

Chapter Five

Research

Statutory Requirements

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.³⁷

Document Submission

The chief judge of each district is required to ensure that within 30 days after entry of judgment in a criminal case, the sentencing court submits a report of the sentence to the Commission which includes (1) the judgment and commitment order (J&C); (2) the written statement of reasons (SOR); (3) any plea agreement; (4) the indictment or other charging document; (5) the presentence report (PSR); and (6) any other information the Commission requests.³⁸ The Commission is required to submit to Congress at least annually an analysis of these documents and to report to Congress if any districts have not submitted the required information and documents.³⁹

For fiscal year 2011, the Commission received 398,485 documents related to 86,201 individual offender cases.⁴⁰ The vast majority of districts sent in complete documentation related to the cases, and the Commission works continually with the courts to facilitate document submission. The Commission also received documents in 160 cases in which an

organization was sentenced. Additionally, the Commission received documents in 3,588 cases in which a resentencing or other modification of sentence occurred.

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 particular research questions arise, the Commission collects additional information from the documents provided by the courts.

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 Manual*. 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.⁴¹

⁴¹ 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 compiled from three sources. First, many appellate courts submit to the Commission slip opinions of both published and unpublished opinions and orders. 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. Third, because courts do not submit all relevant opinions and orders to commercially available legal databases, the Commission

³⁷ 28 U.S.C. §§ 995 (a)(12) and (14)-(16).

³⁸ 28 U.S.C. § 994(w)(1).

³⁹ 28 U.S.C. § 994(w)(3).

⁴⁰ See 2011 *Sourcebook of Federal Sentencing Statistics*, Table 1.

The Resentencing Dataset, begun in fiscal year 2008, tracks information on the number and type of resentencings and other modifications of sentence.

The Commission's computerized datasets, without individual identifiers, are made available to the public through the Inter-University Consortium for Political and Social Research at the University of Michigan (ICPSR).⁴² Commission data also 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.⁴³

The Commission provides an analysis of this data at the national level in the annual *Sourcebook of Federal Sentencing Statistics*. The Commission provides federal sentencing data organized by circuit, district, and state on its website. See http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/index.cfm.

Data Collection Issues

The Commission received documentation on 86,201 individual offender cases sentenced under the Sentencing Reform Act (SRA) between October 1, 2010, and September 30, 2011.⁴⁴ This represents an increase of 2,255 cases over the number of cases for which the Commission received documentation for fiscal year 2010.⁴⁵ As part of its ongoing activities, the Commission occasionally receives case

checks individual court websites and adds any available appeals from the fiscal year. These sources may not provide the Commission with every appellate sentencing decision rendered in a fiscal year. The Commission's Appeals Dataset, therefore, may not report all appellate decisions rendered in that fiscal year.

⁴² The Consortium's website address is <http://www.ICPSR.umich.edu/>.

⁴³ The data can be found at <http://fjsrc.urban.org>.

⁴⁴ The Commission receives a report of the sentence imposed in all cases to which the sentencing guidelines relate, which are all felony offenses and all Class A misdemeanors in the United States courts. See generally 28 U.S.C. § 994(w); USSG §1B1.9.

⁴⁵ The data reported in this annual report and in the 2011 *Sourcebook of Federal Sentencing Statistics* represents all data collected and analyzed by the Commission for which appropriate documentation was forwarded to the Commission by January 23, 2012.

documentation for a case sentenced in a prior fiscal year after the date on which the data was compiled for the *Annual Report* and *Sourcebook of Federal Sentencing Statistics* corresponding to that year.⁴⁶ In some cases, this documentation is received months or even years after the case was concluded. This data is analyzed and maintained in the Commission's comprehensive database and used in the Commission's work, although it is not reflected in the *Annual Report* and *Sourcebook of Federal Sentencing Statistics* prepared for the year in which the offenders were sentenced, nor is it contained in the publically available datasets released each fiscal year, as they are based on the data in the corresponding *Annual Report* and *Sourcebook of Federal Sentencing Statistics*.

Summary of 2011 Findings

The 2011 *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.⁴⁷ The *Sourcebook* also provides statistics on organizational sentencing practices from the Organizational Dataset, data on appellate review of sentencing decisions from the Appeals Dataset, and information on the number and type of resentencings and other modifications of sentence from the Resentencing Dataset.

⁴⁶ For example, after the date on which the data were compiled to prepare the fiscal year 2011 *Annual Report* and *Sourcebook of Federal Sentencing Statistics*, the Commission received documentation on 137 additional cases in which the offender was sentenced in that fiscal year. Since 1991, the Commission has received documentation on 13,306 cases after the respective dates on which the data were prepared for the *Annual Report* and *Sourcebook of Federal Sentencing Statistics* for each of those fiscal years. This represents 1.2% of all cases reported to the Commission during that period.

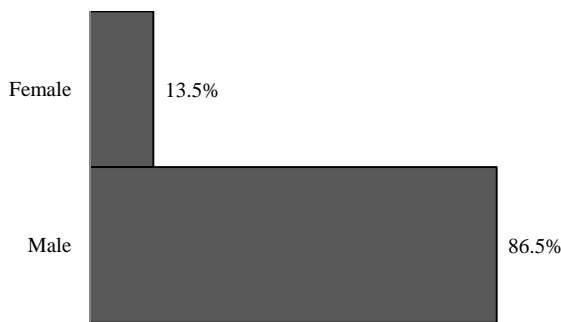
⁴⁷ All tables and figures referenced in this chapter can be found in the companion volume to this annual report, the 2011 *Sourcebook of Federal Sentencing Statistics*. The year 2011, as used in this report, refers to the fiscal year 2011 (October 1, 2010, through September 30, 2011).

Sentencing Individual Offenders

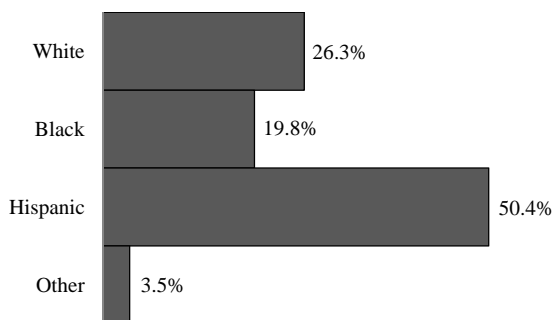
Offender Characteristics

The proportion of offenders who are not United States citizens has changed markedly in the last several years. In 2011, non-citizens made up 48.0 percent of all offenders, up 0.5 percentage points from the previous year. For offenses with 100 or more offenders, the offense categories with the largest percentages of non-citizens were the following: immigration (94.6%); drug simple possession (39.3%); money laundering (33.6%); drug trafficking (30.8%); fraud (28.0%); and administration of justice (16.3%).

Historically, male offenders have accounted for approximately 85 percent of federal criminal cases. In 2011, men made up 86.5 percent of all offenders sentenced, down slightly from 86.8 percent the previous year.

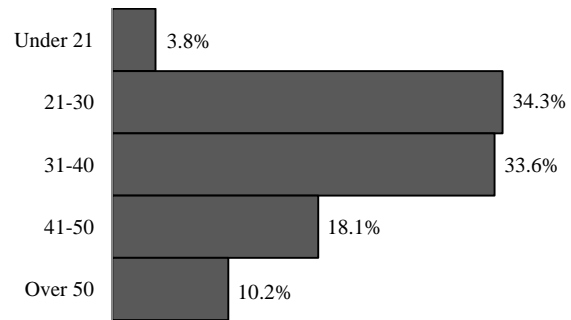


The racial/ethnic composition of offenders in 2011 was Hispanic 50.4 percent, White 26.3 percent, Black 19.8 percent, and Other 3.5 percent.



The average age of federal offenders sentenced in 2011 was 35 years with a median of 34 years. More

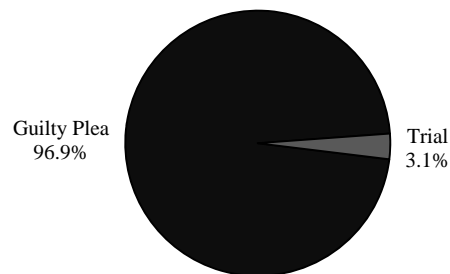
than half (52.0%) of the offenders sentenced did not graduate from high school, and only 5.5 percent graduated from college.



For additional demographic information about the federal offender population, see Tables 4 through 9 in the *2011 Sourcebook of Federal Sentencing Statistics*.

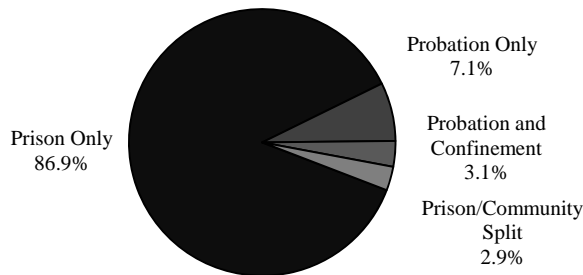
How Offenders Were Sentenced

In 2011, 96.9 percent of all offenders plead guilty. The rate at which offenders were convicted after trial varied by both district and offense type. Among offense types with more than 100 cases, trial rates ranged from a low of 0.0 percent for cases involving a drug communication facility up to 12.7 percent for sexual abuse cases.

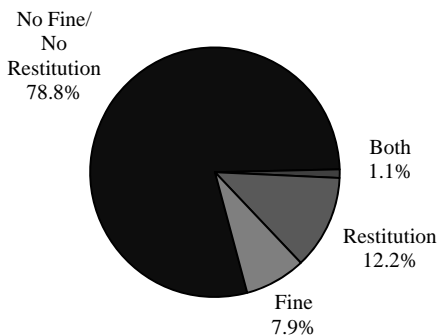


The vast majority of offenders (86.9%) were sentenced to prison only. Conversely, 7.1 percent of offenders were sentenced to probation only. The remaining offenders were sentenced to both imprisonment and some other form of confinement (2.9%) or to probation with some additional form of community confinement (3.1%). The type of sentence imposed varies depending on the type of crime involved. For example, more than 90 percent of all offenders convicted of the following offenses were sentenced to some type of imprisonment:

murder, manslaughter, kidnapping, sexual abuse, robbery, arson, drug trafficking, firearms offenses, burglary/breaking and entering, racketeering/extortion, immigration offenses, child pornography, and prison offenses. In contrast, more than half of the offenders sentenced for larceny, embezzlement, gambling/lottery, environmental/wildlife offenses, food and drug offenses, or other miscellaneous offenses received a sentence including probation.



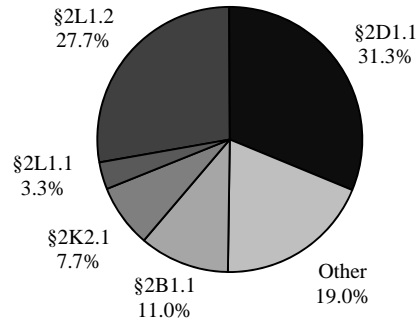
The average sentence varies widely by the type of crime involved. For all offenders sentenced in 2011, the average sentence was 43 months, counting probation-only sentences as zero months' imprisonment. The highest sentences on average were imposed for murder, kidnapping/hostage taking, sexual abuse, and child pornography offenses. Among offenders sentenced to imprisonment, the average prison term was 52 months. A fine or restitution was ordered in 21.2 percent of all cases.



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 2011 *Sourcebook of Federal Sentencing Statistics*.

Guideline Application

In 2011, the most frequently applied primary guidelines from the *Guidelines Manual* were Drug Trafficking (31.3%),⁴⁸ Unlawful Entry into U.S. (27.7%),⁴⁹ Theft/Fraud (11.0%),⁵⁰ Firearms (7.7%),⁵¹ and Smuggling an Unlawful Alien (3.3%).⁵²



Of all offenders, 4.1 percent received an upward adjustment to their sentence due to an aggravating role in the offense while 7.4 percent received a downward adjustment as the result of a mitigating role in the offense. More than 95 percent of all offenders received an adjustment to their sentence for accepting responsibility for their crime. Just over two percent (2.3%) 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. A list of all of the various adjustments provided for in the *Guidelines Manual* and the rate of application of those adjustments can be found in Table 18 of the 2011 *Sourcebook of Federal Sentencing Statistics*.

In determining the applicable guideline range, the courts found that nearly two-thirds of all offenders (64.8%) had a criminal history sufficient to be assessed points for prior criminal convictions. Nearly half (44.1%) of the offenders were placed in Criminal History Category I, the least severe category, and 8.8 percent were placed in Criminal History Category VI, the most severe category. Courts determined that 3.0 percent of all offenders were career offenders,⁵³ and 0.7 percent were armed

⁴⁸ USSG §2D1.1.

⁴⁹ USSG §2L1.2.

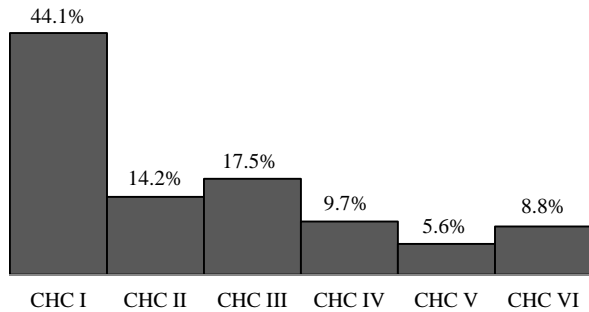
⁵⁰ USSG §2B1.1.

⁵¹ USSG §2K2.1.

⁵² USSG §2L1.1.

⁵³ See USSG §4B1.1.

career criminals.⁵⁴ In contrast, in 35.2 percent of cases the court did not assess any criminal history points under the guidelines' criminal history computations, either because those offenders had never been convicted of an offense or had been convicted of an offense for which points are not assessed under the guidelines.⁵⁵



For further details of the guideline application components, see Tables 20 through 22 of the 2011 *Sourcebook of Federal Sentencing Statistics*.

Sentences Within the Guideline Range and Outside the Guideline Range

In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. To remedy the Sixth Amendment violation, the Court excised two provisions of the Sentencing Reform Act: the provision that required sentencing courts to impose a sentence within the applicable guidelines range (in the absence of circumstances that justified a departure from the guidelines), and the provision that set forth the standard of review on appeal, including *de novo* review of departures from the applicable guidelines range. In *Booker*, the Supreme Court instructed courts to consider the guidelines, but "tailor the sentence in light of other statutory concerns."⁵⁶ This instruction necessitated changes in the methodology used by the Commission in the

collection and analysis of the data.⁵⁷ Tables N through N-11 in the *Sourcebook* present national and circuit data on sentences within the guideline range and those outside the range.

Nationally in 2011, the courts imposed sentences that were within the applicable guideline range in 54.5 percent of all cases. Sentences above the guideline range accounted for 1.8 percent of all cases.

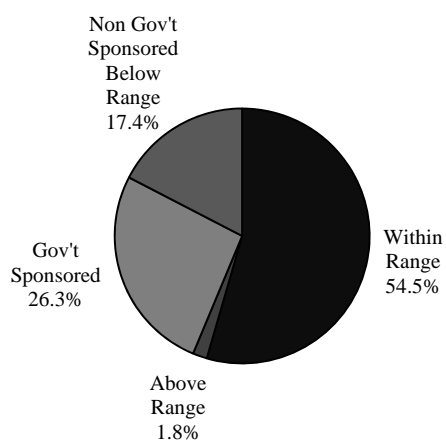
Approximately one quarter (26.3%) of sentences were imposed below the guideline range at the request of the government to impose such a sentence. In about one-half of these cases (11.2% of all cases) the government filed a motion seeking a reduction in sentence because the defendant provided substantial assistance to the government in the investigation or prosecution of another person who had committed an offense. In 10.7 percent of these cases, the government sought the below range sentence because the offender agreed to abide by the provisions of an Early Disposition Program.

⁵⁴ See USSG §4B1.4.

⁵⁵ See generally Chapter 4 of the *Guidelines Manual*.

⁵⁶ *Id.* at 245.

⁵⁷ The *Sourcebook* includes a number of tables created in response to the *Booker* decision and which present data on cases, sorted into a number of categories, in which the sentence is outside the applicable guideline range. For example, before the decision in *Booker*, non-government sponsored outside the range sentences were classified as upward departures or downward departures. Subsequent to the *Booker* decision, the Commission began coding outside the range cases, separately for above and below: Departure; Departure w/*Booker*; *Booker*; and Remaining. In place of the two categories, the Commission now codes non-government sponsored outside the range cases into a total of eight categories (the four categories described above for above range and those same categories for below range sentences). For expanded definitions of these categories, see Appendix A of the *Sourcebook*.



In 17.4 percent of all cases, the sentence imposed was below the guideline range and not at the request of the government. Of all cases, the courts cited one or more guideline departure provision as a reason for the sentence in 3.4 percent of the cases.

The rate at which the sentence imposed was within the applicable guideline range varied by the type of offense involved and the district in which the offender was sentenced.⁵⁸ Nationally, the percentage of within-guideline range sentences was 54.5 percent and varied by district from a high of 80.4 percent to a low of 24.6 percent. The offense type with the highest within guideline range rate was simple drug possession (94.9%). For sentences imposed within the applicable guideline range, the sentence was most often at the minimum point of the guideline range (in 50.7% of all within-guideline sentences). The sentence was at the maximum of the guideline range in 10.7 percent of all within-guideline cases.

A sentence above the guideline range was imposed in 1.8 percent of all cases. The offense type with the highest above range rate was manslaughter (20.0%).

Government sponsored below range sentences accounted for 26.3 percent of all cases sentenced during this period and are classified into three categories: USSG §5K1.1 Substantial Assistance; USSG §5K3.1 Early Disposition; and Other Government Sponsored. The national rate of

substantial assistance was 11.2 percent and varied by district from 37.6 percent to 1.7 percent. The rate of below range sentences based upon the Early Disposition Program (USSG §5K3.1) was 10.7 percent nationally and ranged from 52.0 percent to 0.0 percent (as EDP sentences were authorized in only 18 districts for all or part of fiscal year 2011). The rate of other government sponsored below range sentences was 4.4 percent nationally and varied from 25.0 percent to 0.0 percent (in five districts). The offense type with the highest rate of substantial assistance departures was antitrust (70.0%). The offense type with the highest rate of early disposition departures was immigration (26.0%). The highest rate of application of other government sponsored below range sentences was assault (16.5%).

In 2011, a sentence below the guideline range not sponsored by the government was imposed in 17.4 percent of all cases. These types of sentences are classified into four categories. The national rate of below range departures was 2.3 percent. Below range departures also citing *Booker* were 1.1 percent nationally. The national rate of below range cases that were not departures but which cited *Booker* was 13.4 percent. The rate of the remaining below range cases was 0.6 percent nationally. The offense type with the highest rate of non-government sponsored below range sentences was child pornography (44.9%).

Tables 30–32 in the 2011 *Sourcebook of Federal Sentencing Statistics* 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 imposed on offenders receiving a substantial assistance reduction had a median reduction of 34 months from the minimum of the applicable guideline range. This represents a 50.0 percent median decrease in sentence from the otherwise applicable guideline minimum. Cases receiving a reduction for early disposition (USSG §5K3.1) had a median decrease of seven months from the minimum guideline range, which is a 30.0 percent median decrease. Those cases receiving an other government sponsored reduction had a median decrease of 15 months from the applicable guideline minimum, a median decrease of 36.4 percent.

⁵⁸ Tables 27 and 27A show, by offense type, the number and percent of sentences within the guideline range and outside of the range.

The median decrease in cases receiving a below range departure was 11 months below the guideline minimum, a median decrease of 33.3 percent. Cases receiving a departure below range with *Booker* saw a median decrease of 18 months from the guideline minimum, a median decrease of 46.4 percent. The median reduction from the guideline minimum for below range cases with *Booker* was 13 months, a median decrease of 35.1 percent. The median reduction from the guideline minimum for all remaining below range cases was six months, a median decrease of 58.5 percent.

The median extent of departures above the guideline range was 12 months above the guideline maximum, a 33.3 percent median increase above the guideline maximum. The median increase for cases receiving an above range departure with *Booker* was 21 months above the guideline maximum, a 43.3 percent median increase. Cases with a sentence above range with *Booker* had a median increase of 12 months, a 41.2 percent median increase. The category with the lowest median increase, seven months above the guideline maximum, occurred in all remaining cases above the range, a 30.4 percent median increase.

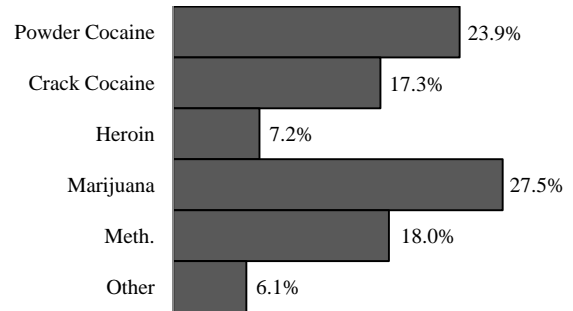
For more information concerning departures and other sentences outside the applicable guidelines range, see Tables 24 through 32C and Figures G and H of the *2011 Sourcebook of Federal Sentencing Statistics*.

Immigration Cases

In 2011, immigration cases were the single largest category of federal convictions for the third consecutive year, making up 34.0 percent of all offenders sentenced. Most of these offenses (75.3%) involved illegally entering or remaining in the United States. Another 9.0 percent involved alien smuggling. Immigration offenders were largely male (93.3%), of Hispanic origin (89.3%), and had less than a high school education (81.8%). Most immigration convictions involved non-United States citizens (93.8%) and were the result of a guilty plea (99.4%). For more information on immigration cases, see Tables 46 through 50 of the *2011 Sourcebook of Federal Sentencing Statistics*.

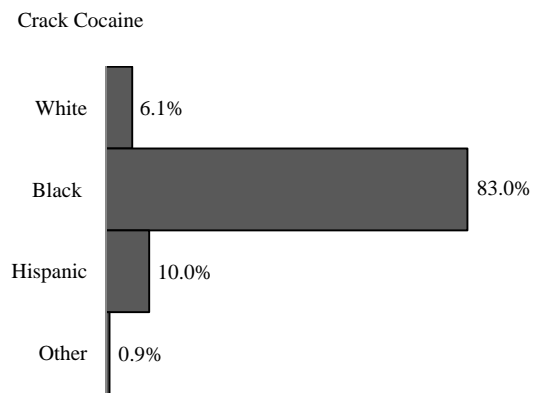
Drug Cases

Drug offenses were the second largest category of federal convictions in 2011. Among all drug cases, 41.2 percent involved some form of cocaine (23.9% powder cocaine and 17.3% crack cocaine), followed by cases involving marijuana (27.5%), methamphetamine (18.0%), and heroin (7.2%).



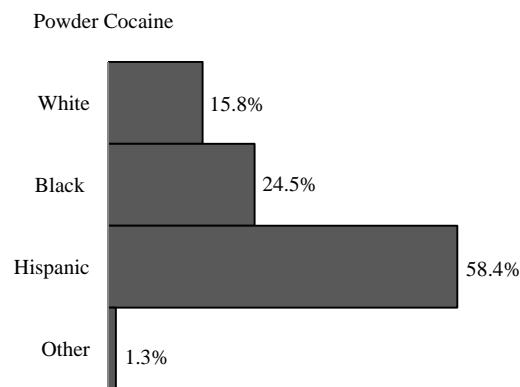
The average prison term for drug offenders varied widely by drug type, from an average of 104 months for crack cocaine offenders (median of 84 months) to 36 months for marijuana offenders (median of 24 months).⁵⁹

Most crack cocaine defendants were Black (83.0%) while 10.0 percent were Hispanic, and 6.1 percent were White.

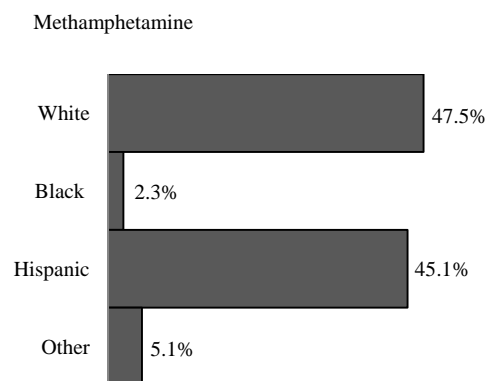


In contrast, the race/ethnicity distribution of powder cocaine defendants was 58.4 percent Hispanic, 24.5 percent Black, and 15.8 percent White.

⁵⁹ See *2011 Sourcebook of Federal Sentencing Statistics*, Figure K.



The race/ethnicity distribution of drug defendants involved with methamphetamine was 47.5 percent White, 45.1 percent Hispanic, and 2.3 percent Black.



Among drug defendants overall, 86.6 percent were male and 30.2 percent were non-United States citizens. With the exception of crack cocaine offenders, the majority of drug offenders were in Criminal History Category I.⁶⁰

Drug offenders received sentence increases for possession or use of weapons in 15.6 percent of all drug cases. A sentence adjustment for role in the offense was imposed in 24.0 percent of drug cases: 18.0 percent received a mitigating role adjustment, and 6.0 percent received an aggravating role adjustment. Wide variation was observed in application of the mitigating role adjustment across drug types, with 25.7 percent of marijuana offenders and 21.1 percent of heroin and methamphetamine offenders receiving a mitigating role adjustment

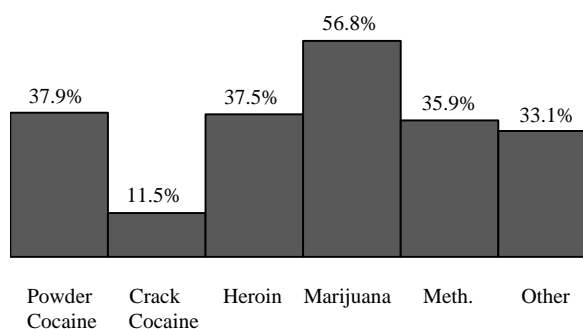
⁶⁰ See 2011 Sourcebook of Federal Sentencing Statistics, Tables 34–37.

compared to 3.6 percent of crack cocaine offenders. Nearly 95 percent (94.9%) of drug offenders received an adjustment for acceptance of responsibility.⁶¹

Sixty-one percent of drug offenders were convicted under statutes carrying a mandatory minimum penalty. The highest percentages of offenders receiving a mandatory minimum penalty were methamphetamine offenders (81.1%), powder cocaine offenders (76.0%), and crack cocaine offenders (74.0%). A ten-year or longer mandatory minimum penalty was applicable in over 45 percent of all powder cocaine cases (45.7%) and more than half of all methamphetamine cases (57.8%).

The “safety valve” provision provides nonviolent, low-level, first-time drug offenders relief from mandatory minimum sentences.⁶² In 2011, 48.0 percent of drug offenders received the benefit of the two-level reduction in offense level for meeting the “safety valve” criteria, including 23.0 percent who were subject to a drug mandatory minimum penalty and 15.0 percent who were not subject to a drug mandatory minimum penalty. Marijuana offenders (56.8%) were the most likely to receive the reduction for meeting the safety valve criteria, while crack cocaine offenders (11.5%) were the least likely.

Safety Valve Reduction



For more information on drug cases, see Tables 33 through 45 and Figures I through L of the 2011 Sourcebook of Federal Sentencing Statistics.

⁶¹ See 2011 Sourcebook of Federal Sentencing Statistics, Tables 39–41.

⁶² See 18 U.S.C. § 3553(f), which is incorporated into the guidelines at USSG §5C1.2.

Death Penalty Cases

In fiscal year 2011, the Commission received information on no cases in which the offender was sentenced to a punishment of death. The sentencing guidelines are not used when a jury imposes a sentence of death, therefore, a death penalty case would not have been included in the *2011 Sourcebook of Federal Sentencing Statistics*.⁶³

Organizational Sentencing Practices

Sentencing guidelines for organizations convicted of federal offenses became effective November 1, 1991.⁶⁴ 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.⁶⁵ 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.⁶⁶ In addition, the sentencing guidelines for antitrust violations and most bribery and kickback offenses contain specific formulations for calculating fines for organizations.⁶⁷

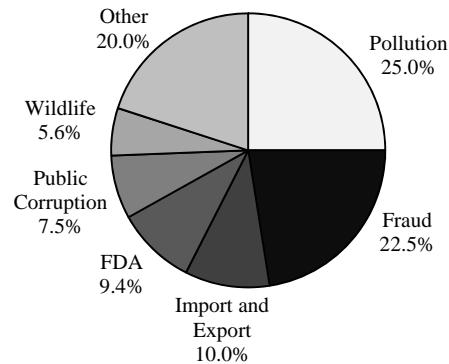
The organizational guidelines do not contain fine provisions for most offenses involving environmental pollution, food, drugs, agricultural and consumer products, civil/individual rights, administration of justice (*e.g.*, contempt, obstruction of justice, and perjury), and national defense.⁶⁸ In those cases in which the Chapter Eight fine guidelines do not apply, the statutory provisions of sections 3553 and

3572 of title 18, United States Code, govern the determination of an appropriate fine.

In 2011, the Commission received information on 160 organizations that were sentenced under Chapter Eight, a 7.4 percent increase from 2010 (149) and a 9.6 percent decrease from 2009 (177).⁶⁹ The sentenced organizations pled guilty in 151 (94.4%) of the cases; nine (5.6%) were convicted after a trial.⁷⁰

Offense Characteristics

Environmental pollution⁷¹ was the most frequent type of offense committed by an organization sentenced in federal court, accounting for 40 (25.0%) of the 160 cases for which the Commission received complete sentencing information. Other significant offense categories included fraud (22.5%), import and export (10.0%), food, drugs, agricultural and consumer products (9.4%); and public corruption (7.5%).⁷²



Offender Characteristics

In those cases in which the fine provisions of USSG §8C2.1 apply to the offense and the offender organization has the ability to pay, the court calculates a culpability score that may decrease or increase the applicable offense level. The Commission obtains culpability score calculation data from the sentencing court's judgment and

⁶³ These cases are also excluded from the Commission's datasets made available to the public.

⁶⁴ See *Guidelines Manual*, Chapter Eight–Sentencing of Organizations.

⁶⁵ See USSG §8A1.1.

⁶⁶ See USSG §8C2.1.

⁶⁷ See USSG §§2B4.1(c); 2C1.1(d); 2R1.1(d).

⁶⁸ See USSG §8C2.1.

⁶⁹ 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.

⁷⁰ *2011 Sourcebook of Federal Sentencing Statistics*, Table 53.

⁷¹ Environmental pollution offenses refer to the aggregate of "Environmental-Water," "Environmental-Air," and "Environmental-Hazardous/Toxic Pollutants."

⁷² *2011 Sourcebook of Federal Sentencing Statistics*, Table 51.

commitment order and/or the probation officer's presentence report. Of the 160 cases for which the Commission received complete sentencing information in 2011, the court ordered a fine in 113 cases (70.6%) and applied the fine provisions of USSG §8C2.1 to calculate the fine in at least 74 cases (46.2%) for which the Commission received detailed culpability score information.⁷³ In many cases, the sentencing court reduced the organization's culpability score based on the presence of certain mitigating culpability factors. Of the 74 cases with detailed culpability score information on self-reporting, cooperation, and acceptance of responsibility, 66 organizations (89.2%) received reductions in their culpability scores, pursuant to USSG §8C2.5(g), for either self-reporting, cooperating, or accepting responsibility. Forty-four organizations (59.5%) received reductions in their culpability scores for cooperating with the government's investigation⁷⁴ and another 19 organizations (25.7%) received reductions for accepting responsibility for their wrongdoing.⁷⁵

Three organizations received the full five-point reduction in culpability score for reporting the offense to governmental authorities,⁷⁶ cooperating with the investigation, and accepting responsibility for the offense (4.1%). No organization received a reduction in its culpability score for having in place an "effective compliance and ethics program."⁷⁷ Eight organizations (10.8%) received no culpability score reductions as they did not self-report, cooperate with the authorities, or accept responsibility.

In a number of cases, the presence of aggravating culpability factors increased the organization's culpability score. Among those 74 cases with complete detailed culpability score calculations, four organizations (5.4%) received an increase pursuant to USSG §8C2.5(e) for having obstructed justice, which resulted in an increased culpability score for sentencing purposes. Thirty-six organizations

(48.6%) received an increase under USSG §8C2.5(b) (for involvement in or tolerance of criminal activity by authority). One organization received an increase under USSG §8C2.5(c) (for a history of prior criminal or administrative offenses within five years). No organizations received an increase under USSG §8C2.5(d) (for violation of a judicial order, injunction, or condition of probation).

Sanctions Imposed on Organizational Offenders

Of the 160 cases for which the Commission received complete sentencing information in fiscal year 2011, sentencing courts ordered restitution in 52 cases (32.5%), and imposed a fine in 113 cases (70.6%). The average restitution amount ordered was \$2,289,575 (median \$233,125), and the average fine imposed was \$12,712,222 (median \$100,000). The highest fine in 2011 was \$253,962,251 imposed on a medical supply and equipment organization for violations of food and drug laws. The second highest fine of \$170,000,000 was imposed on a pharmaceutical corporation for violations of food and drug laws. The largest restitution order in 2011, \$87,533,863 was imposed on a health care provider organization for fraud violations.

In addition to restitution and monetary penalties, offenders sentenced under the organizational guidelines were subject to other sanctions. Of the 160 organizational offenders sentenced pursuant to Chapter Eight, 69.4 percent received one month or more of probation, and the courts ordered compliance or ethics-related improvements in 19.4 percent of the cases. For more information on the sanctions imposed on organizational offenders see Tables 51–54 of the *2011 Sourcebook of Federal Sentencing Statistics*.

Appeals Data

The Sentencing Reform Act authorized appellate review of a sentence if the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater (appeal by the defendant) or less (appeal by the government) than the sentence specified in the applicable guideline range; or (4) was imposed for an offense for which there is no

⁷³ In the remaining 86 cases, the fine guideline was not applied, or data on the application of the fine guideline was missing.

⁷⁴ See USSG §8C2.5(g)(2).

⁷⁵ See USSG §8C2.5(g)(3).

⁷⁶ See USSG §8C2.5(g)(1).

⁷⁷ See USSG §8C2.5(f).

sentencing guideline and is plainly unreasonable.⁷⁸ In *Booker*, the Supreme Court excised 18 U.S.C. § 3742(e), which provided a *de novo* standard of review for departures from the guidelines.⁷⁹ The standard of review for all sentences on appeal is reasonableness.⁸⁰

Summary of Information Received

In fiscal year 2011, the Commission collected⁸¹ information on 9,651 appellate court cases.⁸² Of those cases, 5,875 (60.9%) were sentencing appeals; “conviction only” appeals accounted for 1,970 (20.6%) of appeals, and 1,708 (17.9%) were *Anders* briefs.⁸³ Of the 9,651 appellate court cases, the

⁷⁸ 18 U.S.C. § 3742(a), (b).

⁷⁹ *Booker*, 543 U.S. at 259.

⁸⁰ *Booker*, 543 U.S. at 260-62. See also *Gall v. United States*, 552 U.S. 38, 51 (2007) (Regardless of whether the sentence imposed is within or outside the guideline range, the appellate court must review the sentence under an abuse-of-discretion standard).

⁸¹ In 1992, the Commission implemented a data collection system to track appellate review of sentencing decisions. Each fiscal year, appeals decisions are collected from various sources. The Commission relies on slip opinions received directly from some circuits, electronic legal databases, individual circuit court websites, and from the federal judiciary public access electronic records system (PACER) to generate the universe of appellate criminal decisions. Some appellate courts transmit published and unpublished slip opinions to the Commission. The Commission performs an electronic search for all published and unpublished criminal decisions using commercially available legal databases. Additionally, since not all relevant decisions appear in commercially available legal databases, the Commission checks individual court websites and PACER for additional decisions. These sources may not provide the Commission with every criminal appellate sentencing decision rendered in a fiscal year. The Commission’s Appeals Dataset, therefore, may not report all criminal appellate decisions rendered during that fiscal year.

⁸² Although the Commission is interested primarily in information on appellate court cases that involve sentencing issues, it collects limited information on all direct criminal appeals. The Commission then collects more detailed information on cases involving sentencing issues.

⁸³ *Anders* brief cases are those where the counsel for the appellant has advised the court of appeals that he or she has conscientiously examined the case but finds the appeal to be wholly frivolous and has requested permission to withdraw. See *Anders v. California*, 386 U.S. 738 (1967).

defendant was the appellant in 9,570 (99.2%), the government was the appellant in 46 (0.5%), and 35 (0.4%) were cross appeals.

Defendants were the appellants in 5,844 (99.5%) of the 5,875 sentencing appeals analyzed for 2011. Four circuits (the Fourth, Fifth, Ninth, and Eleventh) accounted for 3,436 (58.8%) of sentencing appeals brought by the defendant. The government was the appellant in 53 (0.9%) of the 5,875 sentencing appeals analyzed for 2011. Four circuits (the Second, Fourth, Sixth, and Ninth) accounted for 30 (56.6%) of the 53 sentencing appeals brought by the government. See Tables 56 and 56A of the *2011 Sourcebook of Federal Sentencing Statistics*.

The overall disposition rates for sentencing appeals in 2011 were –

| | Number | Percent |
|--|--------|---------|
| Affirmed | 4,360 | 74.2 |
| Dismissed | 752 | 12.8 |
| Reversed | 479 | 8.2 |
| Affirmed in part/Reversed in part ⁸⁴ | 185 | 3.2 |
| Remanded only ⁸⁵ | 99 | 1.7 |
| Totals | 5,875 | 100.0 |

The circuit courts affirmed 74.5 percent of the sentencing appeals brought by the defendant in fiscal year 2011, a decrease of 9.4 percentage points from fiscal year 2010 (83.9%). The First Circuit affirmed the highest percentage of such appeals (79.5%); the Second Circuit affirmed the lowest percentage (65.7%). The circuit courts affirmed 22.6 percent of the 53 sentencing appeals brought by the government

This appeal type was added in fiscal year 2010. Additionally, 98 appeals were identified but excluded from the data set because the appeal type could not be determined.

⁸⁴ Of the 185 sentencing appeals affirmed in part/reversed in part, the appellate courts remanded 162 (87.6%) to the district courts for further action.

⁸⁵ Prior to fiscal year 2005, the Commission did not report separately the number of cases the courts of appeals remanded to the lower courts without vacating the original sentence. These data are now included as “remanded.” See *2011 Sourcebook of Federal Sentencing Statistics*, Tables 56 and 56A.

in fiscal year 2011, a decrease of 8.8 percentage points from fiscal year 2010 (31.4%).

Issues and Guidelines Appealed

In the 5,844 sentencing appeals brought by defendants that were decided in 2011, there were 13,085 discrete sentencing issues appealed. The issue most frequently appealed involved reasonableness, at 29.2 percent of all issues appealed (n=3,815). The specific reasonableness issues most often appealed by defendants in fiscal year 2011 concerned general substantive reasonableness (20.6%); procedural reasonableness in that the court failed to address or improperly considered the 18 U.S.C. § 3553(a) factors (18.4%); substantive reasonableness regarding the court's weighing of those factors (16.4%); and procedural reasonableness in that the court did not adequately explain the reasons for the sentence imposed (14.0%).

In fiscal year 2011, defendants also frequently appealed their sentences for reasons relating to the sentencing factors at 18 U.S.C. § 3553(a) (10.7% of issues raised), followed by challenges to: USSG §2D1.1 (Drug Trafficking) (7.4% of issues raised) USSG §1B1.10 (Retroactivity of Amended Guideline Ranges) (5.3% of issues raised); USSG §2L1.2 (Unlawfully Entering or Remaining in the United States) (2.4% of issues raised); and USSG §2B1.1 (Larceny, Embezzlement, and Theft) (2.0% of issues raised). The affirmance rate for the 13,085 discrete sentencing issues in defendant appeals decided in fiscal year 2011 increased 0.1 percentage points from 92.8 percent in fiscal year 2010 to 92.9 percent.

In the 53 sentencing appeals brought by the government that were decided in fiscal year 2011, there were 92 discrete sentencing issues appealed. The issue appealed most frequently by the government related to reasonableness at 16.3 percent of all issues raised (n=15). The government also frequently appealed sentences involving the factors at 18 U.S.C. § 3553(a) (12.0% of issues raised); followed by the Armed Career Criminal Act (USSG §4B1.4) (9.8% of issues raised); Retroactivity of Amended Guideline Ranges (USSG §1B1.10) (7.6% of issues raised); application of the drug trafficking guideline (USSG §2D1.1) (7.6% of issues raised); and restitution (USSG §5E1.1) (7.6% of issues raised). The

affirmance rate for the 92 discrete sentencing issues appealed by the government in fiscal year 2011 decreased 5.9 percentage points from 35.3 percent in 2010 to 29.4 percent.

Reasonableness

Of the 5,875 sentencing appeals analyzed for fiscal year 2011, the appellate courts reviewed the sentences for reasonableness in 2,426 appeals. Of the 2,426 reasonableness appeals, defendants were the appellants in 2,415 cases (99.5%), the government was the appellant in 3 cases (0.1%), and eight cases (0.3%) involved cross appeals. Of the 2,415 reasonableness appeals brought by defendants, the circuit courts determined the sentence to be reasonable in 2,259 cases (93.5%) and unreasonable in 156 cases (6.5%). Of the three reasonableness appeals brought by the government, the circuit courts determined the sentence to be reasonable in one case (33.3%) and unreasonable in two cases (66.7%). Of the eight cross appeals, the circuit courts determined the sentence to be reasonable in four cases (50.0%).

Overall Offense and Offender Characteristics

In the 5,875 sentencing appeals brought by defendants that were decided in fiscal year 2011, the racial/ethnic background of the defendant was Black in 40.8 percent of the cases, Hispanic in 31.1 percent of the cases, White in 25.0 percent of the cases, and Other in 3.0 percent of the cases. Blacks comprise a larger proportion of the appellant population than they do of the federal offender population generally (*e.g.*, of the defendants initially sentenced in 2011, 26.3 percent were White, 19.8 percent were Black, and 50.4 percent were Hispanic). Just under three-quarters (71.5%) of the defendants in the appellate court cases analyzed were United States citizens. United States citizens comprise a larger portion of the appellant population than they do of the federal offender population generally (*e.g.*, 52.0 percent of defendants initially sentenced in 2011 were United States citizens).

Of 5,726 sentencing appeals (for which the Commission received complete information) analyzed for fiscal year 2011, in 1,743 cases (30.4%) the defendant was sentenced pursuant to a mandatory drug sentencing statute, in 428 cases (7.5%) the defendant was sentenced pursuant to a

mandatory firearm sentencing statute, and in 264 cases (4.6%) the defendant was sentenced pursuant to both drug and firearm mandatory sentencing statutes. Mandatory minimum penalties applied in 42.5 percent (n=2,435) of the appellate cases, compared to 20.4 percent (n=17,574) of the cases in which the offender was sentenced in district court cases in 2011.

The sentences imposed in appealed cases decided in 2011 were considerably longer, on average, than the sentences imposed in cases in which the offender was sentenced that year. The average sentence in appealed cases was 143 months (median=108 months) compared to an average sentence of 43 months (median=21 months) for all cases in which the offender was initially sentenced.

Data on Resentencings and Other Modifications of Sentence

In 2008, the Commission implemented a data collection system to track resentencings and other modifications of sentence. The information collected includes judicial district, reason for resentencing, new sentence, and guideline application information if available. Information is collected on eight⁸⁶ types of resentencings and other modifications of sentence: (1) reduction of sentence for substantial assistance (Fed. R. Crim. P. 35(b));⁸⁷ (2) modification of restitution order (18 U.S.C. § 3664); (3) correction of sentence on remand from the circuit court (18 U.S.C. § 3742(f)(1) and (2)); (4) direct motion to the district court (18 U.S.C. § 3559(c)(7));⁸⁸ (5) direct motion to the district court (28 U.S.C. § 2255);⁸⁹ (6) modification

of imposed term of imprisonment for extraordinary and compelling reasons (18 U.S.C. § 3582(c)(1));⁹⁰ (7) modification of imposed term of imprisonment for retroactive amendment to the sentencing guidelines (18 U.S.C. § 3582(c)(2));⁹¹ and (8) unknown type of resentencing.⁹² The following is a summary of resentencings occurring during fiscal year 2011 from the Commission's Resentencing Dataset.⁹³

⁸⁶ There is an additional type of resentencing, Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e)). This type of resentencing is generally not reported to the Commission.

⁸⁷ Commonly referred to as a "Rule 35(b) resentencing." This type of resentencing occurs when the government files a substantial assistance motion after the offender was sentenced.

⁸⁸ This type of resentencing occurs after a prior conviction for a serious violent felony or serious drug offense that triggered any aggravated penalty under 18 U.S.C. § 3559(c)(7) is overturned.

⁸⁹ This type of resentencing occurs after a court determines that (1) the original sentence was imposed in violation of the Constitution or the law; (2) the court lacked jurisdiction

to impose the sentence; (3) the sentence was greater than the maximum sentence allowed by the law; or (4) the sentence is otherwise subject to collateral attack.

⁹⁰ This type of resentencing occurs following a successful motion by the director of the Federal Bureau of Prisons to reduce the sentence for extraordinary and compelling reasons, or the defendant is at least 70, has served at least 30 years for the offense for which the defendant is currently imprisoned, and the Federal Bureau of Prisons has determined that the defendant is not a danger to the safety of any person or the community.

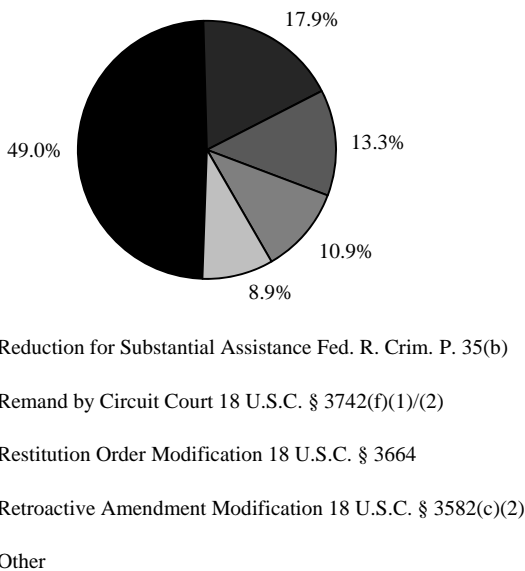
⁹¹ Courts may modify the sentence for a defendant who was sentenced based on a sentencing range that later was lowered by the Commission and where the Commission voted to apply the lowered penalty retroactively. This reduction can occur through a motion from the defendant, the director of the Federal Bureau of Prisons, or on the court's own motion.

⁹² This category includes resentencings in which the documentation received by the Commission was sufficient to determine that a resentencing occurred, but the exact type was not able to be determined.

⁹³ The Commission's Resentencing Dataset may not represent all resentencings decided in the fiscal year. Only those resentencings submitted to the Commission are reported.

Summary of Information Received

In 2011, the Commission received documentation on 3,588 resentencings and other modifications of sentence. The most frequently reported reason was a reduction for substantial assistance to the government after sentencing pursuant to Federal Rule of Criminal Procedure 35(b). Of the 1,757 cases (49.0% of the total) citing this reason, four districts resentenced offenders under the rule in more than 100 cases: Southern Florida (225), Eastern Virginia (195), South Carolina (115), and Wyoming (105).



The second most common type of resentencing is remands from the circuit court, comprising 644 resentencings (17.9%). The districts with the highest number of resentencings after remand are Southern Texas (52), Northern Illinois (35), and Central California (32).⁹⁴

The third most common type of resentencing or modification of sentence was modification of a restitution order (478 or 13.3% of all cases).

Data Analyses for the Courts, Congress, and Others

Each year, the Commission compiles detailed information on sentencing activities for each federal circuit, federal district, and state (by combining data for all districts in that state). The information presented includes the distribution of cases, mode of conviction, type of sentence imposed, incarceration rate, length of imprisonment, and departure rate by primary offense type. The data are by circuit and district and provide comparisons to national figures.

The informational packets are used in guidelines orientation sessions for new chief circuit and district court judges by Commission staff and in other training programs for court personnel. The statistical informational packets are also provided to the members of the Senate and House Committees on the Judiciary. The Commission makes these statistical informational packets available to the general public on the Commission’s website.⁹⁵ The website also includes similar statistical informational packets from 1995 to 2010.

Commission staff also regularly respond to data requests from other government entities, including the courts, individual members of Congress and congressional committees, the Congressional Budget Office, and the Congressional Research Service. Responses to court requests 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 these requests ranges from serving as a consultant about a particular data analysis to performing substantial, sophisticated data analyses. Last year staff responded to 86 such requests.

⁹⁴ See 2011 Sourcebook of Federal Sentencing Statistics, Table 62.

⁹⁵ www.ussc.gov.

The year 2011, as used in this report, refers to the fiscal year 2011 (October 1, 2010, through September 30, 2011).