

CHAPTER FIVE

Research

Statutory Requirements

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

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 submits 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 2005, the Commission received 332,079 documents related to 72,462 cases sentenced. See Table 1, *2005 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 two districts. The PSR was not received in more than five percent of cases in four districts. The SOR form was submitted in more than 95 percent of cases in all but 17 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 four districts (for charging documents) and two 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, *2005 Sourcebook of Federal Sentencing Statistics*.

Data Collection

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 sentencing 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 *2005 Sourcebook of Federal Sentencing Statistics*. The year 2005, as used in this report, refers to the fiscal year 2005 (October 1, 2004, through September 30, 2005).

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.⁵⁸

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://fjsrc.urban.org/index.cfm>. In addition to the *2005 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 72,462 cases sentenced under the Sentencing Reform Act (SRA) between October 1, 2004, and September 30, 2005. 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

⁵⁸ 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*,⁵⁹ invalidating 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.⁶⁰ 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*,⁶¹ to clarify the implications of the decision for the federal sentencing guidelines, and the Commission filed an *amicus curiae* brief in the case.

On January 12, 2005, the Supreme Court decided *United States v. Booker*,⁶² applying *Blakely* to the federal guideline system and determining that the mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. The Court remedied the Sixth Amendment violation by excising the provisions in the Sentencing Reform Act that made the federal sentencing guidelines mandatory, thereby converting the mandatory system that had existed for almost 20 years into an advisory one.

The Commission continued its statutory mission to collect data on sentencing decisions both before and after *Booker*. In fiscal year 2005, the Commission received documentation on 72,462 cases sentenced under the guidelines. The Commission coded and assimilated the information from these sentencings into its comprehensive, computerized data collection system. Of these, 53,674 cases were sentenced after the Supreme Court decision in *Booker*.

Because *Booker* generated differences in sentencing practices and procedures, the Commission decided to create two datasets analyzing the federal sentences imposed in fiscal year 2005. The first dataset contains cases sentenced between October 1, 2004, and January 11, 2005, the day before the *Booker* decision. During this period before *Booker* but following *Blakely*, courts arrived at different conclusions regarding the continued viability of the guidelines or did not apply those guidelines in a uniform fashion. In *Booker*, the Supreme Court instructed courts to consider the guidelines, but "tailor the sentence in light of other statutory concerns."⁶³ This instruction necessitated changes in

⁵⁹ 542 U.S. 296 (2004).

⁶⁰ *Id.* at 304, n.9.

⁶¹ 542 U.S. 956 (2004).

⁶² 543 U.S. 220 (2005).

⁶³ *Id.* at 245.

the methodology used by the Commission in the collection and analysis of the data. Thus, the post-*Booker* dataset uses the new methodology to classify cases sentenced from January 12, 2005, through September 30, 2005.

The *Sourcebook* presents the fiscal year 2005 data in three parts. In the first part, Tables 1 through 9 and Figures A and B present data on all 72,462 cases sentenced during the year, and Tables 55-61 and Figure M present data on the year's 7,813 appellate court cases. These tables and figures present data on overall number of cases, offender demographic information, and trends in offense type.

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 the volume.⁶⁴ Thus, the second part of the *Sourcebook* reports on the 18,788 individual and 45 organizational cases sentenced, and 1,768 appeals cases before the *Booker* decision (October 1, 2004, through January 11, 2005) that were collected and analyzed by the Commission. The third part reports on the 53,674 individual and 142 organizational cases sentenced, and 6,045 appeals cases after the *Booker* decision (January 12, 2005, through September 30, 2005) 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-*Booker* period is printed on yellow paper and the post-*Booker* period is printed on green paper. Data combining both periods is printed on white paper.

Summary of 2005 Findings

The 2005 *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. As seen in Table 5, females make up 13.6 percent of offenders sentenced in 2005, down slightly from 13.7 percent the previous year. The racial/ethnic composition is shown in Table 4. During 2005, the racial/ethnic composition was – White 29.2 percent; Black 23.9 percent; and Hispanic 42.4 percent. The average age of federal offenders sentenced, as shown in Table 6, was 34.7 years and a median of 33 years. Nearly half (47.4%) of the offenders sentenced did not graduate from high school (Table 8), and only 5.7 percent graduated from college.

⁶⁴ Tables 57-59 and Figure M appear in all three sections of the *Sourcebook*.

The proportion of offenders who are not United States citizens increased slightly between 2004 and 2005. As Table 9 shows, non-citizens made up 36.8 percent of all offenders sentenced in 2005, up 1.0 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 (89.5%); money laundering (32.5%); simple drug possession (31.5%); drug trafficking (28.1%); administration of justice (24.4%); fraud (19.2%); and drug communication facility (18.8%). For additional demographic information about the federal offender population, see Tables 4 through 9 in the Commission's *2005 Sourcebook of Federal Sentencing Statistics*.

Organizational Sentencing Practices

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.⁶⁵ 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.⁶⁶ 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.⁶⁷ In addition, the sentencing guidelines for antitrust violations and most bribery and kickback offenses contain specific formulations for calculating fines for organizations.⁶⁸ 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.⁶⁹ 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-*Booker* and post-*Booker* 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 make compliance and ethics-related improvements as a condition of probation. Also beginning with the

⁶⁵ See *Guidelines Manual*, Chapter Eight—Sentencing of Organizations.

⁶⁶ See USSG §8A1.1.

⁶⁷ See USSG §8C2.1.

⁶⁸ See USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d).

⁶⁹ See USSG §8C2.1.

2000 Annual Report, the Commission instituted new designations for some offense types, which continue to be refined to more accurately report the data captured. Consequently, some direct comparisons of the *2005 Annual Report* to prior annual reports may not be possible.

Overall Organizational Data for Fiscal Year 2005

In 2005, the Commission received information on 187 organizations that were sentenced under Chapter Eight, a 43.8 percent increase from 2004 and a 6.5 percent decrease from 2003.⁷⁰ Fraud was the most frequent type of offense committed by an organization sentenced in federal court (27.8%), followed by environmental pollution (25.1%), antitrust (8.0%), and import/export offenses (7.5%). Of the 187 cases sentenced in 2005, 45 were sentenced before the *Booker* decision (“pre-*Booker* cases”) and 142 were sentenced after the *Booker* decision (“post-*Booker* 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 2005 information from the Commission’s Appeals Database.⁷¹ Because of the *Booker* decision, discussed *supra*, the Commission has created two sets of appellate data for fiscal year 2005. The first dataset contains cases decided between October 1, 2004, and January 11, 2005. The second dataset contains cases decided between January 12, 2005, and September 30, 2005. 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 2005, the Commission gathered information on 7,813 appellate court cases, of which 1,434 were “conviction only” cases. The defendant was the appellant in 97.8 percent of these

⁷⁰ 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 32.

⁷¹ 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.

cases, and the United States was the appellant in 1.4 percent of the cases.⁷² The remaining cases (0.7%) involved a cross appeal. The total number of sentencing cases analyzed was 6,208. Of the cases analyzed, 54.7 percent were affirmed, 7.5 percent were dismissed, 21.2 percent were reversed, 6.8 percent were affirmed in part/reversed in part, and 9.8 percent were remanded.

The affirmance rate of the sentencing cases analyzed declined significantly in 2005, from 78.1 percent in fiscal year 2004 to 54.7 percent. The Eighth Circuit had the highest rate of defendant sentencing appeals affirmed (79.2%); the Ninth Circuit had the lowest (26.5%). Four circuits (the Fifth, Sixth, Ninth, and Eleventh) accounted for 54.8 percent of these cases (n=3,402). See Table 56. The D.C. Circuit had the highest rate of defendant sentencing appeals remanded (36.0%); the Fourth Circuit had the lowest (2.3%).⁷³ See Table 56. The First and Third Circuits had the highest rate of government sentencing appeals affirmed (66.7% each): the D.C. Circuit had the lowest (0.0%). The Second Circuit had the highest rate of government sentencing appeals remanded (36.8%); the D.C., First, Third, Fourth, Fifth and Sixth Circuits, the lowest (0.0% each).⁷⁴ See Table 56A. Of the 1,314 cases reversed, the appellate courts remanded 1,284 (97.7%) to the district courts for further action. Of the 420 cases that were affirmed in part and reversed in part, the appellate courts remanded 385 (91.7%) to the district courts for further action. An additional 611 cases were remanded to the district courts without having been reversed. Thus, of the cases analyzed for fiscal year 2005, the appellate courts remanded to the district court 26.9 percent (n=1,669) of the 6,208 sentencing cases reviewed that year. This represents a 1,107 case (196.0%) increase in the number of cases remanded compared to 2004.

Overall Offense and Offender Characteristics

The data reveal that 31.1 percent of defendants in the appellate court cases analyzed for fiscal year 2005 were White, 33.5 percent Black, 32.2 percent Hispanic, and 3.2 percent Other.⁷⁵ Blacks constitute a larger proportion of the appeals population than they do of the district court population (of the defendants sentenced in district court, 29.2 percent were White, 23.9 percent were Black, and 42.4 percent were Hispanic). Just over 71 percent (71.5%) of the defendants in the appellate court cases analyzed were United States citizens, up from 67 percent in 2004. In 28.5 percent of the appellate court cases analyzed, the defendants were sentenced under mandatory drug sentencing

⁷² Although the Commission is interested primarily in information on appellate court cases that involve sentencing issues, it requests the circuit courts of appeals provide information on all criminal appeals, and its supplemental computer search of commercially available legal databases includes both sentencing 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.

⁷³ Prior to fiscal year 2005, the Commission did not report separately the number of appeals remanded to the lower court. Post-*Booker*, several of the circuit courts (Second, Seventh, Eleventh) remanded a statistically significant number of cases without vacating the original sentence. This data is now included as “remanded” in Tables 56 and 56A of the *2005 Sourcebook of Federal Sentencing Statistics, Fiscal Year 2005*.

⁷⁴ Results may be skewed where a court reviewed a statistically small number of cases. For example, in fiscal year 2005, the D.C. Circuit reviewed only one sentencing appeal by the government. See Tables 56 and 56A of the *2005 Sourcebook of Federal Sentencing Statistics, Fiscal Year 2005*.

⁷⁵ These data include *all* appellate criminal cases gathered by the Commission, not merely cases involving a sentencing issue.

statutes, 4.9 percent were sentenced under mandatory gun sentencing statutes, and 3.7 percent were sentenced under both drug and gun mandatory sentencing statutes. Mandatory minimum penalties applied to 37.1 percent of the appellate court cases analyzed, as compared to 24.8 percent of the district court cases. See Table 60 of the *2005 Sourcebook of Federal Sentencing Statistics, Fiscal Year 2005*.

Appealed cases had considerably longer sentences. The mean sentence of appealed cases was 137 months (median = 96 months) compared to 50 months (median = 27 months) for all district court cases. The mean sentence of appealed cases is up from 124 months (median = 78 months) in 2004, and the mean sentence of district court cases is slightly up from 49 months (median = 27 months) in fiscal year 2004. Slightly more than 40 percent (40.7%) of the appellate court cases involved defendants whose primary offense of conviction was drug trafficking, up from 40.4 percent in 2004. Drug trafficking was the primary offense in 33.8 percent of all cases sentenced in district court, down from 34.0 percent in fiscal year 2004. See Table 61 of the *2005 Sourcebook of Federal Sentencing Statistics, Fiscal Year 2005*.

Sentencing Data For Cases Sentenced Between October 1, 2004, and January 11, 2005

Guideline Cases Pre-Booker

As seen in Figure C (pre-*Booker*) and Table 10 (pre-*Booker*), trial rates were 4.4 percent in pre-*Booker* 2005. Table 11 (pre-*Booker*) shows that among offense types with more than 100 cases, trial rates ranged from 1.3 percent for immigration cases to 9.8 percent for assault cases.

All tables and figures referenced in this chapter can be found in the companion volume to this annual report, the *2005 Sourcebook of Federal Sentencing Statistics*. The year 2005, as used in this report, refers to the fiscal year 2005 (October 1, 2004, through September 30, 2005).

Table 12 (pre-*Booker*) shows that the vast majority of offenders (85.1%) 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, manslaughter, kidnapping, sexual abuse, robbery, arson, drug trafficking, drug communication facility offenses, firearms offenses, auto theft, 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 (pre-*Booker*) shows that the average sentence for all offenders sentenced in pre-*Booker* 2005, counting probation-only sentences as zero months' imprisonment, was 46.3 months (median of 24 months). For those offenders sentenced to imprisonment, Table 14 (pre-*Booker*) shows the average prison term was 53.9 months (median of 32 months). As seen in Figure F (pre-*Booker*), 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 (pre-*Booker*) shows that 75.7 percent of the offenders had no fine or restitution ordered; and therefore, 24.3 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 pre-Booker section of the 2005 *Sourcebook of Federal Sentencing Statistics*.

Guideline Application Pre-Booker

Table 17 (pre-Booker) shows that in pre-Booker 2005 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 (pre-Booker) shows that 3.7 percent of all offenders received an aggravating role adjustment, 9.8 percent received a mitigating role adjustment, 1.9 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 (pre-Booker) 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 93.1 percent.

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|-------|--|
| 70.9% | Sentences Within Guideline Range |
| 14.7% | Sentences Below Guideline Range for Substantial Assistance on Motion of Government |
| 9.4% | Government Sponsored Departures Below Guideline Range |
| 4.3% | Other Departures Below Guideline Range |
| 0.7% | Sentences Above Guideline Range |

As seen in Table 20 (pre-Booker), 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 (pre-Booker) shows that in pre-Booker 2005, 45.4 percent of the offenders were placed in Criminal History Category I, and 10.3 percent were placed in Category VI. Table 22 (pre-Booker) shows that 407 offenders received a career offender adjustment, and 160 received an armed career criminal adjustment. For further details of the guideline application components, see Tables 17 through 23 of the pre-Booker section of the 2005 *Sourcebook of Federal Sentencing Statistics*.

Pre-Booker Departures and Sentences Within the Guideline Range

Table 26 (pre-Booker) 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 (pre-Booker). 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 (70.9%) of pre-Booker 2005 sentences were within their applicable guideline ranges. The lowest percentage of within-guideline sentences were in Arizona (31.1%), Vermont (43.6%), Idaho (45.6%), and Eastern New York (49.0%). The highest within-guideline rates were

in Northern Mariana Islands (100.0%), Puerto Rico (96.9%), Western Wisconsin (94.6%), Eastern Virginia (93.3%), Eastern Texas (92.0%), and Southern West Virginia (91.4%). See Table 26 (pre-Booker).

As seen in Table 26A (pre-Booker), substantial assistance departures occurred in 14.7 percent of cases, and downward departures (government sponsored downward departures and other downward departures) occurred in 13.7 percent of cases. Table 26A (pre-Booker) 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 the Northern Mariana Islands to a high of 47.3 percent in Eastern Kentucky.

Forty-two districts reported no government sponsored downward departures, and many districts reported a very small percentage of cases receiving this type of departure. Eight districts reported greater than ten percent of their cases receiving this type of departure: Arizona (57.3%); New Mexico (31.4%); Idaho (25.0%); Southern Texas (20.9%); Eastern California (17.9%); Western Washington (17.2%); Southern California (16.8%); and Nebraska (14.7%). Rates of other departures below the guideline range ranged from 0.0 percent in 11 districts to 21.8 percent in Vermont. Sixty-one districts had fewer than five percent of their cases receiving an other downward departure. See Table 26A (pre-Booker).

Table 27 (pre-Booker) shows that the rate of upward departures was 0.7 percent. Table 26 (pre-Booker) also provides upward departure rates for each circuit and district. The pre-Booker 2005 datafile contains just over four 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 (pre-Booker) and 27A (pre-Booker) 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 (91.4%) followed by embezzlement (89.3%). For substantial assistance departures (Table 27A, pre-Booker), the offense types with the lowest rates were manslaughter, and national defense (no cases), and the offense type with the highest rate was antitrust (100.0%). Among offense types with more than 100 cases, money laundering had the highest substantial assistance departure rate (27.7%).

For sentences within the applicable guideline range, as shown in Table 29 (pre-Booker), the sentence most often given (59.8%) 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 money laundering (72.3%), drug trafficking (71.3%), embezzlement (71.2%), and larceny (70.8%). The sentence was at the maximum of the guideline range in 10.3 percent of all within-guideline cases. The offense with the highest proportion of cases at the guideline maximum was arson (60.0%).

Tables 30-32 (pre-Booker) 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 (pre-Booker), had a median 24-month sentence reduction from the minimum of the applicable guideline range. This results in a 49.9 percent median decrease in the otherwise applicable guideline minimum. Sentences for offenders receiving a government sponsored downward departure, as shown in Table 31 (pre-Booker), had a median 7.8 month sentence reduction from the minimum of

the applicable guideline range. This results in a 25.0 percent median decrease in the otherwise applicable guideline minimum. Offenders receiving an other downward departure (Table 31A, pre-*Booker*) had a median 11-month sentence reduction from the minimum of the applicable guideline range, resulting in a 41.3 percent median decrease. Offenders receiving an upward departure, as shown in Table 32 (pre-*Booker*), experienced a median 10.5-month sentence increase above the guideline maximum, amounting to a 40.0 percent median sentence increase. For further departure statistics, see Tables 24 through 32 and Figures G and H in the pre-*Booker* section of the 2005 *Sourcebook of Federal Sentencing Statistics*.

Drug Cases Pre-Booker

As Figure A shows, 43.7 percent of all drug cases involved cocaine (22.8% powder cocaine and 20.9% crack cocaine), followed by marijuana (25.2%), methamphetamine (20.0%), and heroin (6.8%). Table 33 (pre-*Booker*) shows that nearly all drug offenses (96.0%) were sentenced under the primary drug trafficking guideline (§2D1.1).

For drug offenders, Tables 34 through 37 (pre-*Booker*) show the following: 40.5 percent were of Hispanic origin, 29.1 percent were Black, and 27.2 percent were White; 86.1 percent were male; and 28.1 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, pre-*Booker*). A sentence adjustment for role in the offense (Table 40, pre-*Booker*) was imposed in 25.7 percent of drug cases; 20.9 percent received a mitigating role adjustment and 4.8 percent received an aggravating role adjustment. Slightly more than 92 percent (92.3%, Table 41, pre-*Booker*) of drug offenders received an adjustment for acceptance of responsibility.

Table 43 (pre-*Booker*) shows that 59.2 percent of drug offenders were convicted under statutes carrying a mandatory minimum penalty (26.6% a five-year and 32.6% a ten-year or longer mandatory minimum). The highest percentages receiving a mandatory minimum were crack cocaine cases (77.1%), powder cocaine cases (73.9%), and methamphetamine cases (69.4%). A ten-year or longer mandatory minimum was applicable in nearly half of crack cocaine cases (47.8%), methamphetamine cases (48.4%), and powder cocaine cases (41.6%).

In 1994, Congress enacted the “safety valve” provision (§5C1.2) to provide nonviolent, low-level, first-time drug offenders relief from mandatory minimum sentences.⁷⁶ Table 44 (pre-*Booker*) shows that 38.3 percent of drug offenders received the benefit of the “safety valve,” including 15.9 percent who were not subject to a drug mandatory minimum, and 22.4 percent who were subject to a drug mandatory minimum. Heroin and marijuana offenders were the most likely to receive a

⁷⁶ 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.”

reduction under the “safety valve” provision, while crack cocaine (14.7%) and methamphetamine (30.4%) offenders were the least likely.

As seen in Table 45 (pre-*Booker*), about 25 percent of drug offenders received substantial assistance departures (25.6%), with another 4.0 percent being granted other downward departures. As displayed in Figure J (pre-*Booker*), the average overall prison term for drug offenders varied widely by drug type, from a mean of 131.2 months for crack cocaine cases (median of 108 months) to 39.4 months for marijuana cases (median of 27 months). See Tables 33 through 45, and Figures I through L of the pre-*Booker* section of the 2005 *Sourcebook of Federal Sentencing Statistics* for additional statistics and trends on drug cases.

Immigration Cases Pre-Booker

As seen in Table 46 (pre-*Booker*), most immigration offenders were male (91.4%), of Hispanic origin (88.4%), and had less than a high school education (80.1%). A large percentage of immigration convictions involved non-United States citizens (87.9%, Table 48, pre-*Booker*) and were the result of a guilty plea (98.5%, Table 46, pre-*Booker*). For detailed statistics on immigration violations, see Tables 46 through 50 in the pre-*Booker* section of the 2005 *Sourcebook of Federal Sentencing Statistics*.

Organizational Sentencing Practices: Pre-Booker Data

Offense Characteristics in Pre-Booker Cases

In 2005, the Commission received information on 45 organizations that were sentenced under Chapter Eight before the *Booker* decision.⁷⁷ In 2005 pre-*Booker*, the sentenced organizations pled guilty in 95.6 percent of the cases; 4.4 percent were convicted after trial. See Table 53 (pre-*Booker*). Fraud was the most frequent offense committed by an organization, accounting for 17 of the 45 cases sentenced pre-*Booker* (37.8%). Other significant offense categories include environmental pollution (15.6%),⁷⁸ import and export (13.3%), and antitrust (8.9%). See Table 51 (pre-*Booker*).

Offender Characteristics in Pre-Booker Cases

In those cases in which the offender organization 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

⁷⁷ 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 32.

⁷⁸ Environmental pollution offenses refer to the aggregate of “Environmental-Water,” “Environmental-Air,” and “Environmental-Hazardous/Toxic Pollutants.”

Report. Of the 45 cases sentenced pre-Booker in 2005, the court applied the fine provisions of section 8C2.1 to calculate the fine in at least 22 cases (48.9 %). The Commission received detailed culpability score information for 20 of those cases. See Table 54 (pre-Booker).

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."⁷⁹ Eighteen organizations (90.0 %) received reductions in their culpability scores, pursuant to section 8C2.5(g), for either self-reporting, cooperating, or accepting responsibility. Eleven organizations (55.0%) were given credit at sentencing for cooperating with the government's investigation,⁸⁰ and another seven organizations (35.0%) were given credit for accepting responsibility for their wrongdoing.⁸¹ No organization received full credit for reporting the offense to governmental authorities,⁸² cooperating with the investigation, and accepting responsibility for the offense. Two organizations (10.0%) received no mitigating credit inasmuch as they did not self-report, cooperate with the authorities, or accept responsibility. See Table 54 (pre-Booker).

In a number of cases, the organization's culpability score was increased based on the presence of culpability factors. Among those, one organization (5.0%) received an increase pursuant to section 8C2.5(e) for having obstructed justice, which resulted in an increased culpability score for sentencing purposes. No organization received an increase under section 8C2.5(c) (for a history of prior criminal or administrative offenses) or an increase under section 8C2.5(d) (for violation of a judicial order, injunction, or condition of probation). See Table 54 (pre-Booker).

Sanctions Imposed in Pre-Booker Cases

Of the 45 pre-Booker cases overall, restitution was ordered in 19 cases (42.2%), and a fine was imposed in 27 cases (60.0%). See Table 52 (pre-Booker). The mean restitution ordered was \$3,371,659 and the mean fine imposed was \$8,980,039. See Table 52 (pre-Booker).

The highest fine during the pre-Booker period of 2005, \$160 million, was imposed on a corporation for participating in an international conspiracy to fix the prices of a semiconductor memory product. The second highest fine, \$66 million, was imposed on a corporation for participating in an international conspiracy to fix prices in the rubber chemicals industry. The third highest fine pre-Booker, \$10.0 million, was imposed on a corporation in the business of the marine transportation of petroleum products for violations of the Clean Water Act and the Migratory Bird Treaty Act. In addition, the largest restitution order imposed in the pre-Booker period of 2005, \$31.2 million, was imposed on a financial services company for mail fraud and money laundering.

⁷⁹ See USSG §8C2.5(f).

⁸⁰ See USSG §8C2.5(g)(2).

⁸¹ See USSG §8C2.5(g)(3).

⁸² See USSG §8C2.5(g)(1).

In addition to restitution and monetary penalties, offenders sentenced under the organizational guidelines were subject to other sanctions. Of the 45 cases sentenced before *Booker* pursuant to Chapter Eight, 29 (64.4%) received one month or more of probation, and seven (15.6%) were ordered to make compliance or ethics-related improvements. See Table 53 (pre-*Booker*).

Appeals Data Pre-Booker

Summary of Information Received, Pre-Booker Cases

The Commission gathered information on 1,768 appeals offenders from October 1, 2004, through January 11, 2005, of which 501 were “conviction only” cases. See Figure M of the *2005 Sourcebook of Federal Sentencing Statistics, Pre-Booker*. The total number of sentencing cases analyzed for 2005, pre-*Booker*, was 1,198.⁸³ Of the cases analyzed, 74.6 percent were affirmed, 10.3 percent were dismissed, 8.3 percent were reversed, and 6.8 percent were affirmed in part/reversed in part. See Figure M of the *2005 Sourcebook of Federal Sentencing Statistics, Pre-Booker*.

Of the 100 cases reversed, the appellate courts remanded 92 (92.0%) to the district courts for further action. Of the 81 cases that were affirmed in part and reversed in part, the appellate courts remanded 72 (88.9%) to the district courts for further action. See Figure M of the *2005 Sourcebook of Federal Sentencing Statistics, Pre-Booker*.

Issues and Guidelines Appealed Pre-Booker

In 2005, pre-*Booker*, defendants appealed the illegal re-entry guideline (§2L1.2) more than any other guideline, at 12.4 percent (272 cases). Other guidelines that frequently formed the bases for 2005, pre-*Booker* appeals by defendants were section 2D1.1 (Drug Trafficking)(5.8%), section 5K2.0 (Departures)(3.4%), section 3B1.2 (Mitigating Role)(2.4%), section 3B1.1 (Aggravating Role)(2.1%), and section 3E1.1 (Acceptance of Responsibility)(2.0%). See Table 57 of the *2005 Sourcebook of Federal Sentencing Statistics, Pre-Booker*.

The affirmance rate of 2005, pre-*Booker* defendant-based appeals increased for a number of issues compared to the 2004, post-*Blakely* affirmance rate; the affirmance rate of appeals involving section 2L1.2 increased 14.8 percent, from 80.0 percent in 2004, post-*Blakely*, to 94.8 percent in 2005, pre-*Booker*; those involving section 2D1.1 increased 6.5 percent, from 84.9 percent to 91.4 percent; those involving section 5K2.0 increased 3.7 percent, from 89.5 percent to 93.2 percent; and those involving section 3B1.2 increased 8.1 percent, from 90.0 percent to 98.1 percent. The affirmance rates for 2005, pre-*Booker* defendant-based appeals involving section 3B1.1 and section 3E1.1 decreased from the 2004, post-*Blakely* affirmance rates; the affirmance rates of appeals involving section 3B1.1 decreased 0.8 percent, from 87.5 percent in 2004, post-*Blakely*, to 86.7 percent in 2005, pre-*Booker*, and those involving section 3E1.1 decreased 12.3 percent, from 91.9 percent to 79.6 percent. Constitutional issues appealed by defendants decreased from 5.1 percent in the 2004, post-*Blakely* appeals, to 4.8 percent 2005, pre-*Booker*, and defendant-based appeals

⁸³ Of the 1,768 cases, 501 were “conviction only” cases. Of the 1,267 remaining cases, 69 were missing the type of appeal information, resulting in 1,198 known sentencing cases. See Table 57 (n. 1) of the *2005 Sourcebook of Federal Sentencing Statistics*.

involving other non-guideline issues increased, from 23.6 percent to 37.5 percent. See Table 57 of the *2005 Sourcebook of Federal Sentencing Statistics, Pre-Booker*.

For cases in which the government was the appellant, section 5K2.0 (Departures)(22.0%), section 2K2.1 (Firearms)(6.8%), section 5H1.4 (Physical Condition)(5.1%), and section 5H1.6 (Family Ties and Responsibilities)(5.1%) were the guidelines most frequently appealed. The affirmance rate of governmental appeals involving section 5K2.0 increased from 7.7 percent in 2004, post-*Blakely*, to 38.5 percent in 2005, pre-*Booker*. In 2004, post-*Blakely*, the government did not appeal any cases involving sections 2K2.1; in 2005, pre-*Booker*, the affirmance rate for government-based appeals involving section 2K2.1 was 0.0 percent and for section 5H1.4 was 66.7 percent. The affirmance rate of cases appealed by the government for section 5H1.6 decreased from 33.3 percent in 2004, post-*Blakely*, to 0.0 percent in 2005, pre-*Booker*. The government only appealed one constitutional issue in 2005, pre-*Booker*, an increase of 1.7 percent from 0.0 percent in 2004, post-*Blakely*. Government-based appeals involving other non-guideline issues increased from 5.2 percent to 15.3 percent. See Table 58 of the *2005 Sourcebook of Federal Sentencing Statistics, Pre-Booker*.

Sentencing Data For Cases Sentenced Between January 12, 2005, and September 30, 2005

Guideline Cases Post-Booker

As seen in Figure C (post-*Booker*) and Table 10 (post-*Booker*), trial rates were 5.5 percent of all cases sentenced in post-*Booker* 2005. However, these rates have varied historically by both district and offense type. Table 11 (post-*Booker*) shows that among offense types with more than 100 cases, trial rates ranged from 1.0 percent for drug communication facility cases to 12.7 percent for money laundering cases.

All tables and figures referenced in this chapter can be found in the companion volume to this annual report, the *2005 Sourcebook of Federal Sentencing Statistics*. The year 2005, as used in this report, refers to fiscal year 2005 (October 1, 2004, through September 30, 2005).

Table 12 (post-*Booker*) shows that the vast majority of offenders (88.1%) 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, firearms offenses, auto theft, racketeering, immigration offenses, pornography, and prison offenses. In contrast, more than half of the offenders sentenced for larceny, embezzlement, gambling, 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-*Booker*) shows that the average sentence for all offenders sentenced in post-*Booker* 2005, counting probation-only sentences as zero months' imprisonment, was 51.1 months (median of 28 months). For those offenders sentenced to imprisonment, Table 14 (post-*Booker*) shows the average prison term was 59 months (median 36 months). As seen in Figure F (post-*Booker*), 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 (post-*Booker*) shows that 76.8 percent of the offenders had no fine or restitution ordered; and therefore, 23.2 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 post-Booker section of the 2005 Sourcebook of Federal Sentencing Statistics.

Guideline Application Post-Booker

Table 17 (post-Booker) shows that in post-Booker 2005 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), Robbery (§2B3.1), and Fraud (§2F1.1). Table 18 (post-Booker) 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-Booker) shows that 4.8 percent of all offenders received an aggravating role adjustment, 9.2 percent received a mitigating role adjustment, 2.2 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-Booker) also shows the application rates of the adjustments for obstruction of justice (3.0%) and reckless endangerment (0.5%). The rate of those receiving the acceptance of responsibility adjustment was 91.8 percent, as shown in Table 18 (post-Booker).

As seen in Table 20 (post-Booker), 37.7 percent of offenders did not receive criminal history points under the guidelines’ criminal history computations. Conversely, more than half of all offenders (62.3%) received points for prior criminal convictions (Chapter Four of the guidelines). Table 21 (post-Booker) shows that in post-Booker 2005 fewer than half (46.4%) of the offenders were placed in Criminal History Category I, and 10.7 percent were placed in Category VI. Table 22 (post-Booker) shows that 1,574 offenders received a career offender adjustment, and 466 received an armed career criminal adjustment. For further details of the guideline application components, see Tables 17 through 23 of the post-Booker section of the 2005 Sourcebook of Federal Sentencing Statistics.

Sentences Within the Guideline Range and Outside the Range Post-Booker

Table 26 (post-Booker) shows, by district, both the number and percent of cases sentenced within the guideline range, or receiving a sentence outside the applicable guideline range. 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-Booker). The Sourcebook includes a number of modified tables presenting data on cases sentenced outside the guideline range and sorted into a number of new categories created in response to the

| Rates of Within-Range and Outside the Range Sentences | |
|---|----------------------------------|
| 61.6% | Sentences Within Guideline Range |
| 0.2% | Above Range Departure |
| 0.1% | Above Range Departure w/Booker |
| 0.7% | Above Range w/Booker |
| 0.7% | Remaining Above Range |
| 14.7% | §5K1.1 Substantial Assistance |
| 6.2% | §5K3.1 Early Disposition |
| 2.9% | Other Government Sponsored |
| 2.3% | Below Range Departure |
| 0.9% | Below Range Departure w/Booker |
| 6.2% | Below Range w/Booker |
| 3.5% | Remaining Below Range |

Booker decision. See Appendix A (post-*Booker*). Nationally, the percentage of within-guideline sentences was 61.6 percent and ranged by district from 29.1 percent to 91.3 percent. See Table 26 (post-*Booker*).

Sentences above the range totaled 1.7 percent across four categories: Above Range Departure; Above Range Departure w/*Booker*; Above Range w/*Booker*; and Remaining Above Range. Above range departures nationally were at 0.2 percent and ranged from 0.0 percent (49 districts) to 1.5 percent. Above range departures also citing *Booker* were 0.1 percent nationally and ranged from 0.0 percent (73 districts) to 1.3 percent (two districts). Nationally the rate of above range cases citing *Booker* was 0.7 percent and ranged from 0.0 percent (18 districts) to 3.7 percent. The national rate of the remaining above range cases was 0.7 percent and ranged from 0.0 percent (12 districts) to 5.9 percent. See Table 26 (post-*Booker*).

Government sponsored below range sentences account for 23.8 percent of all cases sentenced during this period and are classified into three categories: \$5K1.1 Substantial Assistance; \$5K3.1 Early Disposition; and Other Government Sponsored. The national rate of substantial assistance was 14.7 percent and ranged from 2.5 percent to 39.3 percent. The rate of below range sentences for early disposition was 6.2 percent nationally and ranged from 0.0 percent (76 districts) to 52.4 percent. The rate of other government sponsored below range sentences was 2.9 percent nationally and ranged from 0.0 percent (five districts) to 24.3 percent. See Table 26 (post-*Booker*).

Nationally an additional 12.9 percent of cases were sentenced below the guideline range classified into four categories: Below Range Departure; Below Range Departure w/*Booker*; Below Range w/*Booker*; and Remaining Below Range. Nationally the rate of below range departures was 2.3 percent, ranging from 0.0 percent (seven districts) to 9.9 percent. Below range departures also citing *Booker* were 0.9 percent nationally and ranged from 0.0 percent (12 districts) to 4.2 percent. The national rate of below range cases citing *Booker* was 6.2 percent with a range of 0.0 percent (two districts) to 21.1 percent. The rate in the category of remaining below range cases was 3.5 percent nationally and ranged from 0.0 percent (three districts) to 12.5 percent. See Table 26 (post-*Booker*).

Table 27 (post-*Booker*) shows, by offense type, the number and percent of sentences within the guideline range and outside of the range. The offense type with the highest within-guideline rate was simple drug possession (88.9%). Above range departure rates ranged from 0.0 percent (17 offense types) to 7.3 percent (manslaughter). The rates for above range departure with *Booker* cases ranged from 0.0 percent (21 offense types) to 3.3 percent (murder). The above range with *Booker* rate ranged from 0.0 percent (ten offense types) to 4.3 percent (auto theft). The rates of the remaining above range cases was between 0.0 percent (ten offense types) and 9.8 percent (manslaughter).

The rate of substantial assistance departures ranged from 0.0 percent (manslaughter) to 54.5 percent (antitrust). Early disposition rates ranged from 0.0 percent (17 offense types) to 19.5 percent (immigration). The rate of application of other government sponsored below range sentences was 0.0 percent (five offense types) to 9.0 percent (sexual abuse). See Table 27 (post-*Booker*).

The rate of below range departures ranged from 0.0 percent (four offense types) to 11.1 percent (national defense). Rates of below range departures with *Booker* ranged from 0.0 percent

(eight offense types) to 9.1 percent (antitrust). Below range with *Booker* had rates ranging from 0.0 percent (antitrust) to 14.3 percent (burglary). The range of rates for the remaining below range cases was 0.0 percent (four offense types) to 11.1 percent (national defense). See Table 27 (post-*Booker*).

For sentences within the applicable guideline range, as shown in Table 29 (post-*Booker*), the sentence most often given (58.9% of all within-guideline sentences) was at the minimum point of the guideline range. Among offenses with more than 100 cases, those with at least 70 percent of cases at the guideline minimum were larceny (71.7%), drug trafficking (71.0%), embezzlement (70.1%), and other miscellaneous offenses (70.0%). The sentence was at the maximum of the guideline range in 10.0 percent of all within-guideline cases. The offense with the highest proportion of cases at the guideline maximum was auto theft (43.5%).

Tables 30-32 (post-*Booker*) show the sentencing effects of the 11 categories of outside the range sentences. Overall, offenders receiving a substantial assistance departure experienced the largest reduction among all types of below range sentences. Sentences for offenders receiving substantial assistance reductions, as shown in Table 30 (post-*Booker*), had a median 28-month sentence reduction from the minimum of the applicable guideline range. This results in a 50.0 percent median decrease in the otherwise applicable guideline minimum. Cases receiving a reduction under USSG §5K3.1 (early disposition) had a median decrease of eight months from the guideline range which is a 26.8 percent median decrease. See Table 30A (post-*Booker*). Those cases receiving an other government sponsored reduction had a median decrease of 11 months from the applicable guideline minimum (a median decrease of 33.2%). See Table 31 (post-*Booker*).

Table 31A (post-*Booker*) shows that the median decrease in cases receiving a below range departure was 11.9 months below the guideline minimum; a median decrease of 34.3 percent. Cases receiving a departure below range with *Booker* saw a median decrease of 13 months from the guideline minimum (36.8% median decrease). See Table 31B (post-*Booker*). Table 31C presents data on below range cases with *Booker*. The median reduction from the guideline minimum was 13 months (33.3 % median decrease). The median reduction from the guideline minimum for all remaining below range cases is presented in Table 31D (post-*Booker*). The median sentence reduction was ten months (37.7% median decrease).

The relative increase above the applicable guideline maximum is presented in Tables 32 through 32C (post-*Booker*). Departures above the guideline range were a median 11 months above the guideline maximum. This is a 29.6 percent median increase above the guideline maximum. See Table 32 (post-*Booker*). Table 32A (post-*Booker*) shows that the median increase for cases receiving a departure above range with *Booker* was 25 months above the guideline maximum (37.9% median increase). Cases with a sentence above range with *Booker* had a median increase of 14 months (41.2% median increase). See Table 32B (post-*Booker*). The category of all remaining cases above the range had a median increase of 14 months above the guideline maximum (33.3% median percent increase). See Table 32C (post-*Booker*). For further departure statistics, see Tables 24 through 32C and Figures G and H in the post-*Booker* section of the *2005 Sourcebook of Federal Sentencing Statistics*.

Drug Cases Post-Booker

As in previous years, drug offenses were the largest single category of federal convictions, comprising 33.6 percent of all offenders sentenced in 2005 (Figure A). As Figure A shows, 43.7 percent of all drug cases involved cocaine (22.8% powder cocaine and 20.9% crack cocaine), followed by marijuana (25.2%), methamphetamine (20.0%), and heroin (6.8%). Table 33 (post-*Booker*) shows that nearly all drug offenses (96.7%) were sentenced under the primary drug trafficking guideline (§2D1.1).

For drug offenders, Tables 34 through 37 (post-*Booker*) show the following: 39.6 percent were of Hispanic origin, 30.4 percent were Black, and 26.1 percent were White; 87.3 percent were male; and 26.7 percent were non-United States citizens. Except for crack cocaine traffickers, the majority of drug offenders were in Criminal History Category I.

Drug offenders received sentence increases for possession or use of weapons in 17.0 percent of all the drug cases (Table 39, post-*Booker*). A sentence adjustment for role in the offense (Table 40, post-*Booker*) was imposed in 25.0 percent of drug cases; 19.1 percent received a mitigating role adjustment and 5.9 percent received an aggravating role adjustment. Wide variation was observed in application of the mitigating role adjustment across drug types, with 30.9 percent of marijuana and 28.1 percent of heroin offenders receiving a mitigating role adjustment compared to 6.3 percent for crack cocaine offenders. Slightly more than 91 percent (91.1%, Table 41, post-*Booker*) of drug offenders received an adjustment for acceptance of responsibility.

Table 43 (post-*Booker*) shows that 65.5 percent of drug offenders were convicted under statutes carrying a mandatory minimum penalty (26.9% a five-year and 38.6% a ten-year or longer mandatory minimum). The highest percentages receiving a mandatory minimum were crack cocaine cases (80.1%), methamphetamine cases (77.0%), and powder cocaine cases (76.6%). A ten-year or longer mandatory minimum was applicable in approximately half of crack cocaine cases (49.6%), powder cocaine cases (49.8%), and methamphetamine cases (52.0%).

In 1994, Congress enacted the “safety valve” provision (§5C1.2) to provide nonviolent, low-level, first-time drug offenders relief from mandatory minimum sentences.⁸⁴ Table 44 (post-*Booker*) shows that 35.9 percent of drug offenders received the benefit of the “safety valve,” including 12.6 percent who were not subject to a drug mandatory minimum and 23.3 percent who were subject to a drug mandatory minimum. Powder cocaine, heroin and marijuana offenders were the most likely to receive a reduction under the “safety valve” provision, while crack cocaine (13.4%) offenders were the least likely.

As displayed in Figure J (post-*Booker*), the average overall prison term for drug offenders varied widely by drug type, from a mean of 124.1 months for crack cocaine cases (median of 108 months) to 45.3 months for marijuana cases (median of 30 months). See Tables 33 through 45 and

⁸⁴ 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.”

Figures I through L of the post-*Booker* section of the *2005 Sourcebook of Federal Sentencing Statistics* for additional statistics and trends on drug cases.

Immigration Cases Post-Booker

As seen in Table 46 (post-*Booker*), most immigration offenders were male (91.8%), of Hispanic origin (88.9%), and had less than a high school education (78.8%). A large percentage of immigration convictions involved non-United States citizens (87.9%, Table 48, post-*Booker*) and were the result of a guilty plea (98.0%, Table 46, post-*Booker*). For detailed statistics on immigration violations, see Tables 46 through 50 in the post-*Booker* section of the *2005 Sourcebook of Federal Sentencing Statistics*.

Organizational Sentencing Practices Post-Booker Data

Offense Characteristics in Post-Booker Cases

In 2005, the Commission received information on 142 organizations that were sentenced under Chapter Eight after the *Booker* decision.⁸⁵ In 2005 post-*Booker*, the sentenced organizations pled guilty in 91.5 percent of the cases; 8.5 percent were convicted after trial. See Table 53 (post-*Booker*). After *Booker* in 2005, environmental pollution⁸⁶ was the most frequent offense committed by an organization, accounting for 40 of the 142 cases sentenced (28.2%). Other significant offense categories include fraud (24.6%), antitrust (7.7%) and money laundering (7.0%). See Table 51 (post-*Booker*).

Offender Characteristics in Post-Booker Cases

In those cases in which the offender organization 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 142 cases sentenced post-*Booker* in 2005, the court applied the fine provisions of section 8C2.1 to calculate the fine in at least 74 cases (52.1%). The Commission received detailed culpability score information for 69 of those cases. See Table 54 (post-*Booker*).

In numerous cases, the organization's culpability score was reduced based on the presence of certain culpability factors. Of the 69 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."⁸⁷ Fifty-nine organizations (85.5%) received reductions in their culpability

⁸⁵ 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 32.

⁸⁶ Environmental pollution offenses refer to the aggregate of "Environmental-Water," "Environmental-Air," and "Environmental-Hazardous/Toxic Pollutants."

⁸⁷ USSG §8C2.5(f).

scores, pursuant to section 8C2.5(g), for either self-reporting, cooperating, or accepting responsibility. Forty-two organizations (60.9%) were given credit at sentencing for cooperating with the government's investigation,⁸⁸ and another 15 organizations (21.7%) were given credit for accepting responsibility for their wrongdoing.⁸⁹ Two organizations (2.9%) received full credit for reporting the offense to governmental authorities,⁹⁰ cooperating with the investigation, and accepting responsibility for the offense. See Table 54 (post-Booker). Ten organizations (14.5%) received no mitigating credit inasmuch as they did not self-report, cooperate with the authorities, or accept responsibility. See Table 54 (post-Booker).

In a number of cases, the organization's culpability score was increased based on the presence of culpability factors. Among those, five organizations (7.2%) received an increase pursuant to section 8C2.5(e) for having obstructed justice, which resulted in increased culpability scores for sentencing purposes. Four organizations (5.8%) received an increase pursuant to section 8C2.5(c) of the sentencing guidelines (for a history of prior criminal or administrative offenses), and four organizations (5.8%) received an increase pursuant to section 8C2.5(d) (for violation of a judicial order, injunction, or condition of probation). See Table 54 (post-Booker).

Sanctions Imposed in Post-Booker Cases

Of the 142 post-Booker cases overall, restitution was ordered in 45 cases (31.7%), and a fine was imposed in 112 cases (78.9%). See Tables 51 and 52 (post-Booker). The mean restitution ordered was \$569,042, and the mean fine imposed was \$3,870,330. See Table 52 (post-Booker).

The three highest fines post-Booker in 2005 were imposed for price-fixing conspiracies in violation of the antitrust laws. The highest fine, \$185 million, was imposed on a corporation for participating in an international conspiracy to fix the prices of a semiconductor memory product. The second highest fine post-Booker in 2005, \$84 million, was imposed for antitrust violations on a corporation that produces rubber products. The third highest fine post-Booker, imposed on a corporation that manufactures and sells certain chemicals, was \$33.0 million. In addition, the largest restitution order imposed in 2005 post-Booker, \$8.2 million, was imposed on a company for improper storage of food products.

In addition to restitution and monetary penalties, offenders sentenced under the organizational guidelines were subject to other sanctions. Of the 142 cases sentenced pursuant to Chapter Eight post-Booker, 96 (67.6%) received one month or more of probation, and 28 (19.9%) were ordered to make compliance or ethics-related improvements. See Table 53 of the 2005 *Sourcebook of Federal Sentencing Statistics, Post-Booker*.

⁸⁸ See USSG §8C2.5(g)(2).

⁸⁹ See USSG §8C2.5(g)(3).

⁹⁰ See USSG §8C2.5(g)(1).

Appeals Data Post-Booker

Summary of Information Received, Post-Booker Cases

The Commission gathered information on 6,045 appeals offenders from January 12, 2005, through September 30, 2005, of which 933 were “conviction only” cases. See Figure M of the *2005 Sourcebook of Federal Sentencing Statistics, Post-Booker*. The total number of sentencing cases analyzed post-*Booker* was 5,010.⁹¹ Of the cases analyzed, 49.9 percent were affirmed, 6.9 percent were dismissed, 24.2 percent were reversed, 6.8 percent were affirmed in part/reversed in part, and 12.2 percent were remanded. See Figure M of the *2005 Sourcebook of Federal Sentencing Statistics, Post-Booker*.

Of the 1,214 cases reversed, the appellate courts remanded 1,192 (98.2%) to the district courts for further action. Of the 339 cases that were affirmed in part/reversed in part, the appellate courts remanded 313 (92.3%) to the district courts for further action. See Figure M of the *2005 Sourcebook of Federal Sentencing Statistics, Post-Booker*.

Issues and Guidelines Appealed Post-Booker

Post-*Booker*, defendants appealed the drug trafficking guideline (section 2D1.1) more than any other guideline, at 10.1 percent (1,120 cases). Other guidelines that frequently formed the bases for post-*Booker* appeals by defendants were section 2L1.2 (Unlawfully Entering or Remaining in the United States)(6.7%), section 2K2.1 (Firearms)(3.5%), section 2B1.1 (Larceny, Embezzlement and Theft)(2.5%), section 3C1.1 (Obstruction of Justice)(1.9%), and section 3B1.1 (Aggravating Role)(1.5%). See Table 57 of the *2005 Sourcebook of Federal Sentencing Statistics, Post-Booker*.

The overall affirmance rate of post-*Booker* defendant-based appeals decreased from 90.1 percent pre-*Booker* to 65.6 percent post-*Booker*. The affirmance rate of appeals involving section 2D1.1 decreased 27.3 percent, from 91.4 percent pre-*Booker* to 64.1 percent post-*Booker*; those involving section 2L1.2 decreased 10.6 percent, from 95.2 percent to 84.2 percent; those involving section 2K2.1 decreased 28.4 percent, from 94.8 percent to 67.0 percent; those involving section 2B1.1 decreased 19.5 percent, from 76.2 percent to 56.7 percent; those involving section 3B1.1 decreased 20.0 percent, from 86.7 percent to 66.7 percent; and those involving section 3C1.1 decreased 17.5 percent, from 81.2 percent pre-*Booker* to 63.7 percent post-*Booker*. Constitutional issues appealed by defendants increased from 4.8 percent in pre-*Booker* appeals to 36.5 percent post-*Booker*, and defendant-based appeals involving other non-guideline issues decreased, from 37.6 percent pre-*Booker* to 15.0 percent post-*Booker*. See Table 57 of the *2005 Sourcebook of Federal Sentencing Statistics, Post-Booker*.

For cases in which the government was the appellant, section 5K2.0 (Departures)(19.0%), section 2D1.1 (Drug Trafficking)(5.4%), section 2L1.2 (Unlawfully Entering or Remaining in the United States)(3.4%), and section 5K1.1 (Substantial Assistance)(3.4%) were the guidelines most

⁹¹ Of the 6,045 cases, 933 were “conviction only” cases. Of the 5,112 remaining cases, 102 were missing the type of appeal information, resulting in 5,010 known sentencing cases. See Table 57 (n. 1) of the *2005 Sourcebook of Federal Sentencing Statistics, Post-Booker*.

frequently appealed. The overall affirmance rate of post-*Booker* governmental appeals decreased from 47.5 percent pre-*Booker* to 34.0 percent post-*Booker*. Although the government did not appeal any cases involving sections 2L1.2 or 5K1.1 pre-*Booker*, the affirmance rate of governmental appeals involving section 5K2.0 increased from 38.5 percent pre-*Booker* to 71.4 percent post-*Booker*. The government only appealed one constitutional issue pre-*Booker*, and appealed constitutional issues 38 times post-*Booker*. Government-based appeals involving other non-guideline issues decreased from 15.3 percent to 10.2 percent. See Table 58 of the 2005 *Sourcebook of Federal Sentencing Statistics, Post-Booker*.

Data Analyses for the Courts and Congress

Using the Commission's 2005 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 2005 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.