

# CHAPTER FIVE

## Research

### Statutory Requirements

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As authorized by Congress, the Commission's numerous research responsibilities include: (1) the establishment of a research and development program to serve as a clearinghouse and information center for the collection, preparation and dissemination of information on federal sentencing practices; (2) the publication of data concerning the sentencing process; (3) the systematic collection and dissemination of information concerning sentences actually imposed and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code; and (4) the systematic collection and dissemination of information regarding the effectiveness of sentences imposed (28 U.S.C. § 995(a)).

### Data Collection

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The Sentencing Commission maintains a comprehensive, computerized data collection system. These data provide the basis for the Commission's clearinghouse of federal sentencing information, which, in large part, supports the agency's research mission. Pursuant to its authority under 28 U.S.C. §§ 994(w) and 995(a)(8), and after discussions with the Judicial Conference Committee on Criminal Law and the Administrative Office of the U.S. Courts (AO), the Commission requested that each probation office in each judicial district submit the following documents on every offender sentenced under the guidelines:

- Indictment
- Presentence Report (PSR)
- Report on the Sentencing Hearing (statement of reasons for imposing sentence as required by 18 U.S.C. § 3553(c))
- Written Plea Agreement (if applicable)
- Judgment of Conviction

Data from these documents are extracted and coded for input into various databases. It should be noted that data collection is a dynamic rather than a static process. When research questions arise, the Commission either analyzes its existing data or adds information to its monitoring system. For each case in its **Offender Dataset**, the Commission routinely collects case identifiers, sentencing data, statutory information, the complete range of court guideline decisions, departure information, and demographic variables.

The Commission also maintains additional datasets to study a variety of sentencing-related issues. The **Organizational Dataset** captures information on organizations sentenced under

Chapter Eight of the guidelines. The data describe organizational structure, size, and economic viability; offense of conviction; mode of adjudication; sanctions imposed; and application of the sentencing guidelines. The **Appeals Dataset** tracks appellate review of sentencing decisions. Information captured includes district, circuit, dates of appeal and opinion, legal issues, and the court's disposition. In addition to its standard data collection, the Commission often codes additional variables to study various discrete issues (e.g., drug offenses, weapon involvement).

The Commission's computerized datasets, without individual identifiers, are available via tape and the Internet through the Inter-University Consortium for Political and Social Research at the University of Michigan (ICPSR).<sup>60</sup>

### ***Data Collection Issues***

The Commission received documentation on 48,848 cases sentenced under the Sentencing Reform Act (SRA) between October 1, 1996, and September 30, 1997. Note, however, that all data collected and analyzed by the Commission reflect only reported populations (i.e., guidelines cases for which appropriate documentation was forwarded to the Commission), and reporting problems specific to individual districts or offices may make analysis at the district level problematic.

The Commission continues to work closely with other federal agencies to collect comprehensive statistical information for the federal criminal justice system and to reconcile differences among agencies in the number of reported cases, offense category definitions, and other relevant and commonly used variables. An Interagency Working Group on Criminal Case Processing Statistics (composed of the Commission, the Administrative Office of the U.S. Courts, the Executive Office for U.S. Attorneys, the Federal Bureau of Prisons, the Department of Justice's Criminal Division, and the Bureau of Justice Statistics) is seeking to improve data collection across the entire system and to produce a more comprehensive and user-friendly profile of all cases under federal jurisdiction. The work of this group will be made available in the Bureau of Justice Statistics publication *Federal Criminal Statistics 1997: Reconciled Data*.

In addition to the efforts described above, this year the Commission initiated a data completeness project, working closely with the Urban Institute, the grantee for the Bureau of Justice Statistics' Federal Justice Statistics Program, to identify potential guideline cases that had not been reported to the Commission, but were present in the Administrative Office of the Court's Criminal Masterfile of all federal sentencings. As a result of this effort, the Commission improved the comprehensiveness of data reporting for FY1997. A complete description of this effort and its analysis and findings can be found in Appendix A.

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<sup>60</sup> The Consortium can be contacted using the following Internet address:  
<http://www.ICPSR.umich.edu/NACJD/archive.html>. For more information, contact Dr. Christopher S. Dunn, ICPSR, P.O. Box 1248, Ann Arbor, MI 48106 or call 1-800-999-0960 or (313) 763-5011.

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## Summary of 1997 Findings

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The *1997 Sourcebook of Federal Sentencing Statistics* presents detailed tables and figures displaying information from the Commission's **Offender Dataset** concerning offender characteristics, guideline cases, guideline application, departure figures, and special sections highlighting drug and immigration cases. The *Sourcebook* also provides statistics on organizational sentencing practices from the **Organizational Dataset**, and data on appellate review of sentencing decisions from the **Appeals Dataset**.

All numbers cited in this Chapter may be found in tables or figures from the *1997 Sourcebook of Federal Sentencing Statistics*.

### ***Sentencing Individual Offenders***

#### Offender Characteristics

Historically, females have accounted for approximately 15 percent of federal criminal cases. This remained true in 1997 (15.0%). The racial/ethnic composition of the offender population continued a shift that began several years ago. The proportions of White and Black offenders have been decreasing, and the proportion of Hispanic offenders has been steadily increasing. During 1997, the percentage of White (34.7%) and Black (27.1%) offenders each decreased by one percentage point from 1996 levels, while the percentage of offenders of Hispanic origin increased by almost three percentage points (to 33.7%). The average age of federal offenders was 34.6 years (median= 33 years). Almost eight percent (7.9%) graduated from college, while the percentage of offenders who did not graduate from high school was 41.5 percent.

The proportion of offenders who are not U.S. citizens increased to 29.0 percent, continuing a six-year trend. Non-citizens comprised more than a quarter of all offenders for immigration, drug trafficking, kidnapping, money laundering, and national defense violations. For additional demographic information about the federal offender population, see Tables 4-9 in the Commission's *1997 Sourcebook of Federal Sentencing Statistics*.

#### Guideline Cases

Trial rates under the guidelines have declined from a high of approximately 15 percent of cases in 1993 to 6.8 percent in 1997. However, these rates vary by both district (ranging from 1.7% in Arizona and Eastern Louisiana to 18.8% in Northern Florida in 1997) and offense type (in 1997 ranging from no trials in burglary/B&E cases to 33.3% in murder cases).<sup>61</sup>

The vast majority of offenders (75.5%) were sentenced to imprisonment without a provision for alternative confinement. More than 90 percent of offenders sentenced for drug trafficking, kidnapping, racketeering/extortion, murder, sexual abuse, arson, firearms, prison offenses, or

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<sup>61</sup> The Northern Mariana Islands had no offenders go to trial in 1997. Because of the low number of cases sentenced (23 in 1997, the least of any federal district) and their geographic isolation, significant findings for this district are reported separately.

robbery offenses received a prison sentence. In contrast, more than half of the offenders sentenced for simple drug possession, larceny, tax violations, gambling, environmental offenses, antitrust offenses, or food and drug offenses received a probationary sentence alone or a sentence of probation with a condition of alternative confinement.

The average sentence (either imprisonment or alternative confinement) for all offenders in 1997 was 47.4 months (median= 24 months), counting probation-only sentences as zero months imprisonment. Of those offenders sentenced to some form of imprisonment, the average term was 58.9 months (median= 30 months), continuing a small but steady decline in the length of prison sentences that began in 1993. With the exception of immigration offenders, the majority of offenders who were in guideline zones eligible for non-prison sentences did, in fact, receive alternative confinement. In addition to a term of prison or probation, 36.1 percent of the offenders were also ordered to pay a fine, restitution, or both. For a detailed statistical description of the mode of disposition and sentences imposed, see Tables 12-16 and Figures D-F of the *1997 Sourcebook of Federal Sentencing Statistics*.

### **Guideline Application**

In 1997, the most frequently applied primary guidelines were (in order): Drug Trafficking (§2D1.1), Fraud (§2F1.1), Unlawful Entry into U.S. (§2L1.2), Theft (§2B1.1), Firearms (§2K2.1), Robbery (§2B3.1), and Smuggling Unlawful Alien (§2L1.1). Victim-related enhancements (part of Chapter Three of the guidelines) were applied at a consistently low rate (in less than two percent of all cases). The adjustments for obstruction of justice (4.5%) and reckless endangerment (0.4%) were also applied infrequently. More than 20 percent of offenders (22.2%) received a sentence adjustment for their role in the offense. Of these, 7.2 percent received an aggravating role adjustment, 11.8 percent received a mitigating role adjustment, three percent received an abuse of position of trust adjustment, and 0.3 percent received an adjustment for use of a minor in the commission of an offense. The rate of those receiving the acceptance of responsibility adjustment (88.3%) increased slightly from 1996 (86.8%), with the percentage of offenders receiving the three-level reduction option increasing from 50.6 percent in 1996 to 52.4 percent in 1997.

Slightly more than half of all offenders (54.2%) received points under the guideline's criminal history computations (Chapter Four of the guidelines). Similar to last year, more than half (55.9%) of the offenders were placed in Category I, and 9.2 percent were placed in Category VI. During 1997, 3.3 percent of offenders qualified for career offender or armed career criminal status, remaining steady from 1996 (3.3%). For further details of the guideline application components, see Tables 17-23 of the *1997 Sourcebook of Federal Sentencing Statistics*.

### **Departures and Sentences Within the Guideline Range**

Nearly seventy percent (67.9%) of 1997 sentences were within their applicable guideline ranges. Substantial assistance departures, for the fourth straight year, remained lower than 20 percent (19.2% in 1997). Upward departures remained at approximately one percent (0.8% in

1997) for the fifth straight year, while downward departures, continuing a seven-year increase, surpassed the twelve-percent mark (12.1%). Most notable was the increase in the number and percentage of cases in which deportation was cited as the reason to depart, from 901 cases (19.3% of reasons offered) in 1996 to 1,679 cases (26.6%) in 1997. The Commission is examining whether this increase is a result of its 1997 data completeness project (see Appendix A).

**Rates of Within-Range and Departure Sentences**

67.9%	Sentences Within Guideline Range
19.2%	Sentences Below Guideline Range for Substantial Assistance on Motion of Government
12.1%	Sentences Below Guideline Range
0.8%	Sentences Above Guideline Range

Great variation in departure rates existed among circuits and districts. The highest rates of substantial assistance departures were in the Third Circuit (31.9% of all cases) and the Southern District of Alabama (49.5%).<sup>62</sup> Other downward departures were granted most frequently in Ninth Circuit cases (25.0%), which had a high of 55.5 percent in the District of Arizona. Departure rates varied by primary offense type, ranging from: 36.4 percent of antitrust violations to 2.3 percent of simple possession of drugs for other downward departures; 54.5 percent of antitrust violations to 0.5 percent of sexual abuse cases for substantial assistance departures; and 11.1 percent of murder cases to zero upward departures in arson, burglary, environmental, antitrust, national defense, and food and drug offenses. Within-range sentences were most common in simple drug possession cases (94.3%) and least common in antitrust cases (9.1%, one of 11 cases sentenced). Overall, offenders receiving a substantial assistance departure experienced a larger sentence reduction than did offenders receiving a downward departure. Sentences for offenders receiving substantial assistance were a median of 24 months below the applicable guideline range, resulting in a median sentence reduction of 51.7 percent. Sentences for offenders receiving a downward departure were a median of ten months below the guideline range, resulting in a median sentence reduction of 34.8 percent. Offenders receiving an upward departure experienced a median 20-month sentence increase above the guideline maximum, amounting to a 33.3 percent median sentence increase. Sentences within the range were most likely to fall at the guideline minimum. For further departure statistics, see Tables 24-32 and Figures G-H in the *1997 Sourcebook of Federal Sentencing Statistics*.

**Drug Cases**

Nearly all drug cases (95.7%) were sentenced under the primary drug trafficking guideline (§2D1.1); about half of these cases involved cocaine trafficking (25.7% powder cocaine and 24.5% crack cocaine), followed by marijuana (26.9%), methamphetamine (10.4%) and heroin (9.8%). Of drug offenders, 39.4 percent were of Hispanic origin, 32.9 percent were Black, and 25.7 percent were White; 87.3 percent were male; and 28.5 percent were non-U.S. citizens.

The tables and figures in the drug section of the *1997 Sourcebook of Federal Sentencing Statistics* focus on the Chapter Two, Part D guidelines which target street drugs (*i.e.*, §2D1.1, §2D1.2, §2D1.5, §2D1.8, and §2D2.1.).

<sup>62</sup> The Northern Mariana Islands had the highest rate at 50.0 percent. See previous footnote.

Except for crack cocaine traffickers, drug offenders tended to be in Criminal History Category I.

Overall, less than ten percent (8.1%) of the drug offenders were convicted at trial (a low of 4.4% in heroin and a high of 12.1% in crack cocaine cases). Weapons were involved in 12.3 percent of all the drug cases; for crack cocaine and methamphetamine cases, this figure was above 20 percent (22.0% and 20.4%, respectively). Approximately 30 percent of drug offenders received a sentence adjustment for their role in the offense; 8.5 percent received an aggravating role adjustment, and 22.2 percent were granted a mitigating role reduction, with wide variation in the application rate of mitigating role found across drug types (33.1% in heroin and marijuana compared to 9.6% in crack cocaine cases). More than three-fourths (76.1%) of drug offenders received the three-level reduction option for acceptance of responsibility.

Nearly two-thirds of the drug offenders were convicted under a mandatory minimum provision, with the highest proportion occurring in methamphetamine (78.8%). A ten-year mandatory minimum was applicable in about half of the crack cocaine and methamphetamine cases. The “safety valve” provision (§5C1.2) was enacted to give non-violent, low-level, first-time drug offenders an opportunity for a lower sentence.<sup>63</sup> The 23.7 percent of drug offenders receiving the benefit of the “safety valve” includes both the 20.9 percent of drug offenders who were subject to a drug mandatory minimum, and the 2.8 percent who were not. The total proportion of offenders benefitting from the “safety valve” varies widely by drug type, from a low of 14.6 percent of crack cocaine cases to a high of 40.7 percent of heroin cases.

About 30 percent of drug offenders received substantial assistance departures, with another 12 percent being granted other downward departures. Crack cocaine offenders were the most likely to be sentenced within the guideline range (60.2%); methamphetamine offenders were the least likely (51.7%). The average overall prison term for drug offenders varied widely by drug type, from a mean of 125.0 months for crack cocaine cases (median= 96 months) to 39.0 months for marijuana cases (median= 27 months). See Tables 33-45 and Figures I-L of the *1997 Sourcebook of Federal Sentencing Statistics* for statistics and trends on drug cases.

### Immigration Cases

Reflecting a significant increase over previous years, 12.1 percent of all cases in 1997 were sentenced under one of the immigration guidelines. Most immigration offenders were male (94.3%), of Hispanic origin (89.4%), and had less than a high school education (78.7%). Almost all convictions were the result of a guilty plea (98.6%). Immigration offenses were more likely than any other offense type to involve non-U.S. citizens (92.0%). For detailed statistics on immigration violations, see Tables 46-50 in the Commission’s *1997 Sourcebook of Federal Sentencing Statistics*.

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<sup>63</sup> Under this provision, certain non-violent drug offenders with little or no criminal history can receive the full benefit of applicable mitigating adjustments under the guidelines and receive sentences below mandatory minimum penalty levels. Effective November 1, 1995, a guideline amendment was passed that provided an additional 2-level reduction for qualified offenders whose offense level is 26 or greater.

## Summary

The number of guideline cases reported to the Commission rose from 42,436 in 1996 to 48,848 in 1997. Federal offenders were sentenced to an average term of 59 months in prison (47 months when counting sentences of probation as zero months of incarceration). Approximately 70 percent of all offenders were sentenced within their applicable guideline range. The rate of departures for substantial assistance remained stable at 19 percent, but other downward departures increased (especially those departures with deportation cited as the reason).

The preceding pages highlight federal sentencing practices on a national level. Individual district profiles are presented in the Commission's *1997 Sourcebook of Federal Sentencing Statistics*.

## **Organizational Sentencing Practices**

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.<sup>64</sup> The organizational guidelines establish fine ranges to deter and punish illegal conduct; require full restitution, the payment of remedial costs to compensate victims for any harm, and the disgorgement of illegal gains; regulate probationary sentences; and implement other statutory penalties such as forfeiture and the assessment of prosecution costs.

The Chapter Eight organizational guidelines apply to all federal felonies and Class A misdemeanors committed by organizational offenders.<sup>65</sup> The fine provisions of Chapter Eight are limited to offenses for which pecuniary loss or harm can be more readily quantified, such as fraud, theft, and tax violations. In addition, the sentencing guidelines for bribery and kickbacks, antitrust, and money laundering offenses contain specific formulations for calculating fines for organizations.<sup>66</sup>

The organizational guidelines do not presently contain fine provisions for most environmental, food and drug, and export control violations.<sup>67</sup> In those cases in which the Chapter Eight fine guidelines do not apply, courts must look to the statutory provisions of title 18, sections 3553 and 3572, to determine an appropriate fine. The guidelines also provide that fines imposed upon owners of closely held organizations who are convicted of the same offense conduct as the corporation may offset the total amount of the corporate fine.

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<sup>64</sup> See *Guidelines Manual*, Chapter Eight - Sentencing of Organizations.

<sup>65</sup> See USSG §8A1.1.

<sup>66</sup> See USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d); 2S1.1(c); and 2S1.2(c).

<sup>67</sup> See USSG §8C2.1.

In 1997, the Commission received information on 220 organizations that were sentenced under Chapter Eight,<sup>68</sup> a 40-percent increase from 1996 and a 98-percent increase from 1995.<sup>69</sup> Fines were imposed upon 183 organizations. In 26 of the cases in which no fines were imposed, the organization was unable to pay the fine after making restitution, or had ceased operations and was insolvent at the time of sentencing. The sentenced organizations pled guilty in 91.9 percent of the cases; 8.1 percent were convicted after trial.

### Offense Characteristics

As in 1996, fraud was the most frequent offense committed by an organization, accounting for 41.0 percent of the cases sentenced. Other significant offense categories included: environmental waste discharge (20.3%), tax (6.3%), antitrust (6.3%), and food and drug violations (5.4%).<sup>70</sup> The proportion of organizational money laundering cases declined from 11.0 percent in 1996 to 4.1 percent in 1997. One organization was sentenced for misprision of a felony (18 U.S.C. § 4).

### Offender Characteristics

The majority of organizations sentenced in 1997 were closely held private corporations. In addition, a number of subsidiaries of major publicly traded corporations, four publicly traded corporations (the largest two of which employ 82,200 and 17,200 individuals, respectively) and three major international corporations headquartered outside the United States were among the organizational offenders sentenced in 1997.

Information on the number of individuals employed by organizations sentenced in 1997 is available for 140 of the 222 cases provided to the Commission. Of those cases, 33.6 percent employed fewer than 10 individuals; 42.1 percent employed at least 10 but fewer than 100 individuals; 12.9 percent employed at least 100 but fewer than 200 individuals; 8.5 percent employed at least 200 but fewer than 1,000 individuals; and 2.9 percent employed at least 1,000 individuals.

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<sup>68</sup> The Commission also received two antitrust cases that were sentenced under the former organizational fine component of USSG §2R1.1 because the offense conduct occurred before the November 1, 1991, effective date of Chapter Eight.

<sup>69</sup> As with individual defendants, the Commission datafile describing organizational defendants is available through the Inter-University Consortium for Political and Social Research at the University of Michigan.

<sup>70</sup> See Table 51 in accompanying *1997 Sourcebook of Federal Sentencing Statistics*.

Consistent with the Chapter Eight definition of “organization,”<sup>71</sup> non-corporate organizational entities sentenced in 1997 included partnerships (a law firm and a consulting firm), a family-held real estate trust, an agricultural cooperative, a non-profit tax-exempt health care provider (with more than 4,000 employees), and three municipal governments (which were convicted of environmental waste discharge offenses).

A total of 344 individuals were sentenced in connection with the same offense conduct as 162 of the organizational cases reported for 1997.<sup>72</sup> Occupational information was provided for 297 of these individuals. These data reflect that 104 were owners of their respective organizations and 39 were officers.

Only one of the organizations sentenced in 1997 had in place an “effective program to prevent and detect violations of law”; as provided by §8C2.5(f) of the sentencing guidelines, that organization received the benefit of a reduction in its culpability score for sentencing purposes.<sup>73</sup> Once under investigation by the authorities, 52.2 percent of the organizations were given credit for cooperating with the government’s investigation, and another 23.9 percent were given credit for accepting responsibility for their wrongdoing. One organization received credit, pursuant to a negotiated plea agreement, for self-reporting. Five organizations had a history of prior criminal or administrative offenses in the past ten years, which resulted in increased culpability scores for sentencing purposes.<sup>74</sup>

### Sanctions Imposed

The largest organizational fine in 1997 – \$100 million – was imposed for an antitrust conspiracy. The second largest organizational fine of \$37,372,826 was imposed for smuggling and excise tax evasion. The largest fine imposed for fraud-related offense conduct occurred in connection with a Medicare fraud case; the fine amounted to \$35,273,141. The largest fine for an environmental/waste discharge offense, which is not determined in accordance with the Chapter Eight fine tables, was \$3 million. In five instances, the fines imposed on closely held organizations

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<sup>71</sup> For sentencing guideline purposes, “organization” means “a person other than an individual” pursuant to 18 U.S.C. § 18, and includes corporations, partnerships, associations, governments, political subdivisions, unions, trusts, pension funds, and joint stock companies. See USSG §8A1.1.

<sup>72</sup> If an individual was still awaiting sentence as of September 30, 1997 (the end of fiscal year 1997), that information is not reflected in this data.

<sup>73</sup> The defendant, a privately-held corporation, which has 100 full-time employee positions, was convicted of making false statements in connection with the importation and distribution of seafood. Consistent with federal regulations, the corporation employed a full-time FDA inspector at its facility, a factor that was noted in giving the organization credit for an effective compliance program.

<sup>74</sup> See USSC §8C2.5(c). Additional information about offender characteristics is found at Table 52 in the accompanying *1997 Sourcebook of Federal Sentencing Statistics*.

were offset by the fines imposed on their respective owners in connection with related criminal convictions.<sup>75</sup>

Restitution was imposed as part of the defendant organization's sentence in 70 of the 222 reported cases (31.5%), and ranged from a high of \$20,625,000 in connection with a fraud conviction to a low of \$40 for the unauthorized sale of prescription drugs. The average restitution amount for fraud offenses was \$1,177,878, an increase of 139.0 percent from 1996.<sup>76</sup> Restitution was imposed in 14 (31.1%) of the environmental/waste discharge cases sentenced in 1997, and public notices of apologies to the communities affected by the waste discharge were required as part of the criminal sentence in two (4.4%) instances.

In addition to monetary penalties and restitution, defendants sentenced under the organizational guidelines were subject to other sanctions. Specifically, 63.0 percent of the organizations were placed on probation,<sup>77</sup> which is required if an organization has at least 50 employees at the time of sentencing and does not already have in place an effective program to prevent and detect violations of law.<sup>78</sup>

### Significant Case Law

A significant issue relating to the application of the organizational sentencing guidelines was recently addressed in *United States v. Sun-Diamond Growers of California*.<sup>79</sup> In appealing convictions stemming from charges of making illegal gifts to a Cabinet member and illegal campaign contributions, Sun-Diamond, a large agricultural cooperative, successfully challenged the district court's decision that reporting requirements imposed as a condition of probation upon the defendant, Sun-Diamond, also extended to all of its member cooperatives.

The appellate court was not persuaded by the government's argument that Sun-Diamond, the charged defendant, was merely the *alter ego* of the various member cooperatives. Finding that "the member cooperatives have their own corporate identities, boards of directors, employees, assets and liabilities," the appellate court observed that "their power to control Sun-Diamond seems no

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<sup>75</sup> See USSC §8C3.4.

<sup>76</sup> When restitution or remedial costs were paid prior to criminal conviction or in connection with a prior or subsequent civil or administrative action, that information is not necessarily furnished to the Commission.

<sup>77</sup> Conditions of probation imposed in connection with organizational sentencing in 1997 included ordering the defendant organization to: implement a compliance program; notify victims of the conviction; make a public apology through newspaper advertisements; dissolve or sell the organization; and, refrain from certain types of business activities (typically related to the offense conduct) for designated time periods.

<sup>78</sup> See USSG §8D1.1(a)(3).

<sup>79</sup> *United States v. Sun-Diamond Growers of California*, 138 F. 3d 961 (D.C. Cir. 1998).

greater than the power of ordinary shareholders to control a corporation.”<sup>80</sup> Accordingly, the D.C. Circuit concluded that the sentencing court could not impose probationary conditions on the defendant’s member cooperatives because they had not been named defendants in the prosecution nor had they received an opportunity to be heard.

**Appeals Data**

The Sentencing Reform Act authorized appellate review of guideline sentences imposed: (1) in violation of law; (2) as a result of an incorrect application of the sentencing guidelines; (3) as a departure from the applicable guideline range or from a plea agreement; or (4) for an offense that is plainly unreasonable and for which there is no sentencing guideline.

In 1992, the Commission implemented a data collection system to track appellate review of sentencing decisions. What follows is a summary of 1997 information from this growing database.

**Summary of Information Received**

In 1997, the Commission gathered information on 6,496 appellate court cases of which 2,472 were “conviction only” cases. The defendant was the appellant in 97.2 percent of the cases, and the United States was the appellant in 1.8 percent of the cases.<sup>81</sup> The remaining cases (1.0%) involved a cross appeal by one of the parties. The total number of sentencing cases analyzed was 3,691.<sup>82</sup> Less than eight percent of the sentencing cases were reversed in full. The overall case disposition rate for 1997 sentencing cases was:

<b>Affirmed</b>	79.4 percent
<b>Dismissed</b>	5.1 percent
<b>Reversed</b>	7.2 percent
<b>Affirmed in part/Reversed in part</b>	8.3 percent

The affirmance rate of sentencing cases decreased 0.3 percent from 79.7 percent in fiscal year 1996. The Eleventh Circuit had the highest rate of affirmed cases (85.8%); the Tenth Circuit had the lowest (67.0%). Of the 267 cases reversed, the appellate courts remanded 219 (82.0%) to the district courts for further action. Of the 307 cases that were affirmed in part and reversed in part,

<sup>80</sup> *Id.* at 977.

<sup>81</sup> Although the Commission is interested primarily in information on appellate court cases that involve sentencing issues, it requests that the circuit courts of appeals provide information on all criminal appeals, including appeals of convictions. The statistics used in this report are from the defendant-based files of the appeals database. Each defendant-based file will be referred to as a case.

<sup>82</sup> Four circuits, the Fourth, Fifth, Ninth, and Eleventh, accounted for approximately 56 percent of these cases (n= 2083).

the appellate courts remanded 281 (91.5%) to the district courts for further action. Thus, in 1997, the appellate courts remanded to the district court 13.5 percent (n= 500) of the 3,691 sentencing cases reviewed that year.

### Issues and Guidelines Appealed

The Commission collects data on the guidelines and other sentencing issues that were bases of appeal for cases involving sentencing issues only and those cases involving both sentencing and conviction issues. Defendants appealed the drug trafficking guideline (§2D1.1) 18.1 percent of the time (1,006 times). Other guidelines that frequently formed the bases for appeals by defendants were §5K2.0 (Departures) (6.2%), §3E1.1 (Acceptance of Responsibility) (5.4%), §3B1.2 (Mitigating Role) (5.1%), and §3B1.1 (Aggravating Role) (4.6%). For cases in which the government was the appellant, §5K2.0 (Departures) (18.6%), §2D1.1 (Drug Trafficking) (10.6%), §3C1.1 (Obstruction of Justice) (8.8%), and §2F1.1 (Fraud and Deceit) (8.8%) were the guidelines most frequently appealed.

### Offense and Offender Characteristics

The data reveal that 39.1 percent of defendants in appellate court cases<sup>83</sup> were Black, 37.9 percent White, 20.2 percent Hispanic, and 2.8 percent other. Whites and Blacks comprise a larger proportion of the appeals population than of the district court population (of the defendants sentenced in district court, 34.7% were White and 27.0% were Black). More than 74.7 percent of the defendants in appellate court cases were United States citizens, and 25.3 percent were non-citizens. In 40.4 percent of the appellate court cases, the defendants were sentenced under mandatory drug sentencing statutes, 7.3 percent were sentenced under mandatory gun sentencing statutes, and 10.0 percent sentenced under both drug and gun mandatory sentencing statutes. Mandatory minimum penalties applied to 57.7 percent of the appellate court cases, as compared to 34.7 percent of the district court cases.

As might be expected, appealed cases had considerably longer sentences. The mean sentence of appealed cases was 131.3 months (median= 97 months) compared to 46.7 months (median= 24 months) for all district court cases. Fifty-three percent of the appellate court cases involved defendants whose primary offense of conviction was drug trafficking, which comprised 37.2 percent of all cases sentenced in district court.

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<sup>83</sup> These data include *all* appellate cases gathered by the Commission, not merely cases involving a sentencing issue.

## Research Studies

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### ***Departure Issues***

#### **Substantial Assistance Departures**

The Sentencing Commission in 1997 finalized an exploratory research report examining the guidelines' "substantial assistance" policy statement in light of the guidelines' overall statutory goal of fair and honest sentencing. A substantial assistance departure (§5K1.1) permits the judge, upon the motion of the prosecutor, to reduce a defendant's sentence below the guideline range as a reward to an offender who cooperates in the investigation or prosecution of another person who has committed an offense.

Using data collected from seven different research methodologies, the Commission study focused on whether different districts' policies and procedures were consistent and whether similar defendants were receiving similar sentence reductions for providing similar assistance.

The study did not find the expected correlations between the extent of the substantial assistance departure received and: (1) the type of cooperation provided, (2) the type of benefit or result received by the government, or (3) the making of a §5K1.1 motion. While limited data hampered significance testing, the consistency of the findings using the different methodologies revealed four problems requiring further examination.

First, the definition of "substantial assistance" was not being consistently applied across the federal districts. Second, although the U.S. attorney offices are required to record the reason for making a substantial assistance motion, there is no provision that this information must be made available for review. Third, the evidence consistently indicated that: (a) factors legally relevant to a §5K1.1 departure (*e.g.*, type of cooperation, benefit of cooperation, defendant's role in the offense, relevant conduct, offense type) generally were found to be inadequate in explaining §5K1.1 departures; and (b) legally irrelevant factors (*e.g.*, gender, race, ethnicity, citizenship) were found to be statistically significant in explaining §5K1.1 departures. Finally, data indicate that, in determining departure lengths, judges do not rely solely on the extent of defendants' cooperation; they relate the magnitude of departure to the length of the pre-departure sentence. In other words, the longer the pre-departure sentence, the greater the departure seems to be.

#### **Departures After *Koon v. U.S.***

In *Koon v. United States*,<sup>84</sup> the Supreme Court examined the standard of review to be applied by appellate courts in reviewing district court guideline departure decisions. To evaluate the effect of *Koon*, the Commission studied the rates of departure before and after the guidelines along with the reasons for departure as stated by the courts (see Chapter Three for additional discussion of *Koon*). The study found:

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<sup>84</sup> 116 S. Ct. 2035 (1996)

- Prior to the *Koon* decision, the rate of downward departures had been slowly and steadily increasing; the decision did not dramatically increase this growth;
- Differences among the circuits in departure rates existed before *Koon*. These differences have somewhat widened since the decision; and
- The types of reasons for departures changed relatively little after the decision.

## ***Disparity Issues***

### **Advisory Panel on Disparity Research**

In 1997, the Commission established a panel of internationally recognized experts to help devise and implement a state-of-the-art program of research on sentencing disparity. The goal of this program is to determine: (1) whether the federal sentencing guidelines have reduced unwarranted disparity, and (2) the types of any unwarranted disparity remaining in the federal system today. The panel is chaired by Professor John Hagan of the University of Toronto. Also serving are Dr. Patrick Langan of the Department of Justice's Bureau of Justice Statistics and Professor Cassia Spohn of the University of Nebraska-Omaha.

### **Inter-Judge Disparity**

A Commission study in 1997 compared sentence length differences among judges before and after implementation of the guidelines. Using a "natural experiment" methodology based on the random assignment of cases to judges, the authors found:

- Significant inter-judge differences in sentencing patterns prior to implementation of the guidelines;
- The guidelines, while not eliminating all unwarranted disparity due to judges or to prosecutors, have reduced the amount of disparity in sentences imposed;
- Regional sentence variation among cities continues to exist under the sentencing guidelines, and may have become greater since guideline implementation. Drug trafficking cases, in particular, exhibit this increase in geographical variation.

### **Race and Gender Sentencing Disparity**

The Commission has contracted with an outside researcher to study the effect of the guidelines on a different type of sentencing disparity – differences due to defendants' race or gender. Some evidence suggests that these characteristics influenced sentences in the pre-guidelines era, a concern the Sentencing Reform Act was intended to address. The Commission is aware of no previous study that has compared the effect of these factors before and after the U.S. sentencing guidelines using a multivariate statistical approach that controls for factors legally relevant to the sentencing decision. In 1997, data on these factors were gathered from cases sentenced in 1992 and

1995. These data will be compared with data from 1985 to assess the effectiveness of the guidelines at reducing this type of disparity.

### **Disparity Issues in the Circuit Courts**

Commission staff in 1997 also conducted research to assist the Ninth Circuit Task Force on Racial, Religious, and Ethnic Fairness. The study included a descriptive analysis of sentences and offenders in the Ninth Circuit for 1994-1995 and a series of multivariate analyses of sentence length that included both legally relevant and irrelevant sentencing factors, including race. A second Commission study was conducted for the Third Circuit Task Force on Equal Treatment in the Courts. The study duplicated the approach used in the analysis performed for the Ninth Circuit.<sup>85</sup>

### ***Intensive Study Sample***

In 1997, the Commission completed its work on a two-year project called the Intensive Study Sample (ISS). This project involved the collection of detailed information on a defendant's personal characteristics, offense conduct, and criminal history for a five-percent random sample of cases. More than 150 variables on a wide variety of factors (*e.g.*, defendant's family and social background, weapons used and injuries inflicted during the offense, and geographic region of drug trafficking organizations) were collected as part of this effort. This database is the foundation for a series of projects that will allow the Commission to examine sentencing issues in greater depth.

### ***Research Presentations at the Annual Meeting of the American Society of Criminology***

In addition to hosting a panel that discussed the use of its unique datafile, Commission research staff also presented several projects using the 1995 ISS data at the 1997 Meeting of the American Society of Criminology.

The first presentation examined patterns of drug use to help explore whether the guidelines' current approach to drug-abusing offenders is appropriate. More than half of federal offenders had used two or more drugs in the past, and at least one quarter had been using a drug during the period in which they committed their crime. It was found that some offenses, such as robbery, are more likely to be committed by persons who use drugs. Only a small fraction of offenders had undergone substance abuse treatment previously, and fewer than half of these reported that their treatment had been successful.

The next presentation examined the ways in which sentences are affected by the use or possession of a dangerous weapon. Under current law, drug trafficking and violent offenses are subject to guideline enhancements and, if charged, mandatory penalties under 18 U.S.C. § 924(c). However, ISS data show that fewer than half of the cases that appear to qualify for current statutory penalties actually receive them. The proportion of cases involving weapons varies by the type of

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<sup>85</sup> Copies of the reports are available from the Third and Ninth Circuit Task Forces.

drug trafficked, with methamphetamine and crack cocaine trafficking cases much more likely to involve guns.

The third presentation used the ISS data to examine the guidelines' criminal history calculations. Rules governing the time frame during which past offenses are counted and rules excluding certain juvenile or foreign convictions cause some prior offenses – including some serious crimes – to be ignored. In addition, the way in which prior convictions affect calculations often depends on the jurisdictions in which the convictions occurred; this may result in different sentences for offenders with similar criminal histories. By evaluating the ways in which the current rules operate, the Commission hopes to identify methods to evaluate criminal history more fairly and simply, and to identify dangerous offenders more effectively.

Another Commission presentation examined potential sources of unfairness in federal sentencing. While discrimination involves differential treatment because of a personal characteristic, “unfairness” occurs when a group of people is disproportionately affected by a rule not justified by the purposes of sentencing. The presentation included a review of the literature and a methodological critique of previous studies of unfairness and discrimination. Stages of the criminal justice process at which disproportionalities arise were identified.

The final presentation examined the factors associated with eligible federal offenders who receive an alternative sentence as compared to those who receive a sentence of imprisonment. An alternative sentence was defined as either a straight assignment by the court to an alternative to incarceration sentence (*i.e.*, intermittent confinement, home detention, or community confinement) with a condition of probation, an alternative in combination with a prison sentence, or straight probation.

### ***Data Enhancement and Promotion***

The Sentencing Commission maintains the nation's most comprehensive database on federal sentencing, with documentation on approximately 350,000 cases. To confirm that the Commission is receiving documents on all district court guideline cases, the Commission in 1997 instituted a new document receipt quality program. Staff used computers to match the sentencing records received by the Commission with the criminal court sentencings reported independently by the Clerks of the Courts to the Administrative Office of the U.S. Courts. Lists of cases missing from Commission files were sent to each district with a request that the case data be forwarded to the Commission. The impact of the case influx as a result of this initiative is discussed in Appendix A.

The Commission has also been promoting and facilitating the use of U.S. Sentencing Commission data by the general criminal justice research community. This initiative should benefit external researchers by increasing the amount of available information and by enhancing their ability to properly analyze and interpret this information. As a result of this effort, the Commission should also benefit, as it receives valuable input about the enhancement of its primary data collection and as it promotes professional dialogue among criminal justice researchers.

The Commission's research on cocaine; money laundering; and theft, fraud, and tax is discussed in Chapter Two of this report.

As part of this effort, the Commission sponsored a one-day technical training workshop for employees of other federal agencies. In addition, the Commission presented a panel discussion on “Use of Federal Sentencing Data” at the Meetings of the American Society of Criminology to familiarize researchers from around the country with Commission databases.

### **Prison Impact Assessment**

As directed by Congress, the Commission regularly assesses the impact of changes to the sentencing guidelines on the federal prison population. During 1997, the Commission assessed the potential prison impact of amendments to 51 guidelines, using its computerized prison impact model when the number of cases was sufficient and relevant information was available. This model calculates how sentences for offenders would have differed had the 1997 amendments been in effect at the time of sentencing. The Commission employed other statistical methods when the number of cases was low.

Of the 51 amended guidelines, 20 involved changes that, by their very nature, would not affect sentences. For eleven other guidelines, insufficient information was available for an estimation. Eight amended guidelines involved new offenses, and consequently, could not be evaluated. In seven instances, it was estimated that there would be negligible prison impact because of the small number of offenders committing these particular crimes. For five guidelines, there was a sufficient number of cases to use the computerized model to assess the impact. These results are reported below.

- **§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy - Methamphetamine)** – This amendment modified the Drug Quantity Table by setting the five- and ten-year quantity thresholds of methamphetamine-mixture at 50 and 500 grams. It also added new specific offense characteristics for environmental hazard and for importation in the absence of a mitigating role adjustment.

This amendment potentially would affect 50.8 percent of the 1,049 methamphetamine offenders for

The basis of the **prison impact model** is the resentencing algorithm. A review of each offender’s presentence report determines whether or not the imposed sentence would have been different under a proposed guideline amendment or statutory change. If the amendment affects the offender’s sentence (*e.g.*, the final offense level or criminal history category), a hypothetical new sentence for the offender is computed using, as a starting point, the position of the offender’s sentence relative to the original guideline range. The new sentence is imposed at the same relative position to the original guideline range.

The Commission’s prison impact model assesses the impact of an amendment on the guidelines using estimated changes in a hypothetical “steady-state” prison system. In general, change is estimated to increase or decrease the size of the prison population over a 30-year period.

In 1995, the Commission calculated that 29,649 offenders sentenced to prison in the federal courts would serve a total of 156,151 person-years of imprisonment. During 1995, 38,500 offenders were sentenced in federal courts. From these, 8,851 cases were excluded from the analysis because no term of imprisonment had been imposed (8,306 cases) or sentencing information was missing (545 cases). The Commission’s 1995 dataset was used because the 1996 dataset was not available at the time these analyses were performed. Under the prison impact model, therefore, the estimate of the hypothetical “steady-state” prison population is 156,151 inmates. This estimate constitutes the baseline against which sentencing policy changes are measured.

whom this was the primary sentencing guideline in 1995.<sup>86</sup>

It was estimated that average sentences would increase from 91 months to 113 months, requiring an additional 818 prison beds over the long term.<sup>87</sup>

- **§2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy)** – This amendment added two offense levels to each quantity range in the Chemical Quantity Table.

This amendment would affect 100 percent of the 55 offenders for whom this was the primary sentencing guideline during 1995. It was estimated that average sentences would increase from 30 months to 37 months, requiring an additional 33 prison beds over the long term.

- **§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)** – This amendment increased the guideline’s base offense levels; reduced offense levels if the conduct involved only the offender’s spouse or child; increased offense levels for the number of aliens involved; added specific offense characteristics for certain prior offenses, use of a weapon, reckless endangerment of lives, and bodily injury; and added a cross reference if a person was killed.

This amendment would affect 100 percent of the 511 offenders for whom this was the primary sentencing guideline in 1995. It was estimated that average sentences would increase from six months to 16 months, requiring an additional 358 prison beds over the long term.

- **§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 Laws)** – This amendment increased the guideline’s base offense level, reduced offense levels if the conduct involved only the offender’s spouse or child, increased offense levels based on the number of documents involved, and increased the offense level if the offender had committed certain prior immigration offenses.

This amendment would affect 100 percent of the 176 offenders for whom this was the primary sentencing guideline in 1995. It was estimated that average sentences would increase from seven months to 18 months, requiring an additional 120 prison beds over the long term.

- **§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)** – This amendment increased the guideline’s base offense level and added a specific offense characteristic if the offender had committed certain prior offenses.

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<sup>86</sup> These defendants were sentenced directly under §2D1.1.

<sup>87</sup> As noted in the sidebar above, the “long-term” is assessed over a 30-year period.

This amendment would affect 100 percent of the 354 offenders for whom this was the primary sentencing guideline in 1995. It was estimated that average sentences would increase from three months to five months, requiring an additional 39 prison beds over the long term.

The combined prison impact of these five amendments is estimated to result in an increase of less than one percent to the long-term prison population.

In addition to providing estimates for approved guideline amendments, the prison impact model is used for Commission reports and for the Commission's amendment consideration process. For example, for its 1997 report to Congress on cocaine policy, the Commission reviewed the impact of a wide range of drug quantity thresholds triggering mandatory minimum penalties. The Commission also provides estimates to Congress for pending legislation (*e.g.*, increases for use of a weapon, increased penalties for gang involvement in a crime).

In April 1997, the Commission sponsored a workshop on the methods and assumptions underlying the prison impact model. The workshop was aimed at federal agencies that routinely request impact analysis. Attending were representatives of the Department of Justice, the Federal Bureau of Prisons, the Bureau of Justice Statistics, the Administrative Office of the U.S. Courts, the Federal Judicial Center, and the Congressional Budget Office.

The Commission's prison impact model is revised on an ongoing basis. During the past year, the model was modified to take advantage of new variables in the Commission's dataset and to more accurately evaluate cases receiving probation or alternatives to prison.

### ***Data Analyses for the Courts***

Using the Commission's 1997 dataset, the Commission compiled detailed information on sentencing activities for each federal district and circuit. The Commission distributed these data to the courts and made them available to the general public via the Commission's Internet web site. These data present the distribution of cases, mode of conviction, type of sentence imposed, incarceration rate, length of imprisonment, and departure rate by primary offense type. The data are organized by circuit and district and provide comparisons to national figures. These informational packets were also used in the guidelines orientation of ten new chief circuit and district court judges by Commission staff. Additionally, these packets were used by the Commission in several training programs for court personnel.

Commission staff continued to respond to numerous data requests from the courts in 1997. Responses included providing information for district- or circuit-based annual reports, supplying the courts with Commission data on specific types of offenses or guideline applications (*e.g.*, drug offenses, departure rates), and examining relationships between guideline application characteristics and offender demographic characteristics (*e.g.*, gender and role in the offense). Commission staff involvement on the various requests ranged from serving as a consultant about a particular data analysis to performing substantial, sophisticated data analyses.