

# CHAPTER FIVE

## Research

### **Statutory Requirements**

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As authorized by Congress, the Commission's numerous research responsibilities include: (1) establishing 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) publishing data concerning the sentencing process; (3) collecting and disseminating 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) collecting and disseminating information regarding the effectiveness of sentences imposed (28 U.S.C. § 995(a)(12) and (14) through (16) inclusive).

### **Document Submission**

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Section 401(h) of the PROTECT Act, which became effective April 30, 2003, amended 28 U.S.C. § 994(w) to require the chief judge of each district to ensure that within 30 days after entry of judgment in a criminal case, the sentencing court submit a report of sentence to the Commission which includes (1) the judgment and commitment order (J&C); (2) the statement of reasons (including the reasons for any departures) (SOR); (3) any plea agreement; (4) the indictment or other charging document; (5) the presentence report (PSR); and (6) any other information the Commission needs. The Commission is required to submit to Congress at least annually an analysis of these documents, as well as any recommendations for legislation thought to be warranted, and to report to Congress if any districts have not submitted the required information and documents.

Prior to the PROTECT Act, the Commission and the Administrative Office of the United States Courts, in consultation with the Committee on Criminal Law of the Judicial Conference of the United States, had requested that the sentencing court submit these documents to the Commission. Section 994(w) of title 28, United States Code, as amended, mandates their timely submission.

For fiscal year 2004, the Commission received 319,767 documents related to 70,068 cases sentenced. See Table I, *2004 Sourcebook of Federal Sentencing Statistics*. The vast majority of districts sent in complete documentation related to the cases. The J&C was received in more than 99 percent of cases in all but five districts. The PSR was received in more than 95 percent of cases in all but two districts. The SOR form was submitted in more than 95 percent of cases in all but 28 districts. Beginning with the *2003 Sourcebook of Federal Sentencing Statistics*, the Commission reported document receipt rates for both charging documents (indictment/information) and written plea agreements. The rate of missing documents was more than five percent in only six districts (for charging documents) and 11 districts (for written plea agreements). The Commission continues to modify its document collection procedures in response to the judiciary's revisions to the SOR form and continues to work with the courts to facilitate document submission. See Table 1A, *2004 Sourcebook of Federal Sentencing Statistics*.

## **Data Collection**

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Data from these documents are extracted and coded for input into computerized databases. For each case in its **Offender Dataset**, the Commission routinely collects case identifiers, demographic variables, statutory information, the guideline provisions applied to the case, and departure information. In addition, when extraordinary research questions arise, the Commission collects new information from the documents provided by the courts.

All tables and figures referenced in this chapter can be found in the companion volume to this annual report, the *2004 Sourcebook of Federal Sentencing Statistics*.

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.<sup>88</sup>

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). The Consortium's website address is <http://www.ICPSR.umich.edu/>. Commission data that have been incorporated into the datasets of the Federal Justice Statistics Resource Center, which is sponsored by the Bureau of Justice Statistics and developed by the Urban Institute, is available at <http://ffsrc.urban.org>. In addition to the *2004 Sourcebook of Federal Sentencing Statistics*, the Commission provides on its website federal sentencing data organized by district and circuit. See <http://www.ussc.gov/linktojp.htm>.

### *Data Collection Issues*

The Commission received documentation on 70,068 cases sentenced under the Sentencing Reform Act (SRA) between October 1, 2003, and September 30, 2004. Note, however, that all data collected and analyzed by the Commission reflect only 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 due to missing or incomplete

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<sup>88</sup> In 1992, the Commission implemented a data collection system to track appellate review of sentencing decisions. Each fiscal year, data collection for appellate review is accomplished by a three-step method. First, many appellate courts submit slip opinions of both published and unpublished opinions and orders directly to the Commission. The Commission creates a master list of these opinions as they are received. Second, the Commission performs a supplemental computer search for all published and unpublished opinions and orders using commercially available legal databases, and adds any available decisions not received directly from the courts to the master list. Last, because courts do not submit all relevant opinions and orders to commercially available legal databases, the Commission checks individual court websites and adds any available cases from the fiscal year. This three-step method may not provide the Commission with all of the appellate sentencing decisions rendered in a fiscal year. The Commission's Appeals Database, therefore, may not report the universe of appellate decisions rendered in that fiscal year.

information. Analyses of smaller datasets (e.g., the organizational guidelines) may also prove problematic due to the limited number of cases involved.

The Commission continues to work with the federal judiciary and other federal agencies to collect comprehensive statistical information for the federal criminal justice system and to reconcile differences among agencies in the number of cases reported, offense category definitions, and other relevant and commonly used variables.

On June 24, 2004, the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), a landmark case which invalidated a sentence imposed under the state of Washington's sentencing guidelines statute. The decision held that the judicial application of an enhanced range under the Washington state guidelines violated the defendant's Sixth Amendment right to a jury trial. The Court stated that it expressed no opinion on the federal sentencing guidelines, which were not before it. After the decision, however, federal circuit and district courts voiced varying opinions on the implications of the decision for federal sentencing. The Supreme Court accepted for expedited review two federal sentencing guideline cases, *United States v. Booker* and *United States v. Fanfan*,<sup>89</sup> to clarify the implications of the decision for the federal sentencing guidelines, and the Commission filed an *amicus curiae* brief in the case.

The Commission also continued its statutory mission to collect data on sentencing decisions. In fiscal year 2004, the Commission received documentation on 70,068 cases sentenced under the guidelines. Approximately 52,000 of these cases were sentenced prior to the Supreme Court decision in *Blakely v. Washington*. The Commission coded and assimilated the information from these sentencings into its comprehensive, computerized data collection system.

Because the mandatory nature of the guidelines was uncertain while cases were being sentenced in the post-*Blakely* portion of the fiscal year 2004, the Commission decided to create two datasets analyzing the federal sentences imposed in fiscal year 2004. The first dataset contains cases sentenced between October 1, 2003, and June 24, 2004, the date of the *Blakely* decision. During this period, courts clearly were bound by statute and by Supreme Court precedent to mandatorily apply the guidelines. From June 25, 2004, through September 30, 2004, courts post-*Blakely* arrived at different conclusions regarding the continued viability of the guidelines or did not apply those guidelines in a uniform fashion. As a consequence, the Commission could no longer rely on the assumption that the guidelines had been mandatorily applied. Accordingly, the Commission created a separate dataset for the post-*Blakely* cases. The second dataset analyzes cases sentenced from June 25, 2004, through September 30, 2004.

This *Sourcebook* presents the fiscal year 2004 data in three parts. In the first part, Tables 1 through 9 and Figures A and B present data on all 70,068 cases sentenced during the year, and Tables 55-56A and 60-61 present data on the year's 7,213 appellate court cases. These tables and figures present data on overall number of cases, offender demographic information, and trends in offense type – information unaffected by the *Blakely* decision.

The remaining tables and charts (Tables 10-54 and 57-59, Figures C through M, and Appendix B (Selected Sentencing Statistics by District)) are reported twice and constitute the second and third parts of this volume. Thus, the second part of this sourcebook reports on the 51,865

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<sup>89</sup> 542 U.S. 956 (2004).

individual and 86 organizational cases sentenced, and 5,940 appeals cases before the *Blakely* decision (October 1, 2003, through June 24, 2004) that were collected and analyzed by the Commission. The third part reports on the 18,203 individual and 44 organizational cases sentenced, and 1,273 appeals cases after the *Blakely* decision (June 25, 2004, through September 30, 2004) that were collected and analyzed by the Commission.

To facilitate comparability to prior *Sourcebooks*, table numbers and table titles are identical in both sections, while differing subtitles identify the data collection period. Also, to highlight the different time periods, the pre-*Blakely* period is printed on blue paper and the post-*Blakely* period is printed on yellow paper. Data combining both periods is printed on white paper.

## **Summary of 2004 Findings**

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The *2004 Sourcebook of Federal Sentencing Statistics* presents detailed tables and figures displaying information from the Commission's **Offender Dataset** concerning offender characteristics, guideline cases, guideline applications, 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**.

### *Sentencing Individual Offenders*

#### **Offender Characteristics**

Historically, females have accounted for approximately 15 percent of federal criminal cases. After declining for the past few years, the number of female offenders increased slightly. As seen in Table 5, females make up 13.7 percent of offenders sentenced in 2004, up from 13.1 percent the previous year. The racial/ethnic composition is shown in Table 4. During 2004, the racial/ethnic composition was – White 30.2 percent; Black 23.7 percent; and Hispanic 41.9 percent. The average age of federal offenders sentenced, as shown in Table 6, remained unchanged from 2003 to 2004, with a mean age of 34 years and a median of 32 years. Nearly half (48.3%) of the offenders sentenced did not graduate from high school (Table 8), and only 5.5 percent graduated from college.

The proportion of offenders who are not United States citizens increased slightly between 2003 and 2004. As Table 9 shows, non-citizens made up 35.8 percent of all offenders sentenced in 2004, up 0.6 percent from the previous year. Table 9 also shows that, for offenses with 50 or more offenders, the offense categories with the largest percentages of non-citizens were the following: immigration (89.9%); simple drug possession (31.6%); drug trafficking (29.1%); money laundering (28.6%); administration of justice (22.5%); drug communication facility (22.2%); racketeering/extortion (20%); and fraud (19.1%). For additional demographic information about the federal offender population, see Tables 4 through 9 in the Commission's *2004 Sourcebook of Federal Sentencing Statistics*.

### ***Organizational Sentencing Practices***

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.<sup>90</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>91</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 offenses.<sup>92</sup> In addition, the sentencing guidelines for antitrust violations and most bribery and kickback offenses contain specific formulations for calculating fines for organizations.<sup>93</sup>

The organizational guidelines do not presently contain fine provisions for most offenses involving environmental pollution, food, drugs, agricultural and consumer products, civil/individual rights, administration of justice (*e.g.*, contempt, obstruction of justice, and perjury), and national defense.<sup>94</sup> In those cases in which the Chapter Eight fine guidelines do not apply, courts must look to the statutory provisions of sections 3553 and 3572 of title 18, United States Code, to determine an appropriate fine.

### **Changes from Prior Annual Reports**

As with the individual data, pre-*Blakely* and post-*Blakely* data on organizations is reported separately. In addition, the organizational sentencing data reported in the *2000 Annual Report* marked the beginning of a new system for recording organizational sentencing data, including the capturing of new data, such as the frequency with which courts ordered organizations to implement effective compliance programs as a term of probation. Also, beginning with that report, the Commission instituted new designations for some offense types. The offense type designations continue to be refined to more accurately report the data captured. Consequently, some direct comparisons of the *2004 Annual Report* to prior annual reports may not be possible.

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<sup>90</sup> See *Guidelines Manual*, Chapter Eight—Sentencing of Organizations.

<sup>91</sup> See USSG §8A1.1.

<sup>92</sup> See USSG §8C2.1.

<sup>93</sup> See USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d).

<sup>94</sup> See USSG §8C2.1.

## **Overall Organizational Data for Fiscal Year 2004**

In 2004, the Commission received information on 130 organizations that were sentenced under Chapter Eight, a 35-percent decrease from 2003 and a 48.4-percent decrease from 2002.<sup>95</sup> Fraud was the most frequent offense type committed by an organization sentenced in federal court (27.7%), followed by environmental pollution (21.5%), money laundering (9.2%), and food, drug and agricultural product offenses (8.5%). Of the 130 cases sentenced in 2004, 86 were sentenced before the *Blakely* decision (“pre-*Blakely* cases”) and 44 were sentenced after the *Blakely* decision (“post-*Blakely* cases”).

## ***Appeals Data – Introduction***

The Sentencing Reform Act authorized appellate review of guideline sentences (1) imposed in violation of law; (2) imposed as a result of an incorrect application of the sentencing guidelines; (3) less than the sentence specified in the applicable guideline range, including such sentences as a result of a plea agreement; or (4) imposed for an offense for which there is no guideline where the sentence is plainly unreasonable. What follows is a summary of 2004 information from the Commission’s Appeals Database.<sup>96</sup> Because of the *Blakely* decision, discussed supra, the Commission has created two sets of appellate data for fiscal year 2004. The first dataset contains cases decided between October 1, 2003, and June 24, 2004, the date of the *Blakely* decision. The second dataset contains cases decided between June 25, 2004, and September 30, 2004. The appeals data are first reported in this chapter for the fiscal year overall; each distinct dataset is then reported separately.

## **Overall Summary of Information Received**

In fiscal year 2004, the Commission gathered information on 7,213 appellate court cases of which 2,102 were appeals of “conviction only.” The defendant was the appellant in 97.1 percent of these cases, and the United States was the appellant in 2.3 percent of the cases.<sup>97</sup> The remaining

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<sup>95</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. See page 42.

<sup>96</sup> In 1992, the Commission implemented a data collection system to track appellate review of sentencing decisions. Each fiscal year, data collection for appellate review is accomplished by a three-step method. First, many appellate courts submit slip opinions of both published and unpublished opinions and orders directly to the Commission. The Commission creates a master list of these opinions as they are received. Second, the Commission performs a supplemental computer search for all published and unpublished opinions and orders using commercially available legal databases, and adds any available decisions not received directly from the courts to the master list. Last, because courts do not submit all relevant opinions and orders to commercially available legal databases, the Commission checks individual court websites and adds any available cases from the fiscal year. This three-step method may not provide the Commission with all of the appellate sentencing decisions rendered in a fiscal year. The Commission’s Appeals Database, therefore, may not report the universe of appellate decisions rendered in that fiscal year.

<sup>97</sup> Although the Commission is interested primarily in information on appellate court cases that involve sentencing issues, it requests the circuit courts of appeals to provide information on all criminal appeals, and its supplemental computer search of commercially available legal databases includes both sentencing

cases (0.6%) involved a cross appeal. The total number of sentencing cases analyzed was 4,608. Of the cases analyzed, 78.1 percent were affirmed, 8.7 percent were dismissed, 8.2 percent were reversed, and 5.0 percent were affirmed in part/reversed in part.

The affirmance rate of the sentencing cases analyzed declined slightly in 2004, from 79.3 percent to 78.1 percent. The Fifth Circuit had the highest rate of affirmed cases (89.2%); the Seventh Circuit had the lowest (52.8%). See Table 56. Four circuits (the Fourth, Fifth, Sixth and Ninth) accounted for approximately 62.3 percent of these cases (n=2,872). See Tables 56 and 56A. Of the 379 cases reversed, the appellate courts remanded 354 (93.4%) to the district courts for further action. Of the 229 cases that were affirmed in part and reversed in part, the appellate courts remanded 208 (90.8%) to the district courts for further action. Thus, of the cases analyzed for fiscal year 2004, the appellate courts remanded to the district court about 12.2 percent (n=562) of the 4,608 sentencing cases reviewed that year. This represents a 75-case (13.4%) increase in the number of cases remanded compared to 2003.

### **Overall Offense and Offender Characteristics**

The data reveal that 28.2 percent of defendants in the appellate court cases analyzed for fiscal year 2004 were White, 31.0 percent Black, 37.4 percent Hispanic, and 3.4 percent Other.<sup>98</sup> Blacks comprise a larger proportion of the appeals population than they do of the district court population (of the defendants sentenced in district court, 30.2 percent were White, 23.7 percent were Black, and 41.9 percent were Hispanic). Sixty-seven percent of the defendants in the appellate court cases analyzed were United States citizens, up from 65.3 percent in 2003. In 29.7 percent of the appellate court cases analyzed, the defendants were sentenced under mandatory drug sentencing statutes, 3.7 percent were sentenced under mandatory gun sentencing statutes, and 2.6 percent were sentenced under both drug and gun mandatory sentencing statutes. Mandatory minimum penalties applied to 36 percent of the appellate court cases analyzed, as compared to 23.7 percent of the district court cases. See Table 60.

Appealed cases had considerably longer sentences. The mean sentence of appealed cases was 124 months (median = 78 months) compared to 49 months (median = 27 months) for all district court cases. The mean sentence of appealed cases is up from 119.3 months (median = 77 months) in 2003, and the mean sentence of district court cases increased slightly from 47.8 months (median = 24 months) in fiscal year 2003. Slightly more than forty percent (40.4%) of the appellate court cases involved defendants whose primary offense of conviction was drug trafficking, down from 41.4 percent in 2003. Approximately 34 percent of all cases sentenced in district court involved a primary offense of drug trafficking, down from 35.9 percent in fiscal year 2003. See Table 61.

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appeals and conviction appeals. 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>98</sup> These data include *all* appellate criminal cases gathered by the Commission, not merely cases involving a sentencing issue.

*Sentencing Data For Cases Sentenced Between October 1, 2003 and June 24, 2004*

**Guideline Cases Pre-Blakely**

All tables and figures referenced in this chapter can be found in the companion volume to this annual report, the *2004 Sourcebook of Federal Sentencing Statistics*.

As seen in Figure C (*Pre-Blakely*) and Table 10 (*Pre-Blakely*), trial rates under the guidelines increased for the second year in a row, rising to 4.5 percent of all cases sentenced in *Pre-Blakely* 2004, up from 4.3 percent in 2003. However, these rates have varied historically by both district and offense type. Table 11 (*Pre-Blakely*) shows that among offense types with more than 100 cases, trial rates ranged from 0.8 percent for drug communication facility cases to 10.3 percent for environmental/wildlife cases.

Table 12 (*Pre-Blakely*) shows that the vast majority of offenders (84.1%) were sentenced to imprisonment without provision for any period of alternative confinement. More than 90 percent of all offenders in each of the following offense categories received a prison sentence: murder, manslaughter, kidnapping, sexual abuse, robbery, arson, drug trafficking, burglary, pornography, firearms offenses, immigration offenses, and prison offenses. In contrast, more than half of the offenders sentenced for larceny, bribery, gambling, antitrust, environmental offenses, food and drug offenses, or other miscellaneous offenses received a probationary sentence alone or a sentence of probation with a condition of alternative confinement.

Table 13 (*Pre-Blakely*) shows that the average sentence for all offenders sentenced in *Pre-Blakely* 2004, counting probation-only sentences as zero months' imprisonment, was 50.1 months (median of 27 months). For those offenders sentenced to imprisonment, Table 14 (*Pre-Blakely*) shows the average prison term was 59.6 months (median 37 months), increasing for the second year in a row. As seen in Figure F (*Pre-Blakely*), the majority of offenders who were in zones of the Sentencing Table that made them eligible for non-prison sentences, with the exception of immigration, received alternative confinement. Table 15 (*Pre-Blakely*) shows that 72.7 percent of the offenders had no fine or restitution ordered; and therefore, 27.3 percent of the offenders were ordered to pay a fine, restitution, or both, in addition to a prison term or probation. For a detailed statistical description of the mode of disposition and sentences imposed, see Tables 10 through 16 and Figures D through F of the *Pre-Blakely* section of the *2004 Sourcebook of Federal Sentencing Statistics*.

**Guideline Application Pre-Blakely**

Table 17 (*Pre-Blakely*) shows that in *Pre-Blakely* 2004 the most frequently applied primary guidelines were – Drug Trafficking (§2D1.1), Unlawful Entry into U.S. (§2L1.2), Theft (§2B1.1), Firearms (§2K2.1), Smuggling Unlawful Alien (§2L1.1), Fraud (§2F1.1), and Robbery (§2B3.1). Table 18 (*Pre-Blakely*) shows that the four victim-related adjustments (part of Chapter Three of the guidelines) each were applied in less than one percent of all cases. Regarding role adjustments, Table 18 (*Pre-Blakely*) shows that 5.2 percent of all offenders received an aggravating role adjustment, 9.9 percent received a mitigating role adjustment, 2.1 percent received an abuse of position of trust adjustment, and 0.5 percent received an adjustment for use of a minor in the commission of an offense. Table 18 (*Pre-Blakely*) also shows the application rates of the adjustments for obstruction of justice (3.4%) and reckless endangerment (0.4%). The rate of those receiving the acceptance of responsibility adjustment (92.3%), as shown in Table 18 (*Pre-Blakely*), leveled off, ending an annual increase since 1991.

As seen in Table 20 (*Pre-Blakely*), 37.9 percent of offenders did not receive criminal history points under the guideline’s criminal history computations. Conversely, more than half of all offenders (62.1%) received points for prior criminal convictions (Chapter Four of the guidelines). Table 21 (*Pre-Blakely*) shows that in *Pre-Blakely* 2004 fewer than half (47.0%) of the offenders were placed in Criminal History Category I, and 10.4 percent were placed in Category VI. Table 22 (*Pre-Blakely*) shows that 1,349 offenders received a career offender adjustment, and 411 received an armed career criminal adjustment. For further details of the guideline application components, see Tables 17 through 23 of the *pre-Blakely* section of the 2004 *Sourcebook of Federal Sentencing Statistics*.

**Departures and Sentences Within the Guideline Range *Pre-Blakely***

Table 26 (*Pre-Blakely*) shows, by district, both the number and percent of cases sentenced within the guideline range, or receiving a departure below the guideline range (combining substantial assistance, government sponsored downward departures, and other downward departures), or receiving an upward departure. Beginning with 2003, the Commission augmented its data coding procedures to determine the proportion of non-substantial assistance downward departures that were sponsored by the government. Reasons identifying government sponsored downward departures are listed in Appendix A (*Pre-Blakely*). The *Sourcebook* includes a number of modified tables presenting departure data that initially combine all forms of departures below the guideline range (substantial assistance departures, government sponsored downward departures, and other downward departures). In each case, a new table follows that presents the relevant rates for these three specific classes of departure. More than two-thirds (72.2%) of *Pre-Blakely* 2004 sentences were within their applicable guideline ranges. The percentage of within-guideline sentences was lowest in Arizona (37.8%), with only one other district having a rate lower than 50 percent: Idaho (43.7%). The highest within-guideline sentencing rates were in Southern West Virginia (95.9%) and Western Wisconsin (93.2%). See Table 26 (*Pre-Blakely*).

<b>Rates of Within-Range and Departure Sentences</b>	
72.2%	Sentences Within Guideline Range
15.5%	Sentences Below Guideline Range for Substantial Assistance on Motion of Government
6.4%	Government Sponsored Departures Below Guideline Range
5.2%	Other Departures Below Guideline Range
0.8%	Sentences Above Guideline Range

As seen in Figure G (*Pre-Blakely*) and Table 27A (*Pre-Blakely*), substantial assistance departures decreased to 15.5 percent of all the cases in *pre-Blakely* 2004, and the percentage of downward departures (11.6%) (government sponsored and other downward departures) decreased by 2.2 percent between 2003 and *pre-Blakely* 2004. Table 26A (*Pre-Blakely*) shows the departure rates by district for each of the three types of departure below the guideline range. The rates of substantial assistance departures ranged from a low of 2.6 percent in Southern West Virginia to a high of 40.0 percent in Guam.

Twenty-six districts reported no government sponsored downward departures, and many additional districts reported a very small percentage of cases receiving this type of departure in *pre-Blakely* 2004. Five districts reported greater than ten percent of their cases receiving this type of departure: Arizona (48.4%); New Mexico (23.7%); Idaho (21.3%); Southern California (20.9%); and Southern Texas (10.4%). Other departures below the guideline range ranged from none in six

districts (Western Arkansas, Northern Mariana Islands, Middle North Carolina, Eastern Oklahoma, Northern Oklahoma, and Western Wisconsin) to 21.6 percent in Connecticut. Fifty-seven districts had less than five percent of their cases receiving an other downward departure. See Table 26A (Pre-*Blakely*).

Table 27 (Pre-*Blakely*) and Figure G (Pre-*Blakely*) also show that the rate of upward departures (0.8%) was identical to the rate in 2003. Table 26 (Pre-*Blakely*) illustrates that 11 districts reported a rate of upward departures greater than two percent: Virgin Islands (4.1%), Middle Louisiana (3.7%), Southern Indiana (3.3%), South Dakota (3.3%), New Hampshire (3.0%), Eastern Oklahoma (2.9%), Western Virginia (2.5%), Connecticut (2.2%), Northern Iowa (2.2%), Montana (2.2%), and Middle Georgia (2.1%), while ten districts reported no upward departures.

Tables 27 (Pre-*Blakely*) and 27A (Pre-*Blakely*) show, by offense type, the number and percent of sentences within the guideline range, and departures below and above the guideline range. The offense type with the highest within-guideline rate was simple drug possession (95.8%). For substantial assistance departures (Table 27A, Pre-*Blakely*), the offense type with the lowest rate was manslaughter (zero) and the offense type with the highest rate was antitrust (80.0%). Among offense types with more than 100 cases, bribery (33.3%), racketeering (31.5%), money laundering (27.4%), and drug trafficking (26.3%) had the highest percentages receiving substantial assistance departures. For other downward departures, the offense types with the highest rates were tax offenses (11.5%), murder (8.8%), embezzlement (8.8%), pornography offenses (8.6%), and bribery (8.5%).

For sentences within the applicable guideline range, as shown in Table 29 (Pre-*Blakely*), the sentence most often given (60.4% of all within-guideline sentences) was at the minimum point of the guideline range. Among offenses with more than 100 cases, those with the highest proportion of cases at the guideline minimum were drug trafficking (70.6%), larceny (69.7%), and money laundering (68.4%). The sentence was at the maximum of the guideline range in 10.1 percent of all within-guideline cases. The offense with the highest proportion of cases at the guideline maximum was manslaughter (67.6%).

Tables 30-32 (Pre-*Blakely*) show the sentencing effects for substantial assistance departures, government sponsored downward departures, other downward departures, and upward departures, respectively. Overall, offenders receiving a substantial assistance departure experienced a larger sentence reduction than did offenders receiving either a government sponsored or other downward departure. Sentences for offenders receiving substantial assistance departures, as shown in Table 30 (Pre-*Blakely*), had a median 24-month sentence reduction from the minimum of the applicable guideline range. This results in a 48.5 percent median decrease in the otherwise applicable guideline minimum. Sentences for offenders receiving a government sponsored downward departure, as shown in Table 31 (Pre-*Blakely*), had a median seven-month sentence reduction from the minimum of the applicable guideline range. This results in a 26.8 percent median decrease in the otherwise applicable guideline minimum. Offenders receiving an other downward departure (Table 31A, Pre-*Blakely*) had a median 11.9-month sentence reduction from the minimum of the applicable guideline range, resulting in a 35.1 percent median decrease. Offenders receiving an upward departure, as shown in Table 32 (Pre-*Blakely*), experienced a median 17-month sentence increase above the guideline maximum, amounting to a 31.3 percent median sentence increase. For further departure

statistics, see Tables 24 through 32 and Figures G and H in the pre-*Blakely* section of the 2004 *Sourcebook of Federal Sentencing Statistics*.

### Drug Cases Pre-*Blakely*

As in previous years, drug offenses were the largest single category of federal convictions, comprising 34.7 percent of all offenders sentenced in 2004 (Figure A). As Figure A shows, 42.2 percent of all drug cases involved cocaine (22.3% powder cocaine and 19.9% crack cocaine), followed by marijuana (27.0%), methamphetamine (19.2%), and heroin (7.1%). Table 33 (Pre-*Blakely*) shows that nearly all drug offenses (95.7%) were sentenced under the primary drug trafficking guideline (§2D1.1).

For drug offenders, Tables 34 through 37 (Pre-*Blakely*) show the following: 41.5 percent were of Hispanic origin, 27.9 percent were Black, and 27.4 percent were White; 86.6 percent were male; and 28.2 percent were non-United States citizens. Except for crack cocaine and methamphetamine traffickers, the majority of drug offenders were in Criminal History Category I.

Drug offenders received sentence increases for possession or use of weapons in 16.7 percent of all the drug cases (Table 39, Pre-*Blakely*). A sentence adjustment for role in the offense (Table 40, Pre-*Blakely*) was imposed in 27.0 percent of drug cases; 20.4 percent received a mitigating role adjustment and 6.6 percent received an aggravating role adjustment. Wide variation was observed in application of the mitigating role adjustment across drug types, with approximately one-third of heroin (33.0%) and marijuana (31.6%) offenders receiving a mitigating role adjustment compared to 6.8 percent for crack cocaine offenders. Slightly less than 92 percent (91.8%, Table 41, Pre-*Blakely*) of drug offenders received an adjustment for acceptance of responsibility.

Table 43 (Pre-*Blakely*) shows that 60.4 percent of drug offenders were convicted under statutes carrying a mandatory minimum penalty (25.9% a five-year and 34.5% a ten-year or longer mandatory minimum). The highest percentages receiving a mandatory minimum were crack cocaine cases (77.5%) and methamphetamine cases (73.1%). A ten-year or longer mandatory minimum was applicable in nearly half of crack cocaine cases (49.5%), methamphetamine cases (47.5%), and powder cocaine cases (44.1%).

In 1994, Congress enacted the “safety valve” provision (§5C1.2) to provide nonviolent, low-level, first-time drug offenders relief from mandatory minimum sentences.<sup>99</sup> In Table 44 (Pre-*Blakely*) we see that 38.3 percent of drug offenders received the benefit of the “safety valve,” including 16.0 percent who were not subject to a drug mandatory minimum and 22.3 percent who were subject to a drug mandatory minimum. Heroin and marijuana offenders were the most likely to receive a reduction under the “safety valve” provision, while crack cocaine (14.5%) and methamphetamine (31.1%) offenders were the least likely.

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<sup>99</sup> Under this provision, certain nonviolent 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 two-level reduction for qualified offenders whose offense level is 26 or greater. Effective November 1, 2001, the Commission amended this provision, allowing offenders with offense levels less than 26 to receive the “safety valve.”

As seen in Table 45 (Pre-*Blakely*), about 26 percent of drug offenders received substantial assistance departures (25.5%), with another 4.8 percent receiving government sponsored downward departures and 4.3 percent receiving other downward departures. As displayed in Figure J (Pre-*Blakely*), the average overall prison term for drug offenders varied widely by drug type, from a mean of 129.2 months for crack cocaine cases (median = 111 months) to approximately 43 months for marijuana cases (median = 27 months). See Tables 33 through 45 and Figures I through L of the Pre-*Blakely* section of the 2004 *Sourcebook of Federal Sentencing Statistics* for additional statistics and trends on drug cases.

### **Immigration Cases Pre-*Blakely***

As seen in Table 3 and in Figure B, the number of immigration cases increased over the past four years from 10,458 in 2001 to 11,736 in 2002 to 15,081 in 2003 to 15,717 in Pre-*Blakely* 2004. As seen in Table 46 (Pre-*Blakely*), most immigration offenders were male (93.2%), of Hispanic origin (87.5%), and had less than a high school education (79.7%). A large percentage of immigration convictions involved non-United States citizens (89.0%, Table 48, Pre-*Blakely*) and were the result of a guilty plea (98.4%, Table 46, Pre-*Blakely*). For detailed statistics on immigration violations, see Tables 46 through 50 in the pre-*Blakely* section of the 2004 *Sourcebook of Federal Sentencing Statistics*.

### ***Organizational Sentencing Practices Pre-Blakely Data***

#### **Offense Characteristics in Pre-*Blakely* Cases**

As in 2003, fraud was the most frequent offense committed by an organization, accounting for 25 of the 86 cases sentenced pre-*Blakely* (29.1%). Other significant offense categories included environmental pollution (17.4%),<sup>100</sup> food, drugs, agricultural and consumer products (11.6%), and money laundering (10.5%). See Table 51 (Pre-*Blakely*).

#### **Offender Characteristics in Pre-*Blakely* Cases**

In those cases in which the offender organization both has the ability to pay and the fine provisions of section 8C2.1 apply to the offense, the court calculates a culpability score that may decrease or increase the applicable offense level. Culpability score calculation data is obtained from the sentencing court's Judgment and Commitment Order and/or the probation officer's Presentence Report. Of the 86 cases sentenced in 2004, the court applied the fine provisions of section 8C2.1 to calculate the fine in at least 54 cases (62.7% Pre-*Blakely*). The Commission received detailed culpability score information for 49 of those cases. See Table 54 (Pre-*Blakely*).

In numerous cases, the organization's culpability score was reduced based on the presence of certain culpability factors. Of the 49 cases with detailed culpability score calculations, no organization received a reduction in its culpability score for having in place an "effective compliance

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<sup>100</sup> Environmental pollution offenses refer to the aggregate of "Environmental-Water," "Environmental-Air," and "Environmental-Hazardous/Toxic Pollutants."

and ethics program.”<sup>101</sup> Twenty-four organizations (49.0%) were given credit at sentencing for cooperating with the government’s investigation,<sup>102</sup> and another 15 organizations (30.6%) were given credit for accepting responsibility for their wrongdoing.<sup>103</sup> No organization received full credit for reporting the offense to governmental authorities,<sup>104</sup> cooperating with the investigation, and accepting responsibility for the offense. Ten organizations (20.4%) received no mitigating credit inasmuch as they did not self-report, cooperate with the authorities, or accept responsibility. See Table 54 (Pre-*Blakely*). The sentenced organizations pled guilty in 89.5 percent of the cases; 10.5 percent were convicted after trial. See Table 53 (Pre-*Blakely*).

In several cases, the organization’s culpability score also was increased based on the presence of culpability factors. Specifically, the culpability scores of two organizations (4.1%) were increased pursuant to section 8C2.5(c) because they had a history of prior criminal or administrative offenses. Three organizations (6.1%) received an increase pursuant to section 8C2.5(e) for having obstructed justice, which resulted in increased culpability scores for sentencing purposes. No organization received an increase under section 8C2.5(d) for having violated a judicial order, injunction, or condition of probation. See Table 54 (Pre-*Blakely*).

### Sanctions Imposed in Pre-*Blakely* Cases

The largest fine during the pre-*Blakely* period of 2004, \$240 million, was imposed on a pharmaceutical manufacturer for fraudulent promotion of unapproved uses for one of its drug products. The second highest fine, \$200 million, was imposed for obstructing a criminal investigation of health care fraud. The offender organization was a supplier of liquid nutritional products and equipment. The third highest fine pre-*Blakely* was \$42.5 million for antitrust violations. In addition, the largest restitution order imposed in pre-*Blakely* 2004, \$200 million, was imposed on the nutritional product supplier. For the 86 pre-*Blakely* cases overall, restitution was ordered in 30 cases, and a fine was imposed in 67 cases. The mean restitution ordered was \$7,204,524, and the mean fine imposed was \$8,214,456. See Tables 51 (Pre-*Blakely*) and 52 (Pre-*Blakely*).

In the pre-*Blakely* cases, fines were imposed on 67 of 86 organizations (77.9%). See Tables 51 (Pre-*Blakely*) and 53 (Pre-*Blakely*). In addition to restitution and monetary penalties, offenders sentenced under the organizational guidelines were subject to other sanctions. Of the 86 cases sentenced before *Blakely* pursuant to Chapter Eight, 64 (74.4%) received one month or more of probation, and ten (11.6%) were ordered to make some sort of compliance and ethics-related improvement. See Table 53 (Pre-*Blakely*).

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<sup>101</sup> USSG §8C2.5(f).

<sup>102</sup> See USSG §8C2.5(g)(2).

<sup>103</sup> See USSG §8C2.5(g)(3).

<sup>104</sup> See USSG §8C2.5(g)(1).

## *Appeals Data Pre-Blakely*

### **Summary of Information Received, Pre-Blakely Cases**

Information was gathered on 5,940 appeals offenders from October 1, 2003, through June 24, 2004, of which 1,584 were appeals of “conviction only.” See Figure M (Pre-Blakely). The total number of sentencing cases analyzed pre-Blakely was 3,882.<sup>105</sup> Of the cases analyzed, 79.1 percent were affirmed, 9.0 percent were dismissed, 7.4 percent were reversed, and 4.6 percent were affirmed in part/reversed in part. See Figure M (Pre-Blakely).

Of the 288 cases reversed, the appellate courts remanded 267 (92.7%) to the district courts for further action. Of the 177 cases that were affirmed in part and reversed in part, the appellate courts remanded 161 (91.0%) to the district courts for further action. See Figure M (Pre-Blakely).

### **Issues and Guidelines Appealed Pre-Blakely**

Pre-Blakely, defendants appealed the illegal re-entry guideline (§2L1.2) more than any other guideline, at 13.3 percent (n=966 appeals). Other guidelines that frequently formed the bases for pre-Blakely appeals by defendants were section 2D1.1 (Drug Trafficking)(9.0%), section 5K2.0 (Departures)(3.4%), section 3B1.2 (Mitigating Role)(3.0%), section 3C1.1 (Obstruction of Justice)(2.8%), and section 3E1.1 (Acceptance of Responsibility)(2.7%). See Table 57 (Pre-Blakely). The affirmance rates for sections 2L1.2, 3B1.2, and 3E1.1 increased pre-Blakely from 2003 at a rate of 2.5 percent, 1.1 percent, and 0.5 percent respectively, while the affirmance rates for sections 2D1.1, 5K2.0 and 3C1.1 decreased pre-Blakely from 2003 by 0.4 percent, 4.3 percent, and 2.7 percent, respectively. See Table 57 (Pre-Blakely).

For cases in which the government was the appellant, section 5K2.0 (Departures)(19.9%), section 5H1.6 (Family Ties and Responsibilities)(6.4%), and section 3E1.1 (Acceptance of Responsibility)(5.8%) were the guidelines most frequently appealed. Governmental appeals of issues involving section 5H1.6 increased from 4.0 percent in 2003 to 6.4 percent pre-Blakely, increasing from seven of 176 cases in 2003 to ten of 156 cases pre-Blakely. The affirmance rate of governmental appeals involving section 5H1.6 went up from 14.3 percent in 2003 to 20 percent pre-Blakely, and the affirmance rate for governmental appeals involving section 3E1.1 (Acceptance of Responsibility) increased from 30.0 percent in 2003 to 44.4 percent pre-Blakely. See Table 58 (Pre-Blakely).

## *Sentencing Data For Cases Sentenced Between June 25, 2004, and September 30, 2004*

### **Guideline Cases Post-Blakely**

As seen in Figure C (Post-Blakely) and Table 10 (Post-Blakely), trial rates under the guidelines decreased from 4.3 percent in 2003

All tables and figures referenced in this chapter can be found in the companion volume to this annual report, the 2004 Sourcebook of Federal Sentencing Statistics.

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<sup>105</sup> Of the 4,356 remaining cases, 474 were missing the type of appeal information, resulting in 3,882 known sentencing cases. See Table 57 (Pre-Blakely).

to 3.4 percent in Post-*Blakely* 2004. Table 11 (Post-*Blakely*) shows that among offense types with more than 100 cases, trial rates ranged from 0.7 percent for simple drug possession cases to 10.1 percent for racketeering cases.

Table 12 (Post-*Blakely*) shows that the vast majority of offenders (84.5%) were sentenced to imprisonment without provision for any period of alternative confinement. For each of the following categories, at least 90 percent of all offenders received a prison sentence: murder, kidnapping, sexual abuse, robbery, drug trafficking, firearms offenses, immigration offenses, pornography, and prison offenses. In contrast, more than half of the offenders sentenced for larceny, embezzlement, gambling, civil rights, environmental offenses, food and drug offenses, or other miscellaneous offenses received a probationary sentence alone or a sentence of probation with a condition of alternative confinement.

Table 13 (Post-*Blakely*) shows that the average sentence for all offenders sentenced in post-*Blakely* 2004, counting probation-only sentences as zero months imprisonment, was 45 months (median = 24 months). For those offenders sentenced to imprisonment, Table 14 (Post-*Blakely*) shows the average prison term was 53.3 months (median = 33 months). As seen in Figure F (Post-*Blakely*), the majority of offenders who were in zones of the Sentencing Table that made them eligible for non-prison sentences, with the exception of immigration, received alternative confinement. Drug trafficking offenders eligible for non-prison sentences received alternative confinement about half the time. Table 15 (Post-*Blakely*) shows that 76.0 percent of the offenders had no fine or restitution ordered; and therefore, 24.0 percent of the offenders were ordered to pay a fine, restitution, or both, in addition to a term of prison or probation. For a detailed statistical description of the mode of disposition and sentences imposed, see Tables 10 through 16 and Figures D through F of the Post-*Blakely* section of the 2004 *Sourcebook of Federal Sentencing Statistics*.

### **Guideline Application Post-*Blakely***

Table 17 (Post-*Blakely*) shows that in post-*Blakely* 2004 the most frequently applied primary guidelines were – Drug Trafficking (§2D1.1), Unlawful Entry into U.S. (§2L1.2), Theft (§2B1.1), Firearms (§2K2.1), Smuggling Unlawful Alien (§2L1.1), and Robbery (§2B3.1). Table 18 shows that the four victim-related adjustments (part of Chapter Three of the guidelines) each were applied in less than one percent of all cases. Regarding role adjustments, Table 18 (Post-*Blakely*) shows that 3.4 percent of all offenders received an aggravating role adjustment, 10.6 percent received a mitigating role adjustment, 1.7 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. Table 18 (Post-*Blakely*) also shows the application rates of the adjustments for obstruction of justice (2.5%) and reckless endangerment (0.4%). The rate of those receiving the acceptance of responsibility adjustment was 93.6 percent.

As seen in Table 20 (Post-*Blakely*), 37.1 percent did not receive criminal history points under the guideline's criminal history computations. Conversely, more than half of all offenders (62.9%) received points for prior criminal convictions (Chapter Four of the guidelines). Table 21 (Post-*Blakely*) shows that in Post-*Blakely* 2004, 46.0 percent of the offenders were placed in Criminal History Category I, and 10.2 percent were placed in Category VI. Table 22 (Post-*Blakely*) shows that 415 offenders received a career offender adjustment, and 130 received an armed career criminal adjustment. For further details of the guideline application components, see Tables 17 through 23 of the post-*Blakely* section of the 2004 *Sourcebook of Federal Sentencing Statistics*.

**Post-Blakely Departures and Sentences Within the Guideline Range**

Table 26 (*Post-Blakely*) shows, by district, both the number and percent of cases sentenced within the guideline range, or receiving a departure below the guideline range (combining substantial assistance, government sponsored and other downward departures), or receiving an upward departure. Beginning with 2003, the Commission augmented its data coding procedures to determine the proportion of non-substantial assistance downward departures that were sponsored by the government. Reasons identifying government sponsored downward departures are listed in Appendix A (*Post-Blakely*). The *Sourcebook* includes a number of modified tables presenting departure data that initially combine all forms of departures below the guideline range (substantial assistance departures, government sponsored downward departures, and other downward departures). In each case, a new table follows that presents the relevant rates for these three specific classes of departure. More than two-thirds (71.8%) of post-*Blakely* 2004 sentences were within their applicable guideline ranges. The lowest percentage of within-guideline sentences were in Idaho (30.4%), Arizona (34.0%), and Eastern New York (45.3). The highest within-guideline rates were in Southern West Virginia (96.9%), Virgin Islands (93.8%), Eastern Arkansas (92.9%), Northern Oklahoma (92.3%), and Central Illinois (92%). See Table 26 (*Post-Blakely*).

Rates of Post-Blakely Within-Range and Departure Sentences	
71.8%	Sentences Within Guideline Range
14.4%	Sentences Below Guideline Range for Substantial Assistance on Motion of Government
8.6%	Government Sponsored Departures Below Guideline Range
4.6%	Other Departures Below Guideline Range
0.6%	Sentences Above Guideline Range

As seen in Table 27A (*Post-Blakely*), substantial assistance departures occurred in 14.4 percent of cases, and downward departures (government sponsored downward departures and other downward departures) occurred in 13.2 percent of cases. Table 26A (*Post-Blakely*) shows the departure rates by district for each of the three types of departure below the guideline range. The rates of substantial assistance departures ranged from a low of zero in North Dakota and the Virgin Islands to a high of 46.2 percent in Middle Louisiana.

Forty-five districts reported no government sponsored downward departures, and many additional districts reported a very small percentage of cases receiving this type of departure. Seven districts reported greater than ten percent of their cases receiving this type of departure: Arizona (55.5%); New Mexico (33.6%); Idaho (27.8%); Southern Texas (16.9%); North Dakota (13.3%); Southern California (13.2%); and Eastern California (10.7%). Rates of other departures below the guideline range ranged from none in six districts to 21.8 percent in Eastern New York. Fifty-eight districts had fewer than five percent of their cases receiving an other downward departure. See Table 26A (*Post-Blakely*).

Table 27 (*Post-Blakely*) shows that the rate of upward departures was 0.6 percent. Table 26 (*Post-Blakely*) also provides upward departure rates for each circuit and district. The *Post-Blakely* 2004 datafile contains just over three months of data, including a very small number of upward departures. This small number of cases is insufficient to support significant conclusions regarding upward departures.

Tables 27 (Post-*Blakely*) and 27A (Post-*Blakely*) show, by offense type, the number and percent of sentences within the guideline range, and departures below and above the guideline range. The offense type with the highest within-guideline rate was food and drug (100.0%) followed by simple drug possession (94.1%). For substantial assistance departures (Table 27A, Post-*Blakely*), the offense types with the lowest rates were murder, manslaughter, and food and drug (no cases), and the offense types with the highest rates were civil rights (60.0%) and kidnapping (40.0%). Among offense types with more than 100 cases, money laundering had the highest substantial assistance departure rate (31.0%).

For sentences within the applicable guideline range, as shown in Table 29 (Post-*Blakely*), the sentence most often given (58.7%) was at the minimum point of the guideline range. Among offenses with more than 100 cases, those with the highest proportion of cases sentenced at the guideline minimum were drug trafficking (71.0%), larceny (68.1%), and embezzlement (65.5%). The sentence was at the maximum of the guideline range in 10.4 percent of all within-guideline cases. The offense with the highest proportion of cases at the guideline maximum was murder (80.0%).

Tables 30-32 (Post-*Blakely*) show the sentencing effects for substantial assistance departures, government sponsored downward departures, other downward departures, and upward departures, respectively. Sentences for offenders receiving substantial assistance departures, shown in Table 30 (Post-*Blakely*), had a median 27-month sentence reduction from the minimum of the applicable guideline range. This results in a 50-percent median decrease in the otherwise applicable guideline minimum. Sentences for offenders receiving a government sponsored downward departure, as shown in Table 31 (Post-*Blakely*), had a median eight-month sentence reduction from the minimum of the applicable guideline range. This results in a 26.8 percent median decrease in the otherwise applicable guideline minimum. Offenders receiving an other downward departure (Table 31A, Post-*Blakely*) had a median 12-month sentence reduction from the minimum of the applicable guideline range, resulting in a 37.5 percent median decrease. Offenders receiving an upward departure, as shown in Table 32 (Post-*Blakely*), experienced a median 13-month sentence increase above the guideline maximum, amounting to a 31.9 percent median sentence increase. For further departure statistics, see Tables 24 through 32 and Figures G and H in the post-*Blakely* section of the *2004 Sourcebook of Federal Sentencing Statistics*.

### **Drug Cases Post-*Blakely***

As Figure A shows, 42.2 percent of all drug cases involved cocaine (22.3% powder cocaine and 19.9% crack cocaine), followed by marijuana (27%), methamphetamine (19.2%), and heroin (7.1%). Table 33 (Post-*Blakely*) shows that nearly all drug offenses (95.3%) were sentenced under the primary drug trafficking guideline (§2D1.1).

For drug offenders, Tables 34 through 37 (Post-*Blakely*) show the following: 42.4 percent were of Hispanic origin, 27.9 percent were Black, and 27.3 percent were White; 87.1 percent were male; and 28.2 percent were non-United States citizens. Except for crack cocaine and methamphetamine traffickers, the majority of drug offenders were in Criminal History Category I.

Drug offenders received sentence increases for possession or use of weapons in 14.7 percent of all the drug cases (Table 39, Post-*Blakely*). A sentence adjustment for role in the offense

(Table 40, *Post-Blakely*) was imposed in 26.1 percent of drug cases; 22.0 percent received a mitigating role adjustment and 4.1 percent received an aggravating role adjustment. Slightly more than 93 percent (93.3%, Table 41, *Post-Blakely*) of drug offenders received an adjustment for acceptance of responsibility.

Table 43 (*Post-Blakely*) shows that 61.1 percent of drug offenders were convicted under statutes carrying a mandatory minimum penalty (26.5% a five-year and 34.6% a ten-year or longer mandatory minimum). The highest percentages receiving a mandatory minimum were crack cocaine cases (78.4%), powder cocaine cases (73.5%), and methamphetamine cases (73.4%). A ten-year or longer mandatory minimum was applicable in nearly half of crack cocaine cases (48.9%), powder cocaine cases (47.4%), and methamphetamine cases (46.0%).

In 1994, Congress enacted the “safety valve” provision (§5C1.2) to provide nonviolent, low-level, first-time drug offenders relief from mandatory minimum sentences.<sup>106</sup> Table 44 (*Post-Blakely*) shows that 40 percent of drug offenders received the benefit of the “safety valve,” including 16.6 percent who were not subject to a drug mandatory minimum, and 23.4 percent who were subject to a drug mandatory minimum. Heroin and marijuana offenders were the most likely to receive a reduction under the “safety valve” provision, while crack cocaine (14.8%) and methamphetamine (30.9%) offenders were the least likely.

As seen in Table 45 (*Post-Blakely*), about 25 percent of drug offenders received substantial assistance departures (25.4%), with another 4.1 percent being granted other downward departures. As displayed in Figure J (*Post-Blakely*), the average overall prison term for drug offenders varied widely by drug type, from a mean of 117.8 months for crack cocaine cases (median = 105 months) to approximately 37 months for marijuana cases (median = 24 months). See Tables 33 through 45, and Figures I through L of the *post-Blakely* section of the *2004 Sourcebook of Federal Sentencing Statistics* for additional statistics and trends on drug cases.

### **Immigration Cases *Post-Blakely***

As seen in Table 46 (*Post-Blakely*), most immigration offenders were male (93.5%), of Hispanic origin (88.5%), and had less than a high school education (80.3%). A large percentage of immigration convictions involved non-United States citizens (86.9%, Table 48, *Post-Blakely*) and were the result of a guilty plea (98.8%, Table 46, *Post-Blakely*). For detailed statistics on immigration violations, see Tables 46 through 50 in the *post-Blakely* section of the *2004 Sourcebook of Federal Sentencing Statistics*.

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<sup>106</sup> Under this provision, certain nonviolent 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 two-level reduction for qualified offenders whose offense level is 26 or greater. Effective November 1, 2001, the Commission amended this provision, allowing offenders with offense levels less than 26 to receive the “safety valve.”

### ***Organizational Sentencing Practices Post-Blakely Data***

#### **Offense Characteristics in Post-Blakely Cases**

In 2004, the Commission received information on 44 organizations that were sentenced under Chapter Eight after the *Blakely* decision.<sup>107</sup> After *Blakely* in 2004, environmental pollution<sup>108</sup> was the most frequent offense committed by an organization, accounting for 13 of the 44 cases sentenced (29.5%). Other significant offense categories included fraud (25.0%), money laundering (6.8%), and tax offenses (6.8%). See Table 51 (Post-*Blakely*).

#### **Offender Characteristics in Post-Blakely Cases**

In those cases in which the offender organization both has the ability to pay and the fine provisions of section 8C2.1 apply to the offense, the court calculates a culpability score that may decrease or increase the applicable offense level. Culpability score calculation data is obtained from the sentencing court's Judgment and Commitment Order and/or the probation officer's Presentence Report. Of the 44 cases sentenced post-*Blakely* in 2004, the court applied the fine provisions of section 8C2.1 to calculate the fine in at least 21 cases. The Commission received detailed culpability score information for 20 of those cases. See Table 54 (Post-*Blakely*).

In numerous cases, the organization's culpability score was reduced based on the presence of certain culpability factors. Of the 20 cases with detailed culpability score calculations, no organization received a reduction in its culpability score for having in place an "effective compliance and ethics program."<sup>109</sup> All of the post-*Blakely* offenders received reductions in their culpability scores, pursuant to section 8C2.5(g), for either self-reporting, cooperating, or accepting responsibility. Ten organizations (50.0%) were given credit at sentencing for cooperating with the government's investigation,<sup>110</sup> and another six organizations (30.0%) were given credit for accepting responsibility for their wrongdoing.<sup>111</sup> Four organizations (20.0%) received full credit for reporting the offense to governmental authorities,<sup>112</sup> cooperating with the investigation, and accepting responsibility for the offense. See Table 54 (Post-*Blakely*).

The sentenced organizations pled guilty in all 44 of the cases. See Tables 51 (Post-*Blakely*) and 53 (Post-*Blakely*). In two cases, the organization's culpability score also was increased based on

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<sup>107</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. See page 42.

<sup>108</sup> Environmental pollution offenses refer to the aggregate of "Environmental-Water," "Environmental-Air," and "Environmental-Hazardous/Toxic Pollutants."

<sup>109</sup> USSG §8C2.5(f).

<sup>110</sup> See USSG §8C2.5(g)(2).

<sup>111</sup> See USSG §8C2.5(g)(3).

<sup>112</sup> See USSG §8C2.5(g)(1).

the presence of culpability factors. Specifically, two organizations (10.0%) received an increase pursuant to section 8C2.5(e) for having obstructed justice, which resulted in increased culpability scores for sentencing purposes. No organization received an increase pursuant to section 8C2.5(c) of the sentencing guidelines for a history of prior criminal or administrative offenses, or pursuant to section 8C2.5(d) for having violated a judicial order, injunction, or condition of probation. See Table 54 (Post-*Blakely*).

### **Sanctions Imposed in Post-*Blakely* Cases**

Fines were imposed on 33 of the 44 organizations (75.0%) sentenced after *Blakely* in 2004. The largest fine post-*Blakely* in 2004, \$10 million, was imposed for conspiracy to violate the antitrust laws. The offender organization in that case was a company that manufactured, distributed, and sold diamond products. The second highest fine post-*Blakely* in 2004, \$6 million, was imposed for violations of the Clean Water Act. The offender organization was a company that designed, manufactured, and assembled printed circuit boards and other electronic products. The third highest fine post-*Blakely* was \$5.25 million for violations of the Foreign Corrupt Practices Act. In addition, the largest restitution order imposed in 2004 post-*Blakely*, approximately \$5.5 million, was imposed on a company for making and subscribing a false income tax return. For the 44 cases overall, restitution was ordered in nine cases, and a fine was imposed in 33 cases. The mean restitution ordered was \$4,085,801, and the mean fine imposed was \$1,241,408. See Tables 51 (Post-*Blakely*) and 52 (Post-*Blakely*).

In addition to restitution and monetary penalties, offenders sentenced under the organizational guidelines were subject to other sanctions. Of the 44 cases sentenced pursuant to Chapter Eight Post-*Blakely*, 30 (68.2%) received one month or more of probation, and 11 (25.0%) were ordered to make some sort of compliance and ethics-related improvement. See Table 53 of the 2004 *Sourcebook of Federal Sentencing Statistics*.

### ***Appeals Data Post-Blakely***

#### **Summary of Information Received, Post-*Blakely* Cases**

The Commission gathered information on 1,273 appeals offenders from June 25, 2004, through September 30, 2004, of which 518 were “conviction only” cases. See Figure M (Post-*Blakely*). The total number of sentencing cases analyzed post-*Blakely* was 726.<sup>113</sup> Of the cases analyzed, 73.0 percent were affirmed, 7.3 percent were dismissed, 12.5 percent were reversed, and 7.2 percent were affirmed in part/reversed in part. See Figure M (Post-*Blakely*).

Of the 91 cases reversed, the appellate courts remanded 87 (95.6%) to the district courts for further action. Of the 52 cases that were affirmed in part/reversed in part, the appellate courts remanded 47 (90.4%) to the district courts for further action. See Figure M (Post-*Blakely*).

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<sup>113</sup> Of the 755 remaining cases, 29 were missing the type of appeal information, resulting in 726 known sentencing cases. See Table 57 (Post-*Blakely*).

### Issues and Guidelines Appealed Post-*Blakely*

Post-*Blakely*, defendants appealed the drug trafficking guideline (§2D1.1) more than any other guideline, at 9.6 percent (n=119 appeals). Other guidelines that frequently formed the bases for post-*Blakely* appeals by defendants were section 5K2.0 (Departures)(4.6%), section 2L1.2 (Unlawfully Entering or Remaining in the United States)(4.4%), section 7B1.3 (Revocation of Probation or Supervised Release)(3.1%), section 3E1.1 (Acceptance of Responsibility)(3.0%), and section 3C1.1 (Obstruction of Justice)(2.7%). The affirmance rates for appeals by defendants involving numerous guideline sections decreased from 2003 in the post-*Blakely* cases; the affirmance rate of appeals involving section 2D1.1 decreased 11.4 percent, from 96.3 percent to 84.9 percent; those involving section 5K2.0 decreased 5.6 percent, from 95.1 percent to 89.5 percent; those involving section 2L1.2 decreased 16.4 percent, from 96.4 percent to 80.0 percent; and those involving section 3C1.1 decreased 14.7 percent, from 93.5 percent to 78.8 percent. Constitutional issues appealed by defendants decreased from 6.6 percent in fiscal year 2003 to 5.1 percent post-*Blakely*, and defendant-based appeals involving other non-guideline issues decreased slightly, from 24.6 percent to 23.6 percent. See Table 57 (Post-*Blakely*).

For cases in which the government was the appellant, section 5K2.0 (Departures)(16.9%), section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)(13.0%), section 4A1.3 (Adequacy of Criminal History)(6.5%), and section 5E.1 (Restitution)(6.5%) were the guidelines most frequently appealed. The affirmance rate of governmental appeals involving section 5K2.0 decreased from 29.7 percent in 2003 to 7.7 percent post-*Blakely*. The affirmance rate of governmental appeals involving section 4A1.3 decreased from 20.0 percent in 2003 to 0.0 percent post-*Blakely*. The affirmance rate of governmental appeals involving section 2D1.1 decreased from 50.0 percent in 2003 to 25.0 percent post-*Blakely*. The number of cases appealed by the government post-*Blakely* for sections 5K2.0, 4A1.3, and 2D1.1 were 13, 5, and 4, respectively. Constitutional issues appealed by the government decreased from 4.0 percent in fiscal year 2003 to 0.0 percent post-*Blakely*, and government based appeals involving other non-guideline issues decreased from 8.5 percent to 5.2 percent. See Table 58 (Post-*Blakely*).

### *Data Analyses for the Courts and Congress*

Using the Commission's 2004 dataset, the Commission will compile detailed information on sentencing activities for each federal district and circuit. The Commission will distribute these data to the courts and make them available to the general public via the Commission's Internet web site. These data will 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 will be organized by circuit and district and provide comparisons to national figures. These informational packets will also be used in the guidelines orientation of new chief circuit and district court judges by Commission staff. Additionally, these packets will be used by the Commission in several training programs for court personnel.

The statistical informational packets will also be designed for members of the House and Senate Judiciary Committees. Distribution of these packets will allow the Commission to better inform the members of the oversight committees about what types of information were collected and will be available in the Commission's 2004 dataset and will allow members to see what types of cases were sentenced at the federal level, both nationally and in their individual districts and states. The Commission will also respond to individual members of Congress, the Congressional Budget

Office, and the Congressional Research Office regarding numerous data requests about the frequency of statute and guideline application, average sentence lengths for specific offenses, and prison and sentencing impact projections. The Commission will make all of the statistical informational packets for each federal district and circuit (as well as each state) available to the general public at the Commission's website, <http://www.ussc.gov/linktojp.htm>. The website also includes statistical informational packets for several earlier years of data.

In addition to the informational packets, Commission staff responded to data requests from the courts in the past year. 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 in the various requests ranged from serving as a point of contact about a particular data analysis to performing substantial, sophisticated data analyses.