A, regardless of race. However, among those identity theft offenders to whom section 1028A applies, the average length of sentence imposed differs by the offender's race. Among those offenders, Other Race and Black offenders received average sentences that were somewhat longer (54 and 53 months, respectively) than their White and Hispanic counterparts (45 and 40 months, respectively).

⁸²⁰ This number of cases is too small to allow for any meaningful conclusions about offense severity and criminal history. The Commission's analysis revealed, however, that the median loss amount for these cases was \$269,368. Six of the 13 cases involved loss amounts in excess of \$1 million, and five of the 13 involved offenders with a Criminal History Category VI. The Commission further analyzed the loss amounts and criminal history categories of offenders convicted of multiple counts of an offense under section 1028A who did not receive consecutive mandatory penalties. Of the 69 cases in which the offender was convicted of multiple counts of 1028A and the court did not impose consecutive mandatory penalties, 59 were sentenced under §2B1.1. These 59 offenders had a median loss amount of \$102,214; 28 (47.5%) were in Criminal History Category I; and 10 (17.0%) were in Criminal History Category VI.

Figure 11-7
Average Sentence by Race and Mandatory Minimum Status of Identity Theft Offenders
Fiscal Year 2010



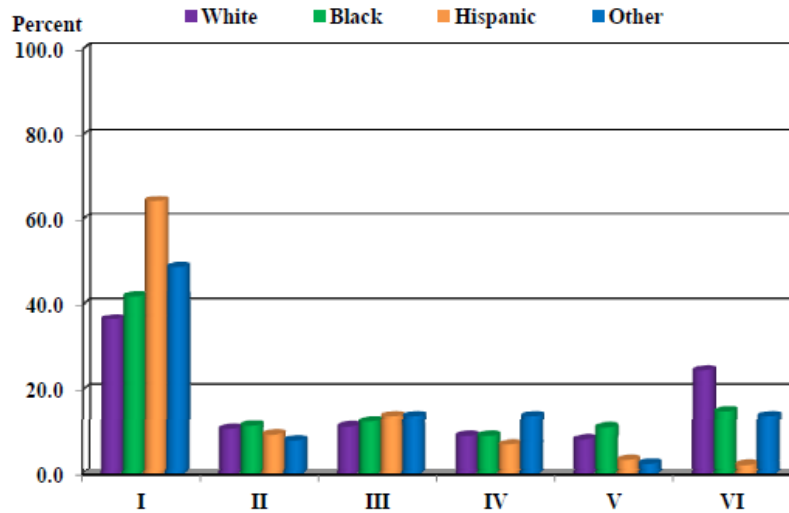
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

To study why Other Race and Black offenders convicted of an offense under section 1028A received longer sentences than White and Hispanic offenders, the Commission conducted additional analyses related to: offense severity, criminal history, “stacking” of multiple counts of section 1028A, and relief from application of section 1028A. First, among identity theft offenders convicted of an offense under section 1028A, Other Race and Black offenders tend to be convicted of more severe offenses than White and Hispanic offenders, as measured by the amount of loss and the number of victims involved in the offense. The median loss amount in cases involving Black offenders convicted of an offense under section 1028A was \$111,323, which was the highest median loss amount among racial groups and 46.8 percent higher than the median loss amount for all identity theft offenders convicted of an offense under section 1028A (\$75,836). Other Race offenders convicted of an offense under section 1028A had the next highest median loss amount (\$77,518), followed by Hispanic offenders (\$51,021), and White offenders (\$49,615). Cases involving Other Race and Black offenders convicted of an offense under section 1028A were also more likely to have ten or more victims (50.0% and 40.8% of the cases, respectively) than cases involving White and Hispanic offenders convicted of an offense under section 1028A (34.0% and 26.6% of the cases, respectively).

Second, the criminal history of identity theft offenders convicted of an offense under section 1028A does not appear to be associated with average sentence length. For example, White offenders convicted of an offense under section 1028A, who received the second shortest average sentences, had the smallest percentage of offenders in Criminal History Category I (36.4%, n=88) of any racial group, followed by Black offenders (41.6%, n=128), Other Race offenders (48.6%, n=18), and Hispanic offenders (64.1%, n=109). Moreover, White offenders also had the highest percentage of offenders in Criminal History Category VI (24.4%, n=59),

followed by Black offenders (14.6%, n=45), Other Race offenders (13.5%, n=5), and Hispanic offenders (2.4%, n=4). See Figure 11-8.

Figure 11-8
Race of Offenders Convicted of an Offense Under 18 U.S.C. § 1028A
by Criminal History Category
Fiscal Year 2010



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

Third, there were too few cases involving multiple section 1028A cases to draw any meaningful conclusions about the role of race in the decision to run multiple section 1028A counts consecutively and, in any event, these few cases did not significantly affect the average sentence length data. As discussed above, of the 82 cases in fiscal year 2010 that involved multiple section 1028A counts, courts imposed consecutive sentences in only 13 of them. Of the 13 cases in which courts imposed consecutive sentences, nine (69.2%) involved Black offenders.

Fourth, the rates of relief for offenders convicted of an offense under section 1028A, when compared by race of the offender, did not produce higher average sentences for Other Race and Black offenders. Other Race and Black offenders convicted of an offense under 1028A received relief under section 3553(e) at higher rates than White and Hispanic offenders convicted of an offense under section 1028A. See Figure 11-5.

E. PRISON IMPACT

The number of offenders convicted of aggravated identity theft is a small but slowly increasing part of the federal prison population. Of the 191,757 offenders in prison on September 30, 2010, 1,649 (0.9%) were convicted of an offense under section 1028A. By contrast, of the 173,922 offenders in prison on September 30, 2006, 273 (0.2%) were convicted of an offense under section 1028A. The number of prisoners convicted of an offense under section 1028A grew in subsequent years to 639 of 179,635 prisoners in 2007 (0.4%); 1,259 of 183,717 prisoners in 2008 (0.7%); and 1,649 of 188,876 prisoners in 2009 (0.9%).

F. SUMMARY

With respect to mandatory minimum penalties and identity theft offenses, Commission analyses demonstrate the following:

Offenses and Offenders

- In fiscal year 2010, 1,870 offenders (2.6%) were convicted of an identity theft offense. Of those 1,870 offenders, 797 (42.6%) were convicted of an offense under section 1028A.
- Over 40 percent of offenders convicted of an offense under section 1028A were Black (40.2%), followed by White (32.8%), Hispanic (22.3%), and Other Race (4.7%) offenders.
- The majority of offenders convicted of an offense under section 1028A (71.8%) were male.
- United States citizens accounted for 74.4 percent of offenders convicted of an offense under section 1028A.
- A disproportionately large number of cases involving a conviction of an offense under section 1028A came from only three judicial districts in fiscal year 2010: Southern Florida (n=103, 12.9% of all cases involving a conviction of an offense under section 1028A); Eastern Pennsylvania (n=37, 4.6%); and Eastern Virginia (n=30, 3.7%).

Application and Relief

- Of the 797 offenders convicted of an offense under section 1028A in fiscal year 2010, 6.8 percent (n=54) proceeded to trial. By contrast, of the 1,072 identity theft offenders not convicted of an offense under section 1028A, 2.1 percent (n=22) proceeded to trial.
- Identity theft offenders who committed more severe identity theft offenses or who had more significant criminal histories were generally more likely to be convicted of an offense under section 1028A.
 - Identity theft cases involving a conviction of an offense under section 1028A had a 28.2 percent higher median loss amount and were more likely to involve ten or more victims than identity theft cases that did not involve such a conviction.
 - A higher percentage of identity theft offenders convicted of an offense under section 1028A were in Criminal History Category VI, and a lower percentage were in Criminal History Category I, than identity theft offenders not convicted of an offense under section 1028A.

- In fiscal year 2010, 15.4 percent of offenders convicted of an offense under section 1028A were relieved of the mandatory penalty at sentencing because they rendered substantial assistance to the government.
 - Other Race offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at the highest rate (18.9%), followed by Black (17.2%), Hispanic (14.7%), and White (13.1%) offenders.
 - Female offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at a higher rate (20.0%) than male offenders convicted of such an offense (13.6%).
 - United States citizen offenders convicted of an offense under section 1028A obtained relief from the mandatory penalty at a higher rate (17.3%) than non-citizens convicted of such an offense (10.3%).
- Of the 797 cases in fiscal year 2010 that involved a conviction of an offense under section 1028A, 10.2 percent (n=82) involved convictions of multiple counts of an offense under section 1028A. In 69 of those 82 cases, the court exercised its discretion to impose the mandatory penalties for violating section 1028A concurrently.

Sentencing

- In fiscal year 2010, 84.6 percent of offenders convicted of an offense under section 1028A were subject to the mandatory minimum penalty at sentencing.
- In fiscal year 2010, the rate at which offenders convicted of an offense under section 1028A were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.
 - White offenders were subject to the mandatory minimum penalty at sentencing most often, in 86.9 percent of their offenses carrying such a penalty, followed by Hispanic (85.3%) and Black (82.8%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 81.1 percent of their cases.
 - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (86.4% of their cases, compared to 80.0% of cases involving female offenders).
 - Non-citizens were subject to the mandatory minimum penalty at sentencing more often than United States citizens (89.7% of their cases, compared to 82.7% of cases involving non-citizen offenders).
- The average sentence for offenders convicted of an offense under section 1028A who were subject to the mandatory penalty (*i.e.*, who did not receive relief for rendering

substantial assistance) was 50 months. The average sentence for offenders convicted of an offense under section 1028A but who were relieved of the mandatory penalty was 32 months. By contrast, identity theft offenders not convicted of an offense under section 1028A received an average sentence of 22 months.

- Among offenders convicted of an offense under section 1028A, Other Race and Black offenders received higher average sentences (53 and 54 months, respectively) than White and Hispanic offenders (45 and 40 months, respectively).
- The higher average sentences for Other Race and Black offenders convicted of an offense under section 1028A may be attributable to the fact that those offenders tended to be convicted of more severe offenses than White and Hispanic offenders, as measured by the amount of loss and number of victims involved in the offense.

Prison Impact

- At the end of fiscal year 2010, 0.9 percent of the offenders in the custody of the Bureau of Prisons were convicted of an offense under section 1028A. The percentage of prisoners convicted of an offense under section 1028A has slowly increased over time, rising from 0.2% of the federal prison population at the end of fiscal year 2006.