Departures and Variances
2018 National Seminar

San Antonio

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Presenter

Raquel Wilson

Director

Office of Education & Sentencing Practice

U.S. Sentencing Commission

Commission Resources

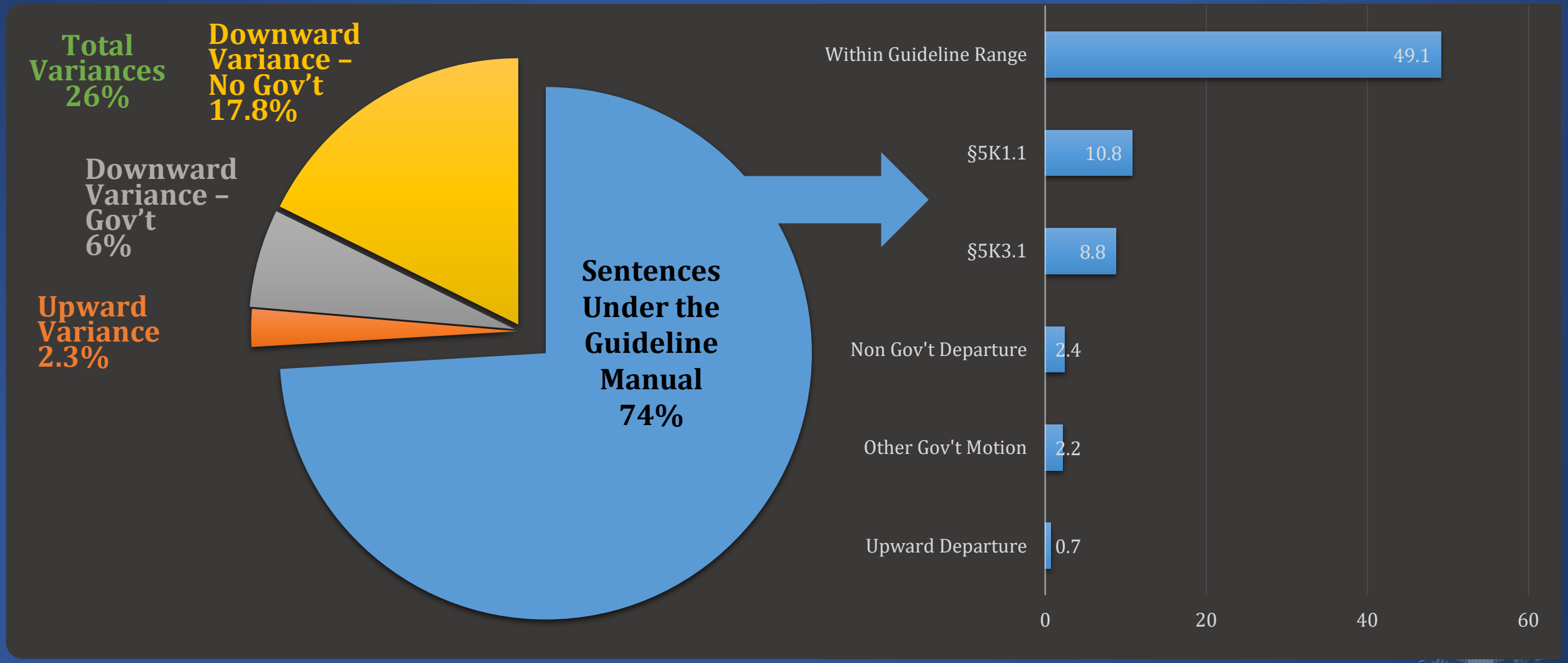
www.ussc.gov

helpline (202) 502-4545

@theusscgov

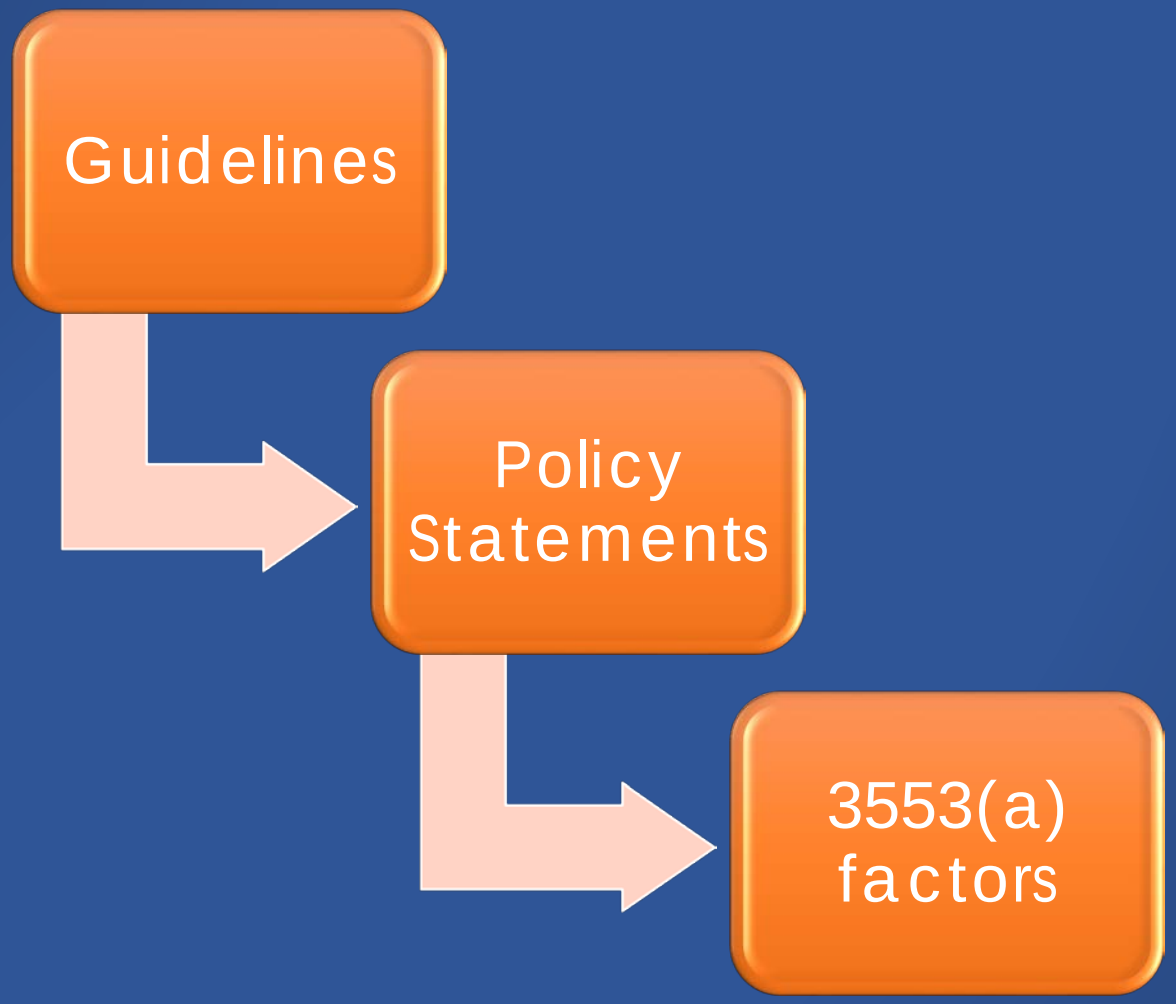
pubaffairs@ussc.gov

Position of Sentences in Relation to Guideline Range National – FY 2017



SOURCE: 2017Monitoring Database

3-Step Approach to Federal Sentencing



Revised Statement of Reasons Form

Statement of Reasons Form (SOR)

Page 2, Section V

C ☐ The court departs from the guideline range for one or more reasons provided in the Guidelines Manual. *(Also complete Section V)*

D ☐ The court imposed a sentence otherwise outside the sentencing guideline system (*i.e.*, a variance). *(Also complete Section VI)*

V DEPARTURES PURSUANT TO THE GUIDELINES MANUAL *(If applicable)*

A **The sentence imposed departs** *(Check only one)*:

☐ above the guideline range

☐ below the guideline range

B **Motion for departure before the court pursuant to** (*Check all that apply and specify reason(s) in sections C and D*):

1 **Plea Agreement**

☐ binding plea agreement for departure accepted by the court

☐ plea agreement for departure, which the court finds to be reasonable

☐ plea agreement that states that the government will not oppose a defense departure motion

2 **Motion Not Addressed in a Plea Agreement**

☐ government motion for departure

☐ defense motion for departure to which the government did not object

☐ defense motion for departure to which the government objected

☐ joint motion by both parties

3 **Other**

☐ Other than a plea agreement or motion by the parties for departure

C **Reasons for departure** (*Check all that apply*):

☐	4A1.3	Criminal History Inadequacy	☐	5K2.1	Death	☐	5K2.12	Coercion and Duress
☐	5H1.1	Age	☐	5K2.2	Physical Injury	☐	5K2.13	Diminished Capacity
☐	5H1.2	Education and Vocational Skills	☐	5K2.3	Extreme Psychological Injury	☐	5K2.14	Public Welfare
☐	5H1.3	Mental and Emotional Condition	☐	5K2.4	Abduction or Unlawful Restraint	☐	5K2.16	Voluntary Disclosure of Offense
☐	5H1.4	Physical Condition	☐	5K2.5	Property Damage or Loss	☐	5K2.17	High-Capacity Semiautomatic Weapon
☐	5H1.5	Employment Record	☐	5K2.6	Weapon	☐	5K2.18	Violent Street Gang
☐	5H1.6	Family Ties and Responsibilities	☐	5K2.7	Disruption of Government Function	☐	5K2.20	Aberrant Behavior
☐	5H1.11	Military Service	☐	5K2.8	Extreme Conduct	☐	5K2.21	Dismissed and Uncharged Conduct
☐	5H1.11	Charitable Service/Good Works	☐	5K2.9	Criminal Purpose	☐	5K2.22	Sex Offender Characteristics
☐	5K1.1	Substantial Assistance	☐	5K2.10	Victim's Conduct	☐	5K2.23	Discharged Terms of Imprisonment
☐	5K2.0	Aggravating/Mitigating Circumstances	☐	5K2.11	Lesser Harm	☐	5K2.24	Unauthorized Insignia
						☐	5K3.1	Early Disposition Program (EDP)

☐ Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual (*see* "List of Departure Provisions" following the Index in the Guidelines Manual). (*Please specify*):

D **State the basis for the departure.** *(Use Section VIII if necessary)*

Revised SOR Form- Departure Reasons

C. Reasons for departure: *(Check all that apply)*

☐	4A1.3	Criminal History Inadequacy	☐	5K2.1	Death	☐	5K2.12	Coercion and Duress
☐	5H1.1	Age	☐	5K2.2	Physical Injury	☐	5K2.13	Diminished Capacity
☐	5H1.2	Education and Vocational Skills	☐	5K2.3	Extreme Psychological Injury	☐	5K2.14	Public Welfare
☐	5H1.3	Mental and Emotional Condition	☐	5K2.4	Abduction or Unlawful Restraint	☐	5K2.16	Voluntary Disclosure of Offense
☐	5H1.4	Physical Condition	☐	5K2.5	Property Damage or Loss	☐	5K2.17	High-Capacity, Semiautomatic Weapon
☐	5H1.5	Employment Record	☐	5K2.6	Weapon	☐	5K2.18	Violent Street Gang
☐	5H1.6	Family Ties and Responsibilities	☐	5K2.7	Disruption of Government Function	☐	5K2.20	Aberrant Behavior
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						☐	5K3.1	Early Disposition Program (EDP)

☐ Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual: *(see "List of Departure Provisions" following the Index in the Guidelines Manual.) (Please specify)*

Old SOR Form- Reasons for Variance

C **Reason(s) for Sentence Outside the Advisory Guideline System** (Check all that apply.)

- ☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
- ☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner
- ☐ (18 U.S.C. § 3553(a)(2)(D))
- ☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))
- ☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

Revised SOR – Reasons for a Variance

C. **18 U.S.C. § 3553(a) and other reason(s) for a variance** *(Check all that apply)*

- ☐ The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Mens Rea
  - ☐ Extreme Conduct
  - ☐ Dismissed/Uncharged Conduct
  - ☐ Role in the Offense
  - ☐ Victim Impact
  - ☐ General Aggravating or Mitigating Factors *(Specify)* _____
- ☐ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Aberrant Behavior
  - ☐ Lack of Youthful Guidance
  - ☐ Age
  - ☐ Mental and Emotional Condition
  - ☐ Charitable Service/Good Works
  - ☐ Military Service
  - ☐ Community Ties
  - ☐ Non-Violent Offender
  - ☐ Diminished Capacity
  - ☐ Physical Condition
  - ☐ Drug or Alcohol Dependence
  - ☐ Pre-sentence Rehabilitation
  - ☐ Employment Record
  - ☐ Remorse/Lack of Remorse
  - ☐ Family Ties and Responsibilities
  - ☐ Other: (Specify)
  - ☐ Issues with Criminal History: *(Specify)* _____
- ☐ To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
- ☐ To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
- ☐ Acceptance of Responsibility
- ☐ Conduct Pre-trial/On Bond
- ☐ Cooperation Without Government Motion for Departure
- ☐ Early Plea Agreement
- ☐ Global Plea Agreement
- ☐ Time Served *(not counted in sentence)*
- ☐ Waiver of Indictment
- ☐ Waiver of Appeal
- ☐ Policy Disagreement with the Guidelines *(Kimbrough v. U.S., 552 U.S. 85 (2007)*: *(Specify)* _____
- ☐ Other: *(Specify)* _____

Use of Revised Form

- 93.6% of FY17 cases use the revised form.
- Using the revised form, there is an average of five reasons cited in cases where the sentence is a non-government sponsored below range sentence.

Non-government sponsored below range cases include cases sentenced with a departure below the guideline range and cases otherwise below the guideline range. See Table N in the *2017 Sourcebook* for more information. The average number of reasons analysis is limited to cases in which the revised SOR form was used by the court.
SOURCE: U.S. Sentencing Commission, FY17 Datafiles, USSCFY17.

Reasons Given for Variances

- In FY17, in 76.2% of all 11,138 variance cases the court cited "history and characteristics of the defendant" or one of its subordinate checkboxes as a reason.

- In FY17, in 43.0% of all 11,138 variance cases the court cited "nature and circumstances of the offense" or one of its subordinate checkboxes as a reason for the sentence.

Variances include below guideline range with *Booker*/18 U.S.C. § 3553 and all remaining below guideline range cases. See Table N in the *2017 Sourcebook* for more information. The analysis is limited to cases in which the revised SOR form was used by the court.
SOURCE: U.S. Sentencing Commission, FY17 Datafiles, USSCFY17.

Reasons Given for Variances

- On the previous SOR courts had the option to cite the combined reason "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D)

- On the revised SOR this reason is divided among three separate boxes. For FY17, the courts checked one or more of these boxes 1,860 times:
  - 802 cases cited as a reason to provide "other" correctional treatment
  - 661 cited as a reason to provide needed educational or vocational training
  - 397 cited as a reason to provide medical care

Variances include below guideline range with *Booker*/18 U.S.C. § 3553 and all remaining below guideline range cases. See Table N in the *2017 Sourcebook* for more information. The analysis is limited to cases in which the revised SOR form was used by the court.
SOURCE: U.S. Sentencing Commission, FY17 Datafiles, USSCFY17.

Reasons Given for Variances

FY17: Top 20 Variance Reasons

1. History & Character of Defendant
2. Nature & Circumstances of Offense
3. Family Ties
4. Age
5. Previous Employment Record
6. Mule/Role in the Offense
7. Drug Dependence/Alcohol Abuse
8. Remorse
9. Mental/Emotional Conditions
10. Acceptance of Responsibility
11. Issues with Criminal History
12. General Agg./Mit. Circumstance
13. Nonviolent Offense/Offender
14. Lack of Youthful Guidance/Troubled Childhood
15. Pre-Sentence Rehabilitation
16. To Provide Other Correctional Treatment
17. Physical Condition
18. To Provide Educational/Vocational Training
19. Conduct Pre-Trial/On Bond
20. Aberrant Behavior

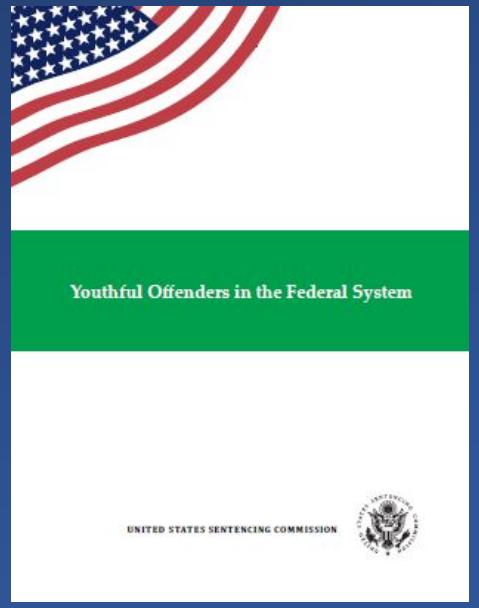
Variances include below guideline range with *Booker*/18 U.S.C. § 3553 and all remaining below guideline range cases. See Table N in the *2017 Sourcebook* for more information. The analysis is limited to cases in which the revised SOR form was used by the court.
SOURCE: U.S. Sentencing Commission, FY17 Datafiles, USSCFY17.

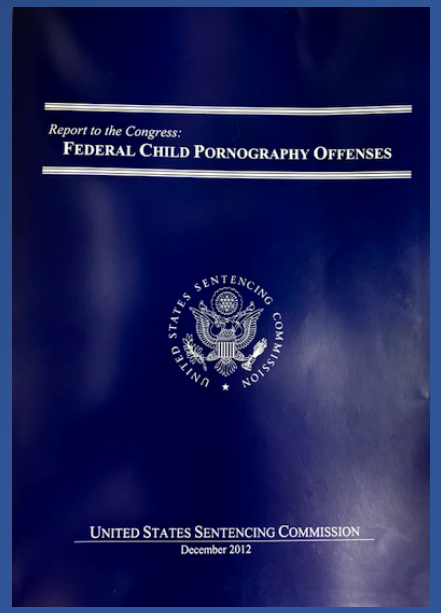
Reasons Given for Variances

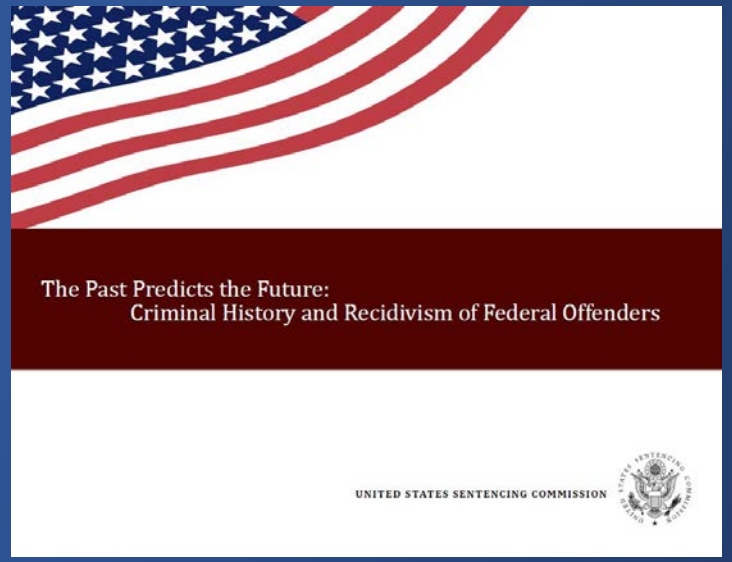
- Other variance reasons cited less often include:
  - Community Ties – 598 cases (5.4% of all variance cases)
  - Time Served – 403 cases
  - Provide Defendant With Medical Care – 397 cases
  - Charitable Service/Good Works – 388 cases
  - Cooperation Without Government Motion – 368 cases
  - Military Service – 227 cases (2.0% of all variance cases)

Variances include below guideline range with *Booker*/18 U.S.C. § 3553 and all remaining below guideline range cases. See Table N in the *2017 Sourcebook* for more information. The analysis is limited to cases in which the revised SOR form was used by the court.
SOURCE: U.S. Sentencing Commission, FY17 Datafiles, USSCFY17.

Commission Reports







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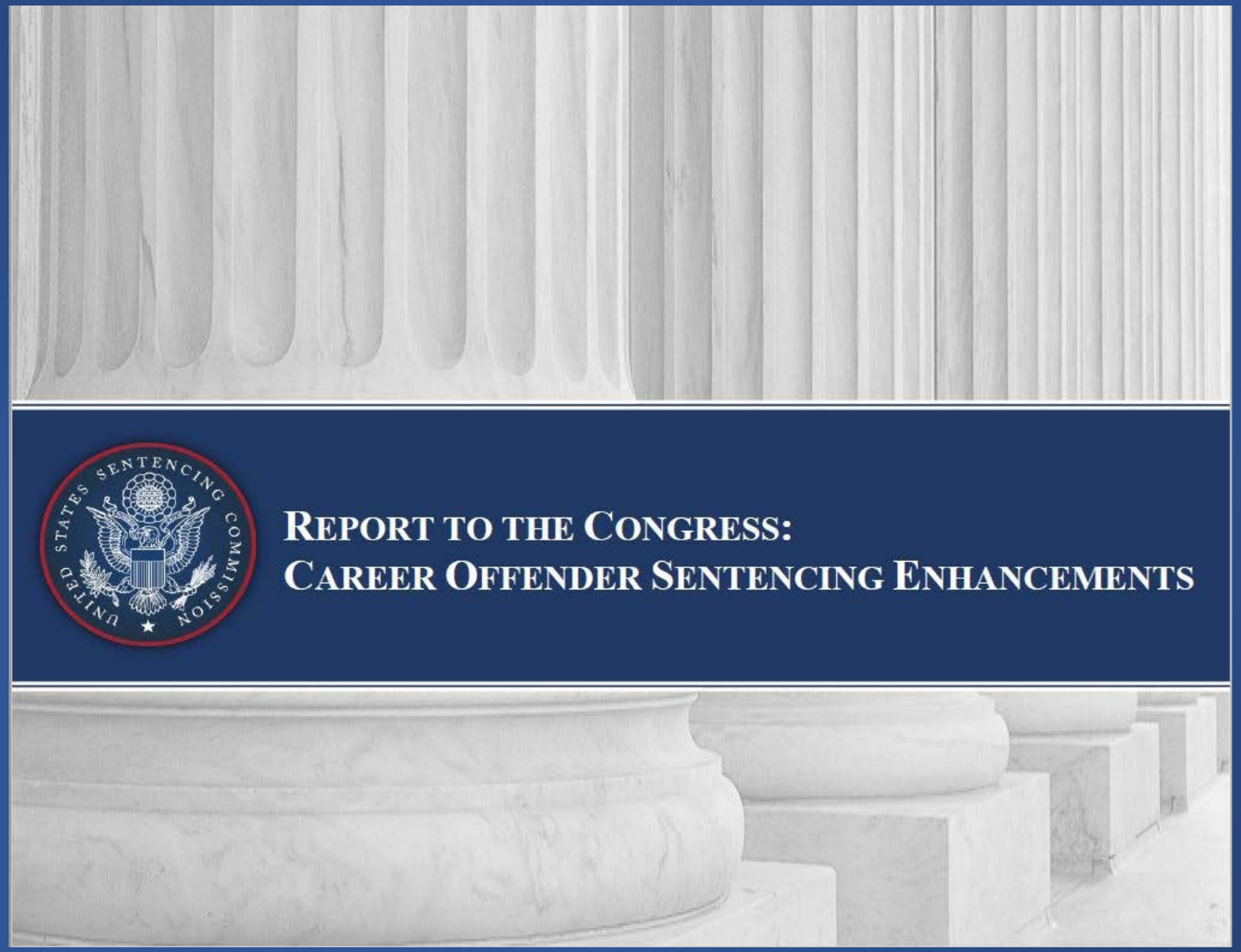
Career Offender Report – August 2016



Career Offender Report

- Career offenders are primarily convicted of drug trafficking offenses – nearly three-quarters (74.1%) of career offenders in FY 2014 were convicted of a drug trafficking offense and would have been sentenced pursuant to §2D1.1 (Drugs)

- Career offenders are sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months).

- Career offenders now account for more than 11 percent of the total BOP population.

Career Offender Report

- During the past ten years, the proportion of career offenders sentenced within the applicable guideline range has decreased from 43.3 percent in fiscal year 2005 to 27.5 percent in fiscal year 2014

- Government sponsored departures have steadily increased from 33.9 percent to 45.6 percent.

Career Offender Report – Recidivism

Career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future.

	Drug Trafficking Only Career Offenders	Mixed Career Offenders	Violent Only Career Offenders
Any Recidivism	54.4%	69.4%	69.0%
Median Time to Recidivism	26 Months	20 Months	14 Months
Median Number of Recidivism Events	2	3	3
Most Serious Post-Release Event (%)	Drug Trafficking (26.5%)	Assault (28.6%)	Robbery (35.3%)

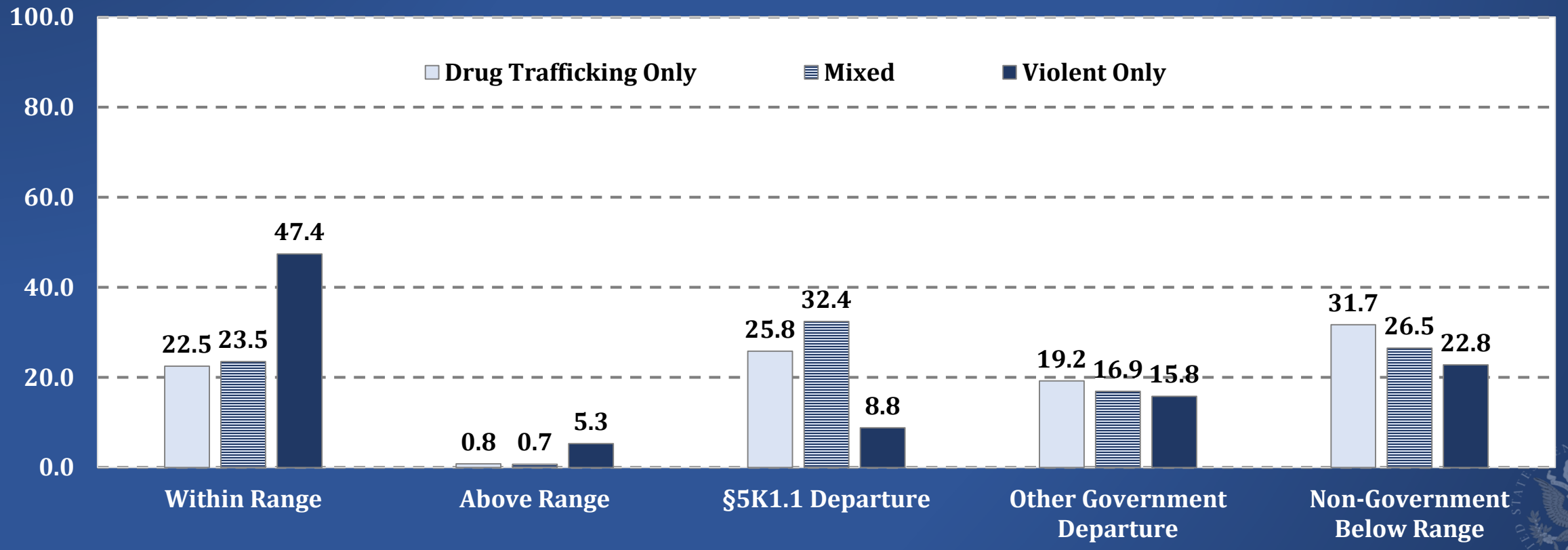
SOURCE: U.S. Sentencing Commission's 2005 Recidivism Release Cohort Datafile, SUMMARY_UPDT. Of the 1,988 cases within the Career Offender analysis, the Commission excluded cases from this analysis that were missing information necessary to perform analysis.

Career Offender Report

- The career offender directive has the greatest impact on federal drug trafficking offenders because of the higher statutory maximum penalties for those offenders.

Career Offender Report

Drug trafficking only career offenders were most likely to receive a sentence below the guideline range (often at the request of the government).



Career Offender Report

- Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive.

- A single definition of the term "crime of violence" in the guidelines and other federal recidivist provisions is necessary to address increasing complexity and to avoid unnecessary confusion and inefficient use of court resources.

Recommended Change to § 994(h)

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—		
(1)has been convicted of a felony that is a crime of violence, and has previously been convicted of two or more prior felonies, each of which is— (A) a crime of violence; or (B) a controlled substance offense	OR	(2) has been convicted of a felony that is a controlled substance offense, and has previously been convicted of— (A) a felony that is a crime of violence; and (B) a second felony offense that is— (i) a crime of violence; or (ii) a controlled substance offense.

Career Offender Report

- The career offender directive should be amended to differentiate between career offenders with different types of criminal records, and is best focused on those offenders who have committed at least one "crime of violence."

Recidivism Among Federal Offenders: A Comprehensive Overview

UNITED STATES SENTENCING COMMISSION

Recidivism Report

- Over an eight year follow-up period, almost one-half of federal offenders released in 2005 (49.3%) were rearrested for a new crime or rearrested for a violation of supervision conditions.

- Of those offenders who recidivated, most did so within the **first two years** of the eight year follow-up period. The median time to rearrest was 21 months.

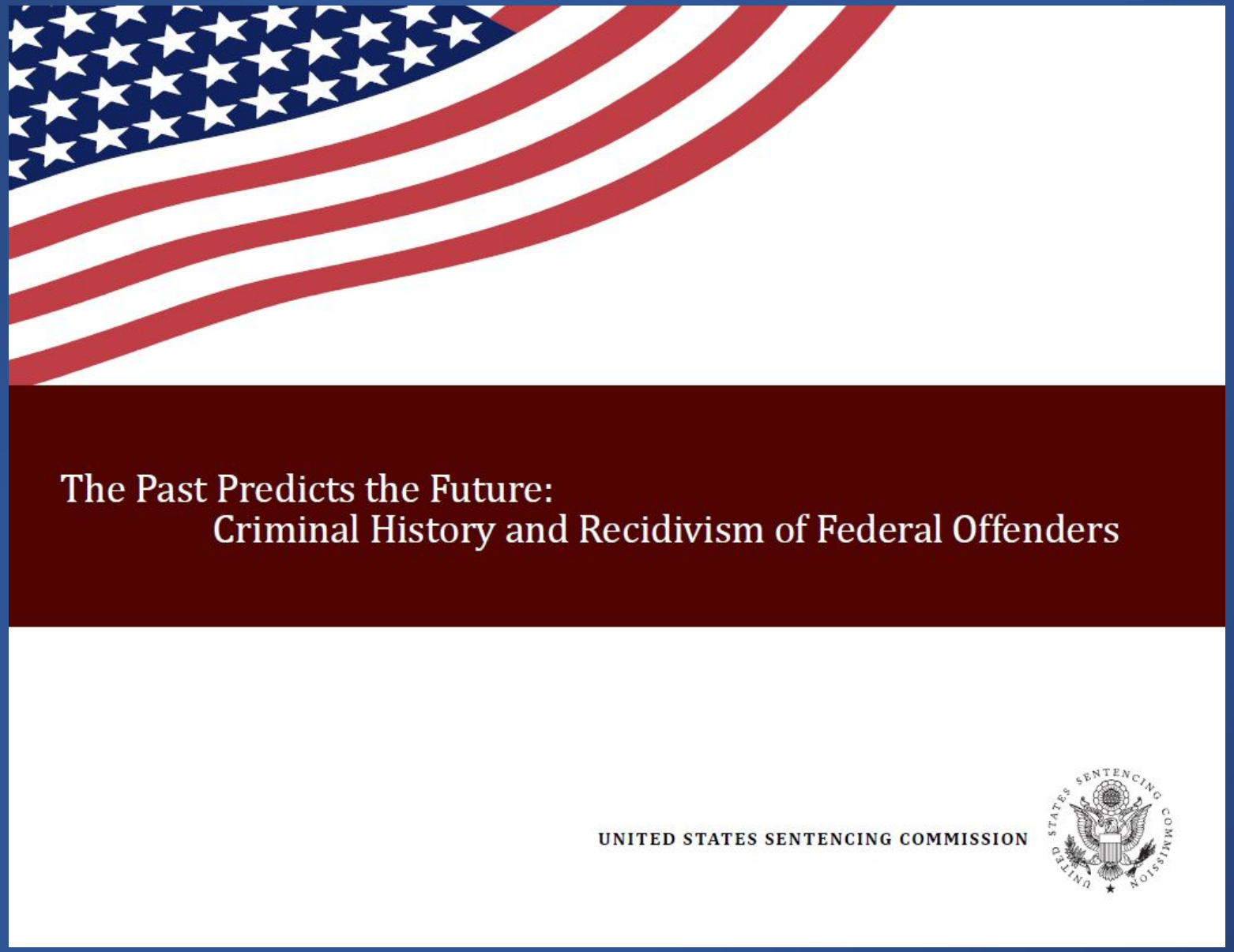
Recidivism Report

- With the exception of very short sentences (less than 6 months), the rate of recidivism varies very little by length of prison sentence imposed (fluctuating between 50.8% for sentences between 6 months to 2 years, to a high of 55.5% for sentences between 5 to 9 years).

Recidivism Report

- A federal offender's age at time of release was also closely associated with differences in recidivism rates. Offenders released prior to age 21 had the highest rearrest rate, 67.6 percent, while offenders over sixty years old at the time of release had a recidivism rate of 16.0 percent.

Recidivism Report – March 2017



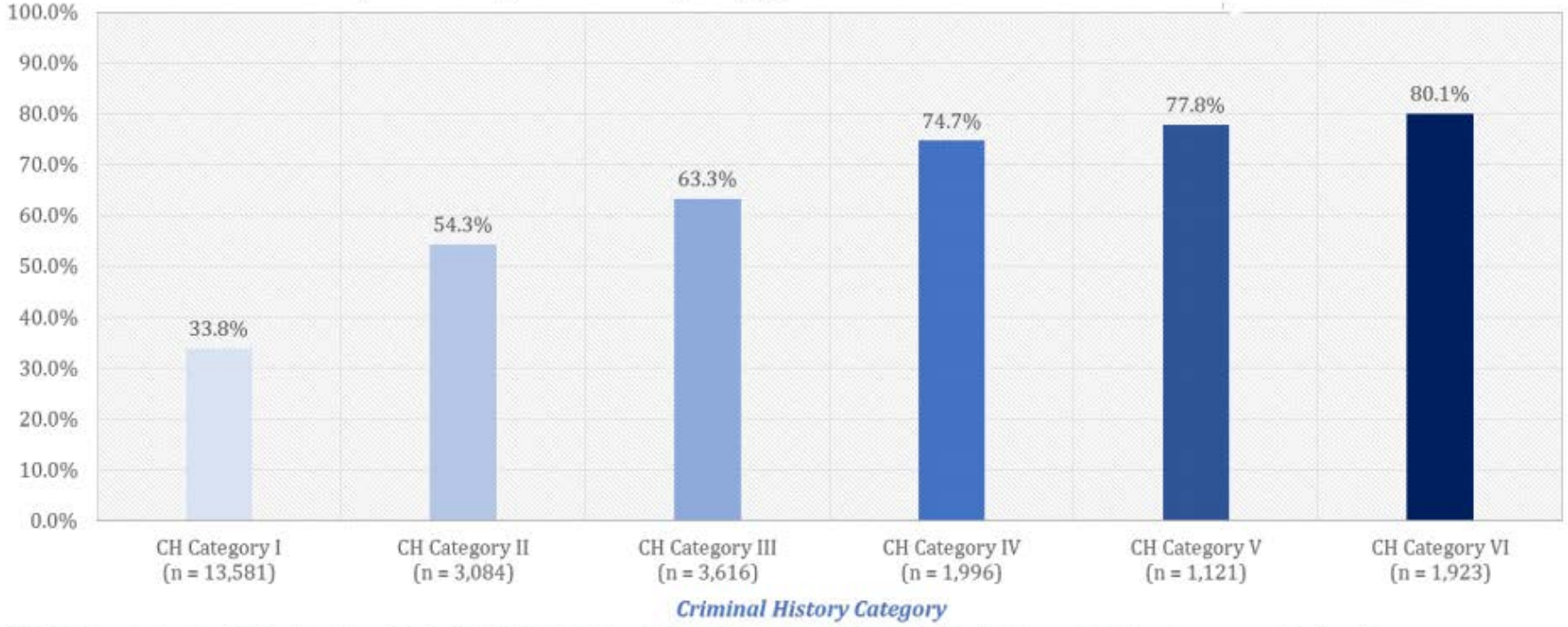
Recidivism Report

- A federal offender's criminal history was closely correlated with recidivism rates. Rearrest rates range from **30.2** percent for offenders with zero total criminal history points to **80.1** percent of offenders in the highest Criminal History Category, VI.

Recidivism and Criminal History

Figure 7A.

Rearrest Rates for Recidivism Study Offenders by Criminal History Category



SOURCE: U.S. Sentencing Commission's 2005 Recidivism Release Cohort Datafile, RECID05. Of the 25,431 cases in this study, the Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

Criminal History and Recidivism Report

- The Commission also found differences in recidivism rates among offenders with zero criminal history points. Offenders with zero points and no prior contact with the criminal justice system have a lower recidivism rate (25.7%) than offenders with zero points but some prior contact with the criminal justice system (37.4%).

Rearrest Rates for Recidivism Study Offenders in Criminal History Category I

	No Criminal History	Convictions/Prior Contact	One Point
Rearrest Rate	25.7%	37.4%	46.9%
Time to Rearrest	27 months	27 months	25 months
Most Serious Rearrest Event	Public order (21.9%)	Public order (21.4%)	Assault (23.0%)
TOTAL	**6,543**	**4,053**	**2,972**

SOURCE: U.S. Sentencing Commission's 2005 Recidivism Release Cohort Datafile, RECID05. Of the 25,431 cases in this study, the Commission excluded cases from this analysis that were missing information necessary to perform the analysis. – indicates insufficient number of cases.

Criminal History and Recidivism Report

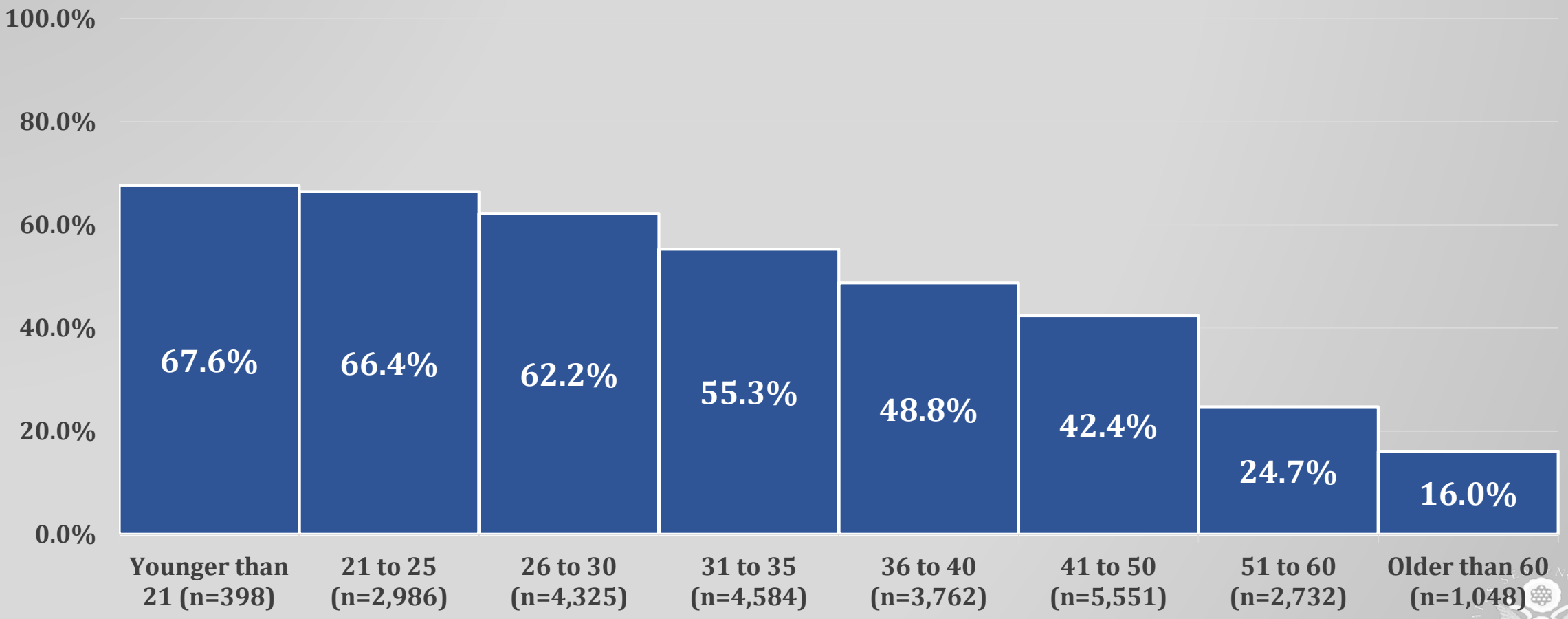
- Offenders who have less serious prior convictions (assigned one point) have a lower recidivism rate (53.4%) than offenders who have prior convictions assigned two or three points (71.3% for offenders with at least one two-point offense and 70.5% for offenders with at least one three-point offense).

Rearrest Rates for Recidivism Study Offenders by Point Types of Past Convictions

	Offenders with Only 1-Point Sentences	Offenders with 2-Point Sentences, No 3-Sentences	Offenders with 3-Point Sentences
Rearrest Rate	53.4%	71.3%	70.5%
Time to Rearrest	24 months	17 months	17 months
Most Serious Rearrest Event	Assault (24.9%)	Assault (26.8%)	Assault (24.6 %)
TOTAL	6,574	2,793	5,386

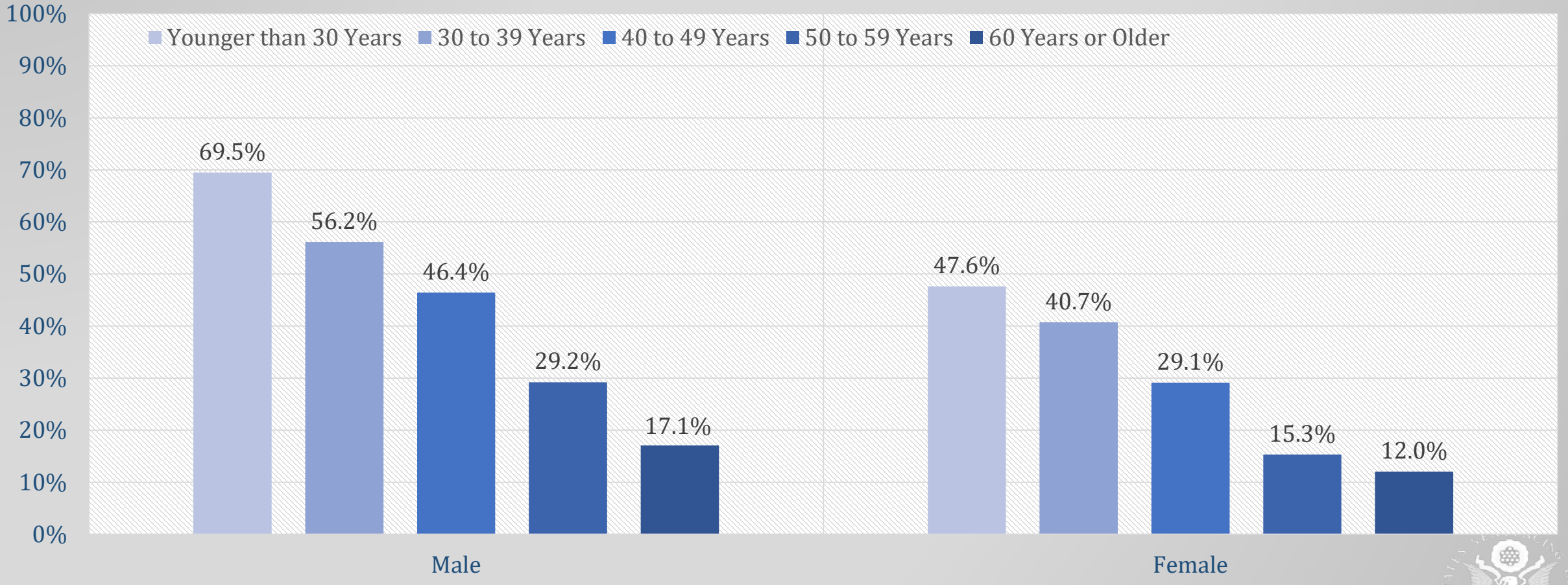
SOURCE: U.S. Sentencing Commission's 2005 Recidivism Release Cohort Datafile, RECID05. Of the 25,431 cases in this study, the Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

Re-Arrest by Age for Calendar Year 2005 Released Offenders

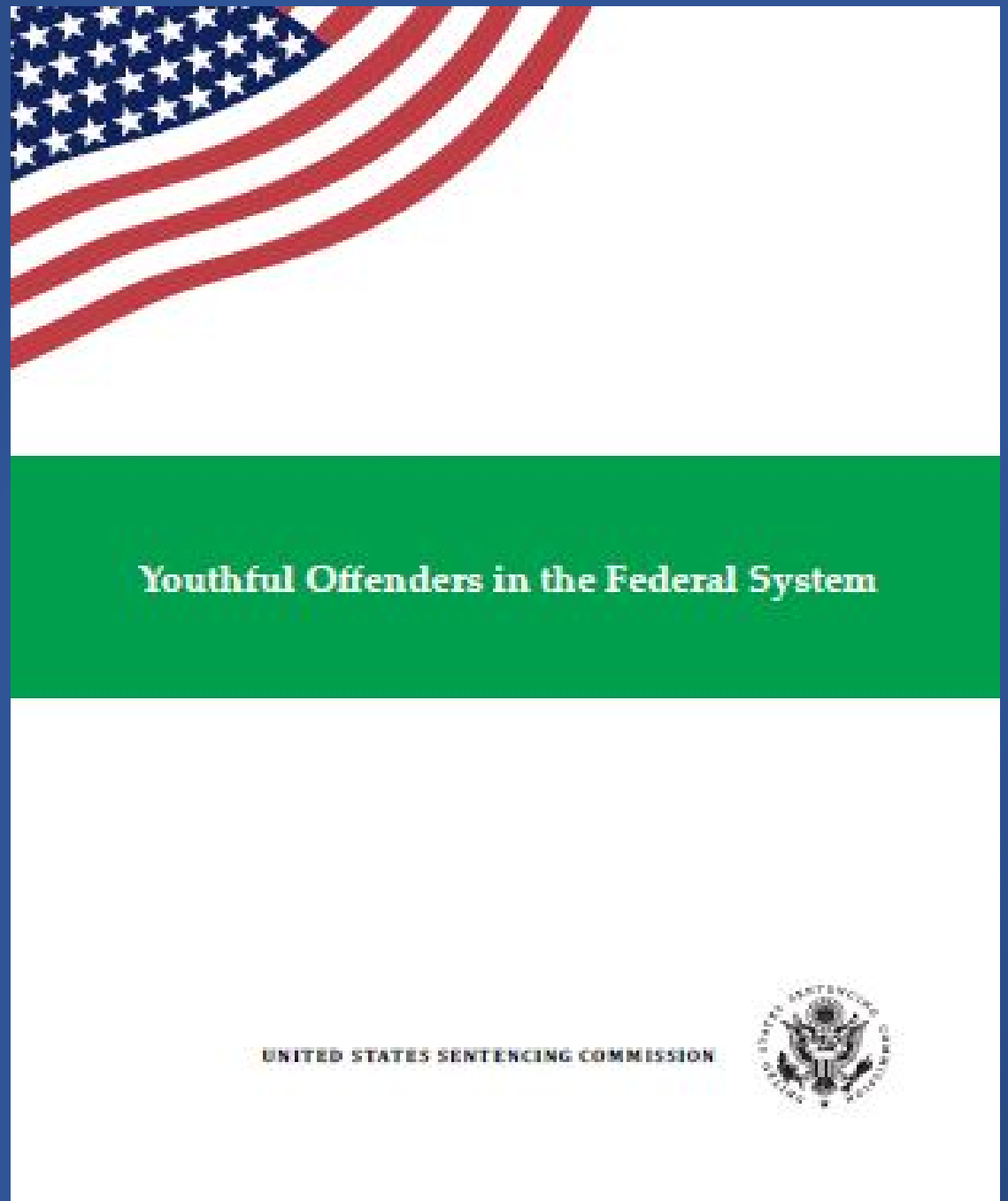


SOURCE: U.S. Sentencing Commission 2005 Recidivism Datafile, RECID05_UPDT. Cases missing information were excluded.

Rearrest Rates by Gender and Age at Release



SOURCE: U.S. Sentencing Commission's 2005 Recidivism Release Cohort Datafile, RECID05_OFFUPDT. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.


Youthful Offenders in the Federal System
UNITED STATES SENTENCING COMMISSION

Youthful Offenders Report Takeaways

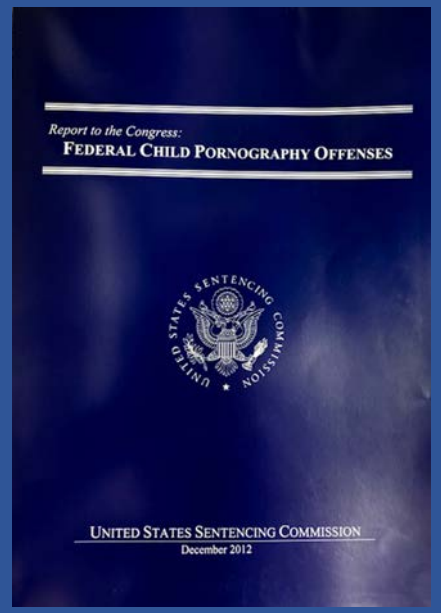
"However, there are a number of points on which researchers in this area generally agree.

First, researchers agree that the prefrontal cortex is not complete by the age of 18, which is the legal age of majority in most state jurisdictions and in the federal system.

Second, researchers agree that development continues into the 20s.

Third, most researchers reference 25 as the average age at which full development has taken place, but note there will be significant variation from person to person. ***Finally***, researchers caution against the over-generalization of brain science."

Report to the Congress: Federal Child Pornography Offenses



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Child Pornography Report Highlights

- A significant percentage of non-production child pornography offenders (31.4%) have known histories of sexually dangerous behavior
- Known sexual recidivism was 7.4%
- §2G2.2 is outdated and the guideline does not reflect the variations in offenders' culpability and sexual dangerous

Report Takeaways

- Three broad factors should be primary considerations in sentencing child pornography offenders:
  - 1) content of collection
  - 2) involvement in offender communities,
  - 3) contact
- The guidelines should be amended to address these factors, and Congress should authorize the Commission to amend guideline provisions that were promulgated pursuant to specific congressional directives or legislation

Sentencing Scenarios