



GuideLines

News from the U.S. Sentencing Commission

Spring 2010

Commission Promulgates Amendments; Sends Package to Congress

Package Provides Greater Availability of Alternatives to Incarceration

On April 29, 2010, the United States Sentencing Commission sent to Congress a package of sentencing guideline amendments that expands the availability of alternatives to incarceration and addresses the relevance of certain specific offender characteristics in sentencing. The Commission also promulgated guideline amendments regarding hate crimes, the calculation of a defendant's criminal history, and the sentencing of organizations.

Alternatives to Incarceration; Relevance of Certain Specific Offender Characteristics; Cultural Assimilation

The amendment on sentencing alternatives has several key components. First, it informs courts that departures from the guidelines

may be warranted in situations where an offender's criminal activity is related to a treatment issue (such as drug or alcohol abuse or significant mental illness) and sentencing options (such as home or community confinement or intermittent confinement) would serve a specific treatment purpose.

The Commission also recommends in a new application note that courts take into consideration the effectiveness of residential treatment programs as part of their decision to impose community confinement. Second, the Commission voted to increase the availability of alternative sentencing options by expanding by one offense level Zones B and C in the guidelines' sentencing table. According to the guidelines, offenders in Zones B and C are eligible, in the court's discretion and subject to statutory limitations, for alternatives to imprisonment (such as split sentences, home or community confinement).

The Commission also voted to amend guideline policy statements regarding age, mental and emotional conditions, physical condition, and military service. Previously, these factors were deemed "not ordinarily relevant" in determining whether a sentence outside the guidelines was

Commission Holds Public Hearing in Washington, D.C. (More on page 3)



The Commission held a public hearing on March 17, 2010, to gather testimony from invited witnesses regarding proposed amendments to the federal sentencing guidelines and issues for comment. (Foreground: Commission Chair Chief Judge William K. Sessions III; background (left to right): *Ex-officio* Commissioner Jonathan J. Wroblewski, Commissioners Beryl A. Howell and Chief Judge Ricardo H. Hinojosa, and Vice Chair Judge Ruben Castillo. Not shown: Vice Chair William B. Carr, Jr., Vice Chair Ketanji Brown Jackson, Commissioner Dabney L. Friedrich, and *Ex-officio* Commissioner Isaac Fulwood, Jr.) (Photo by Michael Courlander)

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Ketanji Brown Jackson Begins Term as Vice Chair

Ketanji Brown Jackson began serving as vice chair of the Commission in February 2010 after the United States Senate confirmed her nomination on February 11, 2010. On July 23, 2009, President Barack Obama had nominated Ms. Jackson to serve on the Commission.

“We are extremely pleased to welcome Ketanji Brown Jackson to serve on the Commission,” said Chief Judge William K. Sessions III, chair of the Commission. “Ms. Jackson brings with her many years of legal experience, and she will contribute significantly to the Commission’s work.”

Vice Chair Jackson most recently served as of counsel with the law firm of Morrison & Foerster LLP in Washington, D.C. From 2005–2007, Ms. Jackson served as an assistant federal public defender in the appeals division of the Office of the Federal Public Defender in Washington, D.C. From 2003–2005, she was an assistant special counsel to the United States Sentencing Commission. Prior to serving on the staff of the Commission, Vice Chair Jackson was an associate at The Feinberg Group, LLP (2002–2003); Goodwin Procter LLP (2000–2002); and Miller, Cassidy, Larroca & Lewin, LLP (1998–1999). Vice Chair Jackson also served as a law clerk to three federal judges, including Associate Justice Stephen Breyer (October Term 1999).

Vice Chair Jackson graduated *cum laude* from Harvard Law School in 1996 and *magna cum laude* from Harvard College in 1992.



The Honorable Stephen G. Breyer, associate justice of the Supreme Court of the United States, administered the oath of office to Vice Chair Ketanji Brown Jackson at an investiture ceremony held at the Commission on March 3, 2010. (Photo by Michael Courlander)

Commission to Hold Hearing on Statutory Mandatory Minimum Penalties in Federal Sentencing

On May 27, 2010, the Commission will hold a public hearing in Washington, D.C., on statutory mandatory minimum penalties in federal sentencing. The hearing will be a component of the Commission’s comprehensive review of statutory mandatory minimum penalties that it announced as a priority in 2009 and will assist the Commission in preparing its report to Congress on statutory mandatory minimum penalties and their interaction with the current federal sentencing system.

A wide range of experts and stakeholders will testify at the hearing, including representatives from the Department of Justice, the defense bar, law enforcement, and community advocacy groups, along with academics and policy analysts. A complete agenda, links to witness statements, and transcripts from the hearing will be available on the Commission’s website, www.ussc.gov.

The hearing will begin at 8:30 a.m. in the Mecham Conference Center, ground level, Thurgood Marshall Federal Judiciary Building.

Public Hearing continued from page 1

As part of the Commission's deliberative process during the 2010 amendment cycle, the Commission heard testimony on March 17, 2010, from invited experts on topics including alternatives to incarceration, specific offender characteristics, recency, and the organizational guidelines. The process culminated in a package of amendments that was sent to Congress on April 29, 2010. The agenda, witness statements, and a transcript of the hearing can be found on the Commission's website at www.ussc.gov/AGENDAS/20100317/Agenda.htm.



(Left to right) Teresa M. Brantley, Susan Smith Howley, and Eric A. Tirschwell present views from the Commission's standing advisory groups on the topic of alternatives to incarceration.



(Left to right) Thomas J. Berger, Elmore T. Briggs, Scott H. Decker, and Marvin D. Seppala share with the Commission their insights on specific offender characteristics under consideration by the Commission.



(Left to right) Andrea Smith, Margy Meyers, and Teresa M. Brantley provided a variety of perspectives on the issue of the recency calculation under the criminal history guideline. (Photos by Michael Courlander)

Fiscal Year 2009 Annual Report and Sourcebook of Federal Sentencing Statistics Now Available

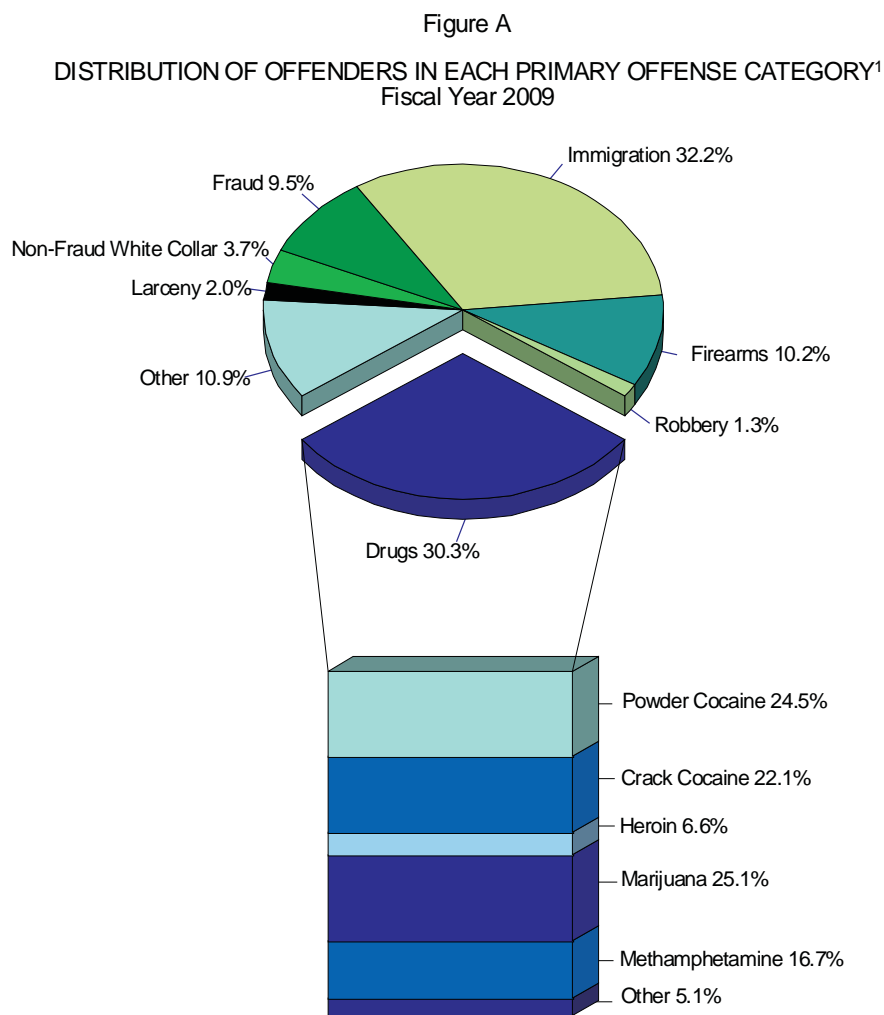
Data Show Increased Federal Criminal Caseload and Other Trends in National Sentencing

The Commission's fiscal year 2009 *Annual Report and Sourcebook of Federal Sentencing Statistics* are now available on the Commission's website: www.ussc.gov/annrpts.htm, and hard copies will be distributed throughout the criminal justice community in the coming weeks. The federal criminal caseload continued to expand in fiscal year 2009 ("2009"). The Commission received documentation on 81,372 individual offender cases sentenced during this period. The Commission also received documentation on the sentencing of 177 organizational defendants. This represents an increase of almost 5,000 cases over the total received for fiscal year 2008 ("2008").

Immigration Overtakes Drugs as Predominant Offense Category

Prior to 2009 and since the inception of the federal sentencing guidelines, drug offenses had always constituted the largest category of guideline cases in the federal docket. In 2009, however, immigration offenses replaced drug offenses as the largest single category of federal criminal cases (felonies and Class A misdemeanors), making up 32.2 percent of all offenders sentenced. The number of immigration cases, rose from 21,429 in 2008 to 25,927 in 2009, a 21.0 percent increase.

By comparison, just over 30 percent (30.3%) of all defendants sentenced under the guidelines were drug defendants. The 25,206 drug cases in 2009 represented a 0.1 percent increase from 2008. Cocaine offenses accounted for the largest number of drug cases (46.6%) (with powder cocaine cases accounting for 24.5 percent of all drug cases and crack cocaine cases accounting for 22.1 percent of all drug cases), followed by marijuana (25.1%) and methamphetamine (16.7%).



¹Of the 81,372 guideline cases, 25,206 were drug cases. Of these, 771 were excluded due to missing drug type. The Drug category includes the following offense types: drug trafficking, use of a communication facility, and simple possession. The Non-Fraud White Collar category includes the following offense types: embezzlement, forgery/counterfeiting, bribery, money laundering, and tax. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY09.

Firearms offenses made up slightly more than ten percent of the federal caseload while fraud offenses accounted for 9.5 percent. These percentages are similar to those from 2008.

Federal Offender Demographics

In 2009, Hispanics comprised the majority (45.4%) of federal offenders. This is an increase from 42.2 percent in 2008. White offenders accounted for 28.5 percent of federal offenders, and Black offenders accounted for 22.1 percent. In 2009, 44.7 percent of federal offenders were non-citizens, compared with 40.5 percent in 2008.

The average age of federal offenders sentenced in 2009 was 35.1 years, with a median age of 33 years.

Types of Sentences Imposed

In 2009, the overwhelming majority of guidelines cases included a term of imprisonment (89.6%). Of these, the vast majority (97.1% or 70,090 cases) received a sentence of incarceration only (*i.e.*, without a term of alternative confinement). A small percentage (2.6%) received a sentence split between prison and community confinement.

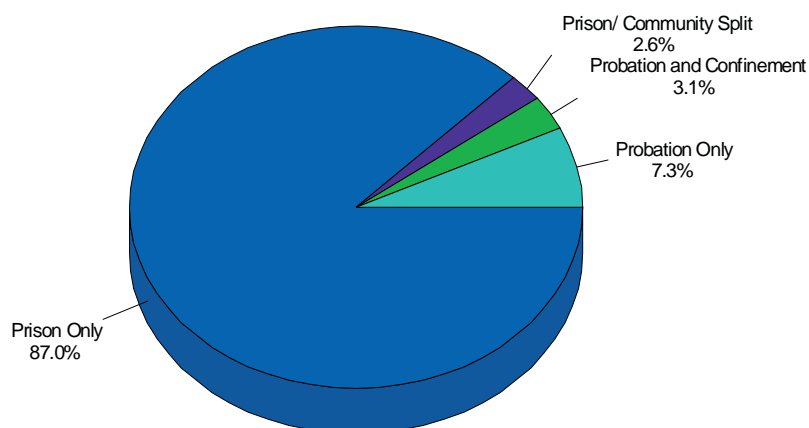
The overall average sentence length for offenders sentenced in 2009 was 46.8 months, compared with 49.6 months in 2008. In 2009, 7.3 percent of all guideline sentences involved only probation, while 3.1 percent included a sentence of probation together with some form of confinement.

Sentence Position Relative to the Guideline Range

In 2009, 56.8 percent of cases were sentenced within the applicable guideline range, compared with 59.4 percent in 2008. Above range cases accounted for a total of 2.0 percent of all cases, and all below-range cases accounted for 41.2 percent. Of all cases sentenced below the applicable guideline range, 25.3 percent were sentenced below the guideline range based upon a ground sponsored by the government. An additional 15.9 percent of cases otherwise were sentenced below the guideline range, compared with 13.4 percent in 2008.

The Commission's *Sourcebook* provides extensive information about federal criminal cases sentenced under the guidelines. Highlights include sentencing profiles of judicial districts, detailed information on guideline departures, plea and trial rates by district and circuit, data on appeals of sentencing decisions, and information about organizational defendants.

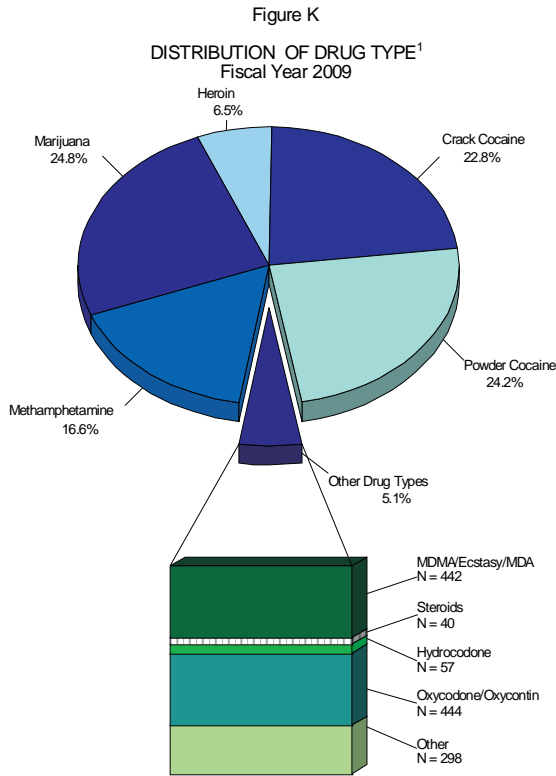
Figure D
DISTRIBUTION OF OFFENDERS RECEIVING SENTENCING OPTIONS¹



¹Of the 81,372 cases, 822 were excluded due to one or both of the following reasons: cases in which the offender received no prison or probation (798) or missing sentencing information (24). Prison and Community Split includes all cases in which offenders received prison and conditions of confinement as identified in USSG 5C1.1. The number of cases in each category is reflected in Table 12. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY2009.

Selected Figures from the 2009 Sourcebook of Federal Sentencing Statistics

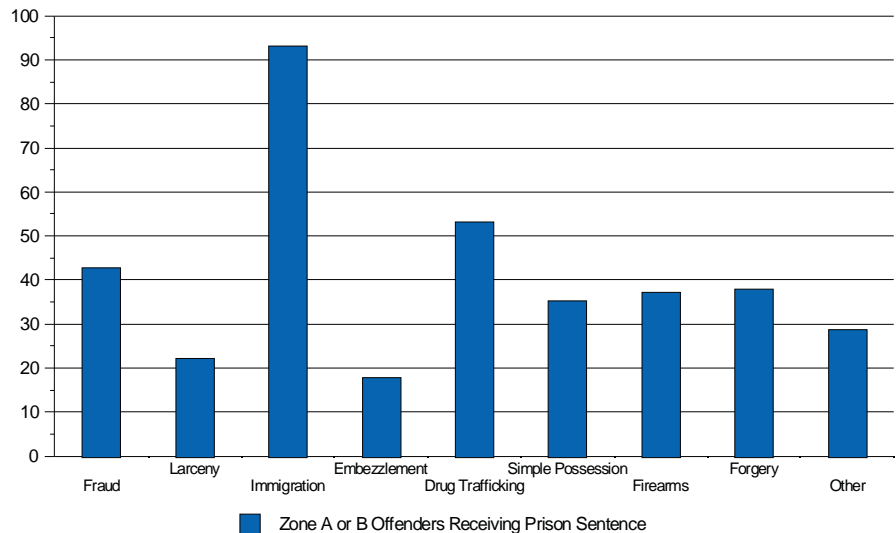


In 2009, just over 30 percent of all defendants sentenced under the guidelines were drug defendants.

¹Of the 81,372 cases, 25,164 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 24,918 were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY09.

Figure F
IMPRISONMENT RATES OF OFFENDERS ELIGIBLE FOR NON-PRISON SENTENCES IN SELECTED OFFENSE TYPES¹
Fiscal Year 2009



In 2009, the overwhelming majority of guidelines cases included a term of imprisonment (89.6%).

¹ Of the 81,372 cases, the Commission received complete guideline application information for 71,054 cases. Of these 71,054 cases, 12,200 were eligible for non-prison sentences because their guideline sentence ranges were in Zones A or B. Prison sentences include either prison alone or prison with conditions of alternative confinement as described in USSG 5C1.1. Non-prison sentences include either probation alone or probation with conditions of confinement. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY09.

Amendments continued from page 1

warranted. The amended policy statement provides that these factors may be relevant if they are present to an unusual degree and distinguish the case from the typical case.

An additional amendment provides that a downward departure based on cultural assimilation to the United States may be warranted in an illegal reentry case and sets forth conditions under which such a departure may be appropriate.

Commission Deletes Recency Provision from Guidelines

The Commission also voted to change the way courts compute an offender's criminal history under the guidelines. Criminal history is one of the most-cited reasons courts give for imposing sentences that are outside the otherwise applicable guideline range and not at the request of the government. Research isolating the effect of the "recency" provision on the predictive ability of the criminal history score indicated that consideration of "recency" only minimally improves the predictive ability. In addition, the Commission received public comment and testimony that defendants who recidivate tend to do so relatively soon after being released from prison but suggested that, for many defendants, this may reflect the

challenges to successful reentry after imprisonment rather than increased culpability. Finally, Commission data indicated that many of the cases in which recency points apply are sentenced under guidelines (in Chapter Two of the *Guidelines Manual*) that have provisions based on criminal history and, therefore, the addition of recency points is not necessary to adequately account for criminal history in those cases.

Commission Addresses New Hate Crimes Legislation; Revises Guidelines Applicable to Organizations

The Commission promulgated an amendment responding to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. The amendment broadens the sentencing guideline for offenses involving individual rights to now specifically include the new hate crime offense, which makes it unlawful to willfully cause bodily injury to a person because of the person's race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. The Hate Crimes Prevention Act also created a second new offense, making it unlawful to attack a United States serviceman on account of his or her service, and the Commission's amendment incorporates this new offense into the sentencing

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National Seminar Nears Registration Capacity

With just a few weeks left until the Commission, in partnership with the ABA Criminal Justice Section, holds its Annual National Seminar on the Federal Sentencing Guidelines, registration is nearing capacity.

More than 1,000 people have registered for the three-day event being held in New Orleans, Louisiana, on June 16–18, 2010. The program provides a unique national forum for new and experienced criminal justice professionals to learn about guideline application, related case law issues, and new amendments to the federal sentencing guidelines.

Complete information on this exciting program is available on the Commission's website at <http://www.ussc.gov/training/trainop.htm>.

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guidelines. The Commission also expanded the definition of a hate crime in its penalty enhancement for hate crimes to include victims who were targeted because of their “gender identity.”

Another amendment made various changes to the sentencing guidelines regarding the sentencing of organizations. Notably, the amendment provides encouragement (by means of potential sentence mitigation) for an organization to adopt a structure that assigns compliance and ethics officers direct reporting obligations to the governing authority of the organization. The amendment also clarifies the remediation efforts required of an effective compliance and ethics program. It describes the reasonable steps an organization should take to respond appropriately after criminal conduct is detected and to prevent further similar criminal conduct.

Any amendments made by the Commission to the guidelines must be submitted to Congress on or before May 1 of each year and become effective on November 1 if not disapproved by Congress.

Commission Receives Congressional Directive to Review Penalties for Health Care Fraud

Congress has directed the Commission to review the guidelines and policy statements applicable to people convicted of federal health care offenses to ensure that they “reflect the serious harms associated with health care fraud and the need for aggressive and appropriate law enforcement action to prevent such fraud.” Congress further directed the Commission to consult with individuals or groups representing health care fraud victims, law enforcement officials, the health care industry, and the federal judiciary. The directive was part of Pub. L. No. 111–148, the “Patient Protection and Affordable Care Act” enacted in March 2010.

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