

# 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>71</sup>

### **Data Collection Issues**

The Commission received documentation on 50,754 cases sentenced under the Sentencing Reform Act (SRA) between October 1, 1997, and September 30, 1998. 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). 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.

### **Summary of 1998 Findings**

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The *1998 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**.

Most numbers cited in this Chapter may be found in tables or figures from the *1998 Sourcebook of Federal Sentencing Statistics*.

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<sup>71</sup> The Consortium can be contacted using the following Internet address:  
<http://www.ICPSR.umich.edu/NACJD/archive.html>.

## ***Sentencing Individual Offenders***

### **Offender Characteristics**

Historically, females have accounted for approximately 15 percent of federal criminal cases. This remained true in 1998 (15.1%). 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 1998, the percentage of White (32.0%) and Black (26.5%) offenders each decreased from 1997 levels, while the percentage of offenders of Hispanic origin increased by slightly more than three percentage points (to 37.0%). The average age of federal offenders was 34.2 years (median= 32 years). More than seven percent (7.2%) graduated from college, while the percentage of offenders who did not graduate from high school has been increasing, reaching 43.5 percent in 1998.

The proportion of offenders who are not U.S. citizens increased to 31.9 percent, continuing a seven-year trend. Non-citizens comprised approximately one-third of kidnapping (38.7%) and drug trafficking (31.3%) offenses; nearly two-thirds (63.2%) of all national defense violations; and 93.6 percent of immigration offenses. For additional demographic information about the federal offender population, see Table 4 through Table 9 in the Commission's *1998 Sourcebook of Federal Sentencing Statistics*.

### **Guideline Cases**

Trial rates under the guidelines have declined from a high of approximately 12 percent of cases in 1993 to 6.4 percent in 1998. However, historically, these rates vary by both district and offense type. In 1998, district trial rates ranged from 1.0 percent in Arizona to 21.9 percent in Idaho, while for offense type the range was from 1.0 percent in environmental cases to 27.8 percent in kidnapping cases.

The vast majority of offenders (78.6%) were sentenced to imprisonment without a provision for alternative confinement. More than 90 percent of offenders sentenced for murder, manslaughter, kidnapping, sexual abuse, robbery, drug trafficking, firearms, burglary, racketeering, immigration, or prison offenses received a sentence that included imprisonment. 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 1998 was 48.1 months (median of 24 months), counting probation-only sentences as zero months imprisonment. Of those offenders sentenced to some form of imprisonment, the average term was 58.1 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, 34.0 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 Table 12 through Table 16 and Figure D through Figure F of the *1998 Sourcebook of Federal Sentencing Statistics*.

### Guideline Application

In 1998, 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). The three victim-related enhancements (part of Chapter Three of the guidelines) were applied at a consistently low rate (each in less than one percent of all cases). The adjustments for obstruction of justice (3.8%) and reckless endangerment (0.6%) were also applied infrequently. More than 20 percent of offenders (22.5%) received a sentence adjustment for their role in the offense. Of these, 6.1 percent received an aggravating role adjustment, 13.3 percent received a mitigating role adjustment, 2.7 percent received an abuse of position of trust adjustment, and 0.4 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 (89.5%) continued the consistent trend (since 1991) of an annual one-to-two percentage point increase. The percentage of offenders receiving the three-level reduction option has also been increasing at a rate of between two-to-four percentage points over each of the past several years, reaching 56.3 percent in 1998.

Slightly more than half of all offenders (55.6%) received points under the guideline's criminal history computations (Chapter Four of the guidelines). Holding fairly constant over the prior several years, more than half (54.4%) of the 1998 offenders were placed in Category I, and 9.2 percent were placed in Category VI. During 1998, approximately three percent of offenders qualified for career offender or armed career criminal status, a statistic that has remained steady over the past several years. For further details of the guideline application components, see Table 17 through Table 23 of the *1998 Sourcebook of Federal Sentencing Statistics*.

### Departures and Sentences Within the Guideline Range

Two-thirds (66.3%) of 1998 sentences were within their applicable guideline ranges. The percentage of within-guideline sentences was lowest in the District of Arizona (31.2%), with three additional districts having rates lower than 50 percent: Eastern New York (43.3%); Eastern Pennsylvania (47.0%); and Northern New York (49.6%). The highest within-guideline sentencing rate was in Western Oklahoma (89.4%). Only one offense type had a percentage of within-guideline sentences less than 50 percent: national defense offenses (44.4%). The offense type with the highest within-guideline rate was simple drug possession (95.9%).

Substantial assistance departures, for the fifth straight year, remained below 20 percent (19.3% in 1998). The rates of substantial

Rates of Within-Range and Departure Sentences	
66.3%	Sentences Within Guideline Range
19.3%	Sentences Below Guideline Range for Substantial Assistance on Motion of Government
13.6%	Sentences Below Guideline Range
0.8%	Sentences Above Guideline Range

assistance departures ranged from a low of 1.7 percent in Alaska to a high of 43.6 percent in the Western North Carolina. The offense types with the lowest rates of substantial assistance departures were simple drug possession and assault (each at 1.3%); the offense type with the highest rate was antitrust (45.5%). The guideline with the highest rate of substantial assistance departures was §2M5.1 (55.6%). Of the 121 guidelines used in 1998 as a primary guideline, 40 guidelines had no substantial assistance departures.

Downward departures (other than substantial assistance departures under §5K1.1) continued an eight-year trend, increasing to 13.6 percent. The rates of downward departures ranged from a low of 0.0 percent in the Northern Mariana Islands, to a high of 61.0 percent in the District of Arizona. The offense type with the lowest rate of other downward departures was antitrust (0.0%); the offense type with the highest rate was national defense (27.8%). The guidelines with the highest rates of other downward departures were §2M6.1 and §2N1.2 (each at 100.0%). Of the 121 guidelines used in 1998 as primary guidelines, 38 guidelines had no other downward departures.

Upward departures remained at approximately one percent (0.8% in 1998) for the sixth straight year. Only three districts had an upward departure rate of three percent or higher: Rhode Island (6.2%), Western Wisconsin (5.5%), and Northern California (3.1%). The offense type with the highest rate of upward departure was manslaughter (17.9%). The two guidelines with the highest rates of upward departures were §2D1.6 and §2G1.2 (each at 33.3%). Of the 121 guidelines used in 1998 as primary guidelines, 67 guidelines had no upward departures.

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 26 months below the applicable guideline range, resulting in a median sentence reduction of 50.4 percent. Sentences for offenders receiving a downward departure were a median of 10 months below the guideline range, resulting in a median sentence reduction of 35.1 percent. Offenders receiving an upward departure experienced a median 16-month sentence increase above the guideline maximum, amounting to a 39.9 percent median sentence increase. For sentences within the applicable guideline range, the sentence most often given (60.3% of all within-guideline sentences) was at the minimum point of the guideline range. For further departure statistics, see Table 24 through Table 32 and Figure G through Figure H in the *1998 Sourcebook of Federal Sentencing Statistics*.

## Drug Cases

As in previous years, drug offenses were the largest single category of federal convictions in 1998 (40.1%). Nearly all drug offenses (95.9%) were sentenced under the primary drug trafficking guideline (§2D1.1); just under half of these cases involved cocaine trafficking (23.6% powder cocaine and 24.1% crack cocaine), followed by marijuana (29.9%), methamphetamine (11.4%) and heroin (8.9%). Of drug offenders, 41.0 percent were of Hispanic origin, 32.7 percent were Black, and 24.2 percent were White; 86.6 percent were male; and 30.4 percent were non-U.S. citizens. Except for crack cocaine traffickers, the majority of drug offenders were in Criminal History Category I.

Weapons were involved in 12.1 percent of all the drug cases; for crack cocaine and methamphetamine cases, this figure rose to approximately 20 percent (19.0% and 20.4%, respectively). Approximately 30 percent of drug offenders received a sentence adjustment for their role in the offense; 7.3 percent received an aggravating role adjustment; and 24.7 percent were granted a mitigating role reduction. There was wide variation in the application rate of the mitigating role adjustment across drug types (roughly 38 percent for marijuana and heroin offenses, compared to 9.2 percent for crack cocaine cases). More than three-fourths (78.8%) 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 (81.4%). A ten-year mandatory minimum was applicable in over half of the crack cocaine and methamphetamine cases. The “safety valve” provision (§5C1.2) was enacted to give nonviolent, low-level, first-time drug offenders an opportunity for a lower sentence.<sup>72</sup> The 24.7 percent of drug offenders receiving the benefit of the “safety valve” included both the 22.0 percent of drug offenders who were subject to a drug mandatory minimum, and the 2.7 percent who were not. Following the trend of the past three years for all drug types except marijuana, the proportion of offenders benefitting from the “safety valve” again increased. In 1998, consistent with prior years, heroin offenders (50.5%) were the most likely to receive the “safety valve” and crack cocaine offenders (15.8%) were least likely to receive the “safety valve.”

About 30 percent of drug offenders received substantial assistance departures, with another nearly 13 percent being granted other downward departures. The average overall prison term for drug offenders varied widely by drug type, from a mean of 122.4 months for crack cocaine cases (median= 96 months) to 37.0 months for marijuana cases (median= 24 months). See Table 33 through Table 45 and Figure I through Figure L of the *1998 Sourcebook of Federal Sentencing Statistics* for statistics and trends on drug cases.

## Immigration Cases

In 1998 there was another significant increase in the number of immigration convictions. In total, 14.6 percent of all cases in 1998 were sentenced under one of the immigration guidelines. Most immigration offenders were male (94.5%), of Hispanic origin (90.7%), and had less than a high school education (80.1%). Almost all immigration convictions involved non-U.S. citizens (93.0%) and were the result of a guilty plea (98.1%). Immigration offenders were less likely than all federal offenders to be in Criminal History Category I, and more likely to be in Criminal History Category VI. For detailed statistics on immigration violations, see Table 46 through Table 50 in the Commission's *1998 Sourcebook of Federal Sentencing Statistics*.

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<sup>72</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 48,848 in 1997 to 50,754 in 1998. Federal offenders were sentenced to an average term of 58 months in prison (48 months when counting sentences of probation as zero months of incarceration). Approximately two-thirds 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 slightly.

The preceding pages highlight federal sentencing practices on a national level. Individual district profiles are presented in the Commission's *1998 Sourcebook of Federal Sentencing Statistics*.

## **Organizational Sentencing Practices**

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.<sup>73</sup> The organizational guidelines establish fine ranges to deter and punish illegal conduct; require full 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>74</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 violations, and money laundering offenses contain specific formulations for calculating fines for organizations.<sup>75</sup>

The organizational guidelines do not presently contain fine provisions for most environmental, food and drug, and export control violations.<sup>76</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.

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<sup>73</sup> See *Guidelines Manual*, Chapter Eight – Sentencing of Organizations.

<sup>74</sup> See USSG §8A1.1.

<sup>75</sup> See USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d); 2S1.1(c); and 2S1.2(c).

<sup>76</sup> See USSG §8C2.1.

In 1998, the Commission received information on 218 organizations that were sentenced under Chapter Eight,<sup>77</sup> a one-percent decrease from 1997 and a 39-percent increase from 1996.<sup>78</sup> Fines were imposed upon 160 organizations.<sup>79</sup> In 86.3 percent (44) of the cases in which no fines were imposed, the organization was unable to pay the fine. The sentenced organizations pled guilty in 89.4 percent of the cases; 10.1 percent were convicted after trial. There was one multiple count case that included both a plea and a trial.

### Offense Characteristics

As in 1997, fraud was the most frequent offense committed by an organization, accounting for 32.4 percent of the cases sentenced. Other significant offense categories included: environmental waste discharge (21.1%), tax (11.3%), money laundering (7.5%), antitrust (6.1%), and environmental wildlife violations (4.2%).<sup>80</sup> Comparing cases sentenced in 1997 and 1998, the proportion of organizational money laundering cases increased from 4.1 percent in 1997 to 7.5 percent in 1998, and the proportion of organizational tax cases increased from 6.3 to 11.3 percent.

### Offender Characteristics

The majority of organizations sentenced in 1998 were closely held private corporations. In addition, four publicly traded corporations (the largest employing 70,000 individuals) and three municipalities were among the organizational offenders sentenced in 1998.

Information on the number of individuals employed by the organizations sentenced in 1998 is available for 144 of the 220 cases provided to the Commission. Of those cases, 30.6 percent employed fewer than ten individuals; 45.8 percent employed at least ten but fewer than 100 individuals; 10.4 percent employed at least 100 but fewer than 200 individuals; 9.7 percent employed at least 200 but fewer than 1,000 individuals; and 3.5 percent employed at least 1,000 individuals.

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<sup>77</sup> The Commission also received one antitrust case that was 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. Of the 220 cases received, one case was missing guideline application information.

<sup>78</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>79</sup> This number is greater than the number of cases with Fines Imposed shown in Table 51 of the accompanying *1998 Sourcebook of Federal Sentencing Statistics* because it includes six cases that received fines but that were excluded from those counted under Table 51 because of missing primary offense category information.

<sup>80</sup> See Table 51 in accompanying *1998 Sourcebook of Federal Sentencing Statistics*.



A total of 452 individuals were sentenced in connection with the same offense conduct as 141 of the organizational cases reported for 1998.<sup>81</sup> Occupational information was provided for 437 of these individuals. These data reflect that 60 were owners of their respective organizations and 86 were officers.

Of those organizations sentenced pursuant to the fine guidelines, in 58.5 percent, personnel with substantial authority were involved in or tolerant of the criminal activity. None of the organizations sentenced in 1998 had in place an “effective program to prevent and detect violations of law” as provided by §8C2.5(f) of the sentencing guidelines. Once under investigation by the authorities, 54.2 percent of the organizations were given credit at sentencing for cooperating with the government’s investigation, and another 30.5 percent were given credit for accepting responsibility for their wrongdoing. No organizations received credit for self-reporting. One organization had a history of prior criminal or administrative offenses in the past five years, which resulted in an increased culpability score for sentencing purposes.<sup>82</sup>

### Sanctions Imposed

The five highest fines in 1998 were imposed on corporations convicted of antitrust violations. The highest fine was \$110 million, and the second highest fine was \$49 million. The two highest fines for fraud offenses, \$8 million and \$4,230,000, were imposed on corporations for making illegal campaign contributions. In both of those cases, executives of the corporate offenders also were sentenced individually for campaign finance violations. The largest fine for an environmental/waste discharge offense, which is not determined in accordance with the Chapter Eight fine tables, was \$1.5 million. Considering all case types, in five instances, the fines imposed on organizations were partially offset by the fines imposed on their respective owners in connection with related criminal convictions.<sup>83</sup>

Restitution was imposed as part of the offending organization’s sentence in 74 cases<sup>84</sup> and ranged from a high of \$12,306,000 in connection with a bribery conviction to a low of \$408 for larceny. The average restitution amount for fraud offenses was \$631,131, a decrease of 46.4 percent

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<sup>81</sup> The guidelines 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. If an individual was still awaiting sentence as of September 30, 1998 (the end of fiscal year 1998), that information is not reflected in these data.

<sup>82</sup> See USSC §8C2.5(c). Additional information about offender characteristics is found at Table 52 in the accompanying *1998 Sourcebook of Federal Sentencing Statistics*.

<sup>83</sup> See USSC §8C3.4.

<sup>84</sup> This number differs from the number of cases under Restitution Imposed shown in Table 51 of the accompanying *1998 Sourcebook of Federal Sentencing Statistics* because it includes two cases that received a restitution order but that were excluded from those counted under Table 51 because of missing primary offense category information.

from 1997.<sup>85</sup> Restitution was imposed in 13 (28.9%) of the environmental/waste discharge cases sentenced in 1998, and public notices of apologies to the communities affected by the waste discharge were required as part of the criminal sentence in eight (18.2%) instances.

In addition to monetary penalties and restitution, defendants sentenced under the organizational guidelines were subject to other sanctions. Specifically, 67.4 percent of the organizations were placed on probation.<sup>86</sup> In 1998, a number of organizations sentenced under the guidelines were suspended from government contracting, were prohibited from participating in Medicare and Medicaid programs, or were subject to asset forfeiture. Certain organizations were required to conduct employee safety programs, provide environmental training, develop and implement compliance programs, or sponsor both in-house and outside training. Organizations were also required to provide the court and government regulators access to financial, operational, and accounting information; submit to unannounced inspections; allow for interrogation of employees; and hire compliance officers.

### ***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. The courts of appeals send to the Commission appellate opinions, and the Commission supplements with a computer search of relevant databases. What follows is a summary of 1998 information from this growing database.

#### **Summary of Information Received**

In 1998, the Commission gathered information on 6,387 appellate court cases of which 2,733 were “conviction only” cases. The defendant was the appellant in 97.1 percent of the cases, and the United States was the appellant in 1.6 percent of the cases.<sup>87</sup> The remaining cases (1.3%) involved a cross appeal by one of the parties. The total number of sentencing cases analyzed was

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<sup>85</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>86</sup> See USSC §§8D1.1–8D1.5.

<sup>87</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.

3,633.<sup>88</sup> Less than six percent of the sentencing cases were reversed in full. The overall disposition rate for 1998 sentencing cases was:

<b>Affirmed</b>	81.9 percent
<b>Dismissed</b>	6.4 percent
<b>Reversed</b>	5.8 percent
<b>Affirmed in part/Reversed in part</b>	5.9 percent

The affirmance rate of sentencing cases increased 2.5 percent from 79.4 percent in fiscal year 1997. The First and Fourth Circuits had the highest rate of affirmed cases (87.1%); the Seventh Circuit had the lowest (74.3%). Of the 210 cases reversed, the appellate courts remanded 191 (91.0%) to the district courts for further action. Of the 214 cases that were affirmed in part and reversed in part, the appellate courts remanded 199 (93%) to the district courts for further action. Thus, in 1998, the appellate courts remanded to the district court 10.7 percent (n= 390) of the 3,633 sentencing cases reviewed that year.

#### Issues and Guidelines Appealed

The Commission collects data on the guidelines for appellate cases involving sentencing issues only and those cases involving both sentencing and conviction issues. Defendants appealed the drug trafficking guideline (§2D1.1) 17.5 percent of the time (941 times). Other guidelines that frequently formed the bases for appeals by defendants were §5K2.0 (Departures) (5.9%), §3E1.1 (Acceptance of Responsibility) (5.1%), §3B1.1 (Aggravating Role) (4.3%), §2F1.1 (Fraud) (4.2%), and §3B1.2 (Mitigating Role) (4.0%). For cases in which the government was the appellant, §5K2.0 (Departures) (27.0%), §2D1.1 (Drug Trafficking) (6.6%), and (Fraud) (6.6%) were the guidelines most frequently appealed.

#### Offense and Offender Characteristics

The data reveal that 38.5 percent of defendants in appellate court cases<sup>89</sup> were Black, 36.2 percent White, 21.7 percent Hispanic, and 3.6 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, 32.1% were White and 26.5% were Black). More than 80 percent of the defendants in appellate court cases were United States citizens, and 19.6 percent were non-citizens. In 39.4 percent of the appellate court cases, the defendants were sentenced under mandatory drug sentencing statutes, six percent were sentenced under mandatory gun sentencing statutes, and 10.8 percent sentenced under both drug and gun mandatory sentencing statutes. Mandatory minimum

<sup>88</sup> Four circuits, the Fourth, Fifth, Ninth, and Eleventh, accounted for approximately 60 percent of these cases (n= 2168).

<sup>89</sup> These data include *all* appellate criminal cases gathered by the Commission, not merely cases involving a sentencing issue.

penalties applied to 56.2 percent of the appellate court cases, as compared to 27.6 percent of the district court cases.

As might be expected, appealed cases had considerably longer sentences. The mean sentence of appealed cases was 132.7 months (median= 93 months) compared to 47.6 months (median= 24 months) for all district court cases. More than 51 percent of the appellate court cases involved defendants whose primary offense of conviction was drug trafficking, which comprised 38.9 percent of all cases sentenced in district court.

## **Prison Impact Assessment**

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As directed by Congress, the Commission regularly assesses the impact of changes to the sentencing guidelines on the federal prison population. During 1998, the Commission assessed the potential prison impact of 12 amendments to the 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 1998 amendments been in effect at the time of sentencing. The Commission employed other statistical methods when the number of cases was low.

Of the 12 amendments, three involved changes that, by their very nature, would not affect sentences. For three other guidelines, insufficient information was available for an estimation. In the remaining six instances, it was estimated that there would be negligible prison impact because of the small number of offenders committing these particular crimes.<sup>90</sup> The specific results are reported below.

### ***No Prison Impact Anticipated***

#### **Conditions of Probation and Supervised Release**

This three-part amendment adds deportation as a condition of probation (in response to section 374 of the Illegal Immigration Return and Responsibility Act of 1996), deletes the reference in the supervised release guideline to “just punishment,” and amends the guidelines pertaining to conditions of probation and supervised release.

#### **Sophisticated Concealment (§§2T1.1, 2T1.4, and 2T3.1)**

This amendment revises the enhancement for “sophisticated means” “used to impede discovery of the existence or extent of the offense” to apply to “sophisticated concealment.” This term is defined in the appropriate Commentary section as, in pertinent part, “especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect.”

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<sup>90</sup> The Federal Bureau of Prisons houses more than 100,000 inmates at any point in time. Because of its size, Bureau facilities are capable of absorbing a number of additional prisoners. When guideline amendments affect a small number of offenders, the impact to the total federal prison population is estimated to be negligible.

The amendment may narrow slightly the applicability of the enhancement. Therefore, the Commission expects approximately the same or possibly a slightly reduced number of offenders to receive this adjustment. Accordingly, this amendment is not projected to affect the size of the federal prison population.

**Circuit Conflict – Grounds for Departure (Policy Statement)**

This amendment incorporates the United States Supreme Court decision in *Koon v. United States*, 116 S. Ct. 2035 (1996).

The Supreme Court has decided that the district court's decision to depart should be reviewed using an abuse of discretion standard. According to the Supreme Court, the district court has an institutional advantage over an appellate court in making the refined assessment of the facts needed to determine the appropriateness of a departure. The amendment should have no prison impact as it merely restates the current law.

***Prison Impact Cannot be Estimated***

**Sophisticated Concealment (§2F1.1)**

During the regular amendment cycle, the Commission amended §2F1.1(b)(5) to provide a two-level enhancement (and a minimum offense level of 12) for sophisticated concealment. (As described above, the tax guidelines were amended to conform to this change.) This amendment modified and broadened the previous enhancement, which provides a minimum offense level of 12 where the offense involved the use of foreign bank accounts or transactions used to conceal the true nature or extent of the fraudulent conduct to apply if (i) the defendant relocated a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials, (ii) a substantial part of a fraudulent scheme was committed from outside the U.S., or (iii) the offense involved sophisticated concealment.

In response to the Telemarketing Fraud Protection Act of 1998, which required that the Commission, under emergency authority, provide “an additional sentencing enhancement, if [a telemarketing] offense involved sophisticated means, including but not limited to sophisticated concealment...,” the Commission promulgated an amendment that modified the above-described amendment to subsection (b)(5) to modify “sophisticated concealment” to “sophisticated means.” The term is defined in the Commentary, in pertinent part, as “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.”

Former section 2F1.1(b)(5), relating only to the use of foreign bank accounts and transactions, has been infrequently applied. During 1996, 11 of 6,192 cases (0.2%) received this adjustment. Broadening the enhancement to cover sophisticated means (or even sophisticated concealment, as in the May 1998 amendment) may increase the number of cases that receive this enhancement.

Prison impact analysis relies heavily on information existing in the case files. Because this change penalizes conduct not currently considered under the guidelines, information on this conduct is not reliably documented in the presentence reports. Additionally, it is unlikely

that sophisticated concealment will be documented to the degree necessary to classify these cases. For these reasons, the prison impact of this amendment cannot confidently be estimated.

**Circuit Conflict – Abuse of Position of Trust**

This amendment expands the definition of this adjustment to cases in which the offender provides “sufficient indicia” to the victim that the offender legitimately holds a position of trust when, in fact, the offender does not.

Prison impact analysis relies heavily on information existing in the case files. Because this change penalizes conduct not currently considered under the guidelines, information on this conduct is not reliably documented in the presentence reports. Additionally, it is unlikely that “sufficient indicia” will be documented to the degree necessary to classify these cases. For these reasons, the prison impact of this amendment cannot confidently be estimated.

**Circuit Conflict – Obstruction of Justice (Failure to Admit to Drug Use)**

This amendment specifically excludes from the adjustment cases in which the defendant lies to the probation officer about drug use while on bail.

Three pieces of information are necessary for this analysis – the frequency of drug use by defendants on bail, the proportion of these cases in which the defendant lies to the probation officer about the use, and the decision of the judge about whether, and to what extent, the application of Acceptance of Responsibility (§3E1.1) is reduced for this conduct. Good indicators for any of this information are not available to the Commission, and consequently, an estimate of the prison impact of this amendment cannot be made.

***Prison Impact Estimated as Negligible***

**Circuit Conflict – Obstruction of Justice (Instant Offense)**

This amendment clarifies a temporal element in the adjustment and instructs that the conduct must relate to the defendant’s offense of conviction or a closely related offense.

During fiscal year 1996, 1,796 offenders received a sentence enhancement for obstruction of justice. This represented 4.4 percent of the total population of offenders. This amendment expands the definition as now used in the circuits that hold the minority opinion (Second and Fourth Circuits). There is no information on the breadth of the definition as it is currently applied in the DC, First, Fifth, Eighth, and Eleventh Circuits, as there are no available opinions from these circuits. Nationally, the rate of application of the obstruction of justice enhancement is quite low (ranging from 3.1% to 5.9%). Comparing the districts in the majority circuits (Third, Sixth, Seventh, Ninth, and Tenth Circuits) with those from the circuits holding the minority opinion results in conflicting findings that do not permit extrapolation to other circuits. The rate of application in the circuits holding the majority opinion (3.8%) is lower than the national rate. The rate of application in the two circuits holding the minority opinion is slightly greater (4.6%) than the national rate. While the available information makes it impossible to predict the actual impact of this amendment to

the prison population, the low rate of application, generally and within the majority circuits, implies that the impact will be very small.

**Circuit Conflict – Failure to Appear**

This amendment addresses internal inconsistencies in the *Guidelines Manual* but otherwise maintains the current grouping rules for failure to appear and obstruction of justice.

The Commission received information on 38 cases, sentenced during 1996, with a conviction under 18 U.S.C. § 3146 (Penalty for Failure to Appear). Of these, 11 received a sentencing enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice). Because this amendment affects so few cases, the prison impact is estimated to be negligible.

**Circuit Conflict – Diminished Capacity Departure**

This amendment addresses a circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a “crime of violence” as that term is defined in the career offender guideline. The amendment replaces the former policy statement and is essentially a compromise approach to the circuit conflict. The amendment adds language requiring the Court to assess the offense conduct to determine the need to protect the public if the offense involved the actual, or serious threat of, violence; and expands the definition of significantly reduced mental capacity to include volitional, as well as cognitive, impairment.

The Commission cannot adequately predict how the various elements of this amendment (the determination of the need to protect the public; and the magnitude of the departure based upon the extent that the mental impairment contributed to the offense) will be implemented by the courts. However, Commission data indicate that this is a rare event; this reason for departure was cited in only 148 cases in 1996. This equates to only 3.5 percent of all downward departures (not including departures for substantial assistance to authorities) and represents only 0.4 percent of all cases sentenced during that year. Because of the general rarity of this circumstance, the prison impact is estimated to be negligible.

**Property Offense at National Cemeteries**

This implements the directive to the Commission in section two of the Veterans’ Cemetery Protection Act of 1997. The amendment provides a two-level enhancement for property offenses committed against national cemeteries in guidelines 2B1.1, 2B1.3, and 2K1.4.

The Commission requested information from the Department of Veterans Affairs’s National Cemetery System on the number of offenses/offenders involved in this conduct in a year. The agency reported that it does not systematically collect data on property offenses at national cemeteries but that it could report estimates of damages. The Department of Veterans Affairs reported that a conservative estimate of 1997 dollar loss (through May 1997) is approximately \$60,000. They also indicated that property damage offenses, though

expensive, are relatively infrequent. Based on this information, it is estimated that the impact of this amendment on the federal prison system is negligible.

#### **Mass Marketing in Fraud**

This amendment increases the guideline calculation by two offense levels if a fraud offense was committed through mass marketing.

As part of a Commission study of telemarketing offenses, cases submitted to the Commission during the first six months of 1997 received additional coding of information from the offender's presentence report if the offender was sentenced for fraud and received a sentencing enhancement for preying on a vulnerable victim (§3A1.1). Additionally, a three-percent random sample of all fraud cases was reviewed for information on telemarketing offenses. Of the 356 cases involving a vulnerable victim, 115 involved a telemarketing crime. None of the randomly selected fraud cases were identified as involving telemarketing. This sampling scheme may underestimate the number of offenders subject to this sentencing enhancement because mass marketing frauds involving only the mails were not identified. The 356 cases, identified above, account for 82.8 percent of all 1997 cases sentenced under the fraud guideline (§2F1.1) that receive an enhancement for preying on a vulnerable victim. Estimates of the prison impact were adjusted to account for this information.

Had this sentencing structure been in place in 1997, 140 offenders would have received a longer sentence. Average sentences would have risen from 22 months to 29 months. This increase would require 48 additional prison beds within ten years. This amendment has a negligible effect on the federal prison population.

#### **Prohibited Persons in Firearm Offenses**

This three-part amendment expands the definition of a "prohibited person" to include a person convicted of a domestic violence misdemeanor, increases the base offense level for persons who knowingly transfer a firearm to a prohibited person, and makes two technical and conforming changes to the guidelines.

It is estimated that 39 offenders sentenced in 1996 would have received a longer sentence had this amendment been in effect. The impact to the total federal prison population is negligible. The methods used to drive this estimate are explained below.

Regarding part one – it is estimated that the expansion of the definition of "prohibited person" to include offenders with a prior conviction for domestic violence would have affected approximately 18 offenders in 1996 had this amendment been available to the court. Because of the small number of cases on which this analysis is based, this is considered a low estimate of the potential amendment impact.<sup>91</sup> Despite the small number of cases in this

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<sup>91</sup> This analysis is based upon a five-percent random sample of cases from the 1995 dataset selected for a special intensive coding project (ISS). This project coded substantially more information on the offender's criminal history than is generally available. From this sample, 119 cases were identified as having a sentencing guideline of §2K2.1. From these, three cases were identified as having a prior



analysis, a conclusion of negligible impact to the federal prison system can be reasonably made.

Regarding part two – in 1996, 21 offenders were sentenced under §2K2.1 and convicted under 18 U.S.C. § 922(d). Each of these offenders would receive a two-level increase in their guideline calculation under this amendment, resulting in a negligible impact on the prison population.

The third part of the amendment is not anticipated to affect the prison population.

### Data Analyses for the Courts

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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 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 1998. 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.

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history of domestic violence (2.5%). Of these three, two defendants had been classified as prohibited persons based upon other prior criminal conduct. Only one of the three cases would achieve prohibited person status based on the domestic violence conviction alone. This case represents 0.08 percent of all cases sentenced under §2K2.1 in the sample. To obtain the estimate of 18 cases, this proportion (0.08%) was applied to the 2,204 cases sentenced under this guideline in 1996.