

ANALYSIS OF COMMISSION SENTENCING DATA

This chapter presents findings from the Commission's data analysis of downward departures. In preparing this analysis, the Commission supplemented data from its comprehensive, computerized data collection system described in Chapter 2 (the "Monitoring" database) with additional data specifically collected from sentencing documents to better understand the incidence of downward departures in cases sentenced under the federal guidelines.

This analysis presents trends in rates and reasons cited for downward departures and examines the relationships between trends and caseload composition, offender characteristics, and judicial districts. Findings also are presented from the Commission's special data collection effort that focused on six frequently cited downward departure reasons. A detailed explanation of the methodology used for this analysis is contained in Appendix C.

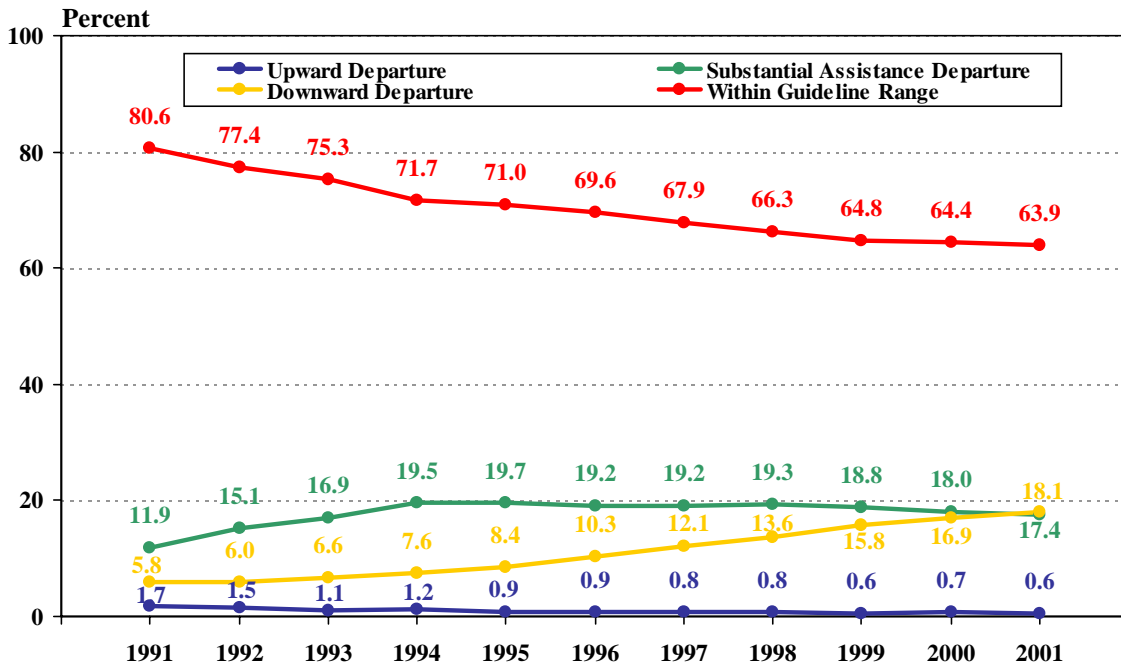
A. TRENDS IN DOWNWARD DEPARTURES

A decreasing majority of cases sentenced under the federal sentencing guidelines were sentenced within the applicable guideline range from fiscal year 1991 (80.6%) to fiscal year 2001 (63.9%).⁸² See Figure 1. The decline in the rate of within range sentences has been gradual and primarily is reflected in the corresponding increase in the nonsubstantial assistance downward departure rate. Between fiscal years 1991 and 2001, the downward departure rate increased from 5.8 percent to 18.1 percent, increasing an average of 1.2 percentage points in any given year. Substantial assistance departures, pursuant to section 5K1.1, increased at a slower rate during this time from 11.9 percent to 17.4 percent.

The data analyses presented in this chapter are for nonsubstantial assistance downward departures only.

⁸² Data from fiscal years 1991-1998 are from the Commission's Monitoring datafiles. Data from fiscal years 1999-2001, however, are from the Commission's revised fiscal year datafiles. See *infra* Appendix C for further information on the revised datafiles.

Figure 1
Trends in Departure Status
Fiscal Year 1991-Fiscal Year 2001



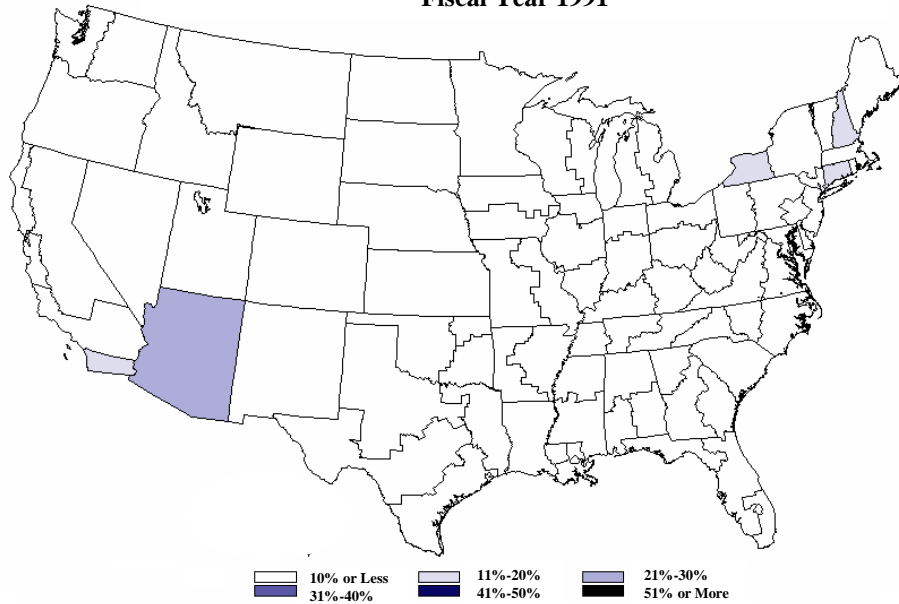
SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

1. Judicial Districts

The average rate of downward departures for all 94 federal judicial districts was 18.1 percent in fiscal year 2001. There was, however, wide variation across districts, with downward departure rates ranging that year from 1.4 percent in the Eastern District of Kentucky to 62.6 percent in the District of Arizona.

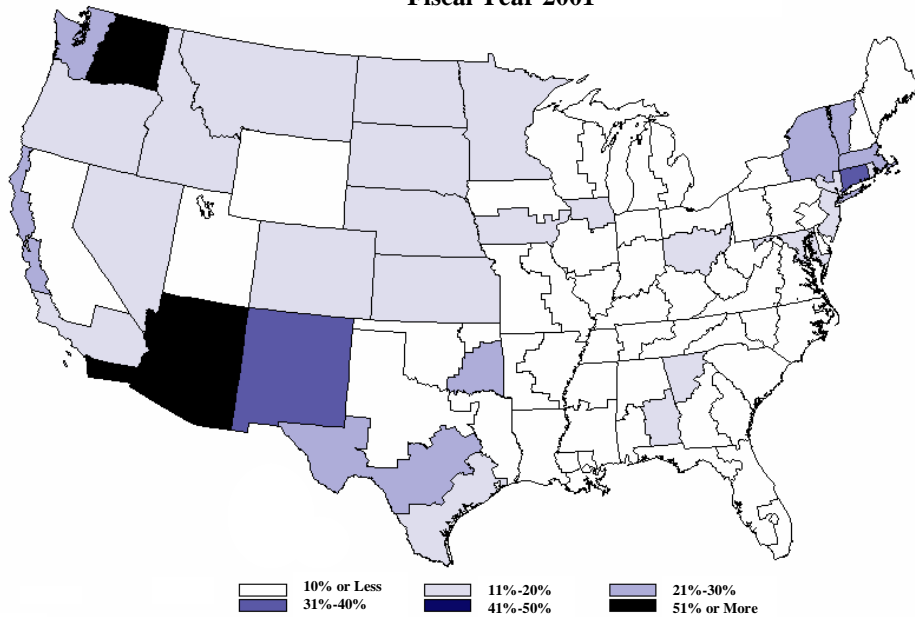
Figure 2 shows the vast majority (94.6%) of federal judicial districts had downward departure rates of 10 percent or less in fiscal year 1991. In 2001, the downward departure rates remained at or below 10 percent in most districts (60.6%), however, 25.5 percent of districts had departure rates between 10 and 20 percent. *See* Figure 3. A small number of districts had much higher downward departure rates by fiscal year 2001. For example, downward departures were granted in more than half of the cases sentenced in the District of Arizona (62.6%), the Eastern District of Washington (51.5%), and the Southern District of California (50.1%).

Figure 2
Downward Departure Rates by Judicial District
Fiscal Year 1991



Of the 33,419 cases, 553 cases with no analogous guidelines were excluded. Of the remaining 32,866 cases, 1,099 were excluded due to missing departure information.
 SOURCE: U.S. Sentencing Commission 1991 Datafile, USSCFY1991.

Figure 3
Downward Departure Rates by Judicial District
Fiscal Year 2001



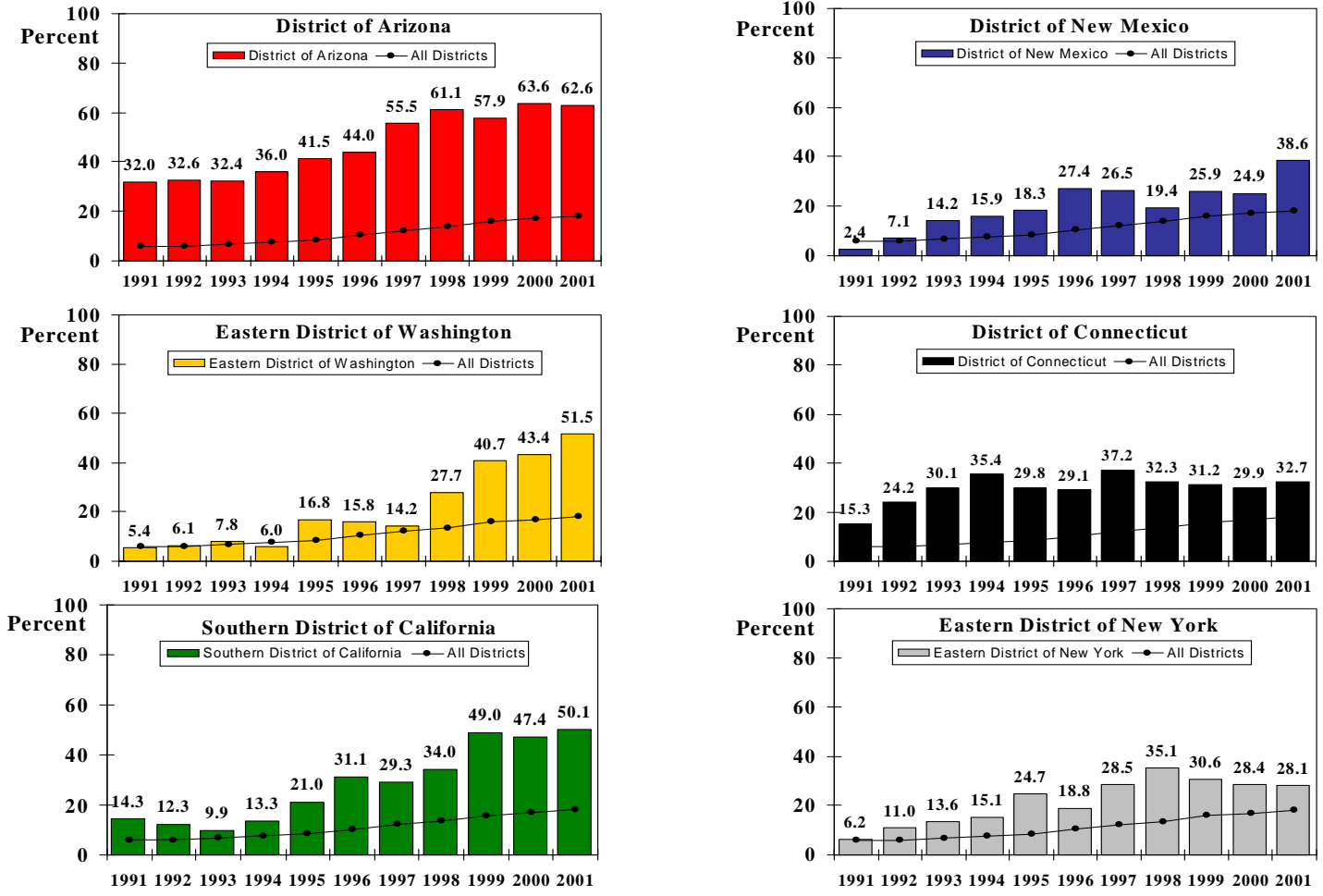
Of the 59,897 cases, 332 cases with no analogous guidelines were excluded. Of the remaining 59,565 cases, 4,461 were excluded due to missing departure information.
 SOURCE: U.S. Sentencing Commission Revised 2001 Datafile, NEWUSSCFY2001.

Districts classified as having relatively high downward departure rates, and districts having relatively low downward departure rates generally remain in those categories from year to year. Figure 4 shows trends for the six districts with the highest downward departure rates in fiscal year 2001. These six districts together accounted for 47.3 percent of all downward departures granted in fiscal year 2001. From 1991 to 2001, two of these districts, Arizona and Connecticut, consistently had high downward departure rates, averaging 52 percent and 33 percent, respectively. Downward departure rates varied, however, in the other high rate districts of Eastern Washington, Southern California, New Mexico, and Eastern New York during the same period.

Districts with the lowest downward departure rates show even greater consistency over time. Downward departure rates between fiscal years 1991 and 2001 consistently have been less than ten percent for the six districts with the lowest downward departure rates (Eastern Kentucky, South Carolina, Western Virginia, Maine, Western Arkansas, and Southern West Virginia).⁸³ See Figure 5.

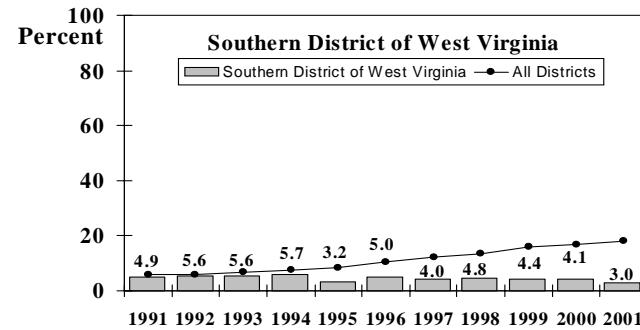
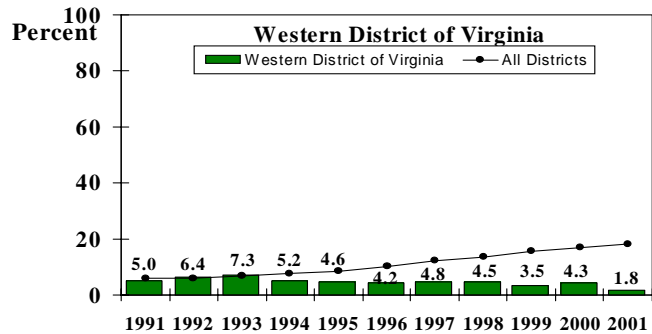
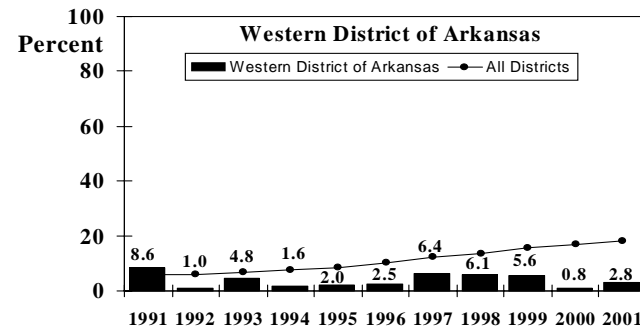
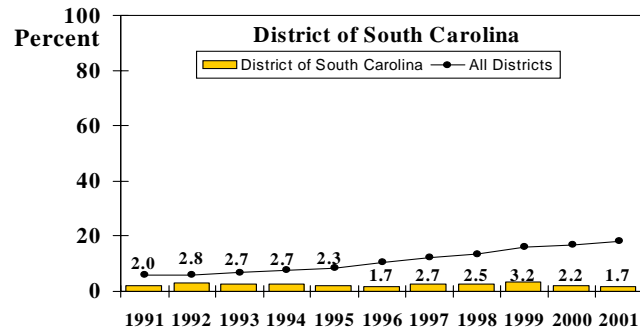
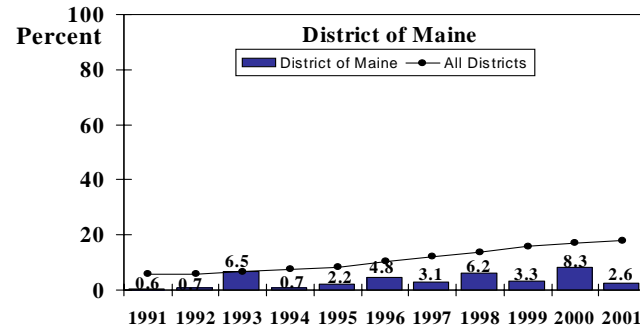
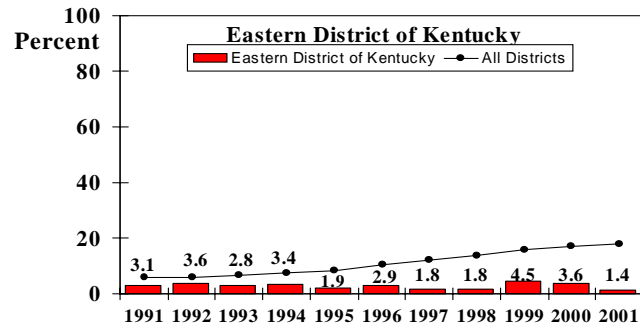
⁸³ Due to their very small caseloads, the districts of Guam and the Northern Mariana Islands (80 cases and 15 cases, respectively, in fiscal year 2001) were excluded from the analysis for Figures 4 and 5. Their downward departure rates were 1.4 percent and 0.0 percent, respectively, in fiscal year 2001.

Figure 4
Trends in Districts with Relatively High Downward Departure Rates
Fiscal Year 1991-Fiscal Year 2001



SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

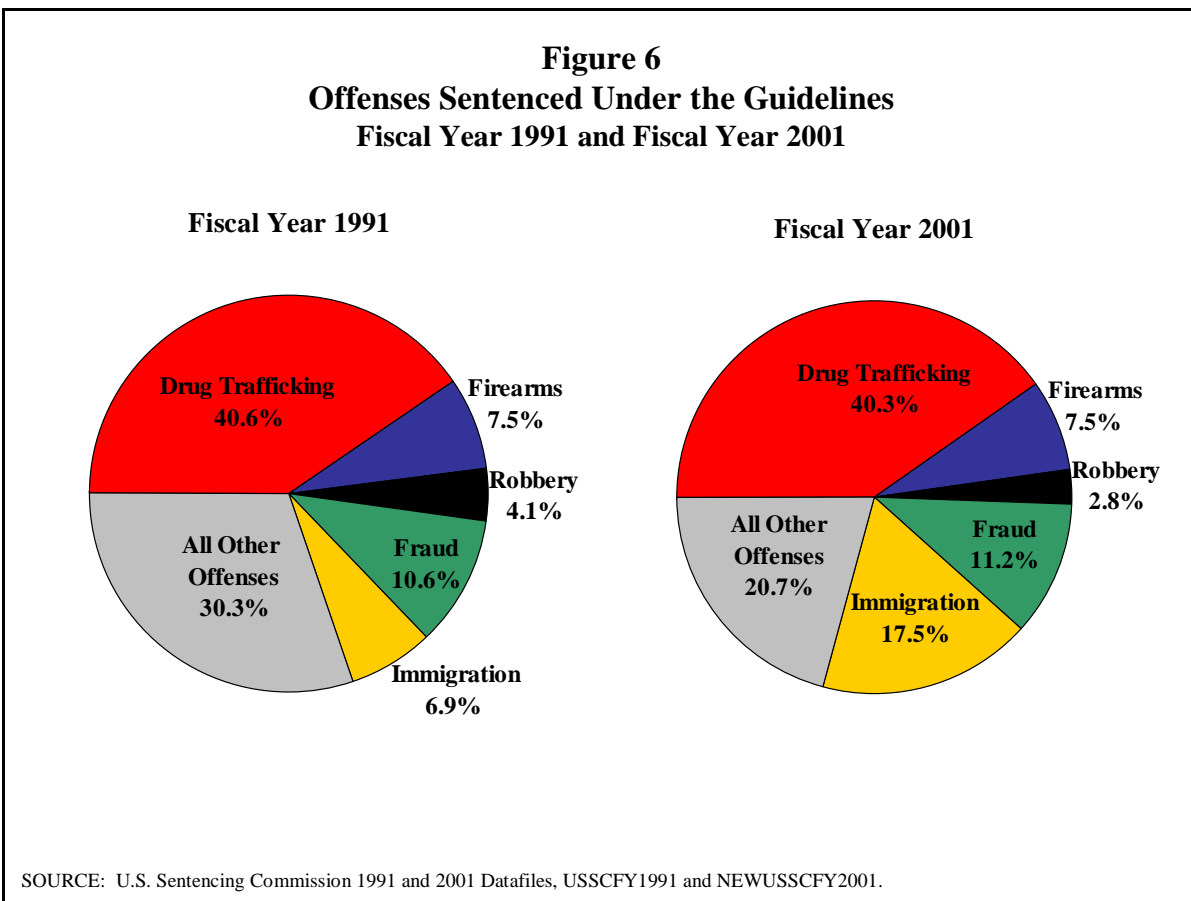
Figure 5
Trends in Districts with Relatively Low Downward Departure Rates
Fiscal Year 1991-Fiscal Year 2001



SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

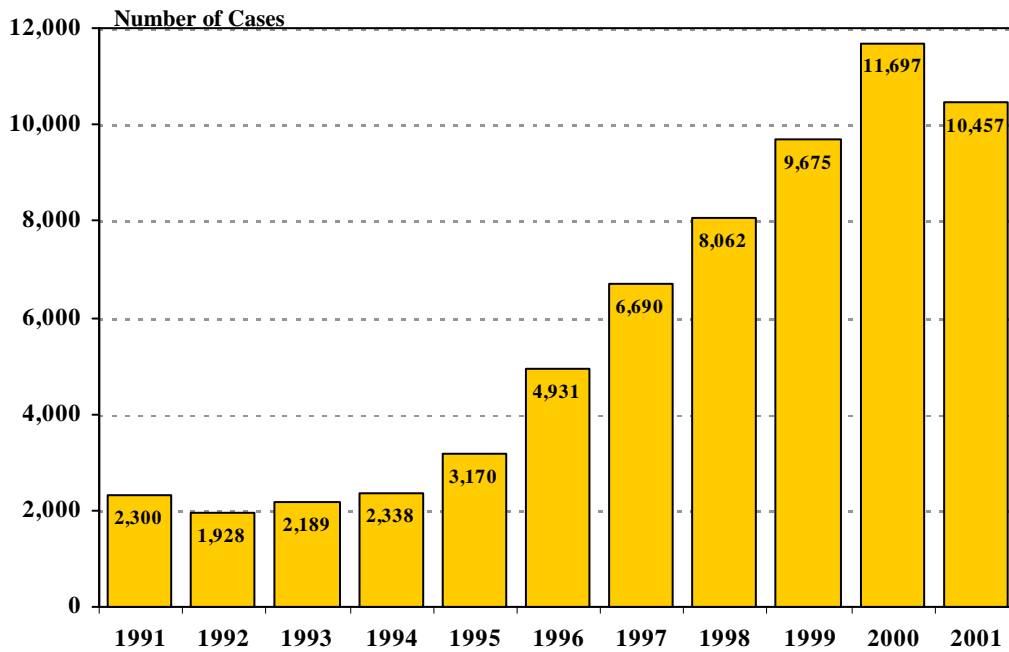
2. Offense Type

Figure 6 shows that the composition of offense types sentenced under the federal guidelines generally has been consistent over time. Drug trafficking, fraud, and firearms offenses combined accounted for approximately the same proportion of all offenses in both fiscal years 1991 (58.7%) and 2001 (59%). The proportion of immigration offenses, however, more than doubled during that period, increasing from 6.9 percent in fiscal year 1991 to 17.5 percent in fiscal year 2001.⁸⁴ Figure 7 depicts the growth in the absolute number of immigration offenses sentenced under the guidelines over the relevant period. By fiscal year 2001, 10,457 immigration offenses were sentenced under the guidelines compared to 2,300 in fiscal year 1991.



⁸⁴ This increase in immigration offenses corresponded with moderate decreases in other offense types. For example, the proportion of robbery, larceny, embezzlement, and simple drug possession offenses declined by a few percentage points during this period.

Figure 7
Trend in Immigration Offenses Sentenced Under the Guidelines
Fiscal Year 1991-Fiscal Year 2001

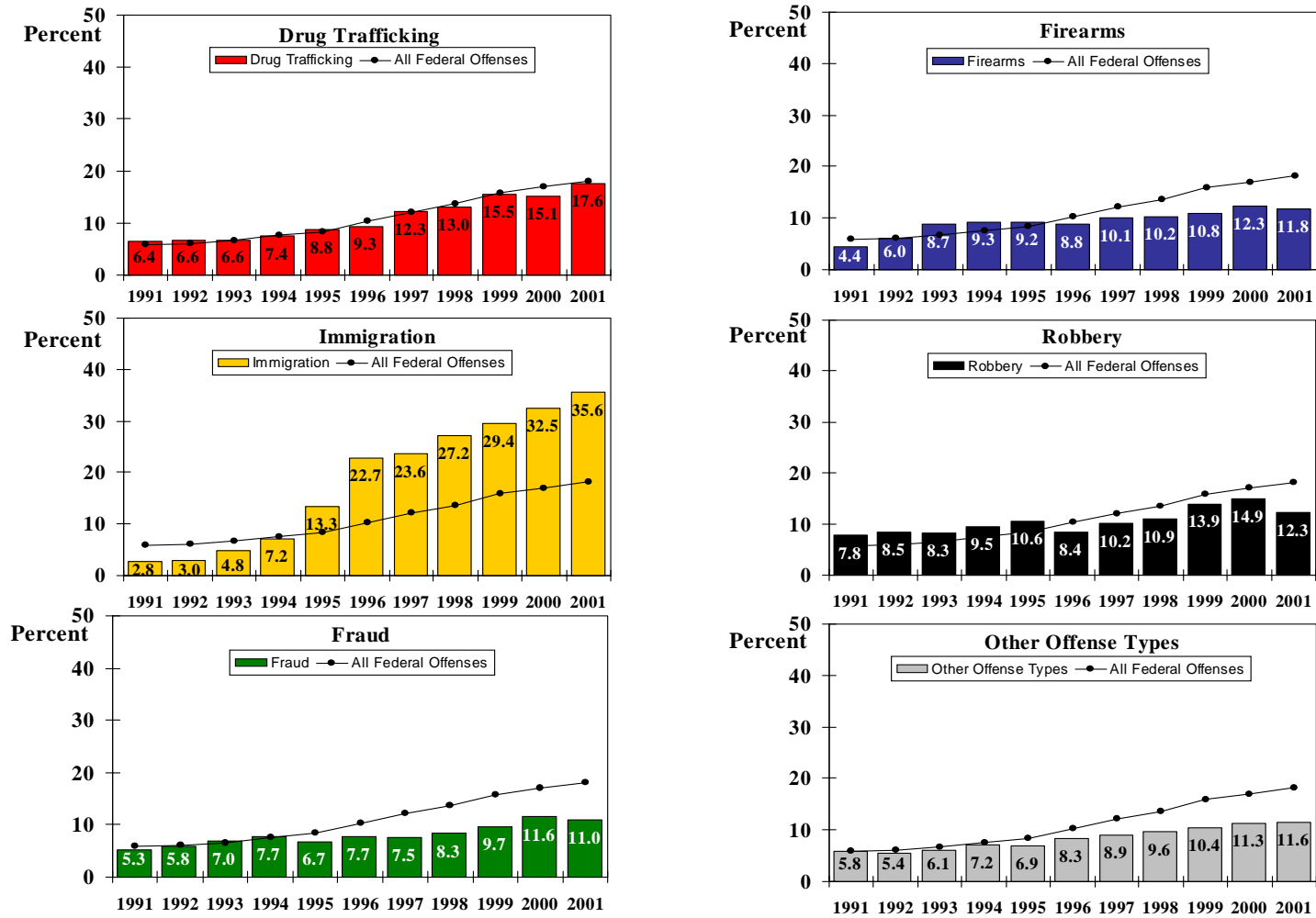


SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

Downward departure rates increased for nearly all offense types between fiscal years 1991 and 2001, but to varying degrees. Figure 8 shows the trends in downward departure rates for each of the five major offense categories between fiscal years 1991 and 2001.⁸⁵ While the number of immigration offenses increased at a faster rate than the overall federal caseload, the downward departure rate for immigration offenses accelerated much faster than rates for other offense types. While downward departure rates approximately doubled for most offenses and nearly tripled for drug trafficking offenses, downward departure rates for immigration offenses increased by *1,171 percent*.

⁸⁵ These five offense categories accounted for 69.8 percent of all federal guidelines cases in fiscal year 1991 and 79.2 percent in 2001.

Figure 8
Trends in Downward Departure Rates for Selected Offense Types
Fiscal Year 1991-Fiscal Year 2001

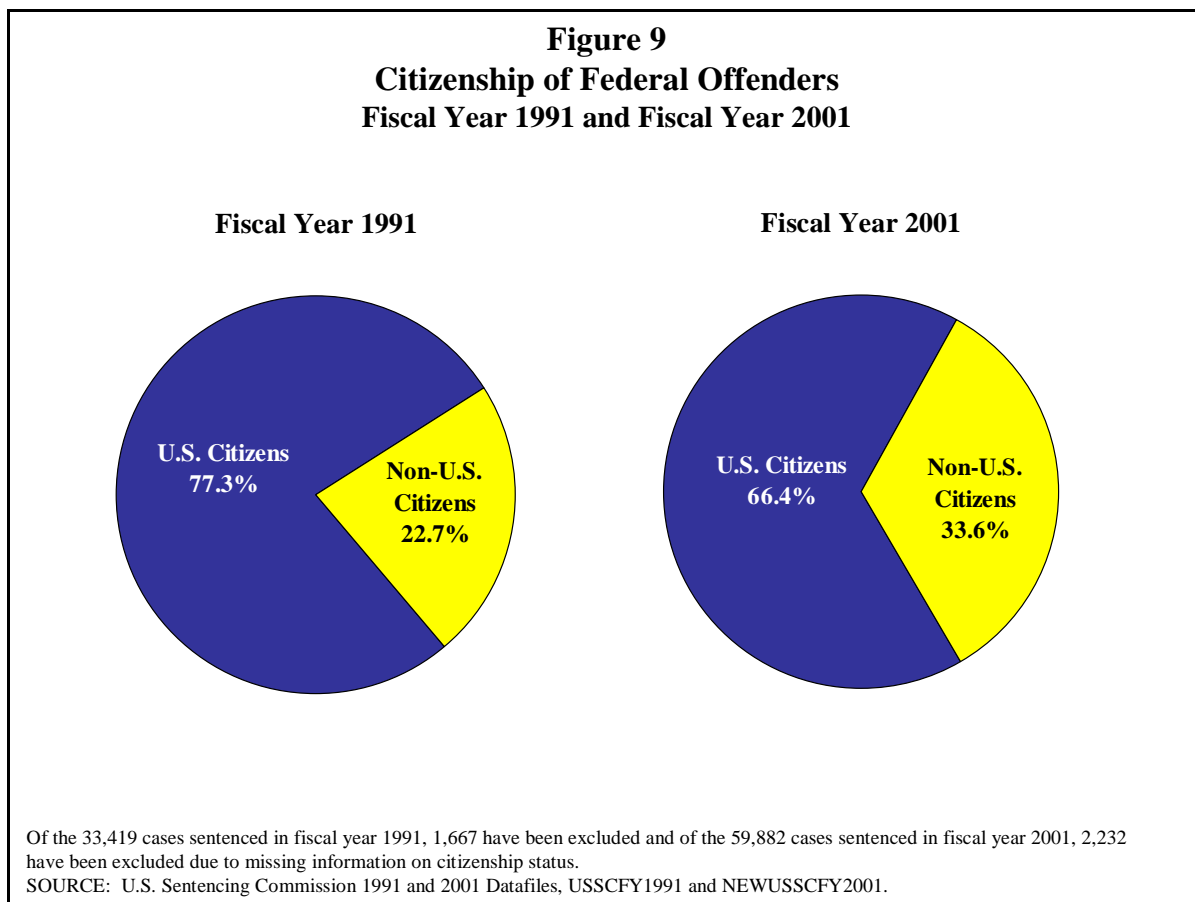


SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

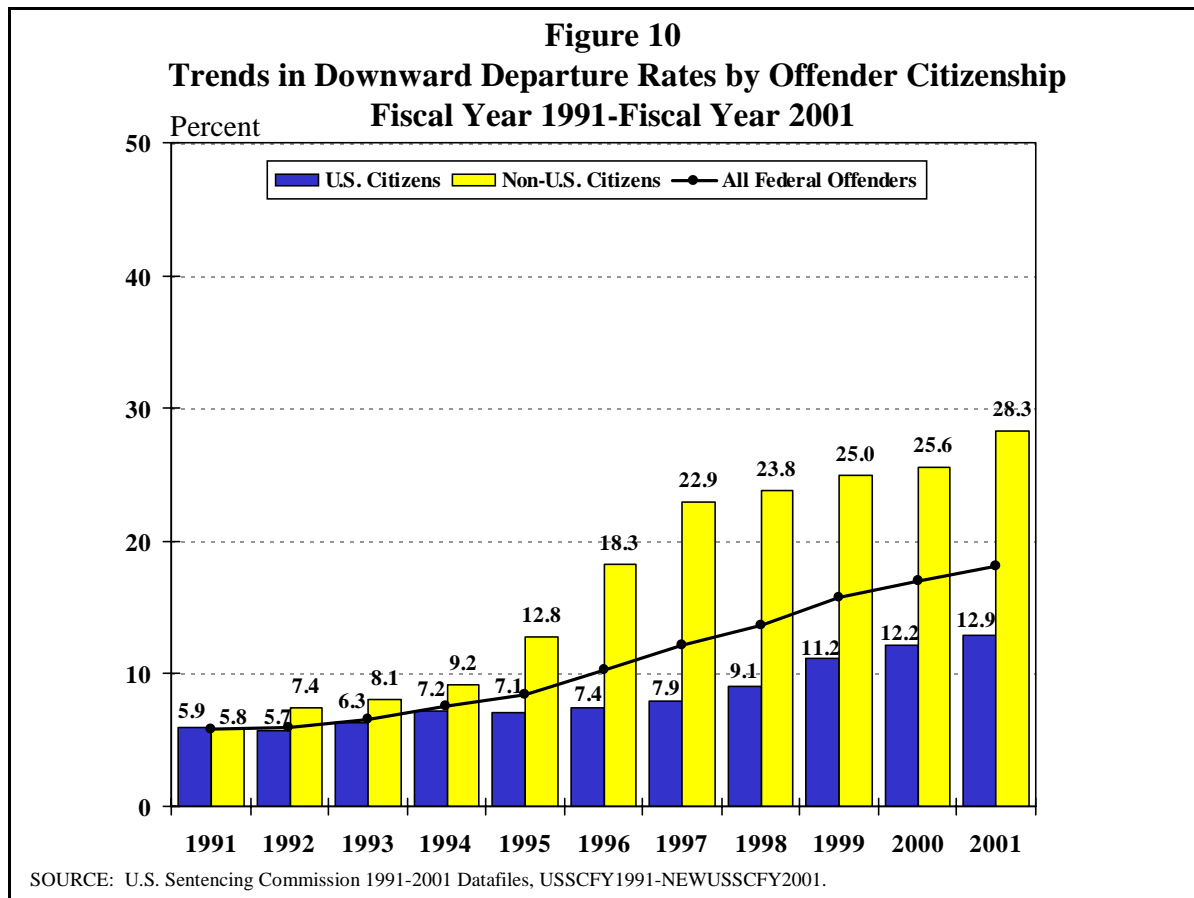
The corresponding increases in both the number of immigration cases and their downward departure rate combined to result in immigration offenses accounting for a steadily increasing proportion of all downward departures. In 1991, downward departures for immigration offenses accounted for about three percent (60 of 1,833) of all downward departures. By 2001, however, downward departures for immigration offenses accounted for one-third (3,310 of 9,972) of all downward departures.

3. Citizenship

As would be expected given the increasing number of federal immigration offenses, the proportion of non-U.S. citizens sentenced under the federal guidelines also increased between 1991 and 2001. Non-U.S. citizens accounted for 33.6 percent of all federal offenders sentenced under the guidelines in fiscal year 2001, an almost 50 percent increase from 22.7 percent in 1991. See Figure 9.



This increase is important in light of the different trends in downward departure rates for U.S. citizen and non-U.S. citizen offenders. While the downward departure rate for U.S. citizens increased gradually, from 5.9 percent to 12.9 percent, the rate for non-U.S. citizens increased from 5.8 percent to 28.3 percent between 1991 and 2001, a five-fold increase. See Figure 10.



4. Downward Departure Reasons

Historically, a small number of reasons have accounted for the majority of downward departure reasons.⁸⁶ The specific mix of those reasons, however, changed substantially between 1991 and 2001.⁸⁷ In fiscal year 1991, six downward departure reasons accounted for half (51.0%)

⁸⁶ Because courts often cite multiple departure reasons in a single case, statistics for individual downward departure reasons are reported as a percentage of all downward departure reasons rather than all downward departure cases. For example, the 9,972 downward departure cases cited 10,814 reasons in fiscal year 2001.

⁸⁷ The fiscal year 2001 downward departure reason data is from the revised datafile. See *infra* Appendix C for more information.

of all reasons cited: Pursuant to plea agreement (22.5%), overrepresentation of criminal history (7.3%), general mitigating circumstances (7.2%), physical condition (5.5%), family ties and responsibilities (4.7%), and diminished capacity (3.7%).

Six reasons accounted for three-quarters of all downward departure reasons in fiscal year 2001, but only three of the reasons cited in 1991 continued their relative prominence a decade later. Plea agreement, criminal history, and general mitigating circumstances continue to account for more than half (54.4%) of all downward departure reasons cited, but by 2001 three different downward departure reasons rounded out the six most frequently cited reasons: aberrant behavior (8.1%), fast track (7.8%), and deportation (5.1%). See Figure 11. Usage trends for these six downward departure reasons appear in Figure 12.

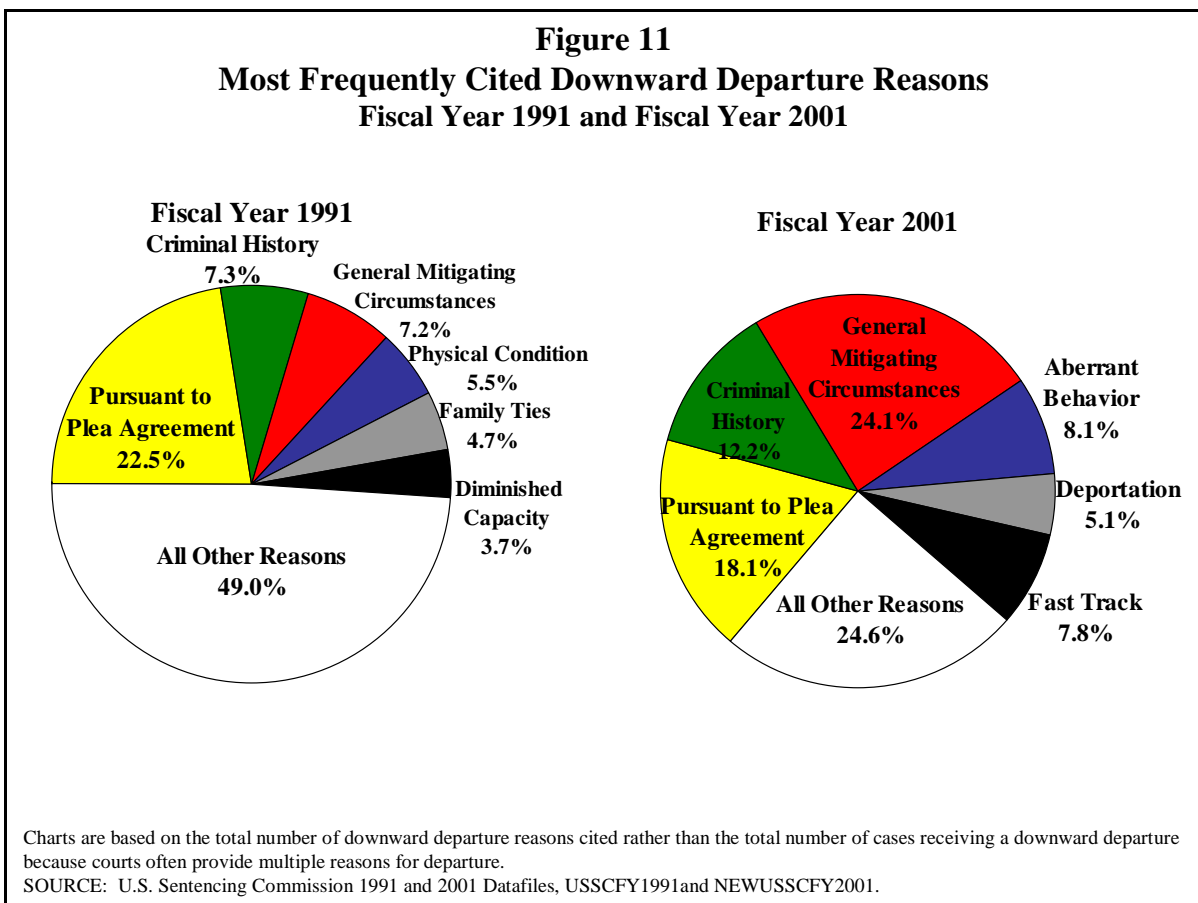
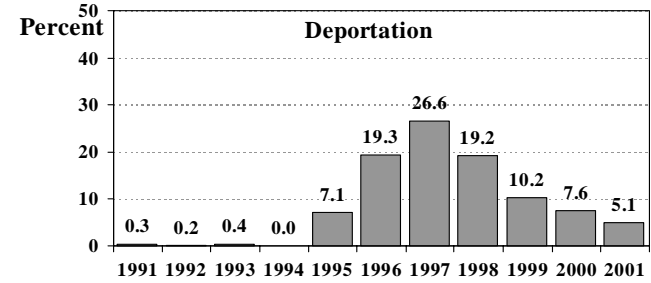
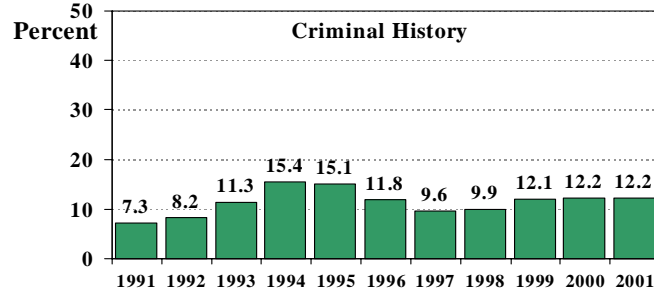
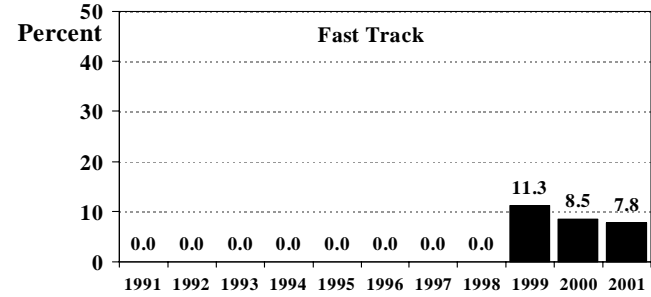
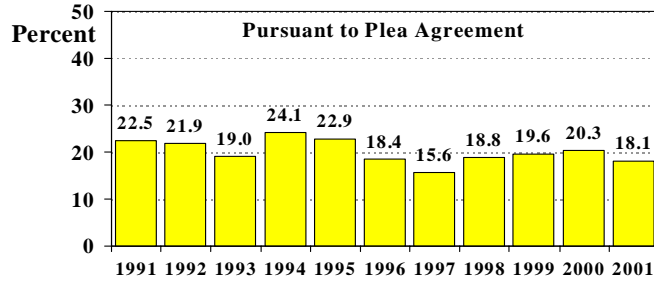
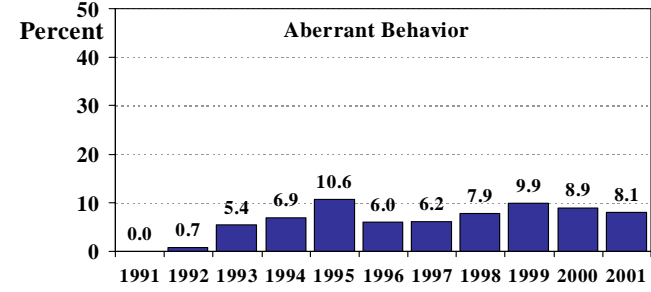
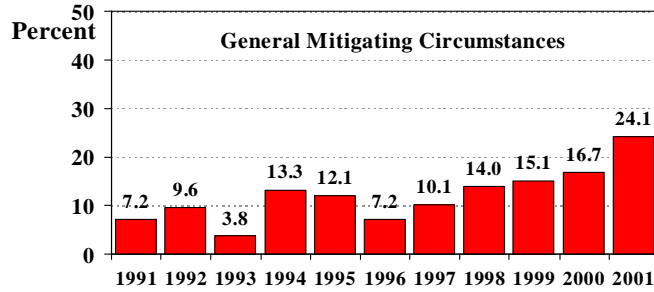


Figure 12
Trends in Most Frequently Cited Downward Departure Reasons
Fiscal Year 1991- Fiscal Year 2001



SOURCE: U.S. Sentencing Commission 1991-2001 Datafiles, USSCFY1991-NEWUSSCFY2001.

The significance of the changing mix of downward departure reasons is their interrelationship with high departure rate districts and offense types. In order to understand the factors considered by the court when citing these frequently cited reasons, the Commission undertook an empirical study of court documents. Results of that review are presented in the following section.

B. ANALYSIS OF DOWNWARD DEPARTURE REASONS

To complement the preceding analysis, the Commission reviewed sentencing documents and collected additional information from a random sample of cases that received downward departures. The Commission reviewed a ten percent sample of each of six frequently cited downward departure reasons (more than 600 downward departure cases): general mitigating circumstances, pursuant to plea agreement, criminal history, aberrant behavior, family ties and responsibilities, and diminished capacity.

Findings from the analysis of cases citing these six departure reasons, as well as information about departures citing fast track and deportation, are described below and underscore the concentration of downward departures in a small number of districts and offense types.

1. Fast Track

Cases that specifically cited fast track on the Statement of Reasons accounted for 7.8 percent of all downward departure reasons in fiscal year 2001. The Commission did not review a sample of downward departure cases citing fast track because existing data and anecdotal evidence indicated that fast track departures operate similarly to the early disposition programs outlined by Congress in the PROTECT Act and the criteria for authorization of early disposition or “fast track” policies included in the Attorney General’s September 22, 2003 memorandum.⁸⁸

Cases citing fast track as a reason for departure are almost exclusive to the Southern District of California, which accounted for 92.4 percent of departures for this reason in fiscal year 2001. The overwhelming majority, 81.6 percent, of fast track departures involved drug trafficking offenses. Non-U.S. citizens accounted for 58.2 percent of offenders granted fast track departures, a rate nearly two times greater than their proportion in the federal offender population (33.6%).

2. Deportation

Cases that specifically cited agreement to deportation on the Statement of Reasons comprised 5.1 percent of all downward departure reasons in fiscal year 2001. The Commission did not include cases with these departures in its sample because, similar to fast track, downward

⁸⁸ Ashcroft Fast Track Memo, *supra* note 50 .

departures for deportation seem to be related to early disposition programs and subject to the criteria outlined in the Attorney General's September 22, 2003 memorandum.⁸⁹ The Districts of Arizona (55.9%) and Eastern Washington (16.8%) granted 72.7 percent of deportation departures in fiscal year 2001. The overwhelming majority (84.3%) of deportation departures involved immigration offenses. Drug trafficking offenses, however, accounted for nearly all of the remaining (13.2%) offenses.

3. General Mitigating Circumstances (§5K2.0)

General mitigating circumstances accounted for 24.1 percent of all downward departure reasons cited in fiscal year 2001. More than half (59.3%) of the cases citing general mitigating circumstances were sentenced in three districts on the southwest border of the United States, the Districts of Southern California (24.9%), Western Texas (24.6%), and Arizona (9.8%). Drug trafficking (43.2%) and immigration offenses (32.3%) comprised three-quarters of the offenses receiving downward departures for general mitigating circumstances. Non-U.S. citizens accounted for slightly more than half (50.9%) of offenders with downward departures for this reason.⁹⁰

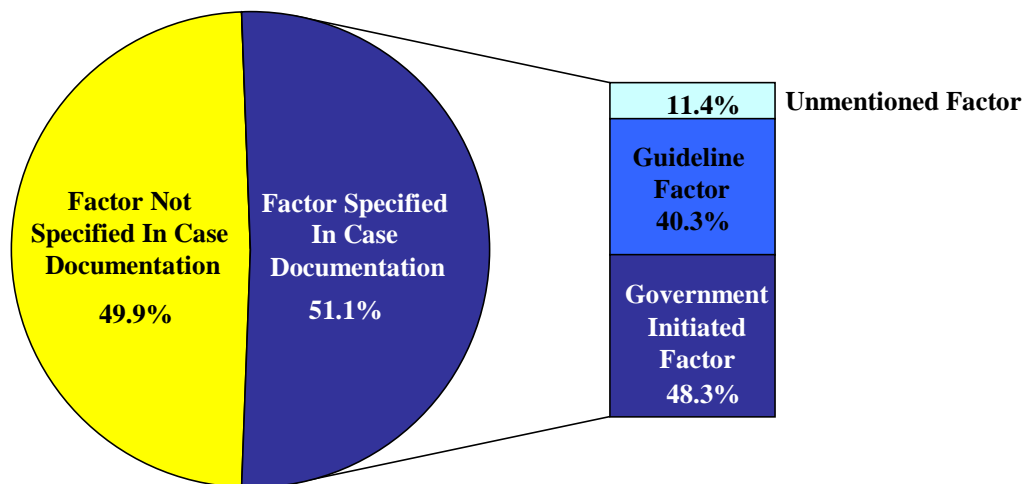
The Commission's analysis of the general mitigating circumstances departure sample attempted to discern the specific substantive factor the court found mitigating in each case.⁹¹ Figure 13 shows that the specific mitigating factor, however, was documented in only half (51.1%) of the sample cases. When case documentation did indicate the substantive mitigating factors considered by the court, nearly half (48.3%) identified factors relating to departures initiated by the government (*e.g.*, early plea, deportation, procedural waivers, fast track, etc.). An additional 40.3 percent of the general mitigating circumstances departure sample cited departure factors identified elsewhere in the *Guidelines Manual* (*e.g.*, family ties, aberrant behavior, mental and emotional conditions, etc.). The mitigating factors in the remaining 11.4 percent were unique to the specific case and not mentioned elsewhere in the guidelines as grounds for downward departure.

⁸⁹ *Id.*

⁹⁰ Non-U.S. citizens also accounted for more than half (54%) of the drug trafficking offenders granted downward departures for general mitigating circumstances in these three districts.

⁹¹ The ten percent sample of general mitigating circumstances departures consisted of 223 cases.

Figure 13
Factors Underlying General Mitigating Circumstances Departures
2001 Downward Departure Sample



The pie chart represents the 223 downward departure cases coded for the general mitigating circumstances sample.
 SOURCE: U.S. Sentencing Commission 2001 Departure Sample.

4. Pursuant to Plea Agreement

Pursuant to plea agreement comprised 18.1 percent of all downward departure reasons cited in fiscal year 2001. Two southwest border districts, Arizona (54.3%) and New Mexico (21.9%), accounted for more than three-quarters of plea agreement departures. Immigration (52.4%) and drug trafficking (34.7%) comprised 87 percent of offenses citing this downward departure reason, and the offenders were predominantly (72.1%) non-U.S. citizens.

The overwhelming majority (91.2%) of plea agreements in the sample⁹² involved agreements pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C).⁹³ In these binding plea agreements, the government typically agreed to either a specific sentence or guideline range, or the applicability of a particular guideline provision or sentencing factor.

⁹² The ten percent sample of downward departures pursuant to plea agreement consisted of 178 cases.

⁹³ Rule 11(e)(1)(C) was redesignated as Rule 11(c)(1)(C) in 2002.

In a substantial majority (69.7%) of the plea agreement cases neither the Statement of Reasons nor the plea document indicated an underlying reason for the departure. Among the less than one-third (30.3%) of the plea agreement cases that did specify an underlying reason for the downward departure, stipulation to a particular criminal history category was the most common (44.1%). Two factors beneficial to the government, stipulation to deportation and prompt plea/savings to the government, combined to account for 22 percent of the reasons underlying departures pursuant to plea agreements. *See* Table 1.

Table 1
Underlying Reasons for Downward Departures
Citing Pursuant to Plea Agreement

Criminal History	44.1%
Combination of Factors	14.4%
Deportation	12.7%
Role in the Offense	10.2%
Prompt Plea/Savings to the Government	9.3%
Other Reasons	9.3%

SOURCE: U.S. Sentencing Commission 2001 Downward Departure Sample.

5. Criminal History (§4A1.3)

Overrepresentation of criminal history category⁹⁴ accounted for 12.2 percent of all downward departure reasons in fiscal year 2001. Criminal history departures were evenly distributed across judicial districts. Drug trafficking (36.9%) and immigration offenses (29.8%) comprised two-thirds of the criminal history related downward departures. Non-U.S. citizens accounted for 36.9 percent of offenders with criminal history departures, similar to their proportion in the federal offender population (33.6%).

Offenders who received criminal history departures were indistinguishable from other

⁹⁴ Section 4A1.3 (Adequacy of Criminal History) provides that a downward departure may be warranted in a case in which the court concludes that “a defendant’s criminal history category significantly overrepresents the seriousness of a defendant’s criminal history or the likelihood that the defendant will commit further crimes.”

federal offenders in terms of guideline criminal history factors. Excluding offenders in criminal history Category I,⁹⁵ the distribution of offenders who received criminal history departures across criminal history categories was similar to the distribution of other federal offenders. *See* Table 2. Offenders receiving criminal history departures were slightly underrepresented in the lower categories and slightly overrepresented in the higher categories. Both groups of offenders also received additional criminal history points at the same rate for commission of the instant offense while under any criminal justice sentence (USSG §4A1.1(d)), commission of the instant offense less than two years after a counted imprisonment sentence (USSG §4A1.1(e)), and uncounted prior violent offenses (USSG §4A1.1(f)).

⁹⁵ Pursuant to §4A1.3(e), downward departures below the lower limit of the guideline range on the basis of the adequacy of criminal history categorically are not permitted for offenders in criminal history Category I.

Table 2
Comparison of Guideline Criminal History Factors For Offenders with Criminal
History Downward Departures and All Other Federal Offenders
(Criminal History Category I Excluded)

Criminal History Category	Offenders With Criminal History Departures	All Other Federal Offenders
II	15.1%	22.8%
III	28.2%	29.9%
IV	19.7%	17.9%
V	13.7%	10.3%
VI	23.3%	19.1%
Additional Criminal History Points		
Criminal Justice Sentence §4A1.1(d)	35.4%	31.8%
Recency of Other Conduct §4A1.1(e)	7.2%	7.3%
Prior Violent Offense §4A1.1(f)	0.1%	0.1%
Combination of Any Above Reasons	26.8%	24.4%

SOURCE: U.S. Sentencing Commission 2001 Datafile, NEWUSSCFY2001.

Analysis of the criminal history departure sample⁹⁶ attempted to identify the specific components of the criminal history computation that the court determined warranted departure.⁹⁷ The courts provided sufficiently specific information on the Statement of Reasons to permit such an analysis in only 17.5 percent of the sample. Among this small subgroup, approximately 90 percent of the prior offenses involved drug trafficking or immigration. Reasons cited for their exclusion included age of the conviction, drug possession without intent to distribute, and the effect of the career offender provision.

⁹⁶ The ten percent sample of criminal history departures consisted of 120 cases.

⁹⁷ The Commission currently is conducting an extensive research project on recidivism among federal offenders. This analysis will address in detail computation of criminal history categories under the guidelines and the utility of different aspects of criminal history in predicting future criminal behavior.

In contrast, courts specified the new criminal history category deemed applicable after departure in the majority (79.2%) of the criminal history sample. A reduction of one criminal history category was the most common (75.8%). Twenty-one percent of criminal history departures exceeded a single category.⁹⁸

6. Aberrant Behavior (§5K2.20)

Aberrant behavior accounted for approximately eight percent of all downward departure reasons cited in fiscal year 2001. More than half of aberrant behavior departures were granted in two southwest border districts, Southern California (36.7%) and Arizona (19.3%). Slightly more than half (58.2%) were for drug trafficking offenses and involved non-U.S. citizens (54.1%).

Sixty-five percent of the offenders in the aberrant behavior departure sample⁹⁹ were sentenced using the *Guidelines Manual* in effect on or after November 1, 2000 and, therefore, received the departure pursuant to §5K2.20.¹⁰⁰ The case review indicates that, as one would expect, none of the cases involved the exclusionary criteria of serious bodily injury, firearm use, or a serious drug trafficking offense, as then defined in §5K2.20. Furthermore, none of the offenders had a prior federal or state felony conviction, but two of the cases in the sample had more than one criminal history point, as determined in Chapter Four (Criminal History and Criminal Livelihood). In both of these cases the court found that criminal history overrepresented the seriousness of the offender's conduct. Case documentation indicated that most offenses involved minimal, if any, planning (95.9%).

7. Family Ties and Responsibilities (§5H1.6)

In fiscal year 2001, family ties and responsibilities comprised nearly four percent of all downward departure reasons cited.¹⁰¹ The Eastern District of New York had the largest proportion (21.9%) of family ties departures. Drug trafficking (34.5%) and fraud offenses (17.9%) accounted for slightly more than half of such departures. Female offenders accounted for a substantial proportion (40.6%) of family ties and responsibilities departures, a proportion nearly three times greater than the federal female offender population. The family ties and

⁹⁸ The remaining 3.2 percent (three cases) of criminal history departures received offense level reductions rather than criminal history category reductions.

⁹⁹ The ten percent sample of aberrant behavior departures consisted of 72 cases.

¹⁰⁰ Case reviews indicate that the terms "aberrant behavior" and "isolated incident" historically had been used to address similar offender circumstances prior to the promulgation of the aberrant behavior departure. Fiscal year 2001 is the first available data regarding the new departure provision.

¹⁰¹ Although community ties was part of §5H1.6 (Family Ties & Responsibilities), it typically has been cited separately on Statements of Reasons and collected as a separate reason in the Commission's data collection process. Community ties accounted for 0.2 percent of all downward departure reasons in fiscal year 2001.

responsibilities departures received by non-U.S. citizens (31.2%) is virtually identical to the proportion of the overall federal offender population (33.6%).

Almost all (90%) of offenders in the family ties departure sample¹⁰² provided caregiving and/or financial support to family members. Nearly two-thirds (61.9%) of these offenders, however, were not the sole provider of such support to dependents.

8. Diminished Capacity (§5K2.13)

Diminished capacity accounted for 2.6 percent of all downward departure reasons cited in fiscal year 2001. The majority (81.4%) of offenders who received sentence reductions for this reason were U.S. citizens, and close to one-third (29.1%) were female (twice the proportion of female offenders in the federal population). The distributions of both offense type and judicial district were substantially similar to their distributions in the federal caseload.

Case documentation for all of the diminished capacity departures reviewed in the sample specified the offender's reduced mental capacity.¹⁰³ The majority (77.3%) of offenders who received diminished capacity departures had chronic, severe mental illnesses such as schizophrenia, depression, and bipolar disorder. The remaining 22.7 percent had low intelligence quotients. Although case documentation clearly specified diagnoses for these offenders, the link, if any, between the diagnosis and the offense conduct was rarely documented.

9. Chapter Two Departures

Application notes in ten Chapter Two guidelines provide downward departure reasons relevant to those offense guidelines.¹⁰⁴ These departure reasons are rarely cited, and the most frequently cited Chapter Two departures recently either have been deleted from the guidelines or amended.

In fiscal year 2001, the most frequently cited Chapter Two departure reason, Application Note 5 in §2L1.2 (Unlawfully Entering or Remaining in the United States), accounted for one

¹⁰² The ten percent sample of family ties departures consisted of 42 cases.

¹⁰³ The ten percent sample of diminished capacity departures consisted of 27 cases.

¹⁰⁴ §2A1.1 (First Degree Murder); §2A3.4 (Abusive Sexual Conduct); §2B1.1 (Theft, Property Destruction, Fraud); §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking in Drugs); §2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy); §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government); §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated License); §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury); §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product); §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification).

percent of all downward departure reasons. This application note provided that downward departures may be warranted for an offender receiving the 16 level sentence enhancement for a prior conviction for an aggravated felony if (1) the prior offense (excluding violent and firearms offenses) was a single instance and (2) the defendant received a sentence of no more than one year for the prior offense. This downward departure provision was deleted from section 2L1.2 as part of an amendment rewriting the guideline effective November 1, 2001, and as a result, this ground for departure should not be cited in the future.

Downward departures citing §2F1.1 (Fraud and Deceit; Forgery), Application Note 8(b) (relating to the amount of loss overstating the seriousness of the defendant's conduct), accounted for 0.2 percent of all downward departure reasons cited in fiscal year 2001. The consolidation of the theft and fraud guidelines, part of the Commission's Economic Crimes Package effective November 1, 2001, substantially restructured the departure provisions for these offenses. The consolidated guideline includes a list of seven upward departure considerations at §2B1.1 (Theft, Property Destruction and Fraud), Application Note 15(A), and one downward departure consideration at Application Note 15(B), stating that a downward departure may be warranted in "cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense." This change in the downward departure provision, combined with other elements of the consolidation (*e.g.*, amendments to the loss definition), may have some impact on downward departures for cases sentenced under the new guideline.

Downward departures citing §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), Application Note 4 (negligent record keeping), and §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), Application Note 5 (low risk of endangering public health), combined to account for a mere 0.07 percent of all downward departure reasons cited in fiscal year 2001.