

An Overview of
**MANDATORY MINIMUM
PENALTIES**
in the
**FEDERAL CRIMINAL
JUSTICE SYSTEM**

UNITED STATES SENTENCING COMMISSION
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OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM



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United States Sentencing Commission

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1 Introduction



Introduction

This publication assesses the impact of mandatory minimum penalties on federal sentencing. It continues the United States Sentencing Commission's work in this area by highlighting recent developments regarding the charging of offenses carrying a mandatory minimum penalty, and providing updated sentencing data regarding the use and impact of mandatory minimum penalties. This publication builds on the Commission's previous reports and publications—particularly, its 2011 *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*—and is intended to contribute to the continued examination of federal mandatory minimum penalties. It is the first in a series, with future publications focusing on mandatory minimum penalties for specific offense types.

Federal statutory mandatory minimum penalties have existed since the early days of the nation,¹ and they have continually evolved in the centuries since. As policy views have shifted over time, Congress² and many others³ have continued to examine the role and scope of these mandatory minimum penalties in the federal criminal system.⁴ For more than thirty years, the United States Sentencing Commission (“the Commission”)⁵ has played a central role in this process, working with the legislative, executive, and judicial branches of government and other interested parties to ensure that sentencing policy promotes the goals of the Sentencing Reform Act of 1984 (“SRA”).⁶

Consistent with its statutory role,⁷ the Commission has continued to inform the ongoing discussion regarding sentencing policy by gathering, analyzing, and disseminating sentencing data, including analyses regarding the use, scope and impact that mandatory minimum penalties have on sentencing in the federal system. The Commission has submitted numerous reports to

Congress, released varying data publications, responded to Congressional data requests, and provided Congressional testimony regarding mandatory minimum penalties over the past 30 years.⁸ The Commission submitted its first report to Congress about mandatory minimum penalties only a few years after the initial guidelines went into effect.⁹ At that time, the Commission concluded that “the most efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of the sentencing guidelines, permitting the sophistication of the guidelines structure to work, rather than through mandatory minimums.”¹⁰

Most recently, the Commission issued its comprehensive 2011 *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011 *Mandatory Minimum Report*). That report, which was submitted pursuant to the statutory directive contained in section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009,¹¹ provided detailed historical analyses of the evolution of federal mandatory minimums,¹² scientific and medical literature on the topic, and extensive analysis of the Commission's own data, public comment, and expert testimony.¹³

While expressing a “spectrum of views” regarding mandatory minimum penalties in its 2011 *Mandatory Minimum Report*, the Commission uniformly concluded that “a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act.”¹⁴ The Commission further concluded that where “Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties, . . . such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently.”¹⁵



Lastly, the Commission encouraged Congress to request prison impact analyses as early as possible in its legislative process whenever it considers enacting or amending criminal penalties to ensure that increasingly strained federal prison resources are focused on offenders who commit the most serious offenses.¹⁶ Guided by these general principles, the Commission expressed its belief that the current system of mandatory minimum penalties could be improved, and made several specific recommendations regarding the four major offense types studied in the report.¹⁷

In conjunction with its concluding recommendations in the 2011 *Mandatory Minimum Report*, the Commission explained that it “stands ready to work with Congress on measures that can be taken to enhance the strength and effectiveness of the current guidelines system and address the problems with certain mandatory minimum penalties identified in this report.”¹⁸ To that end, the Commission has continued to provide timely and objective sentencing data, information, and analysis to assist the efficient and effective exercise of congressional power to direct sentencing policy.

This publication continues the Commission’s work in the area of federal mandatory minimums by highlighting recent developments, as well as providing updated sentencing data regarding the use and impact of mandatory minimum penalties. It analyzes the most recently available sentencing data to supplement the data presented in the 2011 *Mandatory Minimum Report*, providing a detailed empirical research study of the effect of mandatory minimum penalties under federal law, including an updated assessment of the impact of mandatory minimum sentencing provisions on the federal prison population.

Like the Commission’s recent publications on recidivism of federal offenders,¹⁹ this publication is designed to be the first in a series, with future publications focusing on mandatory minimum penalties for specific offense types.

Key 2011 Recommendations

Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011)

- A strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act.
- If Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties, such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently.
- Congress should request prison impact analyses from the Commission as early as possible in its legislative process whenever it considers enacting or amending criminal penalties.



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2 Key Findings



Key Findings

Building directly on its previous reports and analyses, this publication continues the Commission's examination of mandatory minimum penalties in the federal system.

As part of this overview analysis the Commission makes the following key findings.

Key 2017 Findings

1. Mandatory minimum penalties continue to result in long sentences in the federal system.

- In fiscal year 2016, the average sentence length for offenders who were convicted of an offense carrying a mandatory minimum penalty was 110 months of imprisonment, nearly four times the average sentence (28 months) for offenders not convicted of an offense carrying a mandatory minimum penalty.
- Even when such offenders receive relief from a mandatory minimum penalty, the average sentence (67 months) is still over two times greater than the average sentence for those not convicted of a mandatory minimum.

2. Mandatory minimum penalties continue to have a significant impact on the size and composition of the federal prison population.

- While the percentage decreased slightly between 2010 and 2016, more than half (55.7%) of federal inmates in custody as of September 30, 2016 were convicted of an offense carrying a mandatory minimum penalty.
- Among offenders in federal prison as of September 30, 2016, 42.7 percent were convicted of an offense carrying a mandatory minimum penalty and remained subject to that penalty at sentencing, which compared to 40.4 percent as of September 30, 2010.

3. Offenses carrying a mandatory minimum penalty were used less often, as the number and percentage of offenders convicted of an offense carrying a mandatory minimum penalty has decreased since fiscal year 2010.

- Just over one-fifth of all offenders sentenced in fiscal year 2016 (21.9%) were convicted of an offense carrying a mandatory minimum penalty, a difference of 5.3 percentage points from fiscal year 2010 (27.2%).

Key 2017 Findings

4. While fewer offenders were convicted of an offense carrying a mandatory minimum penalty in recent years, those who were tended to be more serious offenders.

- Offenders convicted of an offense carrying a mandatory minimum penalty were less likely to receive relief from such penalty at sentencing—38.7 percent of such offenders received relief in fiscal year 2016 compared to 46.7 percent in fiscal year 2010.
- Additionally, convictions for drug trafficking offenses carrying a mandatory minimum penalty were more likely to involve the use of a weapon, violence or credible threats of violence, or death or serious bodily injury (28.7% of such offenders had a conviction or guideline finding suggesting the existence of these factors compared to 20.7% in fiscal year 2010).
- Offenders convicted of such offenses were also more likely to have played a leadership role, as evidenced by application of a guideline adjustment for aggravating role (11.7% in fiscal year 2016 compared to 7.7% in fiscal year 2010), and were more likely to have three criminal history points or more (50.9% in fiscal year 2016 compared to 45.8% in fiscal year 2010).

5. There were significant demographic shifts in the data relating to mandatory minimum penalties.

- As they did in fiscal year 2010 (38.3%), Hispanic offenders continued to represent the largest group of offenders (40.4%) convicted of an offense carrying a mandatory minimum penalty in fiscal year 2016. However, other demographic data has shifted.
- Unlike in fiscal year 2010, White offenders, as opposed to Black offenders, had the highest average sentence among offenders convicted of an offense carrying a mandatory minimum penalty (127 months), offenders relieved of the application of a mandatory minimum penalty at sentencing (73 months), and offenders subject to a mandatory minimum penalty at sentencing (150 months).
- While Black offenders convicted of an offense carrying a mandatory minimum penalty continued to receive relief from the mandatory minimum penalty least often, the gap between Black offenders and White offenders has narrowed. In fiscal year 2016, 73.2 percent of Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to that penalty, compared to 70.0 percent of White offenders convicted of such an offense. This difference of 3.2 percent in fiscal year 2016, compares to a difference of 11.6 percent in fiscal year 2010 (65.1% of Black offenders convicted of an offense carrying a mandatory minimum penalty compared to 53.5% of White offenders).



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3 Mandatory Minimums



What are Mandatory Minimum Penalties?

The term “mandatory minimum penalty” refers to a federal criminal statute requiring, upon conviction of a federal criminal offense and the satisfaction of criteria set forth in that statute, the imposition of a specified minimum term of imprisonment.²⁰ Mandatory minimum penalties vary in length depending on the offense type and specified criteria, from two years for aggravated identity theft, to life in prison for certain drug trafficking offenses.

Statutory Criteria Triggering Mandatory Minimum Penalties

The statutory criteria that trigger mandatory minimum penalties can be classified into at least one of three categories:

- penalties triggered by offense characteristics or elements of the offense of conviction;
- penalties triggered by reference to another underlying offense; or
- penalties triggered by the offender’s criminal history.

The first category is best exemplified by the federal mandatory minimum penalties for drug trafficking offenses. As discussed in more detail below, the mandatory minimum penalty applies if the instant offense of conviction involves a specified element of which the offender is found guilty. In the case of drug offenses, these triggering characteristics include manufacturing, trafficking, importing or distributing a particular type of drug at quantities above a specified threshold. For example, under 21 U.S.C. § 841(a) and (b)(1), an offender convicted of trafficking 28 grams or more of a mixture or substance containing cocaine base (crack cocaine) is subject to a mandatory minimum penalty of not less than five years, whereas an

offender convicted of an offense involving 280 grams is subject to a mandatory minimum penalty of ten years. While drug quantity is the most common triggering factor in these offenses, other triggering characteristics include selling to a person under 21 years of age, selling within 1,000 feet of a school, and employing a person under 18 years of age.²¹

Under the second category, the mandatory minimum penalty generally does not apply to the underlying offense, but an additional consecutive mandatory minimum penalty applies if criteria specified in a separate statute are met. The most commonly applied mandatory minimum penalty of this type is 18 U.S.C. § 924(c), which requires a mandatory consecutive term of imprisonment for the possession or use of a firearm in connection with certain underlying offenses. Another example is 18 U.S.C. § 1028A, which requires a mandatory consecutive term of imprisonment for identity theft committed in connection with certain underlying offenses. These mandatory minimum penalties are often applied in addition to any sentence imposed for the other underlying offense, although they also can be charged as a sole count in an indictment.

The third category involves mandatory minimum penalties that are triggered when the offender’s criminal history includes a conviction for one or more of a specified category of prior offenses. An example of this type of mandatory minimum penalty is found in 18 U.S.C. § 924(e), commonly known as the Armed Career Criminal Act. Section 924(e) provides a mandatory minimum penalty of 15 years of imprisonment if a person commits a firearms offense and has previously been convicted of three or more “violent felonies” or “serious drug offenses.” Another example is found in the context of drug trafficking offenses, in which the mandatory minimum penalty increases if the offender has a prior conviction for a felony drug offense.

Common Offenses Involving Mandatory Minimum Penalties

To combat what it perceived as widespread problems resulting from drug trafficking and related crime, Congress made significant changes to mandatory minimum penalties beginning in 1951.²² Reversing its prior policy of disfavoring mandatory minimum penalties, Congress lengthened existing mandatory minimum penalties,²³ enacted new ones, and expanded its use of them to offenses not previously covered by such penalties.²⁴

The policy shift was short-lived: mandatory minimum penalties—particularly those for drug offenses—became increasingly unpopular by the late 1960s and Congress repealed nearly all of them.²⁵ The pendulum swung back again, however, in the 1980s. Prevailing attitudes toward sentencing shifted away from a rehabilitative model toward controlling crime using “more certain, less disparate, and more appropriately punitive” sentences.²⁶ On the heels of this shift, Congress again enacted many mandatory minimum penalties related to controlled substances and firearms, and significantly increased the length of several existing penalties.²⁷ Today, most convictions under statutes requiring mandatory minimum penalties relate to controlled substances, firearms, identity theft, and child sex offenses.

Mandatory Minimum Penalties for Drug Offenses

Mandatory minimum penalties in the federal system are most commonly associated with controlled substance offenses.²⁸ In recent years, drug trafficking offenses have accounted for approximately two-thirds of the offenses carrying a mandatory minimum penalty, significantly higher than the next largest class of offenses.²⁹

This trend is not surprising given the increase in the number and severity of mandatory minimum penalties for drug trafficking offenses just before the initial guidelines were promulgated. The Anti-Drug Abuse Act of 1986³⁰ created mandatory minimum penalties for many drug trafficking offenses committed on or after October 27, 1986. Congress further extended the reach of these mandatory minimum penalties in 1988 to drug trafficking conspiracies, thereby broadening the scope of mandatory minimum penalties to include virtually all offenders in drug trafficking organizations.³¹

The Anti-Drug Abuse Act also established the tiered penalty structure currently applicable to many federal drug trafficking offenses.³² This tiered structure can be found at 21 U.S.C. §§ 841³³ and 960³⁴—the most commonly prosecuted drug offenses carrying mandatory minimum penalties.

Under both provisions, mandatory minimum penalties are first tied to the quantity and type of controlled substances in the offense. The first tier establishes a five-year mandatory minimum penalty and a maximum term of 40 years, while higher thresholds increase the mandatory minimum to ten years with a maximum term of life imprisonment.³⁵

Triggering Thresholds for Common Controlled Substances		
21 U.S.C. § 841	5-year Mandatory Minimum	10-year Mandatory Minimum
Heroin	100 G	1 KG
Powder Cocaine	500 G	5 KG
Cocaine Base (crack)	28 G	280 G
Marijuana	100 KG	1,000 KG
Methamphetamine (pure)	5 G	50 G
Methamphetamine (mixture)	50 G	500 G



The drug trafficking offense mandatory minimum penalties—including those in sections 841(b) and 960(b)—may also include enhanced penalties based on the defendant’s prior record.³⁶ For example, offenders who otherwise qualify for the five-year mandatory minimum penalty would face an increased statutory range of ten years to life if they had a prior conviction for a felony drug offense.³⁷ Similarly, a qualifying prior conviction increases a ten-year mandatory minimum to a 20-year mandatory minimum (the maximum remains life), while offenders previously convicted of two or more prior drug felonies are subject to a mandatory minimum term of life.³⁸

The penalties for committing other drug offenses criminalized under title 21, United States Code, are also tied to the above-referenced penalty structure. For example, attempts or conspiracies to commit any drug offense are subject to the same penalty structure as the substantive offense.³⁹ Congress also criminalized distributing drugs to persons who are under the age of 21 or who are pregnant, using persons under the age of 18 in drug operations, and distributing drugs in or near schools and colleges.⁴⁰ Higher penalty ranges apply if death or serious bodily injury results from use of the controlled substance.⁴¹

2011 RECOMMENDATIONS

In its 2011 *Mandatory Minimum Report*, the Commission recommended that Congress marginally expand the safety valve at 18 U.S.C. § 3553(f), and reassess the severity and scope of the recidivist enhancements for drug offenses.

Mandatory Minimum Penalties for Firearms

Congress also expanded the scope and severity of mandatory minimum penalties for firearms offenses in the later part of the 20th Century.⁴² These firearms mandatory minimum penalties are currently set forth in two subsections of 18 U.S.C. § 924.

*18 U.S.C. § 924(c)*⁴³

Section 924(c) of title 18, United States Code, prohibits using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or a drug trafficking crime.⁴⁴ The statute prescribes a mandatory minimum penalty of at least five years of imprisonment for committing the offense, with increasingly longer mandatory minimum penalties based on how the firearm was used (seven years if the firearm was brandished and ten years if the firearm was discharged) and the type of firearm involved in the crime (ten years if the firearm was a short-barreled rifle, a short-barreled shotgun, or a semiautomatic assault weapon and 30 years if the firearm was a machinegun, a destructive device, or was equipped with a silencer or muffler).⁴⁵ Section 924(c) further provides that these mandatory minimum penalties must be imposed in addition to, and must run consecutively to, “any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the [underlying] crime of violence or drug trafficking crime”⁴⁶

Section 924(c) also establishes longer mandatory minimum penalties of 25 years for each “second or subsequent conviction” of a section 924(c) offense.⁴⁷ The Supreme Court has held that when multiple section 924(c) counts are charged in the same proceeding, this longer mandatory minimum penalty of 25 years applies.⁴⁸ Thus, the longer recidivist mandatory minimum penalty must be served consecutively to any sentences imposed

for the underlying offenses *and* other section 924(c) offenses, even when all of the offenses were charged in a single indictment. This practice of charging multiple violations of section 924(c) within the same indictment is commonly known as “stacking” mandatory minimum penalties.

2011 RECOMMENDATIONS

In its 2011 *Mandatory Minimum Report*, the Commission recommended that Congress consider several changes to the firearms mandatory minimum penalties, including (1) amending 18 U.S.C. § 924(c) so that the enhanced mandatory minimum penalties for a “second or subsequent” offense apply only to prior convictions, and that such penalties be reduced, and (2) eliminating the “stacking” requirement in 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently.

The Armed Career Criminal Act,
18 U.S.C. § 924(e)⁴⁹

The Armed Career Criminal Act requires a minimum 15 years of imprisonment if the defendant violates 18 U.S.C. § 922(g) and has at least three prior convictions for a violent felony or a serious drug offense.⁵⁰ Section 922(g) makes it unlawful for certain prohibited persons, including convicted felons, fugitives from justice, persons dishonorably discharged from the armed forces, and aliens who are illegally or unlawfully in the United States, to possess a firearm or ammunition that is in or affecting commerce, to ship or transport a firearm or ammunition in interstate or foreign commerce, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.⁵¹

Mandatory Minimum Penalties for Child Sexual Exploitation and Related Offenses⁵²

Congress has also enacted mandatory minimum penalties to combat child sexual exploitation. These penalties have expanded since Congress first outlawed the production of child pornography in 1978 and included a mandatory minimum penalty of two years of imprisonment for repeat offenders.⁵³ By 1996, Congress had increased the penalties for production of child pornography to require a mandatory minimum penalty of ten years of imprisonment for first-time offenders, 15 years of imprisonment for offenders with a prior conviction for a child sexual exploitation offense, and at least 30 years of imprisonment for offenders with two such prior convictions.⁵⁴

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003⁵⁵ established new mandatory minimum penalties and increased existing mandatory minimums for certain child sexual abuse and child pornography crimes. Among other changes, Congress increased the mandatory minimum penalties for producing child pornography and related conduct from ten to 15 years of imprisonment for first-time offenders, from 15 to 25 years of imprisonment for repeat child exploitation offenders, and from 30 to 35 years of imprisonment for offenders with more than two prior child exploitation convictions.⁵⁶ The PROTECT Act further increased the mandatory minimum penalty for the buying or selling of children from 20 to 30 years of imprisonment,⁵⁷ and the mandatory minimum penalty for possession of child pornography by a recidivist offender from two to ten years of imprisonment.⁵⁸ Finally, Congress established new mandatory minimum penalties for existing offenses, most notably by requiring at least five years of imprisonment for receipt and distribution of child pornography,⁵⁹ as well as a





new mandatory minimum penalty of five years of imprisonment for enticing a minor to travel in interstate commerce for criminal sexual activity.⁶⁰

Congress again increased existing mandatory minimum penalties and established new mandatory minimum penalties for certain sex offenses three years later in the Adam Walsh Child Protection and Safety Act of 2006.⁶¹ That Act, among other provisions, added a new mandatory minimum penalty of 15 years of imprisonment for sex trafficking,⁶² increased the mandatory minimum penalty from five to ten years of imprisonment for enticing a minor to engage in criminal activity,⁶³ and established a mandatory minimum penalty of 20 years of imprisonment for engaging in a child exploitation enterprise.⁶⁴ The Act also created new offenses and mandatory minimum penalties relating to failure to register as a sex offender.⁶⁵

Thus, as currently in effect, federal law provides numerous mandatory minimum penalties for two types of child exploitation offenses: (1) sexual abuse (also called “contact”) offenses, *i.e.*, those offenses involving actual or attempted sexual contact with the victim regardless of the victim’s age; and (2) child pornography (other than an offense related to the production of pornography depicting an actual child, which is deemed a “contact” offense). The current penalties for each category are briefly summarized.

Sexual Abuse Offenses

These provisions are primarily found in the following sections of title 18:

- § 1591(b)(1) and (2) (minimum ten- or 15-year term for sex trafficking of a minor depending on the age of the victim);
- § 2241(c) (minimum 30-year term for traveling across state lines with the intent to have sex with a child under 12 years of age or for crossing state lines and having sex with a child between the ages of 12 and 16 under certain aggravating circumstances);
- §§ 2251(e) and 2260(c)(1) (minimum term of 15 years for production of child pornography and enhanced minimum terms if such a defendant has a prior felony conviction for an enumerated sex offense);
- § 2251A(a) & (b) (minimum term of 30 years for buying or selling, or otherwise transferring, children to participate in the production of child pornography);
- § 2422(b) (minimum term of ten years for using mails or facilities or means of commerce to cause a minor to engage in prostitution or other criminal sexual activity);
- § 2423(a) (minimum term of ten years for transporting a minor in commerce to engage in prostitution or other criminal sexual activity); and
- § 3559(e) (mandatory life imprisonment for second conviction for certain sex offenses against minors).

Child Pornography Offenses

The most common child pornography offenses are set forth at 18 U.S.C. §§ 2251, 2252, 2252A, and 2260, which broadly prohibit a variety of acts related to the distribution,⁶⁶ transportation (including by shipping or mailing),⁶⁷ importation, receipt, and possession of child pornography, including attempted acts and conspiracies to commit such acts.⁶⁸ An additional statute, 18 U.S.C. § 1466A, prohibits possession, receipt, distribution, and production of “obscene visual representations of the sexual abuse of children.”

The statutory penalty ranges for violations of these provisions vary in severity depending on both the act involved and the defendant’s prior criminal record. Simple possession of child pornography is punishable by up to ten years in federal prison, but does not carry a mandatory minimum term of imprisonment.⁶⁹ If a defendant has a prior federal or state conviction for one or more enumerated sex offenses,⁷⁰ however, the penalty range for simple possession increases to a mandatory minimum term of ten years and a maximum term of 20 years of imprisonment.⁷¹

Child pornography offenses for transportation (including mailing or shipping), receipt, distribution, and possession with the intent to distribute or sell child pornography offenses each carry a mandatory minimum term of five years of imprisonment and a maximum term of 20 years.⁷² If a defendant has a prior federal or state conviction for one or more enumerated sex offenses, however, the penalty range increases to a mandatory minimum term of 15 years and a maximum term of 40 years of imprisonment.⁷³

Violations of section 1466A involving receipt, distribution, or production of “obscene visual representations of the sexual abuse of children”

carry a mandatory minimum penalty of five years and a maximum of 20 years of imprisonment, while violations of section 1466A involving simple possession of such obscene material carry no mandatory minimum penalty and have a statutory maximum of ten years of imprisonment.⁷⁴

2011 RECOMMENDATIONS

In its 2011 *Mandatory Minimum Report*, the Commission recommended that Congress review current mandatory minimum penalties for offenses involving the receipt of child pornography that are virtually indistinguishable from possession offenses. As set forth in the Commission’s *Report to the Congress: Federal Child Pornography Offenses* (2012), available sentencing data suggests that the mandatory minimum penalties for these receipt offenses may be excessively severe and, as a result, are applied inconsistently.

Mandatory Minimum Penalties for Identity Theft⁷⁵

Section 1028A of title 18 provides enhanced punishment for aggravated identity theft, including a required two-year mandatory minimum penalty. This provision, which was enacted in the Identity Theft Penalty Enhancement Act of 2004,⁷⁶ provides, “[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of two years.”⁷⁷ The enumerated felony offenses include theft offenses,⁷⁸ offenses involving false statements and fraud,⁷⁹ offenses related to nationality and citizenship,⁸⁰ offenses related to passports and visas,⁸¹ and immigration offenses.⁸²





Section 1028A requires that the mandatory two-year term of imprisonment be imposed consecutively to “any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used.”⁸³ Moreover, the statute directs the sentencing court not to reduce any sentence for the underlying felony, assuming the defendant is convicted separately of the underlying felony, to “compensate for, or otherwise take into account, any separate term of imprisonment” to be imposed for a violation of section 1028A.⁸⁴

The statute further provides that sentences for multiple violations of section 1028A may be “stacked,” but that the court may, in its discretion, run the sentence for any additional section 1028A counts “concurrently, in whole or in part, . . . with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of [section 1028A].”⁸⁵

How Are Mandatory Minimum Penalties Incorporated Into the Guidelines?

Congress charged the Commission with promulgating guidelines that are “consistent with all pertinent provisions” of federal law⁸⁶ and with providing sentencing ranges that are “consistent with all pertinent provisions of title 18, United States Code.”⁸⁷ To that end, the Commission has incorporated mandatory minimum penalties into the guidelines since their inception, and has continued to incorporate new mandatory minimum penalties as enacted by Congress.⁸⁸

In the initial guidelines, the Commission generally incorporated mandatory minimum penalties by establishing guideline ranges slightly above the mandatory minimum penalty for offenders convicted of offenses carrying a mandatory

minimum penalty in Criminal History Category I.⁸⁹ At the time, the Commission determined that incorporating mandatory minimum penalties in this way fulfilled its statutory mandate to “assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance....”⁹⁰

While this policy remained in place for much of the guidelines’ history, the Commission has varied its methods of incorporating mandatory minimum penalties into the guidelines over time based on its continuing research, experience, and analysis.⁹¹ As Congress has enacted new mandatory minimum penalties, the Commission has drawn on its experience with particular offenses and related guidelines to incorporate the new penalties. Furthermore, the Commission has amended its incorporation of certain types of mandatory minimum penalties—most notably, drug offenses—over time to account for other changes in the statutes and the guidelines.

For example, the Commission has changed the way in which mandatory minimum penalties for drug offenses are incorporated in the Drug Quantity Table at USSG §2D1.1 in recent years. When Congress passed the Anti-Drug Abuse Act of 1986, the Commission responded by incorporating the statutory mandatory minimum penalties into the guidelines and extrapolating upward and downward to set sentencing guideline ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that triggered a five-year statutory minimum were assigned a base offense level (level

26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum penalty for such offenses by at least three months). Similarly, offenses that triggered a ten-year statutory minimum penalty were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum penalty for such offenses by at least one month).⁹²

The Commission recently reduced the drug guidelines for all drugs by two levels, changing how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table.⁹³ Specifically, the amendment reduced the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties by two, resulting in corresponding guideline ranges that include, as opposed to exceed, the mandatory minimum penalties.⁹⁴ The Commission determined that “changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities.”⁹⁵ Instead, the Commission noted that adequate incentives exist through operation of the statutory “safety valve” provision enacted in 1994, and related guideline reductions.⁹⁶ The change also reflected the fact that the guidelines more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established through numerous enhancements and adjustments.⁹⁷

As another example, the Commission set a base offense level that produced a guideline range entirely below the mandatory minimum penalty for offenders in Criminal History Category I when Congress established a new mandatory minimum of five years of imprisonment for existing child pornography trafficking and receipt offenses in the PROTECT Act. The Commission modified its general approach at the time because experience and data showed that several existing enhancements (e.g., use of a computer, material involving children under 12 years of age, number of images) in the applicable guideline, USSG §2G2.2, apply in almost every case.⁹⁸

The Commission also addressed how to incorporate other types of mandatory minimum penalties, including those requiring consecutive terms of imprisonment. To ensure the guidelines’ consistency with federal law, the Commission has incorporated consecutive penalties by specifying that the guideline sentence for that count is the minimum term required by the statute. For example, USSG §2K2.4(b) provides that for an offender convicted of violating section 924(c), “the guideline sentence [for that count] is the minimum term of imprisonment required by statute.”⁹⁹

Finally, for those offenses carrying a mandatory minimum penalty not specifically referenced to a particular guideline,¹⁰⁰ or where the mandatory minimum penalty is not specifically incorporated, the guidelines provide a catchall instruction ensuring that any applicable mandatory minimum penalty controls.¹⁰¹ Similarly, the guidelines ensure that no portion of an offender’s guideline range falls below an applicable mandatory minimum penalty by providing that the mandatory minimum penalty becomes the bottom of the guideline range where some, but not all, of the guideline range falls below the mandatory minimum penalty.¹⁰²





Can Offenders Obtain Relief From Mandatory Minimum Penalties?

Not all offenders convicted of an offense carrying a mandatory minimum penalty are sentenced to the minimum term of imprisonment specified in the statute of conviction.¹⁰³ Under the current system,¹⁰⁴ a sentencing court can impose a sentence below an otherwise applicable statutory mandatory minimum penalty if: (1) the prosecution files a motion based on the defendant's "substantial assistance" to authorities in the investigation or prosecution of another person; or (2) in certain drug trafficking cases, the defendant qualifies for the statutory "safety valve" contained in 18 U.S.C. § 3553(f).

Substantial Assistance

Two related provisions allow a sentencing court to impose a term of imprisonment lower than a mandatory minimum penalty in cases where a defendant provides substantial assistance in the investigation or prosecution of another person: 18 U.S.C. § 3553(e) and Federal Rule of Criminal Procedure 35(b).

18 U.S.C. § 3553(e)

Section 3553(e), which was enacted as part of the Anti-Drug Abuse Act of 1986,¹⁰⁵ grants a court limited authority to impose a sentence below a mandatory minimum penalty at the time of sentencing. Specifically, the section provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."¹⁰⁶ Section 3553(e) further requires such a sentence to "be imposed in accordance with the guidelines

and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code."¹⁰⁷

As directed by Congress, the Commission incorporated this statutory mechanism for relief from mandatory minimum penalties into the guidelines. USSG §5K1.1, consistent with the requirements of the Commission's organic statute,¹⁰⁸ authorizes a departure from the guideline range if the offender has provided substantial assistance to law enforcement. In contrast to section 3553(e), however, §5K1.1 does not explicitly authorize courts to impose a sentence below a mandatory minimum penalty but instead includes a reference to 18 U.S.C. § 3553(e).¹⁰⁹ As such, even if the government files a motion under §5K1.1, the sentencing court may not impose a sentence below a statutory mandatory minimum penalty unless the government also files a motion pursuant to 18 U.S.C. § 3553(e).¹¹⁰

Federal Rule of Criminal Procedure 35(b)

Relief under section 3553(e) is, in most respects, identical to the relief provided under Rule 35 of the Federal Rules of Criminal Procedure, as both require substantial assistance and both require a government motion. The most significant difference between the two types of motions is timing: Rule 35(b) motions are made *after* the original sentencing and so require a resentencing if granted, while section 3553(e) motions are made *before* sentencing and ruled on at the time of the original sentencing.¹¹¹

Rule 35(b) permits a court, upon the government's motion, to impose a new, reduced sentence that considers post-sentencing substantial assistance. Rule 35(b)(1) provides that, "[u]pon the government's motion made within one year of sentencing, the court may reduce a sentence if the

defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.”¹¹² Pursuant to Rule 35(b)(2), motions may also be made later than one year after the original sentence if the “defendant’s substantial assistance involved”: (1) “information not known to the defendant until one year or more after sentencing,” (2) information provided within one year that “did not become useful to the government until more than one year after sentencing,” or (3) if the defendant could not have “reasonably . . . anticipated” that the information in question would be useful until more than a year after sentencing.¹¹³ In evaluating whether the substantial assistance is, in fact, sufficient to warrant a reduction under Rule 35(b), “the court may consider the defendant’s presentence assistance.”¹¹⁴

Rule 35(b) expressly applies to sentences that would otherwise be subject to a mandatory minimum penalty, authorizing the sentencing court to “reduce the sentence to a level below the minimum sentence established by statute.”¹¹⁵

Statutory “Safety Valve” Relief

The second relief provision, codified at 18 U.S.C. § 3553(f) (Limitation on Applicability of Mandatory Minimum Penalties in Certain Cases), is commonly referred to as the “safety valve.”¹¹⁶ Unlike a substantial assistance departure—which applies to all types of federal offenses carrying a mandatory minimum penalty—the safety valve statute only applies in cases in which a defendant faces a mandatory minimum penalty after being convicted of a drug trafficking offense listed in the statute.¹¹⁷ In addition, the safety valve only applies if the following five criteria are met:

- the defendant does not have more than one criminal history point, as determined under the sentencing guidelines;
- the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- the offense did not result in death or serious bodily injury to any person;
- the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined by the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
- no later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful or other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has not complied with this requirement.

Where these criteria are met, section 3553(f) provides that judges shall impose a sentence without regard to the statutory mandatory minimum penalty for the covered offenses.

For defendants who qualify for relief from the mandatory minimum penalty pursuant to the statutory safety valve, the guideline at §5C1.2 directs the court to “impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence.”¹¹⁸ The drug trafficking guideline at USSG §2D1.1 also provides for a 2-level decrease if the defendant meets the safety valve subdivision criteria listed at USSG §5C1.2.¹¹⁹ This decrease applies regardless of whether the defendant was convicted of an offense carrying a mandatory minimum penalty.¹²⁰





United States Sentencing Commission

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4 Recent Changes



Recent Changes

Since the Commission's 2011 *Mandatory Minimum Report* was issued in October of 2011, the landscape of federal mandatory minimum penalties has continued to evolve. Congress has continued to explore criminal justice reform, including possible changes to certain mandatory minimum penalties. Additionally, changes to Department of Justice charging policy and recent Supreme Court case law have impacted charging practices relating to mandatory minimum penalties. As these changes likely impacted data trends since the Commission's last report, they are briefly summarized here.

Impact of the Fair Sentencing Act of 2010

The last significant change to mandatory minimum penalties came in the Fair Sentencing Act of 2010 ("FSA"), which amended penalties for crack cocaine offenses.¹²¹ The Act, which followed four Commission reports on federal cocaine sentencing policy,¹²² altered the mandatory minimum penalties established by Congress in 1986 and 1988 by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively.¹²³ The Act also directed the Commission to provide higher guideline sentences for all drug offenders based on the presence of specified aggravating factors, such as bribing a law enforcement official to facilitate the offense, maintaining an establishment for manufacturing or distributing controlled substances, or obstructing justice while holding an aggravating role in the offense. The Act further directed the Commission to provide lower guideline sentences for certain offenders who receive a guideline adjustment for being a minimal participant in the offense.¹²⁴

Enactment of the FSA triggered responses from the Commission, the Department of Justice, and the Supreme Court, all of which influenced the impact of the Act's changes. In 2011, the Commission implemented the FSA's new penalties in the guidelines and subsequently made the changes retroactive.¹²⁵ After initially advising federal prosecutors that the new penalties would apply prospectively only to offense conduct occurring on or after the FSA's enactment date, the Department of Justice issued subsequent guidance that the FSA's new penalties applied to sentencings occurring on or after August 3, 2010, regardless of when the offense took place.¹²⁶ Finally, the Supreme Court similarly held that the FSA's penalties applied to offenses committed prior to August 3, 2010, but sentenced after that date.¹²⁷

As directed by Congress,¹²⁸ the Commission studied the impact of the changes made by the FSA and issued a report in August of 2015.¹²⁹ The Commission's study concluded that the FSA reduced the disparity between crack and powder cocaine sentences, reduced the federal prison population, and appears to have resulted in fewer federal prosecutions for crack cocaine. The report further observed that these impacts occurred while crack cocaine use continued to decline.¹³⁰

Criminal Justice Reform

Since passage of the FSA in 2010, Congress has continued to express interest in exploring the scope and severity of current mandatory minimum penalties. Members of Congress have introduced numerous pieces of bipartisan legislation proposing various sentencing changes (many of which reflect recommendations made by the Commission in its 2011 *Mandatory Minimum Report*), including:

- reducing mandatory minimum penalties for certain drug offenses;

RECENT CHANGES IN THE CHARGING OF MANDATORY MINIMUM OFFENSES

- broadening the existing “safety valve” to include offenders with prior misdemeanor convictions, while excluding offenders with prior felony convictions, or prior violent or drug trafficking convictions;
- creating a second “safety valve” allowing judges to sentence certain low-level offenders below an otherwise applicable ten-year mandatory minimum penalty;
- revising the mandatory minimum penalties for firearms offenses, including changes to section 924(c) and the Armed Career Criminal Act; and
- making the statutory changes in the Fair Sentencing Act of 2010 retroactive.¹³¹

While these and other proposals have not proceeded beyond the respective Committees in the U.S. Senate and House of Representatives, Members of Congress have continued to express an intent to explore these issues in the current or future sessions.

Changes in Charging Practices

In addition to legislative changes, there were also significant legal and administrative changes relating to the charging of mandatory minimum penalties that impacted the data presented in this publication.

First, beginning in 2010 and continuing through May of 2017, the Department of Justice amended its guidance to federal prosecutors regarding which offenses to charge, including more targeted charging of offenses carrying a mandatory minimum penalty. Since 2003, Department of Justice policy had directed prosecutors to charge the most serious, readily provable offenses supported by the facts and that would result in the longest sentence.¹³² In 2010, however, then-Attorney General Eric Holder issued a memorandum revising this guidance to provide that a prosecutor “should

ordinarily charge” the most serious offense. The memorandum further instructed that this charging decision required an *individualized assessment* to ensure that the charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal laws, and maximize the impact of federal resources. The “Holder Memorandum,” as it has come to be called, further required the same individualized assessment in plea bargaining and sentencing advocacy.¹³³

Further changes in charging practices came in the wake of the Supreme Court’s decision in *Alleyne v. United States*.¹³⁴ In *Alleyne*, the Court revisited a longstanding controversy in criminal law regarding the method of proof the Sixth Amendment requires to impose a mandatory minimum sentence. It has been settled since the Court’s 2000 decision in *Apprendi v. New Jersey*¹³⁵ that any facts that increase a criminal defendant’s maximum possible sentence are considered “elements” of the criminal offense, which must be proved to a jury beyond a reasonable doubt. In the context of mandatory minimums, the Court had previously decided in *Harris v. United States*¹³⁶ that *Apprendi* did not apply to facts that would increase a defendant’s mandatory *minimum* sentence, and therefore that a judge could constitutionally decide to apply a mandatory minimum sentence based on facts not proven to a jury.

Overruling the *Harris* decision, *Alleyne* held that facts that increase a mandatory minimum penalty are elements that must be submitted to a jury and found beyond a reasonable doubt. Relying on the logic of *Apprendi*, the Court concluded that the definition of “elements” necessarily includes facts that not only increase the maximum penalty, but also those that increase the minimum penalty, because both affect the sentencing range to which a defendant is exposed. As the Court notes, “[i]t is impossible to dissociate the floor of a sentencing





range from the penalty affixed to the crime.”¹³⁷ Increasing the legally prescribed floor indisputably aggravates the punishment and “heightens the loss of liberty associated with the crime,” because the government can invoke the mandatory minimum to require a harsher punishment than would have resulted otherwise.¹³⁸ The Court reasoned that “[t]his reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.”¹³⁹ The Court concluded that, by defining facts that increase the mandatory minimum sentence to be elements of the crime, the defendant can predict the potential penalties from the face of the indictment, and the Court has preserved “the historic role of the jury as an intermediary between the State and criminal defendants.”¹⁴⁰

While the issue in *Alleyne* was a seven year sentence imposed on a defendant for having “brandished” a firearm while “using or carrying [it] during and in relation to a crime of violence,” courts have extended its application to other mandatory minimum offenses, including drug offenses. Applying *Alleyne*, courts have held that a factfinder must determine the type and quantity of controlled substances involved in the offense if the drug type and/or quantity increases the statutorily prescribed minimum sentence.¹⁴¹ These decisions have directly impacted the application of mandatory minimum penalties by altering the way in which mandatory minimum enhancements must be charged and proven by the government.

After *Alleyne*, the Department of Justice further modified its charging policies as part of then-Attorney General Holder’s Smart on Crime Initiative.¹⁴² Noting that “the Supreme Court’s decision in *Alleyne* heightens the role a prosecutor plays in determining whether a defendant is subject to a mandatory minimum sentence,” the Department of Justice issued a new policy refining

its charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders.¹⁴³ Specifically, the memorandum provides that “prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets each of the following criteria:

- the defendant’s relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;
- the defendant is not an organizer, leader, manager, or supervisor of others within a criminal organization;
- the defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and
- the defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.”¹⁴⁴

The memorandum provides that prosecutors should decline to pursue the recidivist enhancements provided for in title 21 (and therefore, not file an information pursuant to 21 U.S.C. § 851) “unless the defendant is involved in conduct that makes the case appropriate for severe sanctions.”¹⁴⁵

Given their timing, it is likely that many, if not all, of the above changes have in some way impacted the data discussed in this publication, including the current population of the Federal Bureau of Prisons (BOP). The Commission further notes, however, that the impacts from these changes and recent data trends may not be permanent. Different trends may emerge as policies regarding mandatory minimum penalties continue to evolve. This evolving nature is reflected both in the changes between 2010 and 2016 discussed above and in other more recent

changes, discussed below, that will also impact charging decisions and sentencing in future years.

First, the Department of Justice recently rescinded the changes made in both the 2010 and 2013 memoranda discussed above. On May 10, 2017, Attorney General Jeff Sessions issued revised guidance emphasizing the Department's "responsibility . . . to fulfill [its] role in a way that accords with the law, advances public safety, and promotes respect for our legal system," and "noting that "[i]t is of the utmost importance to enforce the law fairly and consistently." Relying on these principles, the memorandum instructs that "prosecutors should charge and pursue the most serious, readily provable offense." The memorandum further provides that "the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences." The memorandum provides for "circumstances in which good judgement would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted," thus allowing for exceptions with supervisory approval.¹⁴⁶

Additionally, the Supreme Court recently issued its holding in *Dean v. United States*,¹⁴⁷ which addressed the issue of sentencing an offender charged with possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). The Court unanimously held that 18 U.S.C. § 924(c) does not prevent a sentencing court from considering a mandatory sentence imposed under that provision when determining the sentence for the underlying predicate offense. The Court began by reviewing the factors that sentencing courts are required to consider when setting an appropriate sentence and noted that generally, a court "imposing a sentence on one count of conviction [can] consider sentences imposed on other counts."¹⁴⁸ In this case, both the fact that Dean would not be released from prison until after he was 50 years old, and the deterrent effect of the 30-year mandatory minimum

sentence (based on the mandatory stacking of consecutive five and 25-year penalties for his two section 924(c) convictions) were factors that the sentencing court could consider. The Court rejected the government's contention that sentencing courts should not consider the effect of other sentences until it is deciding whether sentences should run consecutively or concurrently. Here, the Court noted that this interpretation goes against the practice of the government in "sentencing package cases." In those cases, where some but not all counts of conviction are vacated on appeal, the government "routinely argues" that the entire sentence should be vacated so that the court may increase the sentences for any remaining counts.

The Court also found that there is nothing in the text of section 924(c) that prohibits a court from considering the mandatory sentence when calculating the sentence for the predicate offense. Neither the fact that the mandatory sentence must be imposed "in addition to" the punishment for the predicate offense, nor the fact that the additional sentence must be imposed "consecutively" to the sentence for the predicate offense affects the sentencing court's discretion to consider the mandatory minimum when calculating each individual sentence. The Court noted that the government was asking for an additional limitation to be read into the text, which is inappropriate, particularly when Congress has shown that it knows how to "make explicit what the Government argues is implicit in § 924(c)." It did this in 18 U.S.C. § 1028A, which deals with identify theft and provides that in determining the sentence for the predicate felony, "a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section."¹⁴⁹





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5 Data Analysis



The Commission's Updated Study

Since the issuance of its 2011 *Mandatory Minimum Report*, the Commission has continued its study of the scope, use, and impact of mandatory minimum penalties in the federal system. The Commission has regularly provided updated data on mandatory minimums in various forms throughout the past six years, through the issuance of *Quick Facts* publications,¹⁵⁰ as well as in testimony on the criminal justice reforms recently under consideration by Congress.¹⁵¹ Nevertheless, given the changes highlighted above, as well as the ongoing interest in this subject, the Commission provides this publication to further update the information and analyses in its 2011 *Mandatory Minimum Report* regarding the application of mandatory minimum penalties for all offenses. Future publications will provide targeted analyses for specific types of offenses.

It is the Commission's intent that the data in this publication will further inform the ongoing discussion regarding mandatory minimum penalties as Congress, the Department of Justice, and others examine the status of current legislation and policies, and explore the need for additional changes in the future.

Methodology

Records Collection

Pursuant to 28 U.S.C. § 994(w), a district court is directed to submit to the Commission the following sentencing documents in each felony or Class A misdemeanor case: the presentence report (PSR), the judgment and commitment order (J&C), the statement of reasons form (SOR), the indictment or other charging instrument, and any plea agreement.¹⁵² These documents are then analyzed to extract demographic, conviction, sentencing, and guideline application information for each case.

Data Analysis

With the exception of the analysis of the BOP inmate population, the data reported in this publication is derived entirely from the Commission's electronic database of information that is routinely collected through the above processes for all federal cases for which the Commission receives full documentation in accordance with 28 U.S.C. § 994(w). In fiscal year 2016,¹⁵³ the Commission's individual datafile included 67,742 cases. Of those cases, the Commission received complete guideline application information and sufficient documentation for analysis in this publication in 62,251 cases.¹⁵⁴

For each of these 62,251 cases, the Commission gathered and analyzed relevant offender and offense characteristics, including demographic data, the types of underlying offenses, and basic criminal history information. This publication provides general comparisons between offenders in the overall federal offender population, offenders convicted of an offense carrying a mandatory minimum penalty,¹⁵⁵ offenders who obtained relief from application of a mandatory minimum penalty, and offenders who remained subject to a mandatory minimum penalty at the time of sentencing. The Commission also provides data about sentencing outcomes involving the application of mandatory minimum penalties. Where appropriate, this publication also highlights key changes between the data set forth in the Commission's 2011 *Mandatory Minimum Report* and the fiscal year 2016 sentencing data.

Lastly, this publication analyzes and provides updated trends regarding the impact of mandatory minimum sentencing provisions on the federal prison population. Specifically, the Commission provides an overall assessment of the prison impact of statutes carrying mandatory minimum penalties. For this analysis, the Commission obtained prisoner data from the BOP to compare to Commission data.

By merging the two datasets, the Commission creates snapshots of the federal prison population at different points in time.

Prevalence of Offenses Carrying Mandatory Minimum Penalties

How Often Are Offenders Charged With An Offense Carrying a Mandatory Minimum Penalty?

Continuing a recent trend, the prevalence of offenders convicted of an offense carrying a mandatory minimum penalty decreased in fiscal year 2016, both in terms of number and as a percentage of all offenders sentenced in that year.

More than one-fifth of all offenders sentenced in fiscal year 2016 (21.9%) were convicted of an offense carrying a mandatory minimum penalty, a change of 5.3 percentage points from fiscal year 2010 (27.2%). This also reflects a 31.6 percent change in the overall number of offenders convicted of an offense carrying a mandatory minimum penalty, decreasing from 19,896 offenders in fiscal year 2010 to 13,604 offenders in fiscal year 2016. Although this decrease is due in part to the reduction in the overall federal sentencing population in recent years, the fact that the number of offenders convicted of an offense carrying a mandatory minimum penalty declined at a greater rate than the decrease in overall population¹⁵⁶ indicates that changes in charging practices are also responsible.

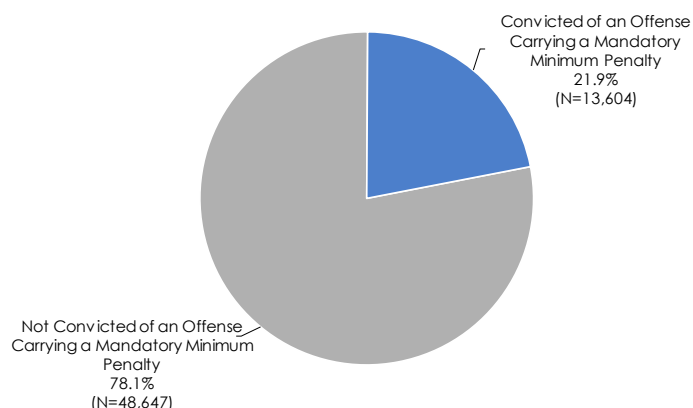
The impact of changes in charging practices is further demonstrated by the recent decrease in the percentage of offenders convicted of an offense carrying a mandatory minimum penalty shown in Figure 2 on the following page. From fiscal years 1991 to 2014, the percentage of offenders convicted of an offense carrying a mandatory minimum penalty remained relatively steady, fluctuating between 26.0 percent and 31.9 percent from fiscal year 1991 through fiscal year 2013. That trend has

changed, however, over the past three years, with the overall percent of offenders convicted of an offense carrying a mandatory minimum penalty decreasing from 27.0 percent in fiscal year 2013 to 22.4 percent in fiscal year 2015 and 21.9 percent in this most recent fiscal year.

This trend is consistent with the stated goals of the Department of Justice's 2010 memorandum and its 2013 Smart on Crime Initiative. As discussed above, in both 2010 and 2013, the Department of Justice instructed prosecutors to be more selective in charging offenses with a mandatory minimum penalty, specifically regarding certain nonviolent, low-level drug offenders. Thus, it is not surprising to see a reduction in the frequency with which offenders were charged with such offenses.

Despite the steady decrease in offenders convicted of an offense carrying a mandatory minimum penalty, the overall percentage of federal offenders who remain subject to a mandatory minimum penalty remained relatively steady over the past seven fiscal years, falling only slightly from 14.5 percent in fiscal year 2010 to 13.4 percent in fiscal year 2016. This is because offenders

Figure 1. Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



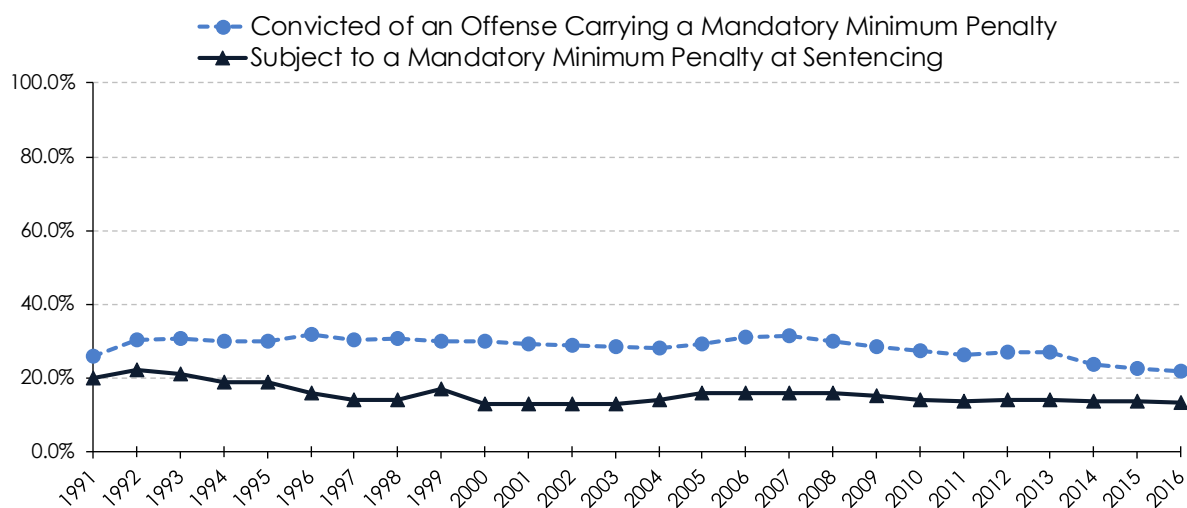
had been increasingly less likely to receive relief from a mandatory minimum through a substantial assistance motion or application of the statutory safety valve.¹⁵⁷ In fiscal year 2016, almost two-thirds (61.3%) of offenders convicted of an offense carrying a mandatory minimum penalty received no relief from that penalty and were still subject to a mandatory minimum penalty at sentencing. This compares to only 53.4 percent who did not receive relief in fiscal year 2010.

This is consistent with the change in Department of Justice policy from 2013 through May of this year as part of its Smart on Crime Initiative. As reflected in the criteria provided in the 2013 Department of Justice memorandum, drug trafficking mandatory minimum penalties were reserved for more serious offenders, including those who used a weapon or whose conduct involved violence, those who were organizers or leaders within a criminal organization, or those with “significant criminal history,” all factors that disqualify an offender from eligibility

for the safety valve. Therefore, it is equally unsurprising that those charged with a mandatory minimum penalty are now more likely to remain subject to the mandatory minimum penalty at sentencing.

To further analyze this trend, the Commission attempted to isolate the factors identified by the Department of Justice in its 2013 memorandum to determine whether they were reflected in the frequency with which offenders were convicted of and ultimately subject to a mandatory minimum penalty at sentencing. The first factor identified by the Department was whether the defendant’s relevant conduct involved the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person.¹⁵⁸ While Commission data may not completely align with the prosecutorial criteria, the first part of Figure 3 compares the frequency with which offenders convicted of a drug trafficking offense

Figure 2. Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty and Offenders Subject to a Mandatory Minimum Penalty at Sentencing
Fiscal Years 1991 - 2016



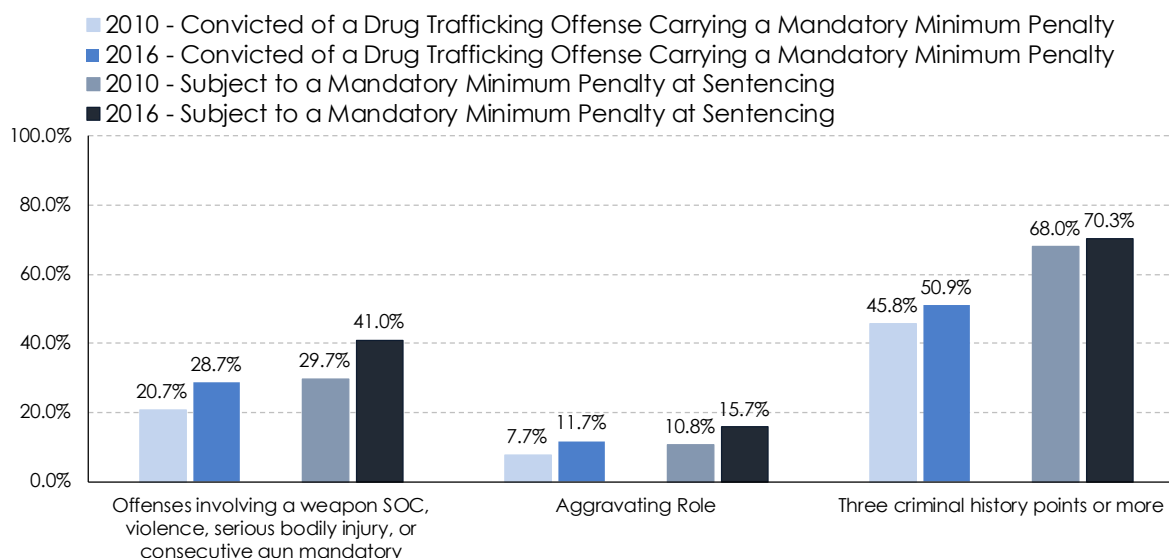
SOURCE: U.S. Sentencing Commission 1991 through 2016 Datafiles, USSCFY1991-USSCFY2016.

carrying a mandatory minimum penalty received a guideline enhancement for use of a weapon¹⁵⁹ or for using violence or credible threats of violence,¹⁶⁰ were subject to a base offense level based on the existence of death or serious bodily injury,¹⁶¹ or had a conviction for a mandatory minimum firearms offense under 18 U.S.C. § 924(c).

Offenders who were convicted of an offense carrying a mandatory minimum penalty in fiscal year 2016 were more likely to have met one of the factors set forth in the Department's 2013 memorandum. In fiscal year 2016, 28.7 percent of offenders convicted of a drug trafficking offense carrying a mandatory minimum penalty involved the guideline factors noted above, as compared to 20.7 percent in fiscal year 2010. Similarly, such offenders who remained subject to the mandatory minimum penalty at sentencing were also more likely to have met the above criteria, increasing from 29.7 percent in fiscal year 2010 to 41.0 percent in fiscal year 2016.

Similar trends were also seen when considering other criteria in the Department's 2013 memorandum. First, offenders convicted of a drug trafficking offense carrying a mandatory minimum penalty were more likely to have received an adjustment for aggravating role,¹⁶² as were offenders ultimately subject to the mandatory minimum penalty at sentencing. Additionally, offenders convicted of a drug trafficking offense carrying a mandatory minimum penalty were more likely to have received three criminal history points or more, which is consistent with the Department's criteria that the defendant did not have a significant criminal history as normally evidenced by three or more criminal history points.¹⁶³

Figure 3. Comparison of Selected Sentencing Data Related to the Smart on Crime Initiative
Fiscal Years 2010 and 2016



SOURCE: U.S. Sentencing Commission, 2010, and 2016 Datafiles, USSCFY10, and USSCFY16.



How Severe Were the Penalties for Mandatory Minimum Offenses for Which Offenders Are Convicted?

As discussed in Section Three, mandatory minimum penalties currently apply to several different types of federal offenses, and are of varying lengths depending on the offense type and specified criteria.

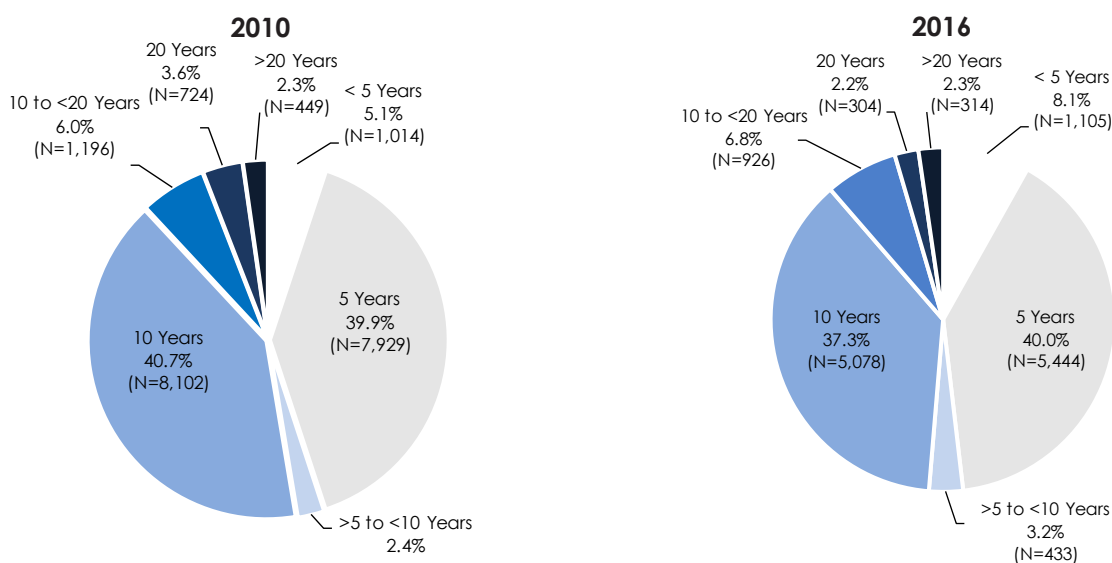
Consistent with fiscal year 2010 data, most offenders (88.7%) convicted of an offense carrying a mandatory minimum penalty in fiscal year 2016 faced mandatory minimum penalties of ten years or less. At 40.0 percent, such offenders were most frequently convicted for violating a statute carrying a mandatory minimum penalty of five years of imprisonment, which is virtually the same as in fiscal year 2010. There was a slight increase, however, in the percentage of offenders convicted of an offense carrying a mandatory minimum penalty less than five years, from 5.1 percent in fiscal year

2010 to 8.1 percent in fiscal year 2016. In contrast, the percentage of offenders convicted of an offense carrying a mandatory minimum of ten years of imprisonment decreased from 40.7 percent in fiscal year 2010 to 37.3 percent in fiscal year 2016.

Where Were Offenders Convicted of Offenses Carrying Mandatory Minimums?

There continues to be geographic differences in the rates at which mandatory minimum penalties apply, much of which is related to differences in caseloads around the country.¹⁶⁴ More than half (54.7%, n=7,442) of the 13,604 cases involving mandatory minimum penalties were brought in the district courts in four circuits: 2,614 (19.2%) were in the Fifth Circuit, 1,935 (14.2%) were in the Eleventh Circuit, 1,459 (10.7%) were in the Ninth Circuit, and 1,434 (10.5%) were in the Eighth Circuit. This is similar to the overall portion (58.5%) of federal criminal cases in fiscal year 2016 that came from the district courts in those four circuits.

Figure 4. Length of Mandatory Minimum Penalty for Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
Fiscal Years 2010 and 2016

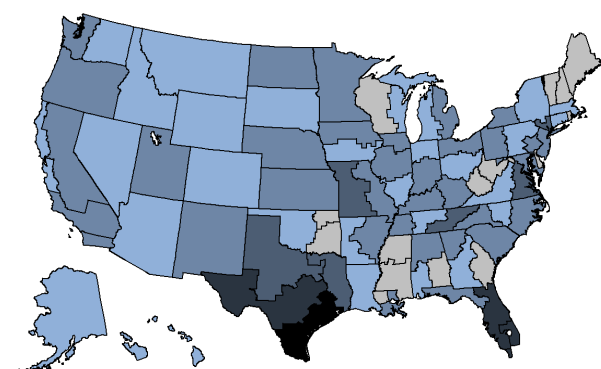


SOURCE: U.S. Sentencing Commission, 2010, and 2016 Datafiles, USSCFY10, and USSCFY16.

In fiscal year 2016, there was one district (Southern District of Texas, n=1,003) in which more than 750 offenders were convicted of an offense carrying a mandatory minimum penalty.¹⁶⁵ That one district accounted for 7.4 percent of the 13,604 cases involving a conviction of an offense carrying a mandatory minimum penalty in fiscal year 2016. An additional four districts reported at least 500 cases involving a conviction of an offense carrying a mandatory minimum penalty: Southern Florida (5.4%, n=733), Western Texas (5.0%, n=676), Middle Florida (4.7%, n=636), and Puerto Rico (3.9%, n=527). Collectively, these five districts accounted for 26.3 percent of cases involving a conviction of an offense carrying a mandatory minimum penalty, and 26.7 percent of the federal caseload in fiscal year 2016. The majority of the 94 districts (83 or 88.3%) reported fewer than 250 cases involving convictions under a statute carrying a mandatory minimum penalty, with the most common grouping being “100 to 249 offenders” (35 districts). Eighteen districts had less than 50 offenders convicted of such a penalty.

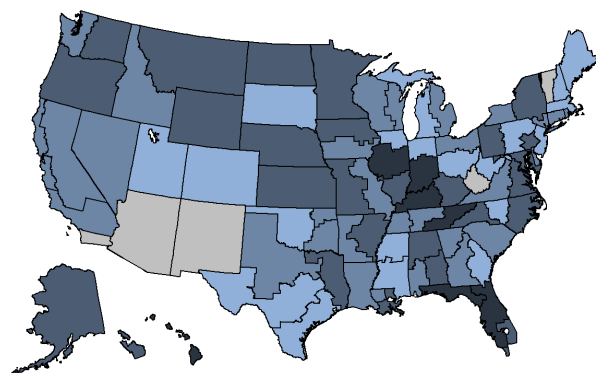
Cases involving a conviction for an offense carrying a mandatory minimum penalty accounted for varying percentages of the districts’ criminal case docket. Overall, however, offenders convicted of an offense carrying a mandatory minimum penalty accounted for a smaller portion of district court dockets than they did in fiscal year 2010. While there were ten districts in which more than 50 percent of the caseload involved offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010,¹⁶⁶ there was only one such district in fiscal year 2016 (Puerto Rico – 51.6%).¹⁶⁷ In the largest proportion of districts (31 districts), such offenses comprised between 20 and 29 percent of the district’s overall docket in fiscal year 2016. By comparison, in the largest number of districts in fiscal year 2010 (32 districts), such offenses comprised between 30 and 39 percent of the district’s docket. Finally, the number of districts that had less than 10 percent of offenders convicted of such a penalty increased from one district in fiscal year 2010 to five districts in fiscal year 2016.

Figure 5. Number of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty by District
Fiscal Year 2016



Number of Offenders:	<50	50-99	100-249	250-499	500-750	>750
Percentage of Offenders:	<10%	10-19%	20-29%	30-39%	40-49%	>50%

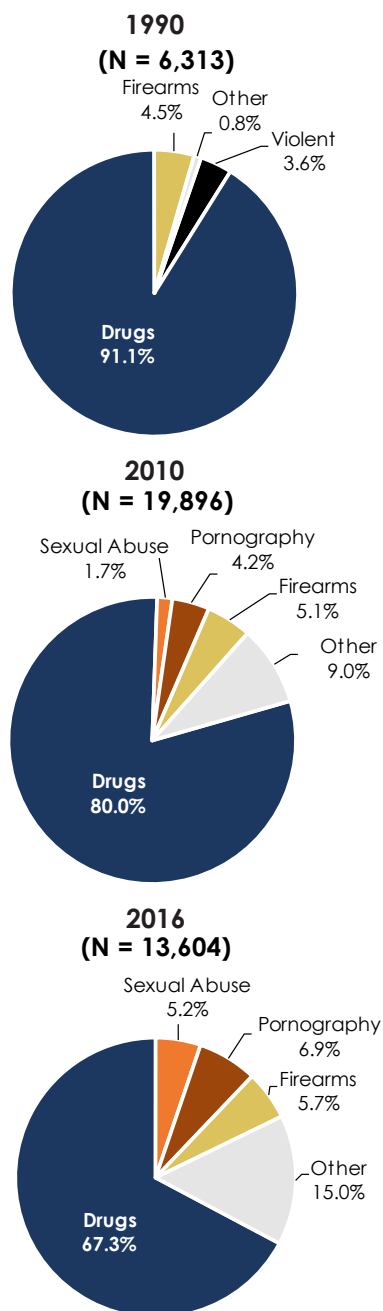
Figure 6. Percentage of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty by District
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2010, and 2016 Datafiles, USSCFY10, and USSCFY16.



Figure 7. Primary Offense of Conviction for Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty Fiscal Years 1990, 2010, and 2016



SOURCE: U.S. Sentencing Commission, 1990, 2010, and 2016 Datafiles, MONFY1990, USSCFY10, and USSCFY16.

Much of the variation in rates of application can be attributed to differences in the composition of the caseloads in those districts. For example, in the five districts applying mandatory minimums at the highest rates,¹⁶⁸ drug and firearms offenses made up a significant portion of these districts' caseload (41.6% of the cases involved drugs and 14.4% involved firearms). In the five districts reporting the lowest application rates,¹⁶⁹ nearly two-thirds of the cases in those courts were immigration offenses (63.8%) and less than one-third were drug or firearms offenses (25.4% and 1.8%, respectively).

Primary Offense Types for Offenders Convicted of Offenses Carrying a Mandatory Minimum Penalty

Drug offenses¹⁷⁰ accounted for slightly more than two-thirds of the offenses (67.3%) carrying a mandatory minimum penalty in fiscal year 2016, significantly higher than the next closest category of offenses.

However, when analyzed over time, the percentage of offenders convicted of a drug offense carrying a mandatory minimum penalty has decreased significantly from 91.1 percent of all offenders convicted of such an offense in fiscal year 1990. Conversely, the percentage of cases involving all other types of offenses carrying a mandatory minimum penalty—violent, firearms, sexual abuse, pornography and “other” offenses—has steadily increased.

Those drug offenders convicted of an offense carrying a mandatory minimum penalty increased from 5,752 offenders in 1990 to 15,831 offenders in 2010 (a 175.2% increase), before decreasing to 9,154 in 2016 (a 42.2% decrease). Firearms offenses increased significantly from 1990 to 2010 (735.7% increase), but decreased from 2010 to 2016 (67.1% decrease). Sexual abuse increased from 1.7 percent of all offenses carrying a mandatory

minimum penalty in fiscal year 2010 to 5.2 percent in 2016. Pornography followed the same trend, increasing from 4.2 percent in 2010 to 6.9 percent in 2016. Finally, “other” offenses increased from 49 offenders in 1990 to 1,779 offenders in 2010, and increased further to 2,037 offenders (14.5% increase) in 2016.

Drug and firearms offenses continue to top the list of most frequently used mandatory minimum penalty statutes. As in fiscal year 2010, the most frequently reported conviction of an offense carrying a mandatory minimum penalty in fiscal year 2016 was 21 U.S.C. § 846 (Attempt and Conspiracy [to Commit a Drug Trafficking Offense]).¹⁷¹ As reflected in Table 1, violations of section 846 accounted for almost a quarter (24.9%) of the convictions of statutes carrying a mandatory minimum penalty. The primary drug trafficking penalty provisions of 21 U.S.C. § 841—sections 841(b)(1)(A) and (B)—remain in the top five most frequent statutes of conviction carrying a mandatory minimum penalty. Finally, the top five statutes in fiscal year 2016 includes two subsections of section 924(c)—section 924(c)(1)(A)(i), which prohibits possession of a firearm during and in relation to a crime of violence or drug trafficking crime (five-year mandatory minimum), and section 924(c)(1)(A)(ii), which prohibits brandishing a firearm during and in relation to a crime of violence or drug trafficking crime (seven-year mandatory minimum).¹⁷²

While drug offenses continue to be the most common mandatory minimum offenses, an evolving picture emerges when analyzing the percentage of offenders convicted of an offense carrying a mandatory minimum penalty within each of the primary offense types. Figure 8 shows that the percentage of drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty remained relatively steady from

Table 1. Number of Convictions for Most Frequently Used Statutes Carrying a Mandatory Minimum Penalty Fiscal Year 2016

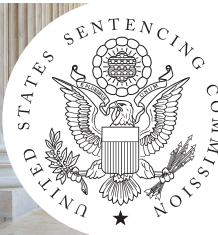
STATUTE	Total Number of Counts of Convictions	Percentage of Counts of Conviction
21 U.S.C. § 846	5,982	24.9%
21 U.S.C. § 841(b)(1)(B)	2,478	10.3%
21 U.S.C. § 841(b)(1)(A)	2,224	9.3%
18 U.S.C. § 924(c)(1)(A)(i)	1,974	8.2%
18 U.S.C. § 924(c)(1)(A)(ii)	1,019	4.2%

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

1991 through 2013, fluctuating between 60 and 70 percent. In the wake of the Department of Justice’s Smart on Crime Initiative in 2013, however, there was a noticeable decrease in the percentage of drug trafficking offenders convicted of offenses carrying a mandatory minimum penalty, decreasing to 52.2 percent in fiscal year 2014, 47.9 percent in fiscal year 2015, and reaching its lowest rate of 46.8 percent in 2016.

Conversely, sexual abuse and pornography offenses have seen an increase in the percentage of offenders convicted of an offense carrying a mandatory minimum penalty. In fiscal year 2010, 52.6 percent of sexual abuse offenders were convicted under such a statute. That rate has increased to 62.6 percent in 2016. While decreasing slightly since its high in fiscal year 2014 (61.2%), the rate of child pornography offenders convicted of such an offense has increased nearly sixty-fold since the Commission’s first report on mandatory minimums in 1991, and is also notably higher since the Commission’s last report (50.2% in fiscal year 2010). This increase is, of course, due in large part to the expansion of mandatory minimum penalties for child pornography offenders in the PROTECT Act in 2003.





The number of firearms offenders convicted of an offense carrying a mandatory minimum penalty has also increased since 1991 (17.5%), reaching a high of 35.4 percent in fiscal year 2011 before decreasing to 30.8 percent in fiscal year 2016.

Offender Demographics & Criminal History

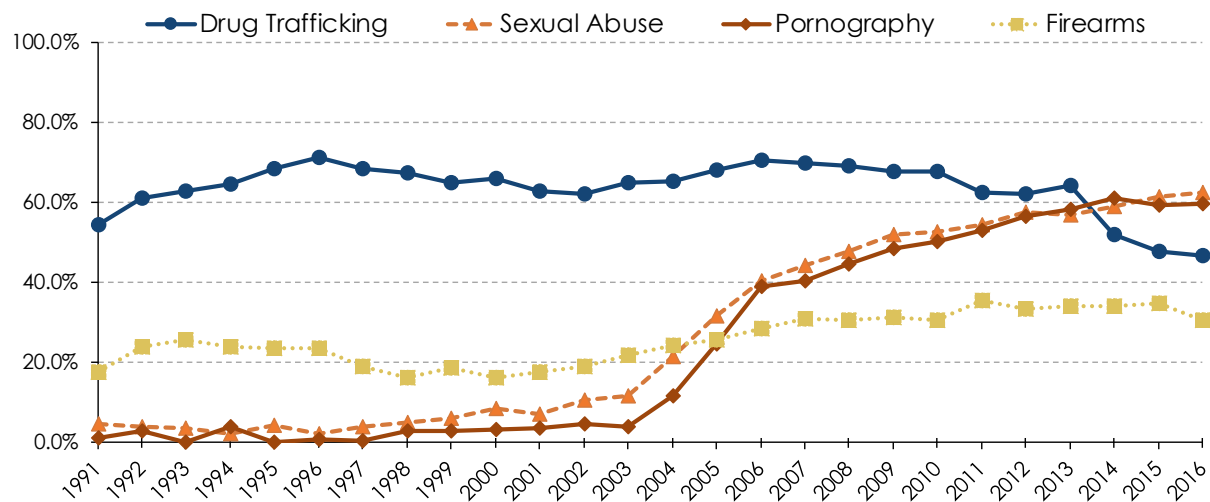
Offender Demographics¹⁷³

In fiscal year 2016, Hispanic offenders continued to represent the largest group of offenders (40.4%) convicted of an offense carrying a mandatory minimum penalty, as they did in fiscal year 2010 (38.3%). Black offenders at 29.7 percent, White offenders at 27.2 percent, and Other Race offenders (2.7%) accounted for the remaining offenders convicted of an offense carrying a mandatory minimum penalty.

Although Hispanic offenders constituted the largest proportion of offenders convicted of an offense carrying a mandatory minimum penalty, they were under-represented when considering their portion of the total federal offender population (52.4%). Conversely, both Black and White offenders were represented disproportionately in the population of offenders convicted of an offense carrying a mandatory minimum penalty compared to their proportion of the offender population.

Hispanic offenders were also the largest group to be relieved of the application of a mandatory minimum penalty (55.5%).¹⁷⁴ This is mainly due to the large number of Hispanic offenders who received relief through the safety valve. White, Black, and Other Race offenders in 2016 were significantly behind at 21.1 percent, 20.6 percent, and 2.8 percent, respectively.

Figure 8. Offenders in Select Offense Types Convicted of an Offense Carrying a Mandatory Minimum Penalty
Fiscal Years 1991 - 2016



SOURCE: U.S. Sentencing Commission, 1991 through 2016 Datafiles, USSCFY91 – USSCFY16.

Hispanic offenders were again disproportionately represented as compared to the percentage of offenders who were convicted of an offense carrying a mandatory minimum penalty (55.5% compared to 40.4%), while both Black and White offenders were under-represented in terms of receiving relief.

Of the 8,342 offenders who were subject to a mandatory minimum penalty at sentencing,¹⁷⁵ Black offenders were the largest group (35.5%) closely followed by White offenders (31.1%) and Hispanic offenders (30.9%). Again, however, both Black and White offenders were more heavily represented in the population of offenders who remained subject to a mandatory minimum penalty at sentencing compared to both their proportion of the overall offender population and their proportion of offenders convicted of an offense carrying a mandatory minimum penalty.

Over three-fourths of offenders convicted of a statute carrying a mandatory minimum penalty were U.S. citizens (77.9%), which is slightly higher than in fiscal year 2010 (73.6%).¹⁷⁶ U.S. citizens were significantly over-represented as compared to their proportion of the overall offender population (77.9% compared to 59.6%). Similarly, most offenders who remained subject to a mandatory minimum penalty were U.S. citizens (86.5%).

Males were most common across all three groups—offenders convicted of an offense carrying a mandatory minimum, relieved of a mandatory minimum, and subject to a mandatory minimum penalty at sentencing. Males were over-represented in the population of offenders who were convicted of and remained subject to a mandatory minimum penalty at sentencing compared to their proportion of the offender population. Conversely, female offenders were over-represented among those receiving relief from a mandatory minimum penalty.

Table 2. Demographic Characteristics of Offenders
Fiscal Year 2016

	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Relieved of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	62,251	13,604	5,262	8,342
RACE				
White	22.7%	27.2%	21.1%	31.1%
Black	20.9%	29.7%	20.6%	35.5%
Hispanic	52.4%	40.4%	55.5%	30.9%
Other	4.0%	2.7%	2.8%	2.5%
CITIZENSHIP				
U.S. Citizen	59.6%	77.9%	64.2%	86.5%
Non-U.S. Citizen	40.4%	22.1%	35.8%	13.5%
GENDER				
Male	86.4%	90.0%	85.3%	93.0%
Female	13.6%	10.0%	14.7%	7.0%

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.





Criminal History

The criminal history of the offenders convicted of an offense carrying a mandatory minimum penalty largely mirrors that of the overall offender population.

A distinct change occurs, however, when looking at offenders who are relieved of the application of a mandatory minimum penalty and offenders who eventually are subject to a mandatory minimum penalty at sentencing. Offenders in Criminal History Category I were more likely to be relieved of the mandatory minimum penalty than offenders in higher criminal history categories, and offenders in higher criminal history categories were less likely to be relieved. This is to be expected since only drug offenders who fall within Criminal History Category I are eligible for relief through the statutory safety valve discussed above.

In all groups, more offenders were assigned to Criminal History Category I than any other criminal history category. Almost half of offenders convicted of an offense carrying a mandatory minimum penalty (45.7%) were in Criminal History Category I. As to be expected, most offenders (63.1%) who were relieved of the mandatory minimum penalty had a Criminal History Category I, while only 34.6 percent of offenders who were subject to a mandatory minimum at sentencing fell into the Criminal History Category I. By contrast, offenders in Criminal History Category VI represented 14.1 percent of offenders convicted of an offense carrying a mandatory minimum penalty, but represented 17.2 percent of offenders who were subject to a mandatory minimum penalty at sentencing.

Table 3. Criminal History of Offenders
Fiscal Year 2016

	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Relieved of Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	N=62,251	N=13,604	N=5,262	N=8,342
CRIMINAL HISTORY CATEGORY				
Category I	45.2%	45.7%	63.1%	34.6%
Category II	13.8%	11.7%	8.6%	13.7%
Category III	16.4%	14.7%	10.3%	17.5%
Category IV	9.6%	8.6%	5.5%	10.6%
Category V	5.5%	5.1%	3.2%	6.4%
Category VI	9.5%	14.1%	9.3%	17.2%

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Relief from Mandatory Minimum Penalties

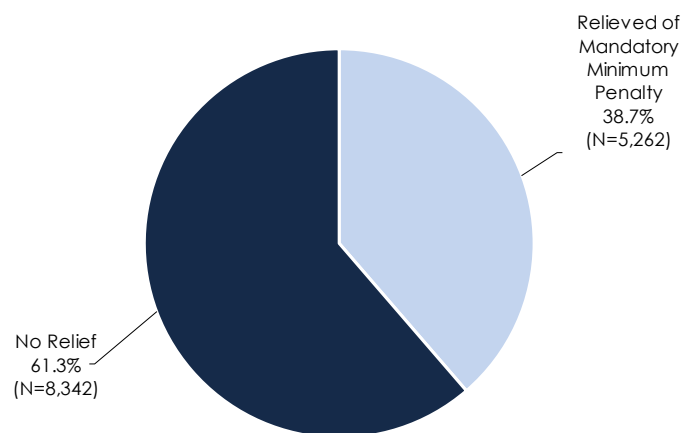
Despite a steady decrease in the percentage of offenders who were convicted of an offense carrying a mandatory minimum penalty,¹⁷⁷ the overall percentage of federal offenders who remain subject to a mandatory minimum remained largely steady over the past seven fiscal years.¹⁷⁸ This is because the rate at which offenders convicted of an offense carrying a mandatory minimum penalty received relief at sentencing has also decreased in recent years.

As demonstrated in Figure 9, 38.7 percent of the offenders convicted of an offense carrying a mandatory minimum penalty were relieved from its application at sentencing due to substantial assistance, safety valve, or both, while almost two-thirds (61.3%) remained subject to the mandatory minimum penalty at sentencing. This compares to 46.7 percent who received relief in fiscal year 2010.

This decrease is primarily the result of a reduction in the percentage of offenders qualifying for the statutory safety valve. Of offenders convicted of an offense carrying a mandatory minimum penalty, 19.8 percent received relief under the safety valve in fiscal year 2016 (14.3% for safety valve only, and 5.5% for both safety valve and substantial assistance). This compares to 28.2 percent in fiscal year 2010 (20.9% for safety valve only, and 7.3% for both safety valve and substantial assistance).¹⁷⁹

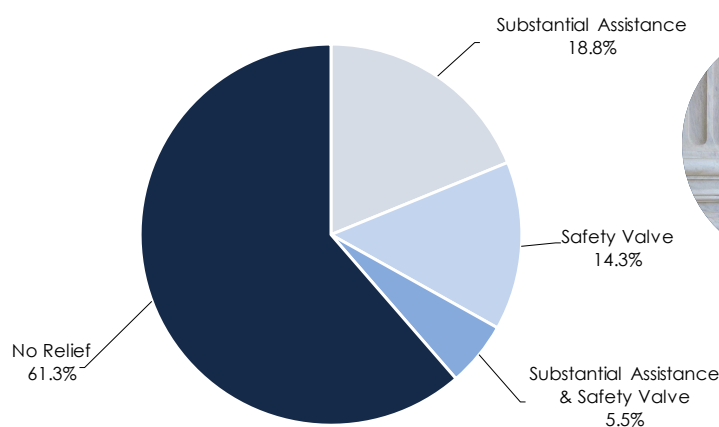
The Commission also identified and analyzed differences in the rates of relief from mandatory minimum penalties in several other areas.

Figure 9. Offenders Relieved of a Mandatory Minimum Penalty
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Figure 10. Offenders Relieved of a Mandatory Minimum Penalty
by Relief Type
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



Offense Type

First, relief varies by offense type. In fiscal year 2016, 50.0 percent of drug offenders, 15.8 percent of sex offenders, and 9.0 percent of identity theft offenders convicted of an offense carrying a mandatory minimum penalty received relief from such penalty. Among firearm offenders, 11.0 percent of offenders convicted of an offense under 18 U.S.C. § 924(c) and 19.1 percent of offenders who were sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), received relief from the mandatory minimum penalty.

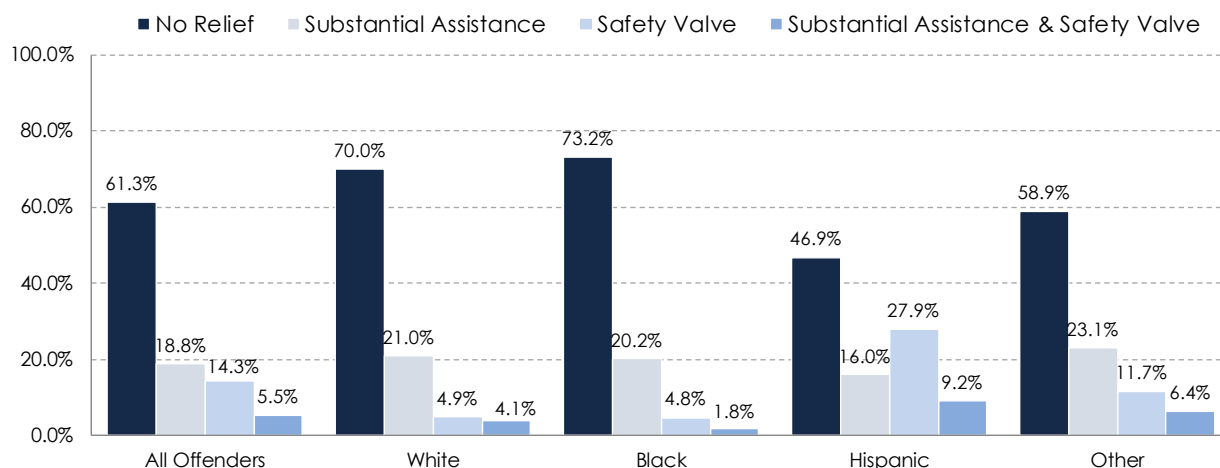
Demographics

Demographic differences also appeared in the rates of relief for offenders convicted of an offense carrying a mandatory minimum penalty. Black offenders continued to receive relief least often. Of Black offenders convicted of an offense carrying a mandatory minimum penalty, 73.2 percent remained subject to that penalty. White offenders had the second highest rate (70.0% of White offenders convicted of an offense carrying

a mandatory minimum penalty remained subject to that penalty at sentencing). Hispanic offenders received relief at the highest rate (53.1%), and so were subject to such penalties at the lowest rate (46.9%). This is due, in large part, to the fact that Hispanic offenders qualified for the safety valve at double the rate of the next closest group (37.1% compared to 18.1% for Other Race offenders), and at nearly six times the rate of Black offenders (37.1% compared to 6.6%).

Much of this difference can be attributable to the fact that Black offenders who commit drug offenses often do not qualify for the safety valve because of their criminal history. In fiscal year 2016, 77.2 percent of Black drug offenders convicted of an offense carrying a mandatory minimum penalty were in Criminal History Categories II – VI, which would disqualify them from consideration for the safety valve. By contrast, 72.8 percent of White drug offenders, 36.0 percent of Hispanic drug offenders, and 56.9 percent of Other Race drug offenders were in Criminal History Categories II–VI. Drug offenses committed by Black offenders involve a dangerous weapon in connection with the offense to a greater

Figure 11. Demographics of Offenders Relieved of a Mandatory Minimum Penalty by Race
Fiscal Year 2016



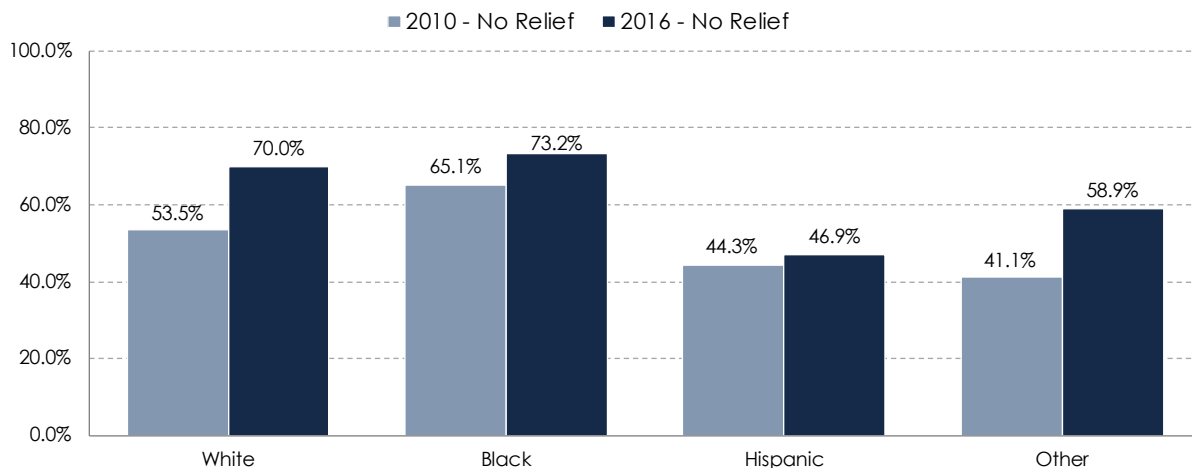
SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

extent. In fiscal year 2016, 13.8 percent of Black drug offenders convicted of an offense carrying a mandatory minimum penalty were convicted of a firearm offense under 18 U.S.C. § 924(c). This compares to 8.9 percent of White drug offenders, 7.3 percent of Hispanic drug offenders, and 7.3 percent of Other Race drug offenders. In addition, 22.6 percent of Black drug offenders convicted of an offense carrying a mandatory minimum penalty received an enhancement under USSG §2D1.1(b) (1) for weapon involvement. This compares to 22.1 percent of White drug offenders, 11.6 percent of Hispanic drug offenders, and 18.1 percent of Other Race drug offenders.

As demonstrated in Figure 12, the rate of offenders receiving relief from a mandatory minimum penalty decreased across all demographics since fiscal year 2010. This is again consistent with the stated goals of the Department of Justice's Smart on Crime Initiative to target more serious offenders for conviction under an offense carrying a mandatory minimum penalty. Commission data demonstrates, however, that the decreased likelihood of relief has not been uniform. In fiscal year 2016,

70.0 percent of White offenders remained subject to a mandatory minimum penalty at sentencing, an increase of 16.5 percentage points since fiscal year 2010. The percent of Black offenders who remained subject to a mandatory minimum penalty also increased, but only by 8.1 percent (from 65.1% in fiscal year 2010 to 73.2% in fiscal year 2016). As a result, the gap between White offenders and Black offenders has significantly decreased since the Commission's 2011 *Mandatory Minimum Report*, from a difference of 11.6 percent (65.1% of Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to that penalty at sentencing compared to 53.5% of White offenders in fiscal year 2010) to a difference of just 3.2 percent in fiscal year 2016. These changes are most likely the result of differences in the types of offenses charged. For example, the number of crack cocaine trafficking offenders, who tend to be predominantly Black,¹⁸⁰ significantly decreased by 67.1 percent in recent years.¹⁸¹ Conversely, the number of methamphetamine trafficking offenders, who tend to be Hispanic or White,¹⁸² increased 56.1 percent.¹⁸³

Figure 12. Demographics of Offenders Who Remained Subject to a Mandatory Minimum Penalty at Sentencing by Race
Fiscal Years 2010 and 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



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As was the case in fiscal year 2010, non-U.S. citizens received relief (62.6%) at a significantly higher rate than U.S. citizens (31.9%). This is due, in large part, to the fact that non-U.S. citizens qualified for relief from the mandatory minimum penalty under the safety valve (48.3%) more often than U.S. citizen offenders (11.8%) because of their lower criminal history scores. Non-U.S. citizen offenders tend to have lower criminal history scores because criminal history calculations under Chapter 4 of the *Guidelines Manual* exclude sentences resulting from foreign convictions.¹⁸⁴

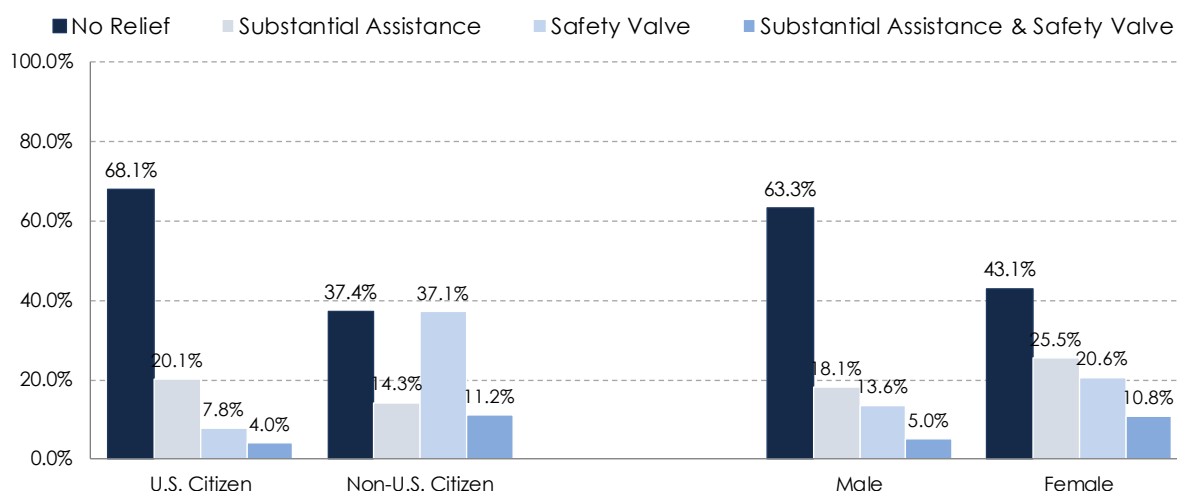
Female offenders continued to receive relief at a higher rate than male offenders. In fiscal year 2016, more than half of female offenders (56.9%) obtained relief from the mandatory minimum penalty at sentencing compared to 36.7 percent of male offenders. As shown in Figure 13, female offenders qualified for each type of relief at a higher rate than male offenders.

Substantial Assistance

Lastly, the Commission analyzed the extent to which mandatory minimum penalties encourage cooperation with law enforcement. As discussed above, offenders convicted of an offense carrying a mandatory minimum penalty are provided an incentive to plead guilty and cooperate with law enforcement officials. Namely, when the government files a motion indicating that the defendant has substantially cooperated, 18 U.S.C. § 3553(e) grants the court limited authority to impose a sentence below a mandatory minimum penalty. Because the Commission has also incorporated this incentive into the guidelines at USSG §5K1.1, non-mandatory minimum offenders are also eligible to receive a departure from the applicable guideline range by providing substantial assistance to the government.¹⁸⁵

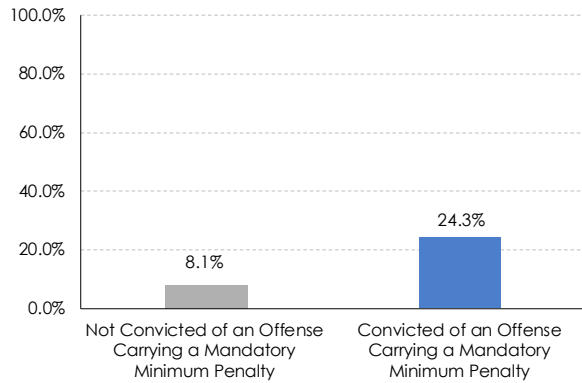
While both the statutory substantial assistance provision at 18 U.S.C. § 3553(e) and the related guideline provision at USSG §5K1.1 serve as a significant incentive to offenders, Commission

Figure 13. Demographics of Offenders Relieved of a Mandatory Minimum Penalty by Citizenship Status and Gender
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Figure 14. Percentage of Offenders Receiving Substantial Assistance
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

data indicates that the longer sentences required by an offense carrying a mandatory minimum penalty provide a significantly greater incentive. In fiscal year 2016, offenders convicted of an offense carrying a mandatory minimum penalty were over three times more likely to have provided substantial assistance to the government. As reflected in Figure 11 above, nearly one-quarter of offenders (24.3%) convicted of an offense carrying a mandatory

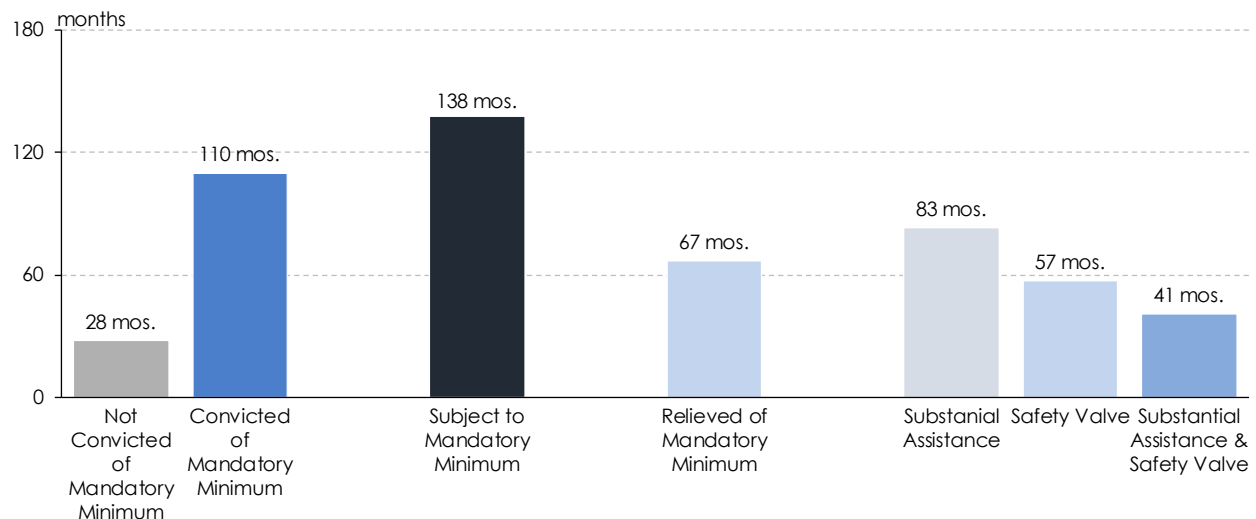
minimum received a substantial assistance motion. This compares to only 8.1 percent of offenders not convicted of an offense carrying a mandatory minimum penalty.

Sentencing of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty

Average Sentence Length

The Commission compared the average length of sentence imposed for all offenders, offenders convicted of an offense carrying a mandatory minimum penalty, offenders relieved from application of a mandatory minimum penalty, and offenders who remained subject to the mandatory minimum penalty at sentencing. In fiscal year 2016, the average sentence length¹⁸⁶ for offenders who were convicted of an offense carrying a mandatory minimum penalty was 110 months of imprisonment, nearly four times the average sentence for offenders not convicted of an offense carrying a mandatory minimum penalty. By comparison, the average sentence length of all offenders sentenced in fiscal year 2016 was 46 months of imprisonment.

Figure 15. Average Sentence Length
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.





United States Sentencing Commission
OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017)

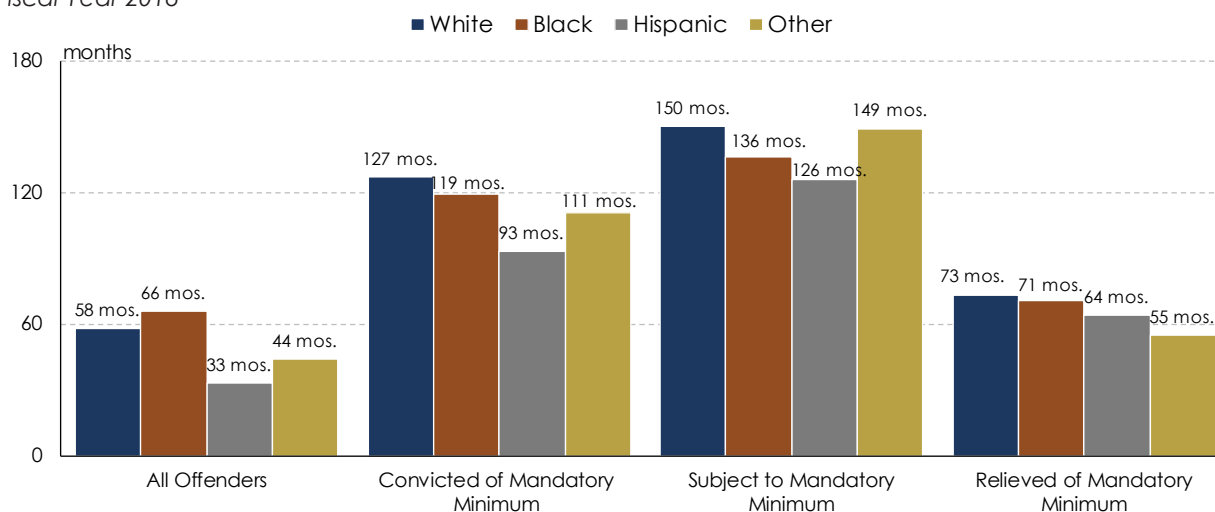
The average sentence length for offenders who remained subject to a mandatory minimum penalty at sentencing was more than twice as high at 138 months than offenders who ultimately received relief from such penalty at sentencing (67 months). For those relieved of the mandatory minimum penalty, the average sentence imposed also varied depending on the type of statutory relief. Offenders who provided substantial assistance to the government received longer average sentences, at 83 months, than offenders who qualified for the safety valve provision (average sentence of 57 months). Offenders who qualified for both received the lowest average sentence of 41 months.

These differences may be attributable to the fact that offenders who qualify for safety valve relief were generally less culpable than other offenders and, therefore, would normally receive lower sentences on average.¹⁸⁷ First, by statute, offenders must fall within Criminal History Category I to qualify for safety valve relief. Additionally, offenders must not have possessed a dangerous weapon in connection with the offense and must not have received an aggravating role adjustment under the

guidelines (for being an organizer, leader, manager, or supervisor in any criminal activity).¹⁸⁸ Of the offenders who provided substantial assistance to the government, 3.4 percent were also convicted of a firearms crime, 16.6 percent received a sentence enhancement for possessing a weapon, and 13.1 percent received an aggravating role adjustment.

To some extent, the average sentences noted above were also attributable to the length of the applicable mandatory minimum penalty. As discussed earlier in this section,¹⁸⁹ of the 13,604 offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2016, 51.8 percent were convicted of an offense carrying a mandatory minimum penalty of more than five years, with 48.6 percent facing a mandatory minimum of ten years or more. Exactly 40.0 percent were offenders convicted of an offense carrying a mandatory minimum penalty of five years of imprisonment. The remaining offenders (8.1%) were convicted of an offense that carried a mandatory minimum penalty of another length less than five years of imprisonment.

Figure 16. Average Sentence Length by Race
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

The Commission also compared the average length of sentences imposed for offenders by race. As reflected in Figure 16, when considering all offenders, Black offenders were sentenced to longer terms than any other racial group (66 months) in fiscal year 2016. White offenders (58 months) had the second highest average sentence, followed by Other Race offenders (44 months) and Hispanic offenders (33 months).

However, among offenders convicted of an offense carrying a mandatory minimum penalty, White offenders had the highest average sentence (127 months), followed by Black offenders (119 months), Other Race offenders (111 months), and Hispanic offenders (93 months). White offenders also received the longest sentences among offenders who were relieved of the application of a mandatory minimum penalty at sentencing (73 months), and those offenders who were subject to a mandatory minimum penalty at sentencing (150 months).

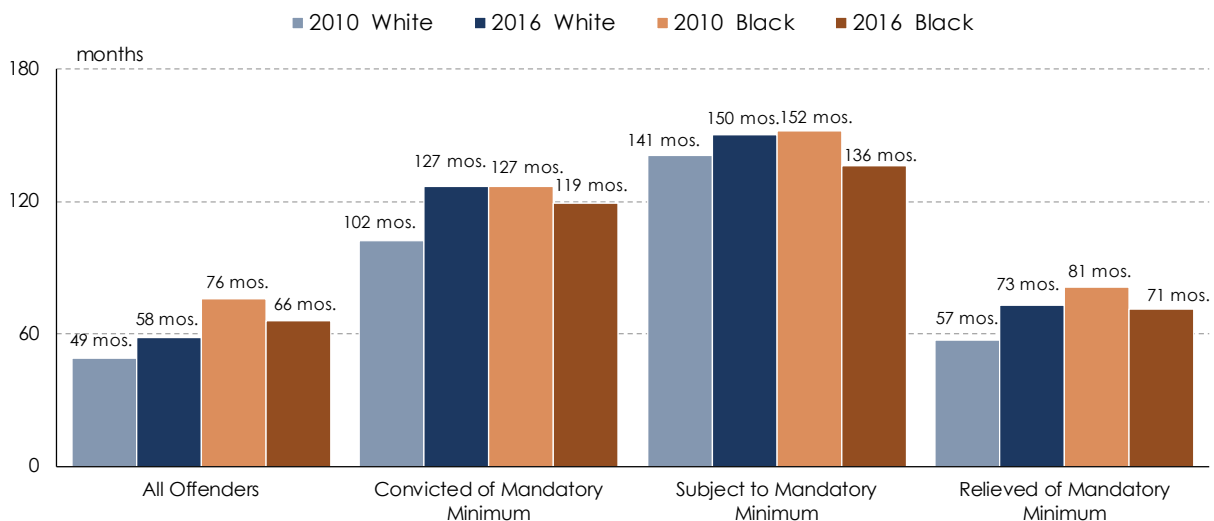
There were several notable changes after fiscal year 2010 in terms of average sentence, particularly

as to White and Black Offenders. While Black offenders continued to receive the highest average sentence overall (66 months), this represents a 13.2 percent decrease in sentence for Black offenders in fiscal year 2010 (76 months). Conversely, White offenders saw an increase in sentences between 2010 and 2016, going from 49 months in fiscal year 2010 to 58 months in fiscal year 2016, an 18.4 percent increase.

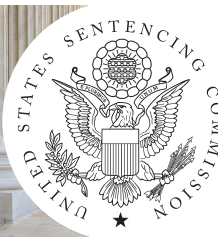
Changes are also seen for offenders convicted of, relieved of, or ultimately subject to a mandatory minimum penalty. Most notably, Black offenders no longer have the highest average sentence in any of those categories. In each instance, White offenders received the longest average sentences in fiscal year 2016.

This is a significant change from fiscal year 2010, in which Black offenders convicted of a statute carrying a mandatory minimum penalty had the highest average sentence (152 months), followed by White offenders with 102 months. This change is a result of the fact that White offenders convicted

Figure 17. Comparison of Average Sentence of White and Black Offenders
Fiscal Years 2010 and 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



United States Sentencing Commission OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017)

Table 4. Average Sentence by Citizenship and Gender
Fiscal Year 2016

	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Relieved of Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	N=62,251	N=13,604	N=5,262	N=8,342
CITIZENSHIP				
U.S. Citizen	59 months	117 months	68 months	140 months
Non-U.S. Citizen	26 months	87 months	66 months	124 months
GENDER				
Male	49 months	115 months	70 months	141 months
Female	26 months	69 months	50 months	95 months

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

of a statute carrying a mandatory minimum penalty had a 24.5 percent increase in their average sentence between fiscal years 2010 and 2016.

For offenders who were convicted of a statute carrying a mandatory minimum penalty but were relieved of the application of the penalty at sentencing, White offenders saw a 16-month increase (28.1%) in their average sentence from fiscal year 2010 (from 57 months to 73 months). Black offenders, on the other hand, saw a 12.3 percent decrease from fiscal year 2010 (from 81 months to 71 months).

White offenders who remained subject to a mandatory minimum penalty at sentencing had an average sentence of 150 months in fiscal year 2016, which is 6.4 percent higher than the average in fiscal year 2010 (141 months). Black offenders had an average sentence of 136 months—a 16-month decrease from the same Black offenders in fiscal year 2010 (from 152 months to 136 months).

Finally, the Commission also compared the average length of sentences imposed for offenders by citizenship and gender. As was the case in fiscal year 2010, U.S. citizens have longer sentences

Table 5. Position of Sentence Relative to the Guideline Range
Fiscal Year 2016

	All Offenders	Convicted of an Offense Carrying a Mandatory Minimum Penalty	Subject to a Mandatory Minimum Penalty at Sentencing
Total (# of offenders)	N=62,251	N=13,604	N=8,342
SENTENCE RELATIVE TO THE GUIDELINE RANGE			
Within Range	46.6%	41.4%	54.7%
Above Range	2.3%	2.0%	3.2%
Substantial Assistance §5K1.1	11.7%	24.4%	0.0%
Other Government Sponsored (no §5K1.1)	17.5%	10.4%	14.9%
Non-Government Sponsored Below Range	21.8%	21.8%	27.4%

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

than non-U.S. citizens in all four instances (all offenders, offenders convicted of a statute carrying a mandatory minimum penalty, offenders relieved of a mandatory minimum penalty, and offenders subject to a mandatory minimum penalty at sentencing). Male offenders also have longer sentences than female offenders in all four categories. The average sentences for each group are provided in Table 4 above.

Sentences Relative to the Guideline Range

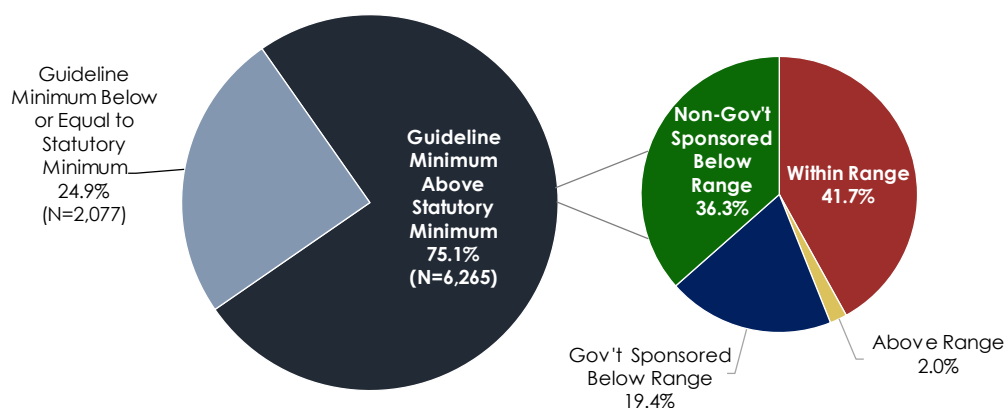
The rate at which the sentence imposed compares to the applicable guideline range varies by whether the offender was convicted of an offense carrying a mandatory minimum penalty, relieved from application of a mandatory minimum penalty because of substantial assistance and/or the safety valve, or remained subject to the mandatory minimum penalty at sentencing.¹⁹⁰

As shown in Table 5, offenders who were subject to a mandatory minimum penalty at sentencing were most likely to receive a sentence within the guideline range (54.7%).¹⁹¹ Offenders who remained subject to a mandatory minimum penalty at sentencing were also most likely to receive a non-government sponsored below range

sentence. More than one-quarter (27.4%) of such offenders received a non-government sponsored departure or variance, a higher rate than all offenders generally (21.8%) and the larger subset of offenders convicted of an offense carrying a mandatory minimum penalty (21.8%).

This high rate of non-government sponsored below range sentences is, in part, because courts often sentence such offenders to the statutory mandatory minimum term of imprisonment regardless of the applicable guideline range. As reflected in Figure 18, 75.1 percent of offenders subject to a mandatory minimum penalty at sentencing had a guideline minimum that was above the applicable mandatory minimum. In these cases, while courts were bound by the minimum penalty, they were free to sentence below the otherwise applicable guideline range. In such instances, the within guideline range rate fell to 41.7 percent, lower than the overall rate in fiscal year 2016. Conversely, both the non-government sponsored and government sponsored below range sentences increased to 36.3 percent and 19.4 percent respectively. In total, 32.1 percent of offenders who remained subject to the mandatory minimum penalty at sentencing received a sentence at the mandatory minimum penalty.¹⁹²

Figure 18. Position of Sentence Relative to the Guideline Range for Offenders Subject to a Mandatory Minimum Penalty at Sentencing
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



Impact of Mandatory Minimum Penalties on the Federal Prison Population

This section further explores the continuing impact of mandatory minimum penalties on the overall prison population, including an update of the Commission's analysis regarding the current portion of the federal prison population who were convicted of a mandatory minimum penalty. This section also provides new analyses regarding the size and composition of the federal prison population convicted of an offense carrying a mandatory minimum penalty by race, gender and citizenship.

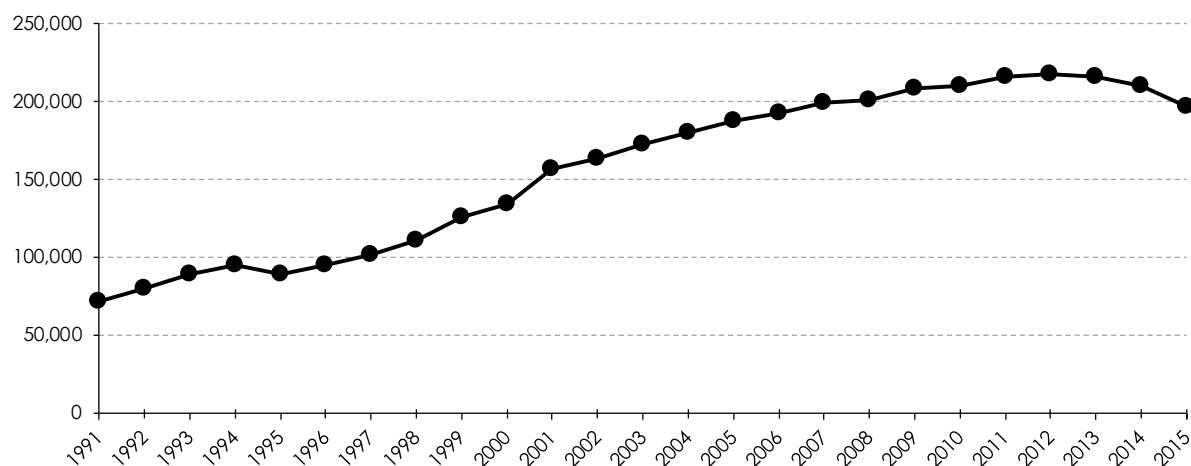
As discussed in this section, many of the changes seen in the prison population were likely the result of the changes in charging practices discussed above. Nevertheless, the full impact of these policies will not be seen for many years as offenders sentenced between 2010 and 2016 serve out their sentences. Many of these offenders received shorter sentences than they would have under different policies, and therefore their release could continue to impact the overall makeup of the prison population in future years. Also unclear is

the extent to which the Department of Justice's decision to refocus its efforts on prosecuting the most serious, readily provable offense will reverse the recent trends seen in the data below.

Federal Population Overall

There have been significant changes to the federal prison population over the past 25 years. The federal population steadily increased for most of that period from 71,608 on December 31, 1991 to a high of 217,815 as of December 31, 2012. The steady increase through 2012 was the result of several factors, including the scope and use of mandatory minimum penalties.¹⁹³ Specifically, in the 2011 *Mandatory Minimum Report*, the Commission noted that these factors have included changes to mandatory minimum penalties themselves, both in terms of number and scope, as well as other systemic changes to the federal criminal justice system, such as the expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, and higher rates of imposition of sentences of imprisonment.¹⁹⁴

Figure 19. Number of Offenders in Federal Prison as of December 31
1991 - 2015



SOURCE: Allen J. Beck and Darrell K. Gilliard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin, 1 (1995); Allen J. Beck and Paige M. Harrison, *Prisoners in 2000*, Bureau of Justice Statistics Bulletin, 1 (2001); Heather C. West, William J. Sabol, and Sarah J. Greenman, *Prisoners in 2009*, Bureau of Justice Statistics Bulletin, 2 (2010); and E. Ann Carson and Elizabeth Anderson, *Prisoners in 2015*, Bureau of Justice Statistics

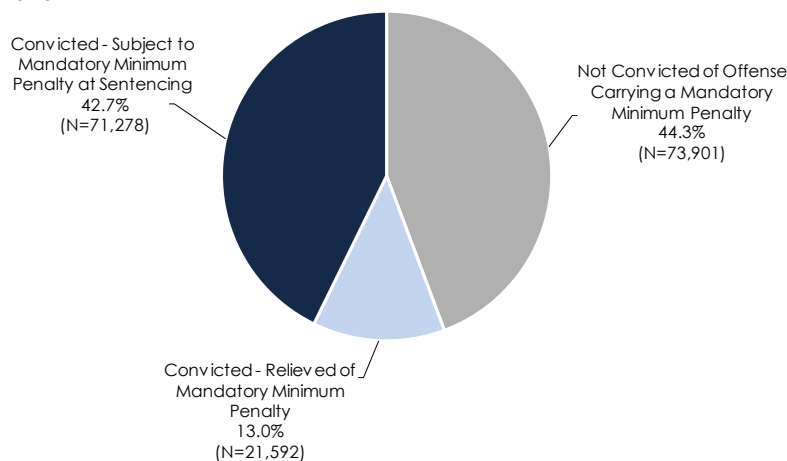
This trend has reversed in recent years. Since the high point at the end of 2012, the number of federal inmates steadily decreased, falling to 196,455 inmates (a 9.8% decrease) on December 31, 2015. This decrease is the result of other more recent changes in the federal criminal justice system. In particular, there have been a number of changes related to the charging and sentencing of drug trafficking offenders. As discussed above in Section Four, these include the statutory changes made by the Fair Sentencing Act and the accompanying changes to the guidelines, and subsequent changes to Department of Justice policies pursuant to its Smart on Crime Initiative. Additionally, the Commission separately reduced the drug guidelines for all drugs, including crack cocaine, by two levels in 2014.¹⁹⁵ These 2014 amendments were also made retroactive,¹⁹⁶ resulting in a sentence reduction for 30,327 offenders as of May 2017, with an average decrease of 25 months.¹⁹⁷

Mandatory Minimum Offenders in the Federal Prison Population

The Commission also combined Commission data with data received from the BOP to study the scope and impact of mandatory minimum penalties in the federal system.¹⁹⁸ This data was used to determine how many offenders were in prison, what percentage of prisoners were convicted of violating a statute containing a mandatory minimum penalty, and what percentage of prisoners were subject to a mandatory minimum penalty at sentencing.¹⁹⁹

As of the end of fiscal year 2016, there were 166,771 offenders in BOP custody, of whom 92,870 (55.7%) were convicted of an offense carrying a mandatory minimum penalty. As shown in Figure 20, 42.7 percent of all offenders in BOP custody were convicted of and remained subject to a mandatory minimum penalty, while 13.0 percent were convicted of an offense carrying a mandatory minimum penalty but received relief, and 44.3 percent were convicted of an offense that did not carry a mandatory minimum penalty.

Figure 20. Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum Penalty, Convicted of an Offense Carrying a Mandatory Minimum Penalty, and Subject to a Mandatory Minimum Penalty at Sentencing
By End of Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP.



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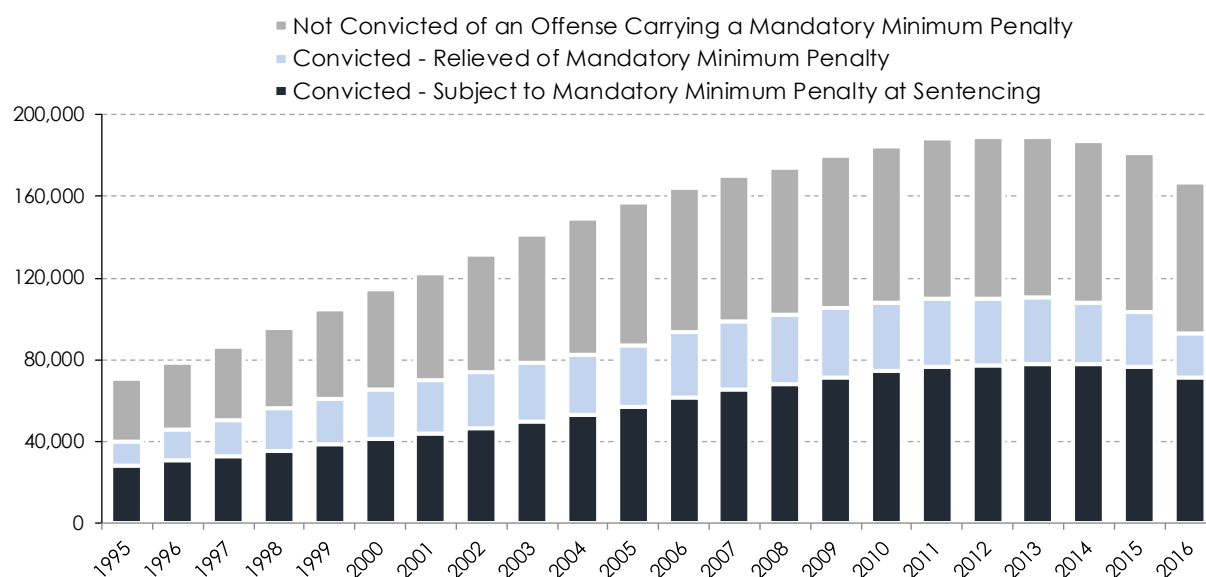
As depicted in Figure 21, the number of offenders convicted of an offense carrying a mandatory minimum penalty has decreased in recent years, which is consistent with the downward trend in the overall federal prison population. As of September 30, 2010, combined Commission and BOP data identified 108,022 offenders in BOP custody who were convicted of an offense carrying a mandatory minimum penalty. By September 30, 2016, there were 92,870 such inmates in BOP custody, a 14.0 percent decrease.

The number of offenders in BOP custody who were convicted of a non-mandatory minimum offense has also decreased since 2010, but to a lesser extent. After hitting a high of 79,126 on September 30, 2014, the population of offenders in BOP custody convicted of violating a statute with no mandatory minimum penalty fell to 73,901 as of September 30, 2016, a 6.6 percent decrease

from 2010. The differing rates of decrease between the number of offenders in the federal prison population who were convicted of violating statutes with and without mandatory minimum penalties is most likely the result of the change in charging and sentencing practices discussed above. As fewer offenders were convicted of offenses carrying mandatory minimum penalties, that population declined, while the rate of non-mandatory minimum offenders remained relatively stable.

The revised charging practices were also reflected in the population of offenders who were ultimately relieved of a mandatory minimum penalty versus those who remained subject to such a penalty at sentencing. Both groups have decreased in number since 2010, but they have done so at drastically different rates. While the number of offenders in BOP custody who remained subject to a mandatory minimum penalty at sentencing

Figure 21. Number of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum Penalty, Convicted of an Offense Carrying a Mandatory Minimum Penalty, and Subject to a Mandatory Minimum Penalty at Sentencing
By End of Fiscal Years 1995 - 2016



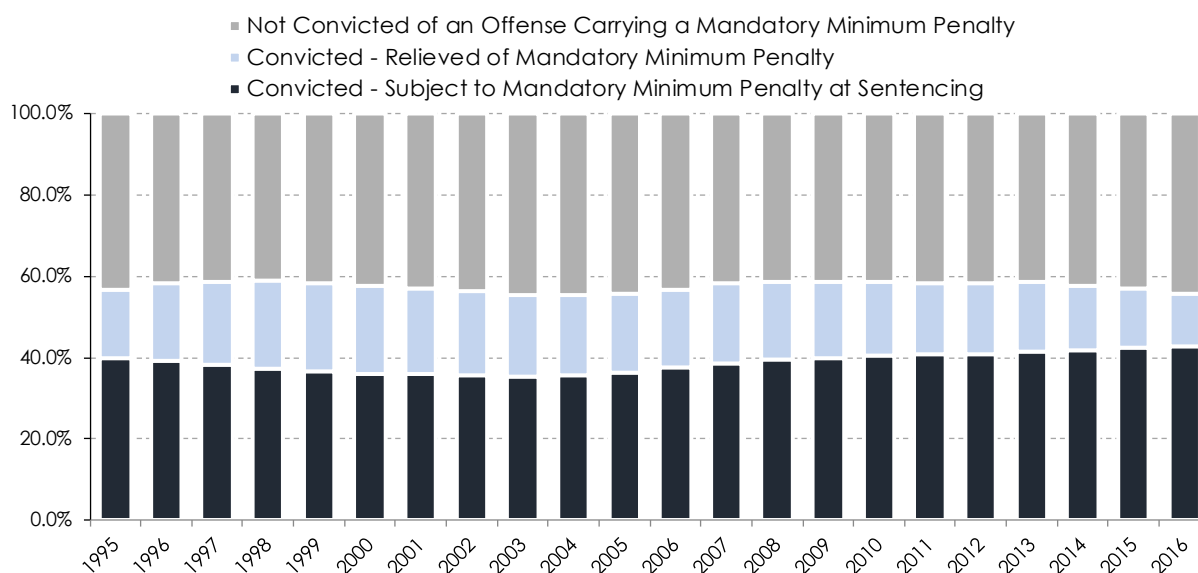
SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2016 Datafiles, USSCBOP.

decreased 4.3 percent between September 30, 2010 (n=74,479) and September 30, 2016 (n=71,278), the number of offenders who were convicted but relieved of such penalty decreased 35.6 percent. This again appears consistent with the intent of the Department of Justice's 2013 Smart on Crime Initiative. That is, while fewer offenders were convicted of an offense carrying a mandatory minimum penalty in recent years, those who were tended to be more serious offenders who are less likely to be eligible for relief.

Combined Commission and BOP data also reflected changes in the distribution of offenders in the federal prison population who were convicted of violating statutes with and without mandatory minimum penalties.

As a percent of the total prison population, offenders convicted of statutes carrying mandatory minimum penalties decreased slightly from 58.6 percent as of September 30, 2010 to 55.7 percent as of September 30, 2016. Among this group, the portion of offenders who remained subject to a mandatory minimum penalty at sentencing steadily increased from 40.4 percent as of September 30, 2010 to 42.7 percent as of September 30, 2016, the highest percentage for any period under study. Conversely, the portion of offenders who were convicted of a statute carrying a mandatory minimum penalty but relieved of the penalty before sentencing steadily decreased from 18.2 percent to 13.0 percent during this same period, the lowest percentage for any period under study.

Figure 22. Percentage Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum Penalty, Convicted of an Offense Carrying a Mandatory Minimum Penalty, and Subject to a Mandatory Minimum Penalty at Sentencing
By End of Fiscal Years 1995 - 2016

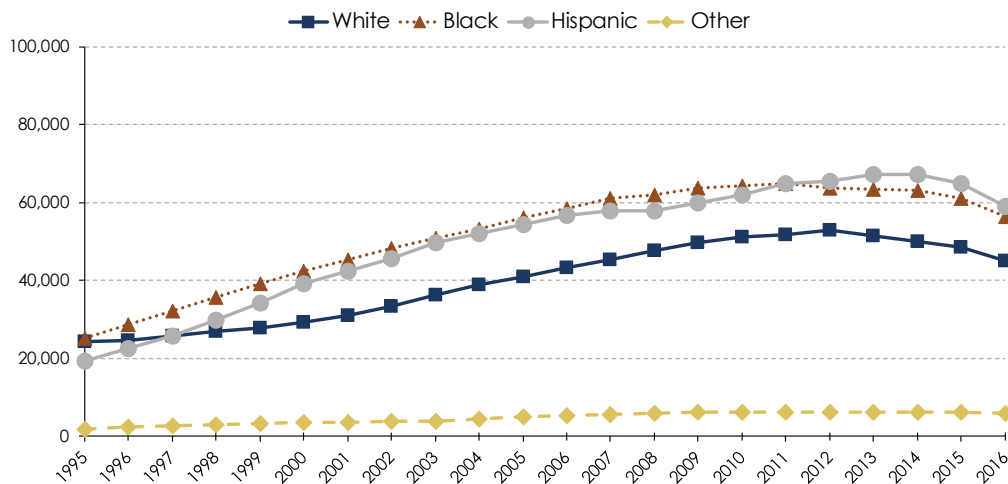


SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2016 Datafiles, USSCBOP.



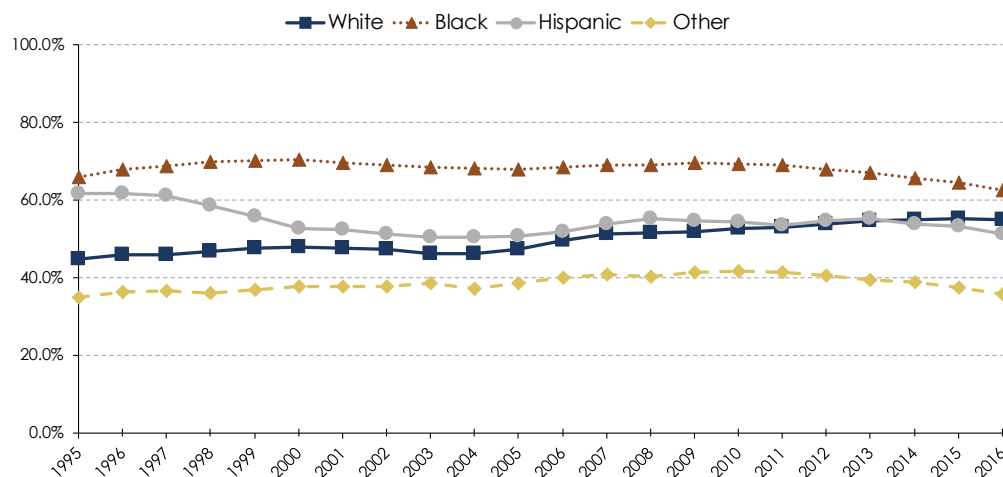
United States Sentencing Commission OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017)

Figure 23. Number of Offenders in Federal Prison by Race
By End of Fiscal Years 1995 - 2016



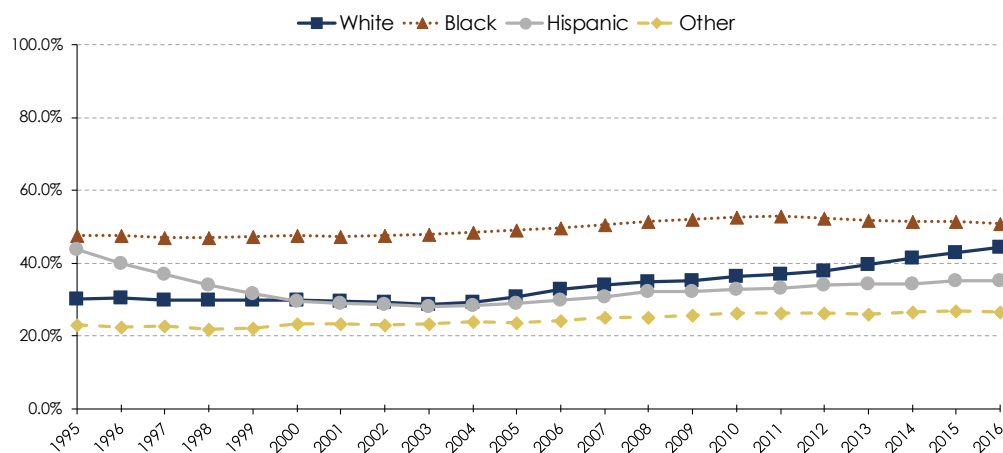
SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP.

Figure 24. Percentage of Offenders in Federal Prison Convicted of an Offense Carrying a Mandatory Minimum Penalty by Race
By End of Fiscal Years 1995 - 2016



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP.

Figure 25. Percentage of Offenders in Federal Prison Subject to a Mandatory Minimum Penalty at Sentencing by Race
By End of Fiscal Years 1995 - 2016



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP.

Mandatory Minimum Offenders in the Federal Prison Population – By Race

All racial groups experienced a steady decrease in population since 2013, following more than a decade of increases. At the end of fiscal year 2012, Hispanic offenders (n=65,384) became the most common racial group in federal prison for the first time, overtaking Black offenders (n=63,807). This trend continued in the years since, with Hispanic offenders (n=58,960) making up the largest portion of offenders in BOP custody at the end of fiscal year 2016. Black offenders (n=56,509) comprised the second largest group, followed by White offenders (n=45,157) and Other Race offenders (n=5,844).

While Hispanic offenders now make up the largest population in BOP custody, Black offenders in prison were more likely than any other race to have been convicted of an offense carrying a mandatory minimum penalty across all years under study. As shown in Figure 24, 62.7 percent of Black offenders in prison were convicted of an offense carrying a mandatory minimum penalty at the end of fiscal year 2016. This percentage, however, has been on a steady decline since fiscal year 2010 (69.4% of all Black offenders in prison). The percentage of Hispanic offenders and Other Race offenders convicted of an offense carrying a mandatory minimum penalty also decreased during this time to 51.4 percent and 35.7 percent, respectively, at the end of fiscal year 2016. Conversely, the percentage of White offenders in prison convicted of an offense carrying a mandatory minimum penalty has slowly increased since the end of fiscal year 2004, reaching a high of 55.1 percent at the end of fiscal year 2016.

Similar trends can be seen in Figure 25 regarding offenders who remained subject to an offense carrying a mandatory minimum penalty at sentencing. At the end of fiscal year 2016, 51.0

percent of Black offenders in prison were subject to a mandatory minimum penalty at sentencing, followed by White offenders (44.3%), Hispanic offenders (35.2%), and Other Race offenders (26.4%). Unlike each of the other categories, however, only the percentage of White offenders in prison subject to a mandatory minimum penalty increased since the end of fiscal year 2010 (from 36.3% to 44.3%).

Mandatory Minimum Offenders in the Federal Prison Population – By Gender

As reflected in Figure 26, the male population decreased from a high of 176,568 at the end of fiscal year 2012 to 155,103 at the end of fiscal year 2016 (a 12.2% decrease). The population of female offenders also decreased slightly in the last two fiscal years, but was more steady over the study period.

Conversely, the percentage of males in prison who were convicted of an offense carrying a mandatory minimum penalty remained relatively constant since the Commission's last report in 2011, decreasing only slightly in the last fiscal year. The percentage of female offenders in prison convicted of an offense carrying a mandatory minimum penalty decreased more sharply during this period, falling from 55.4 percent at the end of fiscal year 2010 to a low of 46.2 percent at the end of fiscal year 2016.

The percentage of male offenders in prison who were subject to a mandatory minimum penalty at sentencing has fluctuated over time. At the end of fiscal year 1995, 40.3 percent of male offenders in prison were subject to a mandatory minimum penalty at sentencing. This decreased to a low of 36.0 percent at the end of fiscal year 2003, but has steadily increased to 43.9 percent at the end of fiscal year 2016 (the highest percentage of any year). The





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Figure 26. Number of Offenders in Federal Prison by Gender By End of Fiscal Years 1995 - 2016

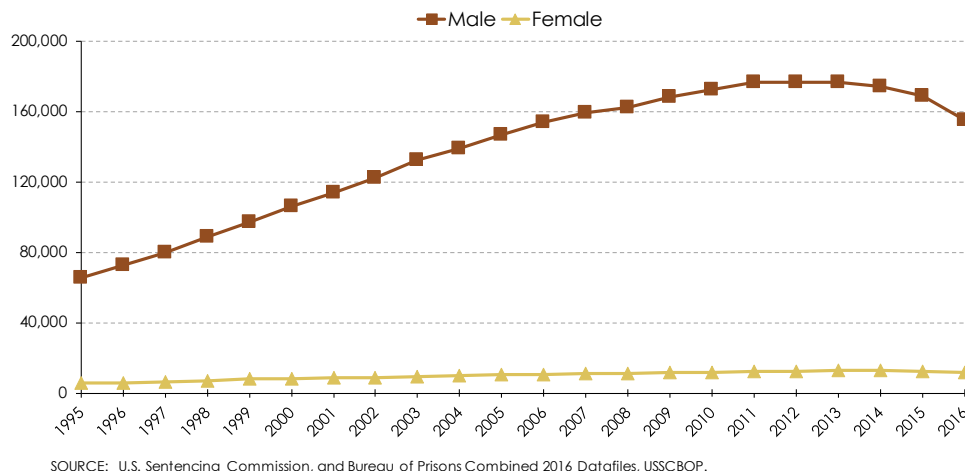


Figure 27. Percentage of Offenders in Federal Prison Convicted of an Offense Carrying a Mandatory Minimum Penalty by Gender By End of Fiscal Years 1995 - 2016

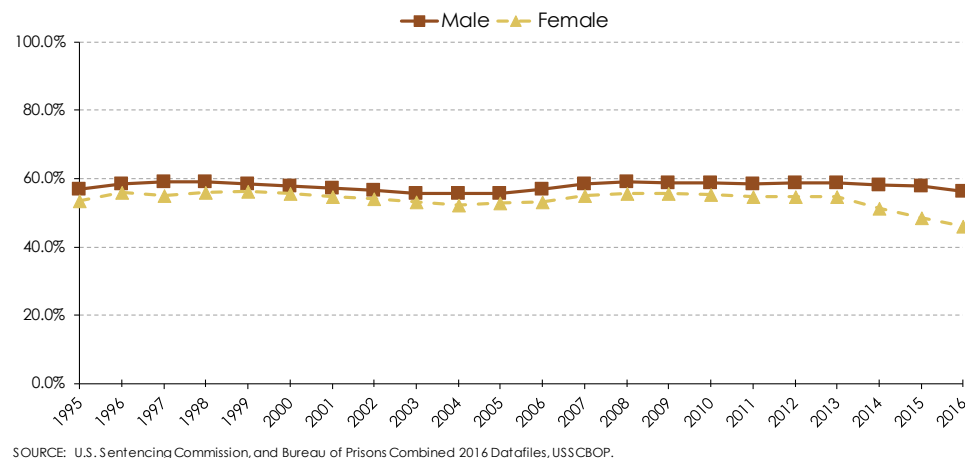
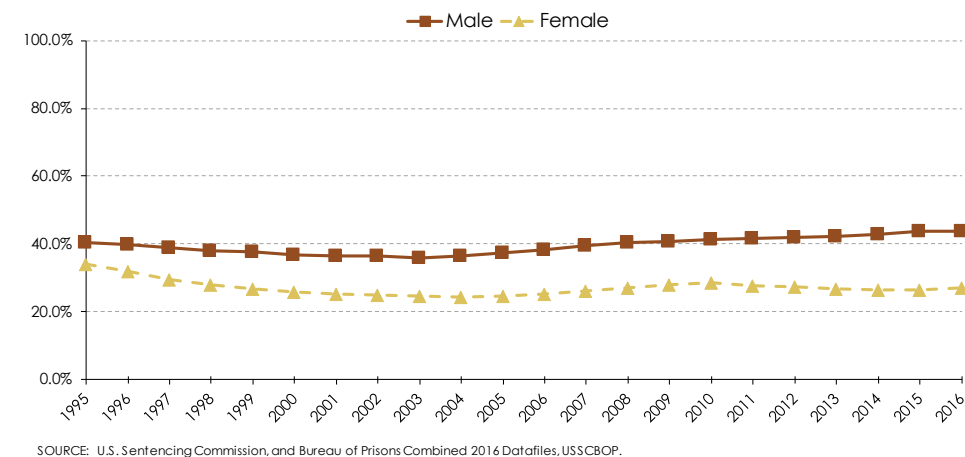


Figure 28. Percentage of Offenders in Federal Prison Subject to a Mandatory Minimum Penalty at Sentencing by Gender By End of Fiscal Years 1995 - 2016



percentage of female offenders in prison subject to a mandatory minimum penalty remained relatively stable in recent years following an initial decline in the late 1990s. As of the end of fiscal year 2016, 27.0 percent of female offenders in prison were subject to a mandatory minimum penalty at sentencing.

Mandatory Minimum Offenders in the Federal Prison Population – By Citizenship

Following a steady increase from the end of fiscal year 1995 (n=54,422) through the end of fiscal year 2014 (n=141,602), the population of U.S. citizens in prison decreased sharply to 130,076 at the end of fiscal year 2016. The population of non-U.S. citizens followed a similar pattern, increasing from the end of fiscal year 1995 (n=15,939) through the end of fiscal year 2011 (n=49,748) before steadily decreasing to 36,524 at the end of fiscal year 2016.

While the percentage has declined slightly in recent years, the majority (59.1%) of U.S. citizens in prison at the end of fiscal year 2016 were convicted of an offense carrying a mandatory minimum penalty. This compares to 43.4 percent of non-U.S. citizens. As reflected in Figure 30, the percentage of U.S. citizens in prison who were convicted of an offense carrying a mandatory minimum penalty slightly increased over the course of the study period (from 55.5% at the end of fiscal year 1995 to 59.1% at the end of fiscal year 2016), while the percentage for non-U.S. citizens has decreased (from 60.5% at the end of fiscal year 1995 to 43.4% at the end of fiscal year 2016). These differences between citizens and non-U.S. citizens were unsurprising as non-U.S. citizens are more frequently convicted of immigration offenses that do not carry mandatory minimum penalties.²⁰⁰

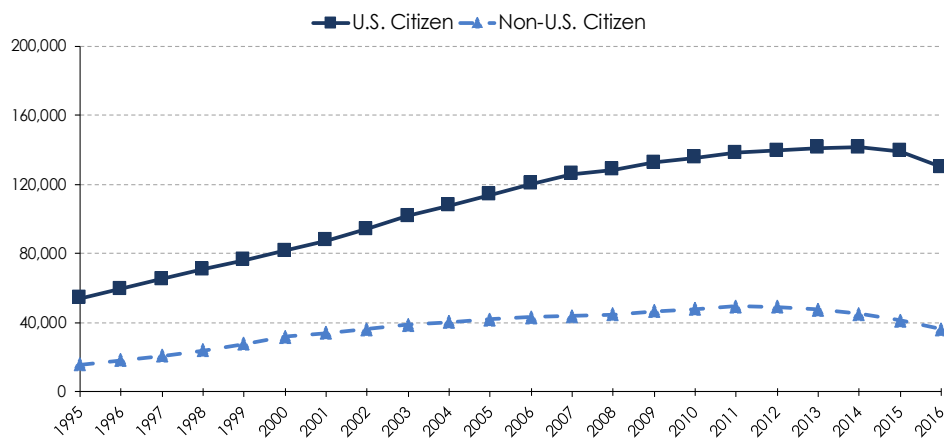
A similar trend is seen when analyzing offenders who remained subject to a mandatory minimum penalty at sentencing. The percentage of U.S. citizen offenders who were in prison and were subject to a mandatory minimum penalty at sentencing has slowly increased over time to a high of 47.1 percent at the end of fiscal year 2016. The percentage of non-U.S. citizen offenders in prison subject to a mandatory minimum has decreased during this same period (from 43.2% at the end of fiscal year 1995 to 27.3% at the end of fiscal year 2016).





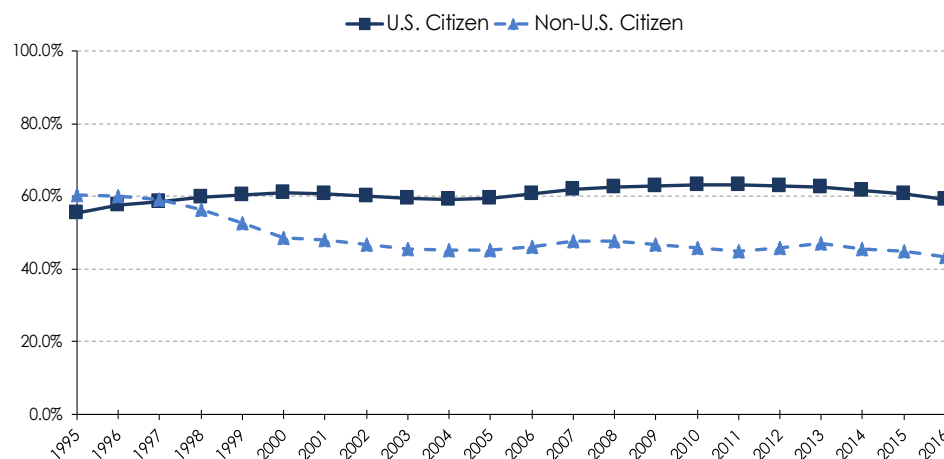
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Figure 29. Number of Offenders in Federal Prison by Citizenship By End of Fiscal Years 1995 - 2016



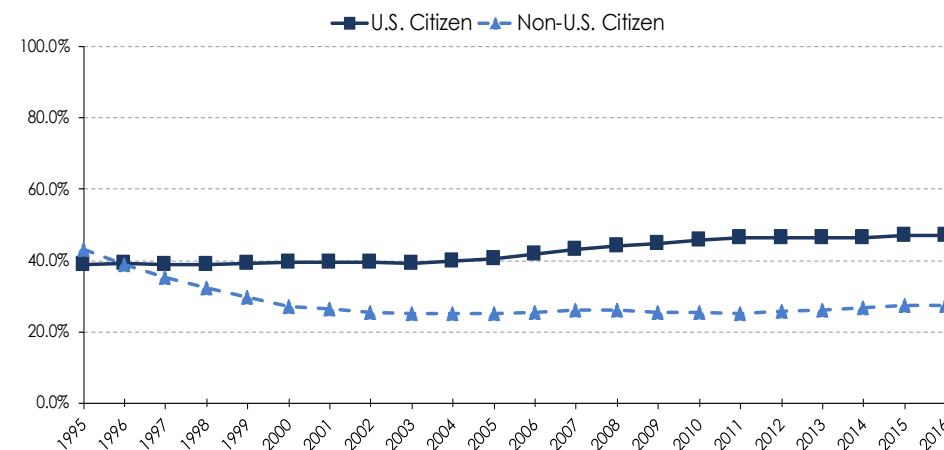
SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP.

Figure 30. Percentage of Offenders in Federal Prison Convicted of an Offense Carrying a Mandatory Minimum Penalty by Citizenship By End of Fiscal Years 1995 - 2016



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP.

Figure 31. Percentage of Offenders in Federal Prison Subject to a Mandatory Minimum Penalty at Sentencing by Citizenship By End of Fiscal Years 1995 - 2016



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP.



6 Conclusion



United States Sentencing Commission OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017)

Conclusion

Since the Commission's 2011 *Mandatory Minimum Report* was issued in October of 2011, the landscape of federal mandatory minimum penalties has continued to evolve. For example, Congress passed the Fair Sentencing Act of 2010, which altered the mandatory minimum penalties established by Congress in 1986 and 1988 by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively. Enactment of the FSA triggered responses from the Commission, the Department of Justice, and the Supreme Court, all of which influenced the impact of the Act's changes. Other changes to Department of Justice charging policy and recent Supreme Court caselaw have also impacted charging practices relating to mandatory minimum penalties.

These changes, as well as other factors, are reflected in the sentencing data analyzed throughout this publication, including an overall decrease in the number of offenders convicted of offenses carrying a mandatory minimum penalty since fiscal year

2010. At the same time, the data demonstrates that mandatory minimum penalties continue to result in long sentences as compared to offenders not convicted of an offense carrying a mandatory minimum penalty.

While this publication provides an overview of the scope and impact of such penalties as a whole, the Commission anticipates that recent developments have impacted the different types of offenses that carry mandatory minimum penalties in different ways. Given these distinctions, many policy considerations regarding the scope of mandatory minimum penalties must necessarily be made in terms of specific offense types. To that end, the Commission will issue additional reports based on its analysis of offenses carrying mandatory minimum penalties in the coming months. These future publications will focus on each of the primary offense types that currently carry mandatory minimum penalties, including drug trafficking, firearms, sex offenses, and aggravated identity theft. While providing much of the same type of analysis, these offense-specific publications will also provide targeted analysis specific to each offense.



Endnotes



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1 As discussed in more detail in the Commission’s 2011 report on mandatory minimum penalties, Congress created the first comprehensive series of federal offenses with the passage of the 1790 Crimes Act, which specified 23 federal crimes. *See* U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at 7 (Oct. 2011), *available at* <http://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system> [hereinafter 2011 MANDATORY MINIMUM REPORT] (citing Act of Apr. 30, 1790, Chap. IX, 1 Stat. 112). Seven of the offenses in the 1790 Crimes Act carried a mandatory death penalty: treason, murder, three offenses relating to piracy, forgery of a public security of the United States, and the rescue of a person convicted of a capital crime. *See id.*

2 *See, e.g.,* Sentencing Reform Act of 2015, H.R. 3713 (first introduced Oct. 8, 2015); Sentencing Reform and Corrections Act of 2015, S. 2123 (first introduced Oct. 1, 2015). *See also* Smarter Sentencing Act of 2013, S. 1410. *See also* 156 CONG. REC. S1680–83 (daily ed. Mar. 17, 2010) and 156 CONG. REC. H6196–6204 (daily ed. July 28, 2010) (for debate associated with passage of Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372). *See also* 150 CONG. REC. H4808–11 (daily ed. June 23, 2004) and 150 CONG. REC. S7527 (daily ed. June 25, 2004) (for debate associated with passage of Identity Theft Penalty Enhancement Act, Pub. L. No. 108–275, 118 Stat. 831). *See also* 149 CONG. REC. S2573–90 (daily ed. Feb. 24, 2003), 149 CONG. REC. H2440–43 (daily ed. Mar. 27, 2003), 149 CONG. REC. H3059, 3066–76 (daily ed. Apr. 10, 2003), 149 CONG. REC. H2950–68 (daily ed. Apr. 9, 2003), 149 CONG. REC. S5113–35, S5137–57 (daily ed. Apr. 10, 2003) (for debate associated with passage of Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650).

3 For a detailed historical discussion of varying policy views regarding the use of federal mandatory minimum penalties, *see* 2011 MANDATORY MINIMUM REPORT, Ch. 5.

4 *See* 2011 MANDATORY MINIMUM REPORT, Ch. 4(B). Overall, statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system that also have had an impact on the size of the federal prison population. Those include expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. The changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.

5 The United States Sentencing Commission (“Commission”) is an independent agency in the judicial branch of government. Established by the Sentencing Reform Act of 1984, its principal purposes are (1) to establish sentencing policies and practices for the federal courts, including guidelines regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues. *See* 28 U.S.C. §§ 995(a)(14), (15), (20).

6 Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473 (1984).

7 *See* 28 U.S.C. §§ 995(a)(14)–(16), which collectively instruct the Commission to systematically collect and disseminate information regarding federal sentencing.

8 *See, e.g.,* Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission, For Hearing on “S. 212, Sentencing Reform and Corrections Act of 2015” Before the Committee on the Judiciary, United States Senate (Oct. 19, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20151021_Saris_Testimony.pdf; Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission, For Hearing on “H.R. 3717, Sentencing Reform Act of 2015” Before the U.S. House of Representatives Judiciary Committee (Nov. 18, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20151117_HR3713.pdf.

9 *See* U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (AS DIRECTED BY SECTION 1703 OF PUBLIC LAW 101–647) (Aug. 1991) [hereinafter 1991 MANDATORY MINIMUM REPORT].

10 *See id.* *See also* Hearing on Federal Mandatory Minimum Sentencing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary, 103rd Cong. (July 28, 1993) (statement of Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission), reprinted in 6 Fed. Sentencing Rep. 67 (1993); Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 110th Cong. 6 (2007) (statement of Hon. Ricardo H. Hinojosa, Chairman, United States Sentencing Commission); U.S. SENTENCING COMM’N, REPORT TO CONGRESS REGARDING FEDERAL MANDATORY MINIMUM SENTENCING PENALTIES (on record in Mandatory Minimums and Unintended Consequences, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. 124 (July 14, 2009)); Mandatory Minimum Penalties Hearing Before the U.S. Sentencing Commission (May 27, 2010).

11 Division E of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, 123 Stat. 2190, 2843 (enacted October 28, 2009). The Commission also submitted its 2011 MANDATORY MINIMUM REPORT pursuant to its general authority under 28 U.S.C. §§ 994–995, and its specific authority under 28 U.S.C. § 995(a)(20) which provides that the Commission shall have authority to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.”

12 *See* 2011 MANDATORY MINIMUM REPORT, Chs. 2–5.

13 *See id.*, Chs. 6–11.

14 *See id.*, at Ch.12.

15 *See id.*

16 *See id.*

17 *See id.*

18 *See id.*, at 369.

19 *See*, U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW (Mar. 2016), available at <http://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>; U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL DRUG TRAFFICKING OFFENDERS (Feb. 2017), available at <http://www.ussc.gov/research/research-reports/recidivism-among-federal-drug-trafficking-offenders>; U.S. SENTENCING COMM’N, CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS (Mar. 2017), available at <http://www.ussc.gov/research/research-reports/criminal-history-and-recidivism-federal-offenders>.

20 This publication uses the terms “mandatory minimum penalty,” “mandatory minimum sentencing provision,” “statute carrying a mandatory minimum penalty,” “convicted of an offense carrying a mandatory minimum penalty,” and related terms interchangeably in discussing statutory provisions carrying a minimum term of imprisonment. A provision that requires a mandatory minimum fine, mandatory minimum term of probation, mandatory minimum term of supervised release, or any other mandatory component of a sentence other than imprisonment is not considered a mandatory minimum penalty for purposes of this publication.

21 *See, e.g.*, 21 U.S.C. §§ 841, 859, 860, and 861.





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22 *See* 2011 MANDATORY MINIMUM REPORT, at 22–23.

23 The enactment of the statutory safety valve in 1994 and passage of the Fair Sentencing Act of 2010, which are discussed in more detail later in this publication, have had some ameliorative effect, but mandatory minimum sentences continue to have a substantial effect on overall sentence length.

24 Before 1951, mandatory minimum penalties typically punished offenses concerning treason, murder, piracy, rape, slave trafficking, internal revenue collection, and counterfeiting.

25 *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, 84 Stat. 1236 (1970). In repealing most drug mandatory minimum penalties, Congress expressed its belief that changes in the existing penalties, “particularly through elimination of mandatory minimum sentences,” would establish “a more realistic, more flexible, and thus more effective system of punishment and deterrence of violations of the federal narcotics laws.” *See* H. REP. NO. 91–1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566.

26 *See* 1991 MANDATORY MINIMUM REPORT, at 7.

27 As noted above, it was during this same period that Congress developed and passed the Sentencing Reform Act of 1984, creating the Sentencing Commission and the federal sentencing guidelines.

28 A detailed historical discussion on statutory mandatory minimum penalties for drug offenses is presented in the Commission’s 2011 MANDATORY MINIMUM REPORT, at 23–25.

29 *See infra*, Figure 7.

30 *See* Pub. L. No. 99–570, 100 Stat. 3207 (1986).

31 *See* Omnibus Anti-Abuse Act, Pub. L. 100–690, §6371, 102 Stat. 4181, 6470(a) (1988) (amending 21 U.S.C. §§ 846, 963). The 1988 Act also increased the mandatory minimum penalty for engaging in a continuing drug enterprise (from 10 to 20 years of imprisonment), and established a five-year mandatory minimum penalty for possessing more than five grams of crack cocaine. *See id.* § 4370 (amending 21 U.S.C. § 844); § 6481(a) (amending 21 U.S.C. § 848(a)).

32 Legislative history suggests that Congress intended for the tiered structure to encourage the Department of Justice to direct its “most intense focus” on “major traffickers” and “serious traffickers.” *See* H.R. REP. NO. 99–845, pt. 1, at 11–12 (1986).

33 Section 841 makes it unlawful for any person knowingly or intentionally to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.”

34 Section 960 criminalizes the knowing and intentional importation or exportation of a controlled substance.

35 These mandatory minimum penalties became effective on November 1, 1987, for all drug types, except methamphetamine. *See* Pub. L. No. 99–570, § 1002, 100 Stat. 3207, 3207-2 (1986) (amending 21 U.S.C. § 841(b)(1)). The mandatory minimum penalties for methamphetamine became effective on November 18, 1988. *See* Pub. L. No. 100–690, § 6470(g)(3), 102 Stat. 4181, 4378 (1988) (amending 21 U.S.C. § 841(b)(1)). Congress also added a mandatory minimum penalty for simple possession of crack cocaine in 1988. *See* Pub. L. No. 100–690, § 6371, 102 Stat. 4181, 4370 (1988) (amending 21 U.S.C. § 844(a)). The FSA altered the mandatory minimum penalties established by the 1986 and 1988 Acts by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively. *See* Pub. L. No. 111–220, § 2, 124 Stat. 2372 (amending 21 U.S.C. §§ 841, 844).

36 These increased mandatory minimum penalties are applicable only if the government provides notice pursuant to 21 U.S.C. § 851, which provides that “[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.”

37 See 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2)(A)–(C), (G), and (H).

38 See 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A)–(C), (G), and (H).

39 See 21 U.S.C. §§ 846, 963.

40 See 21 U.S.C. §§ 859, 860, and 861. A person who commits one of those offenses is subject to a mandatory minimum penalty of at least one year of imprisonment, unless a greater mandatory minimum penalty otherwise applies.

41 See 21 U.S.C. §§ 841(b) and 960(b).

42 A detailed historical discussion on statutory mandatory minimum penalties for firearms offenses is presented in the Commission’s 2011 MANDATORY MINIMUM REPORT, at 25–26.

43 Congress amended the statutory penalties contained in section 924(c) three times between 1984 and 1998. First, in 1984, Congress added a mandatory penalty of five years of imprisonment for using or carrying a firearm during a “crime of violence.” See Pub. L. No. 98–473, § 1005(a), 98 Stat. 1837, 2138–39 (1984) (amending 18 U.S.C. § 924(c)). At the same time, Congress established mandatory sentencing enhancements for possessing dangerous ammunition during drug and violent crimes. See Pub. L. No. 98–473, § 1006(a), 98 Stat. 1837, 2139 (1984) (codified as amended at 18 U.S.C. § 929). Two years later, in 1986, Congress expanded the scope of section 924(c) to include carrying or using a firearm during a drug trafficking crime. See Pub. L. No. 99–308, § 104, 100 Stat. 449, 456 (1986) (amending 18 U.S.C. § 924(c)).

Congress again amended 18 U.S.C. § 924(c) in 1998 in response to the Supreme Court’s decision in *Bailey v. United States*, 516 U.S. 137, 143 (1995). In that case, the Court interpreted the prior version of section 924(c), which applied to an offender who “use[d] or carrie[d]” a firearm during and in relation to a crime of violence or drug trafficking crime, to require the defendant’s “active employment” of a firearm in the predicate offense. The 1998 amendments required a mandatory minimum penalty of five years if the offender “possesses a firearm” in furtherance of a “crime of violence” or “drug trafficking crime,” and established more severe mandatory minimum penalties where an offender, in violating section 924(c), “brandished” or “discharged” a firearm—requiring mandatory minimum penalties of seven years and ten years of imprisonment, respectively. See Pub. L. No. 105–386, 112 Stat. 3469 (1998). Congress also increased the mandatory minimum penalty for second or subsequent convictions under section 924(c) from 20 years to 25 years of imprisonment. See *id.*

44 18 U.S.C. § 924(c). The statute defines a “crime of violence” as any felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” or “that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” A “drug trafficking crime” includes any felony that is punishable under the Controlled Substances Act, codified at 21 U.S.C. § 801 *et seq.*, or the Controlled Substances Import and Export Act, codified at 21 U.S.C. §§ 951, *et seq.* See 18 U.S.C. § 924(c)(2)–(3).

45 See 18 U.S.C. § 924(c)(1)(A)–(C).

46 *Id.* § 924(c)(1)(A), (c)(1)(D).

47 The mandatory minimum penalty for a second or subsequent violation of section 924(c) is 25 years of imprisonment. See 18 U.S.C. § 924(c)(1)(C)(i). The mandatory minimum penalty for a second or subsequent violation becomes life imprisonment if the firearm involved was a machinegun, a destructive device, or was equipped with a silencer or muffler. See *id.* § 924(c)(1)(C)(ii).



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48 *See Deal v. United States*, 508 U.S. 129 (1993). For additional discussion of *Deal* and second or subsequent violations of section 924(c), see 2011 MANDATORY MINIMUM REPORT, at Appendix E(B)(2).

49 In 1986, Congress substantially expanded the Armed Career Criminal provision at section 924(e), and its mandatory minimum penalty of 15 years of imprisonment, to cover firearms possession offenses committed by those with three convictions for crimes broadly defined as “violent felonies” and “serious drug offenses.” *See Career Criminals Amendment Act of 1986*, Pub. L. No. 99–570, § 1402, 100 Stat. 3207, 3239–40 (1986). Previously, section 924(e) applied only to those convicted of burglaries and robberies. *Id.*

50 *See* 18 U.S.C. § 924(e)(1). The definitions of “violent felony” and “serious drug offense” require only that the prior offense be “punishable” by a term of more than one year of imprisonment, or a term of at least ten years of imprisonment, respectively. *See* 18 U.S.C. § 924(e)(2). The Armed Career Criminal Act does not contain any limitation on the date of the predicate offense conviction, meaning that an offender may be subject to the mandatory minimum penalty on account of offenses committed many years or even decades earlier. *See id.*

51 *See* 18 U.S.C. § 922(g).

52 A detailed historical discussion on statutory mandatory minimum penalties for child exploitation offenses is presented in the Commission’s 2011 MANDATORY MINIMUM REPORT, at 27–29.

53 *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, § 2(a), 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. § 2251).

54 *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121(4), 110 Stat. 3009 (amending 18 U.S.C. § 2251(d)). Similarly, Congress prescribed mandatory minimum penalties of 20 years of imprisonment when it established offenses in 1988 for the buying or selling of children.

55 Pub. L. No. 108–21, 117 Stat. 650 [hereinafter PROTECT Act].

56 *See* PROTECT Act, § 103(b)(1)(A) (amending 18 U.S.C. § 2251).

57 *Id.* § 103(b)(1)(B) (amending 18 U.S.C. § 2251A(a), (b)).

58 *Id.* § 103(b)(1)(D) (amending 18 U.S.C. § 2252(b)(2)).

59 *Id.* § 103(b)(1)(C) (amending 18 U.S.C. § 2252(b)(1); *id.* § 103(b)(E) (amending 18 U.S.C. § 2252A(b)(1)). Congress had previous set mandatory minimum penalties for recidivist offenders who possess, receive, and traffic in child pornography. *See* 2011 MANDATORY MINIMUM REPORT, at n.168.

60 *Id.* § 103(b)(2)(A) (amending 18 U.S.C. § 2422(b)).

61 Pub. L. No. 109–248, 120 Stat. 587 [hereinafter the Adam Walsh Act].

62 *Id.* § 208 (amending 18 U.S.C. § 1591(b)(1)).

63 *Id.* § 203 (amending 18 U.S.C. § 2422(b)).

64 *Id.* § 701 (codified at 18 U.S.C. § 2252A(g)).

65 *Id.* § 702 (codified at 18 U.S.C. § 2260A). The Sex Offender Registration and Notification Act, which is Title I of the Adam Walsh Child Protection and Safety Act of 2006, created mandatory minimum penalties that apply to offenders who, having failed to register as a sex offender, commit a crime of violence (consecutive mandatory minimum penalty of five years of imprisonment), *id.* § 141 (codified at 18 U.S.C. § 2250(c)), or certain federal felonies involving a child (consecutive mandatory minimum penalty of ten years of imprisonment).

66 Sections 2252 and 2252A use not only the term “distribute” but also the term “sell,” thus, broadly encompassing any type of transmission of child pornography to another, both electronic and non-electronic distribution and both commercial or non-commercial distribution. *See, e.g.*, 18 U.S.C. §§ 2252(a)(1), (a)(3) & 2252A(a)(1), (a)(4)(B). In addition, sections 2252, 2252A and 2260(b) each prohibit the possession of child pornography with the intent to distribute it (in different circumstances). *See* 18 U.S.C. §§ 2252(a)(3)(B), 2252A(a)(4)(B), & 2260(b).

67 The transportation of child pornography proscribed by statute does not require that the defendant intended to distribute it to another person. *See, e.g.*, *United States v. Fore*, 507 F.3d 412, 415 (6th Cir. 2007); *United States v. Burgess*, 576 F.3d 1078, 1102 (10th Cir. 2009).

68 *See* 18 U.S.C. §§ 2251(e), 2252(b), 2252A(b), and 2260(c). Section 2252 concerns child pornography depicting an actual minor, while section 2252A concerns child pornography depicting a computer-generated image “indistinguishable from that of” an actual minor “engaging in sexually explicit conduct” or modified “to appear that an identifiable minor is engaging in sexually explicit conduct.” 18 U.S.C. §§ 2252A and 2256(8)(B) & (C).

69 18 U.S.C. §§ 2252(b)(2), 2252A(b)(2).

70 These enumerated sex offenses include prior convictions for sex trafficking of children, obscenity offenses, sexual abuse of adults or children, and child pornography offenses. 18 U.S.C. § 2252(b)(2).

71 *See id.*

72 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1), 2260(c)(2).

73 *See id.*

74 18 U.S.C. § 1466A(a) & (b).

75 A detailed historical discussion on statutory mandatory minimum penalties for identity theft offenses is presented in the Commission’s 2011 MANDATORY MINIMUM REPORT, at 29.

76 *See* Pub. L. No. 108–275, § 2, 118 Stat. 831 (2004).

77 *See* 18 U.S.C. § 1028A. “[T]he term ‘means of identification’ means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual,” and includes names, social security numbers, dates of birth, driver’s licenses, taxpayer identification numbers, biometric data, and access devices. *See* 18 U.S.C. § 1028(d)(7). In turn, the term “access device” means “any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number . . . or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value” *See* 18 U.S.C. § 1029(e)(1), incorporated by reference in 18 U.S.C. § 1028(d)(7).

78 *See* 18 U.S.C. § 1028A (c)(1) (“[18 U.S.C. §] 641 (relating to theft of public money, property, or rewards), . . . 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or . . . 664 (relating to theft from employee benefit plans”).





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79 *See id.* at § 1028A (c)(3) (“[Title 18, United States Code,] section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm”); § 1028A(c)(4) (“any provision contained in [chapter 47 of Title 18, United States Code] (relating to fraud and false statements), other than this section or section 1028(a)(7)”); § 1028A(c)(5) (“any provision contained in chapter 63 [of Title 18, United States Code] (relating to mail, bank, and wire fraud)”); § 1028A(c)(8) (“section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. § 6823) (relating to obtaining customer information by false pretenses”); § 1028A(c)(11) (“section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. §§ 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act)”).

80 *See id.* at § 1028A (c)(2) (“[Title 18, United States Code,] section 911 (relating to false personation of citizenship”); § 1028A(c)(6) (“any provision contained in chapter 69 [of Title 18, United States Code] (relating to nationality and citizenship)”).

81 *See id.* § 1028A (c)(7) (“any provision contained in chapter 75 [of title 18, United States Code] (relating to passports and visas”)).

82 *See id.* at § 1028A (c)(9) (“section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. §§ 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card”); § 1028A(c)(10) (“any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. § 1321 *et seq.*) (relating to various immigration offenses”)).

83 *Id.* at § 1028A(b)(2).

84 *Id.* at § 1028A(b)(3).

85 *Id.* at § 1028A(b)(4).

86 28 U.S.C. § 994(a).

87 28 U.S.C. § 994(b).

88 A detailed discussion regarding the interaction between mandatory minimum penalties and the guidelines is presented in the Commission’s 2011 MANDATORY MINIMUM REPORT, at Ch. 3.

89 The Commission achieved this by setting a base offense level for Criminal History Category I offenders that corresponds to the first guidelines range on the sentencing table with a guideline minimum higher than the mandatory minimum. Therefore, the base offense level, before any enhancements, adjustments, or consideration of criminal history, produced a guideline range that was above the applicable mandatory minimum penalty.

90 28 U.S.C. § 994(n).

91 *See* USSG Ch. 1, Pt. A at 2. (“The Commission . . . views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress.”); *id.* at 12. (“[The Commission’s] mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, as more is learned about what motivates and controls criminal behavior.”).

92 *See* USSG §2D1.1(c) (2013).

93 *See* USSG App. C, amend. 782 (effective Nov. 1, 2014). This amendment followed a series of changes to how the penalties for crack were incorporated into the guidelines beginning in 2007. At that time, due to its ongoing concern about the 100-to-1 crack-to-powder drug quantity ratio, the Commission lowered the guideline for crack cocaine offenses, resulting in guideline ranges that included, rather than exceeded, the statutory mandatory minimum penalties. *See* USSG App. C, amend. 706 (effective Nov. 1, 2007), as amended by amend. 711 (effective Nov. 1, 2007). The Commission subsequently shifted the levels corresponding to the crack cocaine mandatory minimum penalties back to 26 and 32, however, in light of the Fair Sentencing Act of 2010's changes to the mandatory minimum drug quantity thresholds. *See* USSG App. C, amend. 748 (effective Nov. 1, 2010), as repromulgated and amended by amend. 750 (effective Nov. 1, 2011).

94 Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum were assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly were adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types were retained, as were previously existing minimum and maximum base offense levels for particular drug types.

95 *See* USSG App. C, amend. 782 (effective Nov. 1, 2014).

96 *See id.* As discussed below, the “safety valve” provision, which applies to certain non-violent drug defendants, allows the court to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant “has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” *See* 18 U.S.C. § 3553(f). The guidelines incorporate the “safety valve” at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and, furthermore, provide a 2-level reduction if the defendant meets the “safety valve” criteria. *See* §2D1.1(b)(16).

97 *See* USSG App. C, amend. 782 (effective Nov. 1, 2014). Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times—often in response to congressional directives—to provide a greater emphasis on the defendant's conduct and role in the offense rather than on drug quantity. The version of §2D1.1 in the original 1987 Guidelines Manual contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. Section 2D1.1 in effect at the time of the amendment contained 14 enhancements and three downward adjustments (including the “mitigating role cap” provided in subsection (a)(5)). These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduces the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

98 *See* USSG App. C, amend. 665 (effective Nov. 1, 2004).

99 USSG §2K2.4(b) (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).

100 *See, e.g.,* 2 U.S.C. § 390, 12 U.S.C. § 617, 18 U.S.C. § 1122.

101 USSG §5G1.1(b) (Sentencing on a Single Count of Conviction) (“Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.”).

102 *See* USSG §5G1.1(c)(2) (“In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence ... is not less than any statutorily required minimum sentence.”).





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103 While this section focuses on mechanism for relief from a mandatory minimum penalty, some offenders are also sentenced to a term of imprisonment that is above the applicable mandatory minimum.

104 Various mechanisms have been in place permitting a court to impose a sentence lower than a mandatory minimum penalty in certain cases for more than a century. For example, even before statutory mechanisms were in place, district courts avoided imposing a term of imprisonment, even for offenses carrying a mandatory minimum penalty, by suspending the sentence or by placing the defendant under the supervision of a state probation officer. For a detailed discussion of the historical development of such “relief” mechanisms, see 2011 MANDATORY MINIMUM REPORT, at 31–36.

105 See Pub. L. No. 99–570, 100 Stat. 3207 (1986).

106 18 U.S.C. § 3553(e). For additional discussion of section 3553(e) and relevant case law, development of such “relief” mechanisms, see 2011 MANDATORY MINIMUM REPORT, Appendix E(A)(2), (B)(3).

107 *Id.*

108 See 28 U.S.C. § 994(n) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

109 See USSG §5K1.1, comment. (n.1).

110 See *Melendez v. United States*, 518 U.S. 120 (1996).

111 For a detailed legal and statistical analysis of Rule 35, see U.S. SENTENCING COMM’N, THE USE OF FEDERAL RULE OF CRIMINAL PROCEDURE 35(b) (January 2016).

112 FED. R. CRIM. P. 35(b)(2). Prior to the enactment of the Sentencing Reform Act, Rule 35(b) allowed the court to reduce a sentence for any reason within 120 days after the sentence was imposed or probation was revoked, and the court had authority to change a sentence from a term of incarceration to probation. See FED. R. CRIM. P. 35(b) (1983). The Sentencing Reform Act amended Rule 35(b), however, making three significant changes. See FED. R. CRIM. P. 35(b) (1986). First, the government was required to make a motion seeking a reduction, which deprived the court of authority to reduce a sentence on its own. Second, the time period was expanded from 120 days to one year. Third, the reduction was limited to reflect the defendant’s “substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission.” *Id.* In addition, before the Act became effective, Congress added language to Rule 35(b) authorizing the court to reduce a sentence lower than the statutory minimum. See *id.* at 35(b)(2) (“When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.”).

113 FED. R. CRIM. P. 35(b)(2). This language has changed substantially over time. From 1991 to 2002, the Rule permitted a motion after one year only if the defendant learned the information in question more than one year after sentencing. In 2002, the Rule was amended to incorporate the current, broader language. See FED. R. CRIM. P. 35 advisory committee’s notes, 2002 Amendments (“where the usefulness of the information is not reasonably apparent until a year or more after sentencing, no sound purpose is served by the current rule’s removal of any incentive to provide that information to the government one year or more after the sentence (or if previously provided, for the government to seek to reward the defendant) when its substantiality become evident.”).

114 FED. R. CRIM. P. 35(b)(3). Before this language was added in 1998, some pre-sentencing assistance was not substantial enough to warrant a §5K1.1 motion; however, because of Rule 35’s language, this assistance could also not then be considered on a Rule 35(b) motion. See, e.g., *United States v. Speed*, 53 F.3d 643, 645 (4th Cir. 1995); *United States v. Bureau*, 52 F.3d 584, 595 (6th Cir. 1995).

115 FED. R. CRIM. P. 35(b)(4).

116 See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796 (codified at 18 U.S.C. § 3553(f)). Enactment of the safety valve stemmed from the Commission's 1991 report on mandatory minimums and its subsequent work with Congress to enact new legislation that would address the impact of mandatory minimum penalties on low-level drug-trafficking offenders. See 2011 MANDATORY MINIMUM REPORT, at 34-36 (discussing the history of the statutory safety valve).

117 These offenses include an offense under section 401, 404, and 406 of the Controlled Substances Act (21 U.S.C. §§ 841 (possession with intent to distribute), 844 (possession), 846 (conspiracy)) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 961 (conspiracy), 963 (importation)). See 18 U.S.C. § 3553(f).

118 See USSG §5C1.2(a). As required by Congressional directive, the new offense level cannot be lower than 17 for offenders whose mandatory minimums were at least five years in length. See USSG §5C1.2(b).

119 See USSG §2D1.1(b)(17).

120 See USSG §2D1.1, comment. (n.21). This application note was added to the guidelines, effective November 1, 2002, that clarifies that the 2-level reduction does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment. See USSG App. C, amend. 640 (effective Nov. 1, 2002).

121 Pub. L. No. 111-220, 124 Stat. 2372 (Aug. 3, 2010) [hereinafter FSA].

122 See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: 1995 COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995) (recommending against the 100-to-1 crack-to-powder drug quantity ratio and that Congress revisit the penalties applicable to simple possession of crack cocaine), available at <http://www.uscc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy>; U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: 1997 COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997) (same), available at <http://www.uscc.gov/research/congressional-reports/1997-report-congress-cocaine-and-federal-sentencing-policy>; U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: 2002 COCAINE AND FEDERAL SENTENCING POLICY (May 2002) (recommending a crack-to-powder drug quantity ratio of no more than 20-to-1 and that Congress repeal the mandatory minimum penalty for simple possession of crack cocaine), available at <http://www.uscc.gov/research/congressional-reports/2002-report-congress-federal-cocaine-sentencing-policy>; U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: 2007 COCAINE AND FEDERAL SENTENCING POLICY (May 2007) (reaffirming the Commission's "consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act).

123 See FSA, at § 2 (amending 21 U.S.C. §§ 841, 844).

124 See *id.* at §§ 6-7.

125 See USSG App. C, amend. 750 (effective Nov. 1, 2011) (implementing as permanent the temporary, emergency amendment (USSG App. C, amend. 748 (effective Nov. 1, 2010)) that implemented the FSA); USSG App. C, amend. 759 (effective Nov. 1, 2011). The statutory changes made by the FSA apply only to offenders sentenced on or after August 3, 2010, the Act's effective date. Thus, the revised penalties apply to offenders who committed a crime after the Act became effective, as well as those who committed a crime before the Act went into effect but were sentenced after the Act's effective date. The revised FSA provisions do not, however, apply retroactively to any offender sentenced before the Act's effective date. See *Dorsey v. United States*, 132 S. Ct. 2321 (2013).

126 See U.S. DEPT. OF JUSTICE, Attorney General Eric Holder, Memorandum: Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010 (July 15, 2011), available at https://www.justice.gov/oip/ag_memo_application_statutory_mandatory_sentencing_laws_amended_fair_sentencing_act_2010/download.





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127 *See Dorsey*, 132 S. Ct. at 2335.

128 The FSA also directed the Commission to “study and submit to Congress a report regarding the impact of the changes in federal sentencing law under this Act and the amendments made by this Act.” Pub. L. No. 111–220, at § 10.

129 *See* U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010 (Aug. 2015), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf.

130 *See id.* at 3.

131 *See, e.g.*, Sentencing Reform Act of 2015, H.R. 3713 (first introduced Oct. 8, 2015); Sentencing Reform and Corrections Act of 2015, S. 2123 (first introduced Oct. 1, 2015). *See also* Smarter Sentencing Act of 2013, S. 1410.

132 *See* U.S. DEPT. OF JUSTICE, Attorney General John Ashcroft, Memorandum: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (September 22, 2003).

133 *See* U.S. DEPT. OF JUSTICE, Attorney General Eric Holder, Memorandum: Department Policy on Charging and Sentencing (May 19, 2010), available at http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/DOJ_memo.pdf.

134 133 S. Ct. 2151 (2013).

135 530 U.S. 466 (2000).

136 536 U.S. 545 (2002).

137 *See Alleyne*, 133 S. Ct. at 2160.

138 *Id.* at 2161.

139 *Id.*

140 *Id.*

141 *See* *United States v. Delgado-Marrero*, 744 F.3d 167, 185 (1st Cir. 2014); *United States v. Harakaly*, 734 F.3d 88, 95 (1st Cir. 2013); *United States v. Claybrooks*, 729 F.3d 699, 708 (7th Cir. 2013). However, factual findings made for the purposes of applying the sentencing guidelines that do not increase the applicable mandatory minimum sentence do not violate the rule in *Alleyne*. *See* *United States v. Ramirez-Negron*, 751 F.3d 42, 49 (1st Cir.), *cert. denied* 135 S. Ct. 276 (2014); *United States v. Hernandez*, 731 F.3d 666, 672 (7th Cir. 2013); *United States v. Johnson*, 732 F.3d 577, 583–84 (6th Cir. 2013).

142 At the direction of the Attorney General in early 2013, the Justice Department launched a “comprehensive review of the criminal justice system in order to identify reforms that would ensure federal laws are enforced more fairly and—in an era of reduced budgets—more efficiently.” The “project identified five goals: (1) To ensure finite resources are devoted to the most important law enforcement priorities; (2) To promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system; (3) To ensure just punishments for low-level, nonviolent convictions; (4) To bolster prevention and reentry efforts to deter crime and reduce recidivism; and (5) To strengthen protections for vulnerable populations.” *See* U.S. DEPT. OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (Aug. 2013), available at <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.

143 See U.S. DEPT. OF JUSTICE, Attorney General Eric Holder, Memorandum: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (August 12, 2013), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-drug-guidance.pdf> (“We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution.”).

144 *Id.*

145 *Id.* The memorandum provided “[w]hen determining whether an enhancement is appropriate, prosecutors should consider the following factors: (1) Whether the defendant was an organizer, leader, manager or supervisor of others within a criminal organization; (2) Whether the defendant was involved in the use or threat of violence in connection with the offense; (3) The nature of the defendant’s criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses; (4) Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels; (5) Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants; and (6) Other case-specific aggravating or mitigating factors.” *Id.*

146 See U.S. DEPT. OF JUSTICE, Attorney General Jeff Sessions, Memorandum: Department Charging and Sentencing Policy (May 10, 2017), *available at* <https://www.justice.gov/opa/press-release/file/965896/download>.

147 137 S. Ct. 1170 (2017).

148 *Id.* at *1173.

149 *Id.*

150 U.S. SENTENCING COMM’N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (May 2016), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY15.pdf.

151 See *supra* note 8.

152 28 U.S.C. § 994(w) (requiring the chief judge of each federal judicial district to ensure that these documents are submitted within 30 days of entry of judgment in a criminal case). The Commission collects information only on criminal cases involving at least one felony or Class A misdemeanor conviction, with the exception that death penalty case information is not submitted to the Commission because these cases are considered non-guidelines cases.

153 The figures for fiscal year 2016 are highlighted because much of the data analyzed in this publication is taken from the Commission’s fiscal year 2016 data file. Nevertheless, this publication also analyzes trends over time by using the Commission’s data files from fiscal years 1991 through 2015. The same methodology applied to selecting cases for analysis in all years.

154 The Commission excluded 5,386 cases because those cases lacked the complete documentation needed for all the analyses performed, including guideline application and demographic information. The Commission excluded other cases in which the statement of reasons form and the presentence investigation report contained conflicting information concerning guideline application because the Commission could not ascertain how the Chapter 2 guideline was applied. Finally, the Commission excluded other cases lacking documentation concerning the statutes of conviction because the Commission could not determine whether those cases involved a conviction of an offense carrying a mandatory minimum penalty.

155 For purposes of this publication, an offender was considered to have been convicted of an offense carrying a mandatory minimum penalty if any statute of conviction in the case contained a provision requiring imposition of a minimum term of imprisonment. This determination was made regardless of whether the offender was ultimately sentenced without regard to the mandatory minimum penalty through operation of the statutory safety valve provision or through a substantial assistance motion made by the government.





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156 The 62,251 cases analyzed for this publication represents a 15.0% decrease from the 73,239 fiscal year 2010 cases analyzed for the Commission's last report on mandatory minimum penalties data.

157 The frequency and types of relief from mandatory minimum penalties are described in greater detail later in this publication.

158 See U.S. DEPT. OF JUSTICE, Attorney General Eric Holder, Memorandum, *supra* note 143.

159 See, e.g., USSG §2D1.1(b)(1).

160 See, e.g., USSG §2D1.1(b)(2).

161 See USSG §2D1.1(a)(1)–(a)(4). The Commission did not collect information regarding which specific base offense level subsection was used in the fiscal year 2010 data. Thus, for purposes of this analysis, this information is collected based upon the statute of conviction cited by the court and the base offense level identified in available sentencing documents. The number of cases sentenced under the specified base offenses may, therefore, be under-represented for fiscal year 2010.

162 See USSG §3B1.1 (Aggravating Role). For purposes of this analysis, aggravating role is used as a proxy for the Department's criteria that the defendant is not an organizer, leader, manager or supervisor of others within a criminal organization. See U.S. DEPT. OF JUSTICE, Attorney General Eric Holder, Memorandum, *supra* note 143.

163 See *id.*

164 A complete distribution of offenders convicted of an offense carrying a mandatory minimum penalty, as well as those who remained subject to such penalty at sentencing is provided for each circuit and district in Appendix A.

165 This compares to three such districts in fiscal year 2010: Southern Texas (5.7%, n=1,129), Western Texas (5.3%, n=1,061), and Southern Florida (3.9%, n=776).

166 In fiscal year 2010, those districts were: Puerto Rico (62.9%, n=491), Southern Indiana (55.8%, n=182), Minnesota (54.3%, n=261), Southern Iowa (54.2%, n=227), Western Virginia (53.7%, n=191), Hawaii (51.9%, n=82), Central Illinois (51.9%, n=191), Eastern Tennessee (51.4%, n=420), Western North Carolina (50.5%, n=251), and Eastern North Carolina (50.1%, n=350).

167 As noted in the 2011 MANDATORY MINIMUM REPORT, the inclusion of immigration offenses in the overall percentage of offenders could mask the prevalence or lack thereof of mandatory minimum carrying offense penalties. This is because immigration offenses, while no longer the largest portion of the docket (as it was in fiscal year 2010), continue to constitute a significant portion of the federal docket, at 29.6% in fiscal year 2016. Nevertheless, only 0.3% of all immigration offenders in fiscal year 2016 were convicted of offenses carrying a mandatory minimum penalty. As such, excluding immigration offenses from the analysis can present a clearer picture of where mandatory minimum penalties are most frequently used. As demonstrated in Appendix B, when immigration cases are excluded, there were three districts in fiscal year 2016 in which more than 50% of the caseload involved offenders convicted of an offense carrying a mandatory minimum penalty. This is, nevertheless, a significant reduction from fiscal year 2010, in which there were 18 such districts.

168 The top five districts are Puerto Rico (51.6%), Middle Florida (45.7%), Hawaii (45.7%), Central Illinois (44.2%), and Northern Florida (44.0%).

169 The bottom five districts are Arizona (1.9%), New Mexico (3.5%), Guam (4.6%), Southern California (7.6%), and Vermont (7.7%).

170 For purposes of this figure, “drug offenses” include those offenses in which the primary guideline used at sentencing is found at Chapter 2, Part D of the *Guidelines Manual*. “Sexual abuse offenses” are those offenses in which the primary guideline used at sentencing was §§2A3.1, 2A3.2, 2A3.3, 2A3.4, 2G1.1, 2G1.3, or 2G2.1. “Pornography offenses” are those offenses in which the primary guideline used at sentencing was §§2G2.2 or 2G2.4 (which was consolidated with §2G2.2 in 2004). “Firearms offenses” are those offenses in which the primary guideline used at sentencing was in Chapter 2, Part K of the *Guidelines Manual* or the only count of conviction was U.S.C. 18 § 924(c). The “other” category includes 35 other primary sentencing guidelines, including, for example, §2B1.1 (40.6%; n=781). For the pie reflecting fiscal year 1990, “drug offenses” include importation and distribution of controlled substances, simple possession of controlled substances and use of a communication facility in the commission of a controlled substance offense. See 1991 MANDATORY MINIMUM REPORT, at 51 (“Drugs Offenses” was referred to as “Controlled Substance” in the 1991 report). “Violent offenses” include homicide, kidnapping, sex offenses, robbery, assault, and burglary/breaking and entering.

171 The statutory penalties for violating 21 U.S.C. § 846 are the “same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” 21 U.S.C. § 846.

172 The top five statutes are largely unchanged from fiscal year 2010, except that section 924(c)(1)(A)(ii) replaced the two-year mandatory minimum for aggravated identify theft found at 18 U.S.C. § 1028A as the last entry.

173 The Commission obtains data on the race and ethnicity of the offender from the presentence report. The “Other Race” category includes offenders of Native American, Alaskan Native, and Asian or Pacific Islander origin. Of the offenders analyzed for this study, there were 2,490 offenders identified as “Other” race offenders: 1,085 (43.7%) were of Asian/Pacific Islander origin, 1,188 (47.8%) were Native American/Alaskan Native, and 211 (8.5%) were of other origin.

174 The percentage of Hispanic offenders in 2016 who are relieved of application of a mandatory minimum penalty represents an increase of nearly ten percent from the proportion in fiscal year 2010 (55.5% compared to 45.7%).

175 Of the 8,342 offenders who remained subject to a mandatory minimum penalty at the time of sentencing, 54.9% were drug offenders, 11.0% were child pornography offenders, 9.9% were identity theft offenders convicted of a violation of 18 U.S.C § 1028A, 7.8% were firearms offenders, and 7.6% were sexual abuse offenders.

176 This is, in large part, because non-U.S. citizens are often convicted of immigration offenses, which do not carry mandatory minimum penalties. See *supra* note 167.

177 See *supra*, Figure 2.

178 See *id.*

179 See 2011 MANDATORY MINIMUM REPORT, Figure 7-8.

180 In fiscal year 2016, more than three-quarters of crack cocaine offenders were Black (82.6%), followed by Hispanic (11.3%), White (5.6%), and Other Races (0.5%).

181 There were 1,562 crack cocaine trafficking offenders in fiscal year 2016, a 67.1% decrease from fiscal year 2010 (n=4,751).

182 In fiscal year 2016, more than half of methamphetamine offenders were Hispanic (50.4%), followed by White (38.8%), Black (6.0%), and Other Races (4.8%).

183 There were 6,508 methamphetamine trafficking offenders in fiscal year 2016, a 56.1% increase from fiscal year 2010 (n=4,169).





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184 *See* USSG §4A1.2(h).

185 *See* USSG §5K1.1 (Substantial Assistance to Authorities) (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”).

186 The average sentence lengths reported here include sentences for all offenders, regardless of the type of sentence imposed. Offenders who did not receive a sentence of imprisonment are counted as having received a sentence of zero months of imprisonment.

187 In fiscal year 2016, offenders who were relieved of a mandatory minimum penalty through substantial assistance only, had an average guideline minimum (including any statutory minimum) of 170 months, compared to 66 months for offenders relieved through safety valve and 78 months for those relieved through safety valve and substantial assistance.

188 *See* USSG §§5C1.2, 3B1.1.

189 *See supra*, Figure 4.

190 The Commission anticipates providing more in-depth analyses of the impact of mandatory minimum penalties on sentences relative to the applicable guideline range by specific offense type in future publications.

191 Unsurprisingly, offenders who are relieved of the mandatory minimum penalty at sentencing are least likely to receive a within range sentence (20.5%) due to high rate of substantial assistance departures (63.0%).

192 Conversely, 5.5% of offenders who were relieved from the application of the mandatory minimum penalty received a sentence at or above the mandatory minimum penalty. In fiscal year 2010, no offenders who were relieved from application of the mandatory minimum penalty received a sentence at or above the mandatory minimum penalty.

193 *See* 2011 MANDATORY MINIMUM REPORT, at Ch. 4.

194 *See id.*

195 *See* USSG App. C, amend. 782 (effective Nov. 1, 2014).

196 *See* USSG App. C, amend. 788 (effective Nov. 1, 2014).

197 *See* U.S. SENTENCING COMM’N, 2014 DRUG AMENDMENT RETROACTIVITY DATA REPORT (May 2017), *available at* <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20170510-Drug-Retro-Analysis.pdf>.

198 The Commission received information from the BOP on the start and release date for each offender in prison from October 1, 1990 through September 30, 2016. These offenders were then matched with the Commission’s information on these offenders. The Commission used September 30, 1995, as the relevant date from which to draw the prison population comparisons presented throughout this report because of data limitations prior to that date. The Commission can only identify offenders convicted of violating a statute carrying a mandatory minimum penalty who were sentenced after nationwide implementation of the federal sentencing guidelines in January 1989, and for whom the Commission received the necessary sentencing documentation from the sentencing court to perform this analysis. Therefore, this analysis cannot account for offenders in BOP custody who were convicted of violating a statute carrying a mandatory minimum and sentenced prior to January 1989. For example, only 27.8% of offenders in the custody of BOP as of September 30, 1991, were sentenced after January 1989. Therefore, an analysis of the offenders in BOP custody as of that date could not account for the remaining 72.2% of offenders in BOP custody at that time. As of September 30, 1995, 71.8% of offenders in BOP custody were sentenced after January 1989, and that figure increased to 90.5% as of September 30, 2009.

199 The numbers and percentages reflected in this publication relating to the BOP population for fiscal years 2010 and earlier may differ slightly from those reported in the Commission's 2011 MANDATORY MINIMUM REPORT. These differences are due to a slight revision in the methodology used to merge and analyze the Commission and BOP data to better account for current federal prisoners with multiple convictions. The revised methodology resulted in only minimal changes in the figures previously reported.

200 *See supra* note 167.





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Appendix A



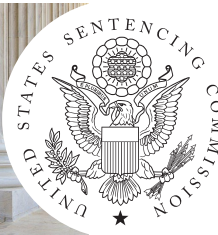
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Table A-1. Mandatory Minimum Status for All Offenders
in Each Circuit and District¹
Fiscal Year 2016

CIRCUIT	Total		No Mandatory Minimum		Mandatory Minimum		Subject to Mandatory Minimum at Sentencing	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	62,251	100.0	48,647	78.1	13,604	21.9	8,342	13.4
D.C. CIRCUIT	250	0.4	167	66.8	83	33.2	47	18.8
District of Columbia	250	0.4	167	66.8	83	33.2	47	18.8
FIRST CIRCUIT	1,943	3.1	1,253	64.5	690	35.5	495	25.5
Maine	198	0.3	159	80.3	39	19.7	30	15.2
Massachusetts	460	0.7	375	81.5	85	18.5	64	13.9
New Hampshire	174	0.3	155	89.1	19	10.9	15	8.6
Puerto Rico	1,021	1.6	494	48.4	527	51.6	374	36.6
Rhode Island	90	0.1	70	77.8	20	22.2	12	13.3
SECOND CIRCUIT	3,257	5.2	2,359	72.4	898	27.6	465	14.3
Connecticut	302	0.5	219	72.5	83	27.5	52	17.2
New York								
Eastern	756	1.2	550	72.8	206	27.3	73	9.7
Northern	277	0.4	186	67.2	91	32.9	55	19.9
Southern	1,292	2.1	912	70.6	380	29.4	199	15.4
Western	449	0.7	325	72.4	124	27.6	74	16.5
Vermont	181	0.3	167	92.3	14	7.7	12	6.6
THIRD CIRCUIT	2,021	3.3	1,443	71.4	578	28.6	341	16.9
Delaware	69	0.1	49	71.0	20	29.0	10	14.5
New Jersey	657	1.1	530	80.7	127	19.3	72	11.0
Pennsylvania								
Eastern	574	0.9	346	60.3	228	39.7	109	19.0
Middle	299	0.5	241	80.6	58	19.4	40	13.4
Western	365	0.6	228	62.5	137	37.5	104	28.5
Virgin Islands	57	0.1	49	86.0	8	14.0	6	10.5
FOURTH CIRCUIT	4,506	7.0	3,179	70.6	1,327	29.4	966	21.4
Maryland	660	1.1	416	63.0	244	37.0	167	25.3
North Carolina								
Eastern	543	0.9	340	62.6	203	37.4	128	23.6
Middle	420	0.7	339	80.7	81	19.3	72	17.1
Western	650	1.0	445	68.5	205	31.5	112	17.2
South Carolina	617	1.0	475	77.0	142	23.0	104	16.9
Virginia								
Eastern	814	1.3	502	61.7	312	38.3	275	33.8
Western	305	0.5	221	72.5	84	27.5	61	20.0
West Virginia								
Northern	296	0.5	260	87.8	36	12.2	30	10.1
Southern	201	0.3	181	90.1	20	10.0	17	8.5

CIRCUIT	Total		No Mandatory Minimum		Mandatory Minimum		Subject to Mandatory Minimum at Sentencing	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	15,297	24.6	12,683	82.9	2,614	17.1	1,313	8.6
Louisiana								
Eastern	328	0.5	213	64.9	115	35.1	84	25.6
Middle	160	0.3	124	77.5	36	22.5	23	14.4
Western	207	0.3	157	75.9	50	24.2	33	15.9
Mississippi								
Northern	157	0.3	140	89.2	17	10.8	13	8.3
Southern	226	0.4	184	81.4	42	18.6	26	11.5
Texas								
Eastern	811	1.3	503	62.0	308	38.0	221	27.3
Northern	1,329	2.1	962	72.4	367	27.6	259	19.5
Southern	6,233	10.0	5,230	83.9	1,003	16.1	341	5.5
Western	5,846	9.4	5,170	88.4	676	11.6	313	5.4
SIXTH CIRCUIT	4,334	7.0	3,075	71.0	1,259	29.0	776	17.9
Kentucky								
Eastern	432	0.7	299	69.2	133	30.8	107	24.8
Western	285	0.5	164	57.5	121	42.5	59	20.7
Michigan								
Eastern	867	1.4	648	74.7	219	25.3	147	17.0
Western	316	0.5	255	80.7	61	19.3	44	13.9
Ohio								
Northern	560	0.9	408	72.9	152	27.1	97	17.3
Southern	472	0.8	378	80.1	94	19.9	56	11.9
Tennessee								
Eastern	740	1.2	434	58.7	306	41.4	161	21.8
Middle	204	0.3	149	73.0	55	27.0	32	15.7
Western	458	0.7	340	74.2	118	25.8	73	15.9
SEVENTH CIRCUIT	2,231	3.6	1,604	71.9	627	28.1	448	20.1
Illinois								
Central	258	0.4	144	55.8	114	44.2	77	29.8
Northern	627	1.0	509	81.2	118	18.8	94	15.0
Southern	312	0.5	214	68.6	98	31.4	77	24.7
Indiana								
Northern	285	0.5	230	80.7	55	19.3	36	12.6
Southern	329	0.5	192	58.4	137	41.6	88	26.7
Wisconsin								
Eastern	296	0.5	217	73.3	79	26.7	52	17.6
Western	124	0.2	98	79.0	26	21.0	24	19.4
EIGHTH CIRCUIT	4,637	7.4	3,203	69.1	1,434	30.9	999	21.5
Arkansas								
Eastern	354	0.6	246	69.5	108	30.5	82	23.2
Western	252	0.4	200	79.4	52	20.6	38	15.1
Iowa								
Northern	347	0.6	228	65.7	119	34.3	75	21.6
Southern	347	0.6	263	75.8	84	24.2	62	17.9
Minnesota	481	0.8	301	62.6	180	37.4	137	28.5
Missouri								
Eastern	740	1.2	547	73.9	193	26.1	139	18.8
Western	804	1.3	498	61.9	306	38.1	209	26.0
Nebraska	532	0.9	347	65.2	185	34.8	144	27.1
North Dakota	356	0.6	215	60.4	141	39.6	54	15.2
South Dakota	424	0.7	358	84.4	66	15.6	59	13.9





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CIRCUIT	Total		No Mandatory Minimum		Mandatory Minimum		Subject to Mandatory Minimum at Sentencing	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	10,791	17.3	9,332	86.5	1,459	13.5	898	8.3
Alaska	166	0.3	108	65.1	58	34.9	33	19.9
Arizona	4,090	6.6	4,011	98.1	79	1.9	39	1.0
California								
Central	865	1.4	633	73.2	232	26.8	150	17.3
Eastern	655	1.1	475	72.5	180	27.5	119	18.2
Northern	433	0.7	335	77.4	98	22.6	69	15.9
Southern	2,317	3.7	2,142	92.5	175	7.6	95	4.1
Guam	65	0.1	62	95.4	3	4.6	2	3.1
Hawaii	138	0.2	75	54.4	63	45.7	18	13.0
Idaho	254	0.4	201	79.1	53	20.9	31	12.2
Montana	310	0.5	216	69.7	94	30.3	56	18.1
Nevada	391	0.6	293	74.9	98	25.1	63	16.1
Northern Mariana Islands	20	0.0	15	75.0	5	25.0	4	20.0
Oregon	358	0.6	249	69.6	109	30.5	64	17.9
Washington								
Eastern	298	0.5	204	68.5	94	31.5	56	18.8
Western	431	0.7	313	72.6	118	27.4	99	23.0
TENTH CIRCUIT	7,319	11.8	6,619	90.4	700	9.6	461	6.3
Colorado	464	3.0	387	83.4	77	16.6	46	9.9
Kansas	459	0.7	321	69.9	138	30.1	83	18.1
New Mexico	4,954	8.0	4,782	96.5	172	3.5	108	2.2
Oklahoma								
Eastern	100	0.2	75	75.0	25	25.0	15	15.0
Northern	210	0.3	161	76.7	49	23.3	32	15.2
Western	295	0.5	242	82.0	53	18.0	44	14.9
Utah	623	1.0	509	81.7	114	18.3	77	12.4
Wyoming	214	0.3	142	66.4	72	33.6	56	26.2
ELEVENTH CIRCUIT	5,665	9.1	3,730	65.8	1,935	34.2	1,133	20.0
Alabama								
Middle	151	0.2	104	68.9	47	31.1	32	21.2
Northern	333	0.5	233	70.0	100	30.0	56	16.8
Southern	313	0.5	235	75.1	78	24.9	41	13.1
Florida								
Middle	1,393	2.2	757	54.3	636	45.7	276	19.8
Northern	241	0.4	135	56.0	106	44.0	65	27.0
Southern	2,130	3.4	1,397	65.6	733	34.4	487	22.9
Georgia								
Middle	303	0.5	239	78.9	64	21.1	45	14.9
Northern	523	0.8	388	74.2	135	25.8	100	19.1
Southern	278	0.5	242	87.1	36	13.0	31	11.2

¹ Of the 67,742 cases sentenced in fiscal year 2016, the Commission received complete guideline information in 61,958. The Commission did not receive complete guideline information for another 287 cases in which the only statute of conviction was 18 U.S.C. § 924(e) and 111 cases in which an offender was sentenced under 18 U.S.C. § 1028A and the guidelines were not applied, but these cases are included in the analysis. Of the remaining 62,356 cases, 105 were excluded due to missing statutory information.

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

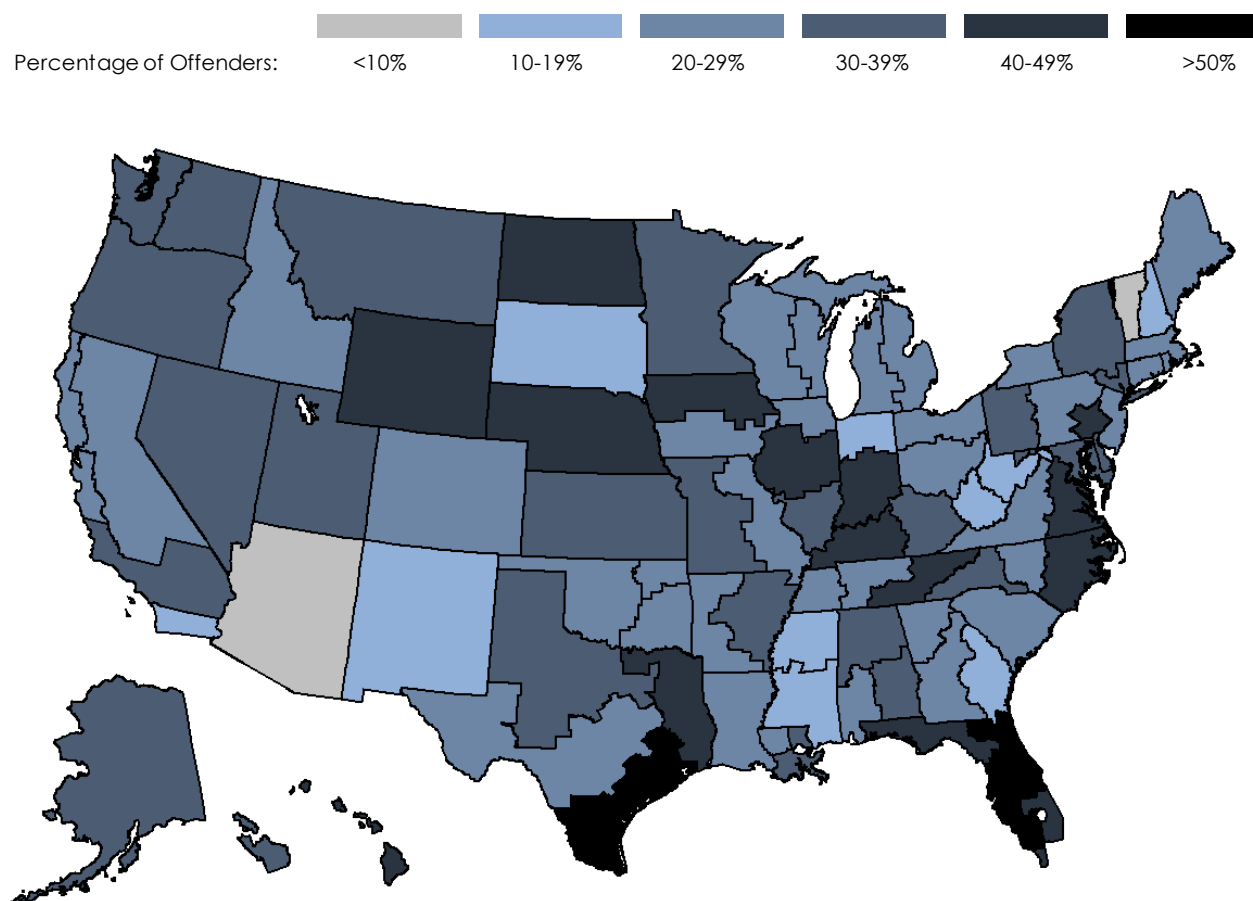


Appendix B



United States Sentencing Commission
OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017)

Figure B-1. Percentage of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty By District: Immigration Offenders Excluded
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

