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**ANALYSIS OF THE VIOLENT CRIME CONTROL
AND LAW ENFORCEMENT ACT OF 1993 — H.R. 3355
(AS PASSED BY THE SENATE NOVEMBER 19, 1993)**

U.S. Sentencing Commission

February 22, 1994

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CRIME BILL ANALYSIS
H.R. 3355, As Passed by the Senate (November 19, 1993)
Prepared by the U.S. Sentencing Commission

INTRODUCTION

The Sentencing Commission provides the following analysis of certain provisions of H.R. 3355, the omnibus crime bill passed by the Senate on November 19, 1993, in response to requests from members of Congress.¹ Provisions were analyzed with an eye toward sentencing goals articulated by Congress in the Sentencing Reform Act of 1984 (SRA),² and in light of the operation of the federal sentencing guidelines.

In examining a number of the bill's mandatory minimum provisions, the analysis builds on research that Congress directed the Sentencing Commission to undertake in legislation enacted in November 1990.³ The Sentencing Commission reported this research in a comprehensive study of mandatory minimum penalties transmitted to Congress in August 1991.⁴

A prison impact assessment is provided for several of the provisions analyzed. The Commission's standard prison impact model, developed in cooperation with the Bureau of Prisons, was used for all of these assessments. This model assumes that factors other than

¹Representatives Don Edwards and William J. Hughes made a written request for this analysis. Other members, through their staffs, have orally requested similar information.

²Pub. L. No. 98-473, 98 Stat. 1838, 1987 (1984) (codified at 18 U.S.C. §§ 3551-3742 (1988); 28 U.S.C. §§ 991-998 (1988)).

³See Pub. L. No. 101-647 §1703, 104 Stat. 4846 (1990).

⁴See U.S. Sentencing Comm'n., *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 57 (1991)* [hereinafter "Mandatory Minimum Report"]. In broad terms, the report concluded that mandatory minimums undercut the certainty, consistency, proportionality, and fairness Congress indicated it was seeking when it enacted the Sentencing Reform Act of 1984. The report found that the most effective way for Congress to exercise its powers to direct sentencing policy is through the guideline system it created with that legislation. For example, in some instances, as an alternative to mandatory minimums or a directive to the Sentencing Commission to increase guideline penalties in a specific way, the report suggests that Congress consider directing the Commission to study sentencing practices in the particular area of concern, report to Congress on its findings, and amend the guidelines as necessary in light of those findings. With more than 170,000 actual cases now comprising the Sentencing Commission's database, this approach, formally proposed by the Commission in the 1991 mandatory minimum report, appears to have even greater vitality today.

1. Sec. 2408

Amends section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. § 841(b)(1)(A)) to mandate a life sentence if the defendant committed a crime of violence or major drug trafficking offense (or other drug trafficking offense under certain aggravating circumstances, such as near a school) after two prior convictions for a crime of violence or drug trafficking. Defines "crime of violence" as a felony punishable by ten years or more imprisonment that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or 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." Except for the threshold requirement relating to a maximum term of imprisonment, the crime of violence definition is identical to that in 18 U.S.C. § 16.

2. Sec. 5111

Amends 18 U.S.C. § 3581 to mandate a sentence of life imprisonment for a defendant convicted of a "violent felony" if the defendant has been convicted of a state or federal violent felony "on two or more prior occasions." Defines violent felony as a federal or state offense that is a "crime of violence" under 18 U.S.C. § 16, and "(A) involves the threatened use, use, or risk of use of physical force against the person of another," (B) is punishable by a maximum term of imprisonment of five years or more, and (C) is not classified as a misdemeanor.

Current Statutory Law

The Controlled Substances Act currently has several provisions that mandate life imprisonment for recidivist drug traffickers. Proposed section 2408 in the crime bill would build on 21 U.S.C. § 841(b)(1)(A), which currently mandates life imprisonment for a defendant convicted of either

- (1) trafficking in a quantity of drugs sufficient to trigger a ten-year mandatory minimum, or
- (2) distributing drugs
 - (a) to persons under 21,
 - (b) near protected locations such as schools,
 - (c) to pregnant individuals, or
 - (d) through the use of minors

apply to conduct that preceded, rather than followed, the qualifying "predicate" convictions (see discussion below).

Significantly, because of limited federal jurisdiction over offenses involving personal violence, it can be expected that a three-time loser provision (particularly one aimed at personal crimes of violence) will impact heavily and perhaps disproportionately on Native Americans who are convicted of committing crimes on federal lands. In comparison to current law and the career offender guideline, both provisions would increase substantially federal prison population in the long term. Importantly, the greatest increase in punishment would occur for defendants convicted of the least serious federal offenses that qualify as a crime of violence.

Each of these concerns is discussed below in greater detail.

1. *Current sentencing policy; proportionality concerns.* In adopting these two recidivist provisions, the Senate made no mention of current federal sentencing policy, any perceived inadequacies of current policy that might have motivated the three-time loser provisions, or the manner in which the provisions would change, supersede, or complement current policy. Yet, in point of fact, the federal criminal justice system already has a three-time loser sentencing provision that Congress mandated in the Sentencing Reform Act of 1984.⁵ Significantly, the legislative history to that Act reflects a deliberate decision by Congress to reject a statutory three-time loser mandatory minimum penalty in favor of a "more effective" instruction to the Sentencing Commission to address the underlying policy concerns through guidelines.⁶

The career offender guideline was drafted by the Commission in response to this directive. Consistent with Congress's express instruction, it provides a sentence at or near the statutory maximum for the offense of which a defendant presently stands convicted, if the defendant has two prior felony state or federal convictions involving drug trafficking or violence.

Conceptually, this guideline is similar to proposed section 2408 of the crime bill, except that instead of a mandatory life sentence being required in every case, regardless of the degree of seriousness, the guideline requires a sentence at or near the maximum penalty Congress has authorized for the violent or drug offense the defendant has recently committed. "Real-time" sentences under the career offender guideline are substantial, averaging slightly more than 17 years (205.6 months), with a median of 15 years, 8 months. A sentence of life currently is required for the most serious offenders.

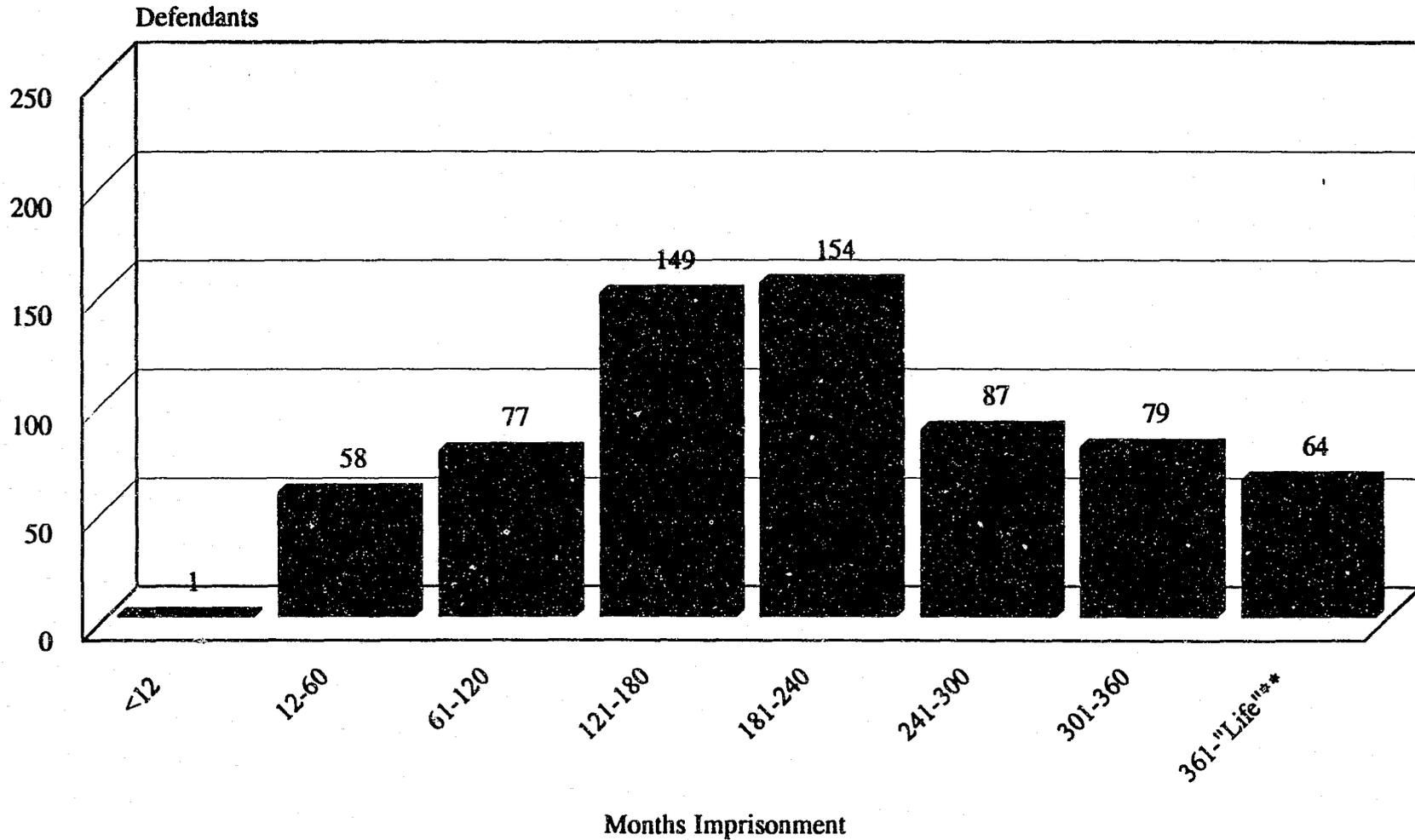
⁵28 U.S.C. § 994(h).

⁶See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983) [hereinafter "Senate Report"].

Figure 1

Sentences for Career Offenders*

(October 1, 1991 through September 30, 1992)



*Excludes offenders who upon motion of the government received a reduced sentence for providing substantial assistance in the investigation of another person. See 28 U.S.C. § 994(n), 18 U.S.C. § 3553(e).

**Life expectancy data indicate that a sentence over 430 months would effectively be a life sentence for the average career offender. The guidelines authorize imposition of an actual "life" sentence, however, for the most serious cases.

Source: U.S. Sentencing Commission, Fiscal Year 1992 data file

at least a "risk of use of physical force against the person of another" (section 5111), is as vast and varied as the laws of the 50 states and the District of Columbia.

(b) Disparate application due to wide variations in statutory penalties among states. Section 2408 encompasses felony crimes of violence only if punishable by ten or more years' imprisonment,⁹ whereas section 5111 covers such offenses if punishable by five years or more. Because penalties for the same offense may vary greatly from state to state, the inclusion of state-law violent offenses that have a statutory penalty exceeding a minimum threshold proves to be an ineffective and inconsistent means of ensuring that only the more serious violent crimes will be included. Other factors being equal, a state with generally high statutory penalties (but which may be coupled with early release practices such as parole and/or extremely generous good time) will tend to have a greater number of "violent" offenses potentially meeting the three-time loser penalty threshold than will a state with significantly lower maximum statutory penalties for the same offenses (but which also may employ a determinate, no-parole system with reduced good time). This wide variation in state penalty structures and sentencing systems, in turn, will lead to disparate application of a federal recidivist provision that can be triggered by prior state-law offenses.

For example, the offense of involuntary manslaughter is punished by up to four years' imprisonment in California and Colorado, up to five years in Illinois, and up to ten years in Georgia and Connecticut.¹⁰ Consequently, such an offense committed in California or Colorado would not constitute a countable crime of violence within the meaning of either section 5111 or section 2408. If, however, the offense occurred in Illinois, it would count under section 5111, but not under section 2408. If it occurred in Georgia or Connecticut, it would count under either section. If the same offense occurred within federal jurisdiction, it would not qualify under either provision (assuming the defendant was convicted under 18 U.S.C. § 1112 (three-year statutory maximum)).

⁹This provision enlarges upon the three-time loser feature currently embodied in the Controlled Substances Act. The existing provision mandates a life sentence for a serious federal drug offense preceded by two or more prior felony drug trafficking offenses. The predicate drug offenses need be punishable only by more than one year. The section thus introduces an internal disparity among offense types (*i.e.*, prior drug trafficking offenses count if punishable by more than one year, prior violent offenses if punishable by ten or more years). It also has the indirect effect of increasing punishment for drug offenses by triggering the mandatory life sentence through any combination of qualifying drug offenses or crimes of violence.

¹⁰U.S. Department of Justice, Bureau of Justice Statistics, *Felony Laws of the 50 States and the District of Columbia, 1986 (1987)*. These states were chosen solely for illustrative purposes. No attempt was made to comprehensively survey current state penalties for offenses meeting the proposed three-time loser criteria. A review of penalties from other states likely will show similar examples.

upon prior convictions approximately 63 percent of the time.¹¹ Consequently, if similar patterns hold, the three-time loser penalties embodied in section 2408 would apply to less than one-half the cases meeting the statutory criteria.

Another permissible exercise of prosecutorial discretion that could impact greatly on the frequency with which defendants meeting the criteria of either three-time loser provision are actually sentenced to life is that of prosecutorial substantial assistance motions under 18 U.S.C. § 3553(e) or Federal Rule of Criminal Procedure Rule 35(b). Under current law and the guidelines, these departures can occur only upon the prosecutor's initiative. Substantial assistance departures from the analogous three-time loser, career offender guideline occur at a significantly higher rate than the rate for all substantial assistance departures under the guidelines. Specifically, in FY 1993 the rate of substantial assistance departures from the career offender guideline was 22.5 percent, compared to 16.9 percent for all guideline cases; in FY 1992, it was 19.3 percent, compared to 15.1 percent for all cases.¹² Based on these data, if prosecutors initiate substantial assistance departures under a three-time loser provision at a rate similar to or exceeding the departure rate from the somewhat analogous career offender guideline, it should be expected that more than one-fifth of the defendants meeting three-time loser criteria in fact will not receive life sentences because of prosecutor substantial assistance motions.

4. *Application to defendants who are not three-time recidivists.* Contrary to the manner in which they tend to be described, the three-time loser provisions are not limited in their application to three-time *recidivists*. That is to say, they do not apply solely to those individuals who, at the time of sentencing in federal court, have twice before been processed through, and failed to learn their lessons from, the state and/or federal criminal justice system (each time committing new serious crimes after the prior sentence).

Section 5111 is perhaps more accurately described as a multiple offense enhancement provision, requiring only that the defendant "[have] been *convicted* of a violent felony on 2 or more prior occasions" (*emphasis added*). The section does not require that the prior convictions be for offenses separated by an arrest (much less a conviction and sentence). Nor does it require that the defendant have committed the current federal offense following criminal justice system intervention for the two prior offenses. Indeed, all three offenses may have occurred essentially on the same occasion, provided they were sequentially processed to produce convictions on three different occasions (with the federal conviction being the last obtained, even if the federal offense might have been the first committed).

¹¹See Mandatory Minimum Report, *supra* note 4.

¹²These departure rates do not include post-sentencing substantial assistance reductions under Rule 35(b). Hence, the combined rate of substantial assistance departures would be higher.

of case law in the context of a major recidivist statute applicable to armed career criminals and the career offender sentencing guidelines. After experimenting with other formulations, the Commission settled on a definition of "crime of violence" virtually identical to that in 18 U.S.C. § 924(e) (except that the Commission definition excludes non-residential burglary) because of its accepted usage in the recidivist context and because it more effectively targets those offenses that involve actual or attempted personal violence or a serious potential risk of physical injury to persons.¹⁴

The introduction of new and different definitional criteria is likely to lead to extensive litigation over a period of years as courts attempt to flesh out the intended meaning of new terminology, with little or no legislative history at this stage indicating how Congress intends the terms to be interpreted in relation to current law. Moreover, the varying definitions of crimes of violence inevitably will lead to confusion and inconsistent application. If enacted, the courts potentially will have to deal with six or more definitions of "crime of violence/violent felony" in various contexts: (1) 18 U.S.C. § 16 (bail release decisions), (2) 18 U.S.C. § 924(c) (use of firearm in connection with crime of violence), (3) 18 U.S.C. § 924(e) (violent felony, Armed Career Criminal Act), (4) USSG §§4B1.1-1.2 (career offender sentencing guidelines), (5) proposed section 2408, and (6) proposed section 5111.

The provisions also invite protracted litigation because determinations of whether an offense is violent may require courts to consider not only the elements of present and prior offenses of which the defendant stands convicted, but also the underlying conduct surrounding those convictions. While a "real offense" approach is clearly desirable, insofar as determining the severity of the current offense, the approach is fraught with problems when applied in a recidivist statute to offenses that may have been committed long ago. For example, prior convictions may have resulted from guilty pleas and consequently little or no record may exist to describe the real offense facts. Key prosecution and/or defense witnesses and/or physical evidence may no longer be available, and memories of witnesses may have become stale. These and other practical problems will make district court determinations difficult, time consuming, and disparate. Numerous appeals also can be expected.

¹⁴USSG §4B1.2 defines "crime of violence" as "any offense under federal or state law punishable by imprisonment for a term exceeding one year that —

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Table I

**Guideline Cases Involving Federal Felony Convictions for Personal Violence
(October 1, 1991, through September 30, 1992)**

TITLE 18 U.S.C. §	Description	RACE OF DEFENDANT							
		TOTAL		Native American		Other		(missing)	
		n	%	n	%	n	%	n	%
TOTAL		235	100.0	136	57.9	88	37.5	11	4.7
113(a),(b), or (c)	Aggravated Assault	64	100.0	33	51.6	26	40.6	5	7.8
1111	Murder	52	100.0	26	50.0	23	44.2	3	5.8
1112	Manslaughter	49	100.0	39	79.6	8	16.3	2	4.1
1113	Attempted Murder	5	100.0	2	40.0	3	60.0	0	0.0
2111	Robbery of an individual	9	100.0	0	0.0	8	88.9	1	11.1
2113(e)	Robbery/Murder	3	100.0	0	0.0	3	100.0	0	0.0
2241(a) or (c)	Aggravated Sexual Abuse	53	100.0	36	67.9	17	32.1	0	0.0

SOURCE: U.S. Sentencing Commission — Fiscal Year 1992 Data File.

incarceration periods under the Armed Career Criminal Act and the career offender sentencing guideline, the effect of these provisions generally will not be felt for some time.

The Commission used its prison impact model to estimate the long-term (approximately 30-year) impact of the two proposals.¹⁵ Proposed section 5111 is estimated under the model to increase average time served by affected defendants from approximately 15 years under current sentencing policy to 33.6 years imprisonment, an increase of 124 percent. The proposal would increase long-term federal prison population by about 5,285 inmate years or 3.9 percent. Proposed section 2408 is estimated under the model to increase average sentence length for affected defendants from 15.4 years under current sentencing policy to 30.3 years, an increase of 96.8 percent in average time served. The proposal would increase long-term federal prison population by about 10,286 inmate-years or 7.6 percent. Tables II and III summarize these impacts.¹⁶

¹⁵The impact assessments were based on FY 1992 sentencing data and an assumption that defendants currently sentenced under the guidelines as career offenders and/or as armed career criminals would approximate the class of persons subject to the three-time loser provisions. This assumption may understate the likely effect of the provisions in the following respects: (1) prior, very dated convictions are not counted under the career offender guideline but would count under the proposed statutory provisions regardless of how long ago they occurred; (2) juvenile adjudications are not counted under the guideline but would be under section 2408; (3) prior convictions that were closely "related" or handled together for trial or sentencing may be counted under the guidelines as one prior "case"; (4) the definition of crime of violence under the career offender guideline may be somewhat narrower; and (5) crimes of violence are included under the guideline only if the offense of conviction is itself such a crime, whereas the statutory provisions seemingly require consideration of underlying conduct. On the other hand, the assumption may overstate the likely impact in other respects: (1) the career offender guideline includes prior violent or drug trafficking offenses if punishable by more than one year, while the statutory provisions have a five- (section 5111) or ten-year (section 2408) threshold requirement for crimes of violence, and (2) the guideline does not depend on filing of a prosecutorial information setting forth prior convictions, whereas section 2408 does. For all of these reasons and others, the impact estimates must be considered only rough approximations of the likely impact of the provisions.

¹⁶If both provisions were enacted, their combined impact would not be fully additive. Roughly speaking, section 2408 subsumes section 5111; however because of definitional differences and different implementation procedures, their combined impact probably would be somewhat greater than for section 2408 alone.

Table III**§2408: Mandatory Life Imprisonment for "Three-Time Losers"**

	Number of Defendants Sentenced (per year)	Time-to-be-Served				Change	
		Pre-Amendment		Post-Amendment		Person-years*	Percent
		Person-years*	Average Sentence (in years)	Person-years*	Average Sentence (in years)		
Impacted Defendants	689	10,622	15.4	20,908	30.3	10,286	96.8
Aggregate Impact	36,845	135,770	3.7	146,056	4.0	10,286	7.6

* Person-years of imprisonment is equivalent to the "steady-state" prison population. The concept of a "steady-state" population envisions a prison system in which the number of defendants admitted into the system is equal to the number of inmates discharged from the system. By focusing on the "steady-state" prison population, the impact of the policy change is isolated from other changes in the system which may impact the prison population. In general, person-years can be thought of as the long-term prison population.

Operation of the Sentencing Guidelines

Guidelines that prescribe sentences for most crimes of violence (e.g., robbery (§2B3.1), drug trafficking (§2D1.1), and firearms (§2K2.1)), contain substantial penalty increases for possession or use of a dangerous weapon. As with all aggravating factors under the guidelines, these increases for dangerous weapons are proportionate to the seriousness of the underlying offense. Thus, using a firearm during the commission of a felony will result in a guideline sentence enhancement that is greater than the five years typically resulting from an accompanying conviction under section 924(c) if the underlying offense is a particularly serious one, and perhaps a smaller enhancement if the offense is less serious. The guidelines for underlying violent crimes and drug trafficking offenses do not presently distinguish among type of firearm used. For example, a firearm brandished during the course of a robbery will result in an enhancement of five offense levels (about a 63 percent increase in sentence), regardless of the type of firearm used. On the other hand, the guideline for firearm possession and trafficking offenses presently provides an enhancement of four offense levels (about a 50 percent increase) if the firearm is of the more dangerous type regulated by the National Firearms Act.

The guidelines also address instances when the defendant is convicted of a section 924(c) count in addition to an underlying violent, drug trafficking, or firearms possession/trafficking offense. For cases in which 18 U.S.C. § 924(c) is charged and a conviction obtained, section 2K2.4 of the guidelines provides that the mandatory minimum penalty established by section 924(c) is added to (or if an underlying offense has not been charged, becomes) the guideline sentence.

This gives effect to the statutory command that the penalty for a violation of section 924(c) must run consecutively to any term of imprisonment imposed for an underlying offense. However, in order to avoid double punishment within the guidelines scheme, the weapon enhancement in the guidelines for underlying offenses is not to be applied when there is a conviction under section 924(c).

Discussion

In response to the proposed directive, the Sentencing Commission will continue accommodating within the guidelines a mixed system of fixed, flat mandatory minimum penalties for certain conduct as well as guideline adjustments for similar conduct. This mixed sentencing system requires guidelines that are more complex for courts and practitioners to use than would be the case in the absence of mandatory minimums for section 924(c) counts. Moreover, no amount of accommodation in the guidelines can fully account for the prosecutorial discretion that arises as a consequence of this mixed system

Table IV

Charging Decision With Respect to section 924(c)	Guideline Sentence When Offense Involves Manual Firearm	Guideline Sentence When Offense Involves Semiautomatic Firearm²¹
18:924(c) is not charged	78-97 months ²²	97-121 months
18:924(c) is charged ²³	46-57 months plus 5 years consecutive	57-71 months plus 5 years consecutive
18:924(c) is the only offense charged ²⁴	5 years	5 years

Recommendations

The proposed directive to the Commission is generally in a form that can be implemented by the Commission consistent with the structure of the guidelines. In this

²¹The guideline range for semiautomatic firearm use in cases in which section 924(c) is not charged assumes that the Commission implements the directive contained in section 401 by providing an additional two-level increase for the semiautomatic nature of the firearm, and that this enhancement would apply whether or not the defendant is convicted of a section 924(c) count if the court determines a semiautomatic firearm was involved.

²²In this example, the "real offense" aspect of the guidelines would increase the sentence for the underlying drug offense by approximately 25 percent, even though 18 U.S.C. § 924(c) was not charged.

²³Because section 924(c) is charged in this example and thus the five-year consecutive penalty would apply, the guideline range does not include an additional enhancement for the firearm.

²⁴The guideline "range" when section 924(c) is the *only* offense charged — i.e., no underlying offense has been charged — is section 924(c)'s flat, fixed penalty. Commission research indicates that both of these selective charging practices — dropping or failing to charge either the underlying offense or the section 924(c) gun conduct — occur and result in sentences that are lower than would otherwise apply if *both* offenses were charged.

implementation by the sentencing court.²⁹ For example, a range working up from the current floor of five years to a maximum of ten years might be considered for semiautomatic weapon use.

This step would generally increase the compatibility between the guidelines and cases involving section 924(c) counts, and, in particular, would lessen the risk of differing sentencing outcomes due to subjective charging decisions by individual prosecutors. At the same time, because the guidelines *do* substantially enhance sentences when an underlying offense involves firearm use, albeit in an incremental and proportionate manner, this approach would not sacrifice the tough, certain, and *consecutively* assessed punishment for firearms that Congress quite understandably is seeking.

Prison Impact

Section 401 directs the Commission to provide an appropriate enhancement for the use of a semiautomatic weapon during the commission of a crime of violence or a drug trafficking offense.

While it is uncertain how the Commission would amend the guidelines in response to this amendment, it was assumed that the Commission would increase offense levels by two if the firearm involved was a semiautomatic and that this enhancement would apply even if the defendant also was convicted of a section 924(c) offense. The guidelines for which this enhancement would be applicable are: §§2A2.2, 2A2.3, 2A2.4, 2A4.1, 2B3.1, 2D1.1, 2D1.11, and 2K2.1. Each of these guidelines represents either a crime of violence or a controlled substance offense.

Because the data currently collected by the Commission do not include information describing the type of firearm involved,³⁰ four different assumptions were made to model the provision's impact: (1) all firearms are semiautomatic; (2) 75 percent are semiautomatic; (3) 50 percent are semiautomatic; and (4) 25 percent are semiautomatic. Table V summarizes the impact of this proposed amendment under these alternative assumptions.

²⁹A guideline provision requiring an increase in the sentence for semiautomatic weapon use would be ineffectual for cases (1) in which the guideline sentence for the underlying offense was *already* at or near the statutory maximum penalty for that offense due to the presence of other aggravating factors, and (2) when a section 924(c) count alone was charged. Coupling the directive with an amendment creating a statutory range in section 924(c) would help to address these problems.

³⁰While case documents could be reviewed to extract this information, this undertaking would be labor intensive and time consuming.

As the table displays, defendants sentenced pursuant to §§2A2.2, 2A2.3, 2A2.4, 2A4.1, 2B3.1, 2D1.1, 2D1.11, and 2K2.1 who received an enhancement for involvement of a firearm currently serve an average of 9.8 years imprisonment. If section 401 were enacted and the aforementioned guidelines were amended to include a two-level enhancement for involvement of semiautomatic weapons, these defendants could expect to serve an average of 11.6 years imprisonment. The proposed amendment therefore would increase time served for these defendants by approximately 18.2 percent. Over the long term (approximately 30 years), it could be expected that the federal prison population would increase by as much as 6,559 inmates or approximately 4.5 percent (100% of the firearms being semiautomatic), or as little as 1,540 inmates or approximately 1.1 percent (25% of the firearms being semiautomatic).

Sec. 413. Enhanced Penalties for Firearms Possession by Violent Felons and Serious Drug Offenders.

Brief Description of Provision

Directs the Commission to amend the guidelines to "appropriately enhance penalties" in cases in which a defendant convicted under 18 U.S.C. § 922(g) has one or two prior convictions for a "violent felony" or "serious drug offense" (as defined under 18 U.S.C. § 924(e)(2)).

Current Statutory Law

Section 922(g) of title 18, commonly called the "felon in possession" statute, makes it an offense for certain persons, including convicted felons, to possess a firearm. Persons convicted of violating 18 U.S.C. § 922(g) are subject to a maximum term of imprisonment of ten years, regardless of prior criminal history. No mandatory minimum penalty applies to this offense (unless the defendant is determined, under 18 U.S.C. § 924(e), to be an Armed Career Criminal; *i.e.*, a section 922(g) defendant with three or more prior convictions for a violent felony or serious drug offense).

Operation of the Sentencing Guidelines

The principal firearms guideline (§2K2.1) currently provides substantial penalties for a felon who possesses a firearm in contravention of 18 U.S.C. § 922(g) after previously being convicted of one or more "crime[s] of violence" or "controlled substance offense[s]." The firearms guideline draws its definitions of "crime of violence" and "controlled substance offense" from 18 U.S.C. § 924(c), 28 U.S.C. § 994(h), and from the criminal history provisions of Chapter Four of the guidelines.

If this section is enacted, it is strongly recommended that the directive be modified to use the guideline terms "crime of violence" and "controlled substance offense" in lieu of "violent felony" and "serious drug offense," respectively. This modification would, as noted, avoid confusion and inconsistent application.

Sec. 2405. Mandatory Prison Terms for Use, Possession, or Carrying of a Firearm or Destructive Device During a State Crime of Violence or State Drug Trafficking Crime.

Brief Description of Provision

Adds a new paragraph "(4)(A)" to 18 U.S.C. § 924(c) to expand the scope of this provision to cover state crimes involving the use of a firearm. Specifically, requires a flat, mandatory ten-year term of imprisonment for possession of firearm during and in relation to a "crime of violence" or "drug trafficking crime" if the crime can be prosecuted in a state court. (The new provision would mandate penalties of 20 years for discharge of a firearm in connection with a state law offense, and 30 years for possession of enhanced-danger firearms (e.g., machinegun) in connection with a state law offense. In the case of a second conviction, the mandatory terms increase to 20 years, 30 years, and life, respectively). Instead of making it an offense to "use or carry" a firearm in connection with a crime of violence or drug trafficking offense, as is the case with existing law involving underlying *federal* offenses, this provision punishes those who "knowingly possess" a firearm in connection with an underlying state crime.

Current Statutory Law

Section 2405 would establish new federal offenses. Current law (18 U.S.C. § 924(c)) provides for a mandatory, consecutive five-year prison term for using or carrying a firearm in relation to a federal crime of violence or drug trafficking offense but does not make it a federal crime to use a firearm in connection with an underlying *state* law offense.

Operation of the Sentencing Guidelines

Guidelines for crimes of violence (e.g., Robbery (§2B3.1)), drug trafficking offenses (§2D1.1), and firearms offenses (§2K2.1) provide substantial penalty enhancements for possession or use of a dangerous weapon in connection with an underlying offense. However, because possession of a firearm in connection with a state law crime is not now a federal offense, there are not as yet guidelines to govern sentencing for the offenses that would be established by section 2405.

indicates that the prosecutor charged the gun conduct as occurring in conjunction with an underlying *federal* offense; a charge under proposed 18 U.S.C. § 924(c)(4)(A) indicates that the prosecutor charged the gun conduct as occurring in conjunction with an underlying *state* offense.)

The table shows that, with this charge-based mandatory sentencing scheme in place, sentences could range from a low of 60 months (5 years) to a high of 288 months (24 years) based almost exclusively on the prosecutor's charging decisions. Consistent with Congress's stated aim of seeking to reduce unwarranted sentencing disparity,³⁴ the sentencing guidelines are designed to minimize undue effects of charging decisions. However, as the table demonstrates, the guidelines' ability to even out the effects of charging decisions is sharply constrained when flat, mandatory minimums are built into federal sentencing law.

Unwarranted Sentencing Uniformity — A second concern regarding section 2405 is that its definitions of underlying conduct — *i.e.*, the definitions for "drug trafficking offense" and "crime of violence" — are sufficiently broad that dissimilar offenders would receive the same ten-year sentence. For example, "drug trafficking" will include simple possession of a controlled substance for personal use, if the state in which the offense occurred has a statutory maximum for simple possession of more than one year. (Research indicates that some states do have statutory maximums of more than one year for simple possession and some do not. This raises separate disparity concerns quite apart from charge-based disparity. It means that the same crime might or might not qualify for the ten-year penalty depending on the state in which it occurred.) "Crime of violence" is defined broadly to include not only crimes in which persons are threatened or harmed, but also property offenses such as stealing a radio from a car.

Thus, while section 2405's ten-year penalty would apply to the most serious categories of armed offenders, it would appear to apply equally to:

-- a person who bought a single dose of cocaine from his car window with a licensed firearm in the glove compartment;

³⁴See 18 U.S.C. § 991 (b)(1)(B); Senate Report, *supra* note 6, at 49-50 ("disparity [in sentencing] is fair neither to the offenders nor to the public"; it creates a "system that lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime").

Table VI

**Sentencing Impact of Prosecutorial Charging Decision
Under Amended 18 U.S.C. § 924(c)**

Charging Decision	Guideline Sentence
Underlying federal drug trafficking offense is the only offense charged ³⁶	168-210 months
18:924(c)(1) <i>and</i> underlying federal drug trafficking offense charged ³⁷	135-168 months plus 5 years consecutive
18:924(c) is the only offense charged ³⁸	5 years
18:924(c)(4)(A) <i>and</i> underlying federal drug offense charged ³⁹	135-168 months plus 10 years consecutive
18:924(c)(4)(A) is the only offense charged	10 years

³⁶The Commission's mandatory minimum report, *supra* note 4, at 57, found that 45 percent of the time that a firearm mandatory minimum appeared applicable in a drug trafficking case the charge carrying the mandatory minimum was not filed. In such cases, the guidelines provide a "real offense" enhancement for gun possession that will increase the sentence for the underlying offense by about 25 percent.

³⁷Because section 924(c)(1) is charged in this example and thus the mandatory consecutive five-year penalty would apply, the guideline sentence does not include an additional enhancement for the firearm.

³⁸When section 924(c)(1) is the only offense charged, the guideline "range" is the flat, 60-month sentence mandated by this section.

³⁹Because section 924(c)(4)(A) is charged in this example and thus the mandatory ten-year penalty would apply, the guideline range presumably would not also include an additional enhancement for the firearm.

imposed under current federal law, cannot provide an estimate of section 2405's prison impact.

However, analyzing published data, Commission staff sought to identify an approximation of the prison impact if federal enforcers sought to have section 2405 apply to a reasonably high percentage of the state law offenses to which it *could* apply. Table VII illustrates the findings.

Excluding drug offenses, burglaries, and other felonies in which a firearm may have been involved but for which reliable conviction data could not be found, Commission staff projected that section 2405 could be applied in 59,829 cases. Given that this number excludes certain frequently occurring gun cases — most notably drug cases involving firearms — the number cannot be said to reflect section 2405's full potential applicability. On the other hand, by including all state convictions for major categories of gun offenses,⁴⁰ the number does provide a sense of the provision's potential scope should federal authorities use it fully in cases that would arguably most justify higher federal penalties.

Based on this estimation of high usage, Table VII shows that section 2405 would increase the overall average of sentences served in the federal system from 3.7 years to 6.8 years. Total impact on the federal prison population would be to increase federal prison population by 383.9 percent over a period of about 9 years.

Prosecution of a high percentage of the state cases to which section 2405 could potentially apply would require a substantial allocation of enforcement resources apparently not yet provided for. For this reason, section 2405's impact on prison resources could be significantly less than projected in the high impact alternative summarized in Table VII. Unfortunately, there appear to be no reliable bases on which to predict which of the relatively large number of cases to which section 2405 potentially *could* apply will, in fact, be prosecuted federally if the provision is enacted.

⁴⁰For purposes of the analysis, convictions in which a firearm charge was the most serious charge, rapes, robberies, and aggravated assaults involving firearms were counted.

Table VIII

§2405: Mandatory Prison Terms for Use, Possession, or Carrying of a Firearm or Destructive Device during the Course of a State Crime of Violence or State Drug Trafficking Crime.
Alternative B: Low Usage Impact Scenarios

		Number of Defendants Sentenced (per year)*	Time-to-be-Served				Change	
			Pre-Amendment		Post-Amendment		Person-years**	Percent
			Person-years**	Average Sentence (in years)*	Person-years**	Average Sentence (in years)*		
<i>Scenario 1</i>								
Aggregate Impact	Current Cases	36,845	135,770	3.7	135,770	3.7	—	—
	New Cases	500	—	—	4,356	8.7	4,356	—
	Total Cases	37,345	135,770	—	140,126	3.8	4,356	3.2
<i>Scenario 2</i>								
Aggregate Impact	Current Cases	36,845	135,770	3.7	135,770	3.7	—	—
	New Cases	1,000	—	—	8,711	8.7	8,711	—
	Total Cases	37,845	135,770	—	144,481	3.8	8,711	6.4
<i>Scenario 3</i>								
Aggregate Impact	Current Cases	36,845	135,770	3.7	135,770	3.7	—	—
	New Cases	1,500	—	—	13,067	8.7	13,067	—
	Total Cases	38,345	135,770	—	140,126	3.9	13,067	9.6

* All defendants sentenced in federal court under the sentencing guidelines.

** Person-years of imprisonment is equivalent to the "steady-state" prison population. The concept of a "steady-state" population envisions a prison system in which the number of defendants admitted into the system is equal to the number of inmates discharged from the system. By focusing on the "steady-state" prison population, the impact of the policy change is isolated from other changes in the system which may impact the prison population. In general, person-years can be thought of as the long-term prison population.

Sec. 4502. Restriction on Manufacture, Transfer, and Possession of Certain Automatic Assault Weapons.

Brief Description of Provision

Creates a new offense with a five-year maximum penalty that prohibits the manufacture, transfer, or possession of a semiautomatic assault weapon. Amends 18 U.S.C. § 924(c) to require a ten-year mandatory minimum for the use of a semiautomatic assault weapon in connection with a crime of violence or drug trafficking crime.

Current Statutory Law

Federal law generally does not prohibit the manufacture, transfer, or possession of domestically produced semiautomatic assault weapons. (Importation and assembly of imported parts of semiautomatic rifles or shotguns is prohibited under 18 U.S.C. §§ 922(r) and 925(d)(3).) Section 924(c) currently contains mandatory minimum penalties for the use of a firearm in connection with a crime of violence or drug trafficking crime, but no separate penalty is provided for semiautomatic assault weapons. Offenses involving semiautomatic assault weapons receive a mandatory prison term of five years (in addition to the sentence for the underlying offense if an underlying offense is charged and a conviction obtained) under the current version of section 924(c) and the guidelines.

Operation of the Sentencing Guidelines

For cases in which 18 U.S.C. § 924(c) is charged and a conviction obtained, section 2K2.4 of the guidelines provides that section 924(c)'s mandatory minimum penalty is added to the sentence for the underlying offense, or if the underlying offense was not charged, becomes the guideline sentence. If section 4502 of the proposed bill were adopted, this same mechanism would be used to ensure that a crime of violence or drug trafficking offense involving a semiautomatic assault weapon reflected the required ten-year minimum.

Because prosecutors do not always charge section 924(c) in cases involving firearms,⁴¹ guidelines that prescribe sentences for most crimes of violence (e.g., Robbery (§2B3.1)), drug trafficking offenses (§2D1.1), and firearms offenses (§2K2.1), contain substantial penalty increases for possession or use of a dangerous weapon (including semiautomatic weapons) in connection with an underlying offense. No separate enhancement currently is provided for offenses involving semiautomatic assault weapons.

⁴¹See discussion of section 401, *supra*.

Current Statutory Law

Current law under 21 U.S.C. §§ 859 and 861 provides for increased statutory maximums and a one-year mandatory minimum penalty for certain drug offenses involving persons under age 21 in the case of section 859, and under age 18 in the case of section 861. More specifically, 21 U.S.C. § 859 makes this penalty scheme applicable to drug *selling* to persons under age 21. All drug sales involving controlled substances of any amount⁴² are covered. Section 861 applies the penalty scheme to offenses involving persons under age 18. Although section 861's title indicates the provision covers "Employment of persons under 18 years of age," the provision actually encompasses conduct that is considerably broader than direct employment of minors. Also covered are such offenses as "persuad[ing]" someone under 18 years of age to assist an offender in avoiding detection for simple possession of a controlled substance, and "receiv[ing] a controlled substance" from someone under age 18.

Operation of the Sentencing Guidelines

The sentencing guidelines currently provide for increased penalties when drug offenses involve violations of sections 859 and 861. In the absence of any mitigating factor, the guidelines prescribe a sentence exceeding five years' imprisonment when the offense involves someone under age 18.

Discussion

Section 2407 raises three concerns that were highlighted in the Commission's 1991 mandatory minimum report.

Unwarranted Sentencing Uniformity — As with other mandatory minimum penalties, a concern with requiring an unvarying, ten-year minimum penalty for the conduct proscribed by §§ 859 and 860 is that dissimilar offenders would be treated similarly, thereby undercutting the Sentencing Reform Act's goals of establishing fair and proportionate sentencing. Undoubtedly, the increased mandatory minimums that would be required by section 2407 could apply to hardened drug traffickers actively involved in recruiting minors into the drug trade. On the other hand, the same sentences would also apply to small-scale, routine transactions between a minor who is already heavily involved in drug trafficking and a defendant, roughly the minor's peer,⁴³ who was substantially less involved. Recent studies have shown that some adolescents

⁴²The one excluded offense is a drug sale involving five grams or less of marijuana. See 18 U.S.C. § 859(a).

⁴³Section 2407's proposed amendment to sections 859 and 861 would require at least a three-year age difference for the increased penalties to apply.

in drafting the required guideline enhancements. These criteria should ensure appropriately tough and rational sentencing in this area.

Additional Technical Issue

The prohibitions in section 2407 against courts "suspend[ing] sentence" should, in any case, be deleted. Suspended sentences have not been authorized under federal law since 1987.

Prison Impact

Section 2407 would increase minimum⁴⁸ penalties from one year to ten years for offenders at least 21 years of age who were involved with persons under age 18. For purposes of generating an approximate prison impact assessment for this provision, it was assumed that defendants convicted under either section 859 or 861 who were at least 21 years old would be subject to the minimum ten-year penalty.⁴⁹ As Table IX shows, there were 130 defendants who were at least 21 years old at the time of their offense and convicted in FY 1992 under the relevant statutes. Because these defendants typically received an additional, significant prison sentence for the underlying drug conduct under the current guidelines, the average time this group will serve in prison is 8.6 years, substantially above the one-year minimum. With the proposed change, average time served would increase to 11.2 years imprisonment. The increase in time served by these defendants would be approximately 30 percent. Over time, this change in average sentence length would increase federal prison population by 336 inmates, or 0.2 percent.

⁴⁸Under present sections 859 and 860 — as well as under the proposed amended versions of these sections — the minimum required sentence is not added to the sentence for the underlying conduct, but rather serves as a floor beneath which the total sentence may not fall. Thus, if the sentence for the underlying drug offense is five years, the current versions of sections 859 and 860, requiring a minimum of one year in prison, would have no additional impact.

⁴⁹Because 1) the proposed ten-year penalty also requires that the defendant involve someone under age 18 and 2) section 859 requires that the defendant involve someone under age 21, the assessment may slightly overstate actual impact. Data currently collected by the Commission do not include the age of the person with whom the defendant has dealings in a section 859 or 861 offense.

Low-Level Drug Defendant "Safety Valve"

Sec. 2404. **Flexibility in Application of Mandatory Minimum Sentence Provisions in Certain Circumstances.**

Brief Description

Amends 18 U.S.C. § 3553, the sentence imposition section of the Sentencing Reform Act, to authorize courts to impose a sentence that is (1) consistent with sentencing guidelines and policy statements and (2) unconstrained by an otherwise applicable statutory mandatory minimum, in the case of defendants convicted of certain drug trafficking or possession offenses who meet specified criteria. In general, the criteria are designed to limit the exception from statutorily mandated minimums to those defendants who are non-violent, did not play a significant role in the drug offense, and do not have a serious prior record.

Existing Law and Guideline Application

The sentencing guidelines for drug offenses were designed by the Sentencing Commission so that a typical defendant whose offense involves a quantity of drugs equal to the threshold quantity triggering a mandatory minimum under 21 U.S.C. § 841(b) — and who is subject to no aggravating or mitigating adjustments under the guidelines — would face a guideline range whose lower limit is slightly above the applicable mandatory minimum penalty. For example, a typical defendant with no prior criminal record convicted of possession with intent to distribute 500 grams of cocaine powder who is subject to a mandatory minimum of five years would have a guideline range of 63-78 months; if the same defendant had five kilograms of cocaine, he would be subject to a ten-year mandatory minimum and a guideline range of 121-151 months.

The guidelines do provide, of course, several possible mitigating adjustments, but the mandatory minimum penalties set by statute "trump" any guideline sentence that otherwise might be lower. Consequently, if the defendant's offense involved a quantity of drugs that triggers a mandatory minimum penalty, a mitigating adjustment based on, for example, a defendant's minor role in the offense which might otherwise adjust the sentence downward below a mandatory minimum (for example, to a guideline range of 97-121 months) is effectively blocked from reducing the sentence below that minimum statutory penalty. Similarly, if the mandatory minimum is triggered, a court is barred from departing below that minimum based upon a valid mitigating factor not considered by the Commission in the guidelines. The only avenue permitting a sentence below a mandatory minimum penalty is that recognized in 18 U.S.C. § 3553(e) and Rule of Criminal Procedure 35(b). These provisions permit a court to sentence below a mandatory minimum based on a government motion recognizing a defendant's substantial assistance in the prosecution of other persons

of the initial bill). To provide a "ballpark" estimate of the effect of the criminal history criteria in section 2404, additional analyses were conducted.

First, the impact analysis was adjusted to exclude all cases that were assigned any criminal history points under the guidelines.⁵¹ This approach could be expected to somewhat overstate the number of qualifying defendants because of the possibility that some defendants who had no criminal history points nevertheless would have a prior disqualifying conviction for a crime of violence or drug trafficking.⁵²

Under this alternative analysis, about .8 percent of all drug offenders (about 125 defendants) would be impacted, while another 3.6 percent (about 600) could be impacted if courts chose a lower sentence within the guideline range. Thus, in the aggregate, a proposal limited to low-level, non-violent defendants with zero criminal history points would potentially encompass about 4.4 percent of all drug offenders (about 725 defendants) — a 20 percent reduction in the scope of the provision compared to a comparable safety valve using not more than one criminal history point. As noted, however, the Senate-passed provision is more limiting in its criminal history feature than zero criminal history points. To estimate the impact of the additional criterion (no prior violent or drug trafficking conviction resulting in imprisonment), a detailed criminal history analysis of the defendants definitely impacted by the S. 1596 proposal was conducted. It was then assumed that the criminal history characteristics of defendants potentially impacted by the proposal (those for whom the bottom of the guideline range was below the mandatory minimum penalty) would be comparable to those defendants definitely impacted (those for whom the top of the guideline range was below the mandatory minimum). Based on this assumption and analysis, it was determined that the additional criminal history criterion would further reduce the number of definitely impacted defendants to .7 percent of all drug defendants. Similarly, the number of potentially impacted defendants would be reduced to 3.5 percent, and the aggregate number impacted would be reduced to 4.2 percent of all drug defendants.

Based on these estimates, it appears then that the criminal history criterion passed by the Senate is about 20 percent narrower than the criterion in the proposal initially

⁵¹Under the guidelines, defendants are assigned one criminal history point for a prior probation sentence or prior sentence of imprisonment of less than 60 days. Thus, a defendant previously sentenced to a year's probation for shoplifting a pair of sunglasses would receive one criminal history point and, therefore, would not qualify under the Senate-passed safety valve.

⁵²This could occur under the guidelines scheme because the conviction occurred many years ago, because it was a foreign or Indian tribal conviction, or for several other reasons determined by the Commission either to (1) substantially diminish the value of the prior sentence as an indicator of greater recidivism likelihood, or (2) call into question the reliability or basic fairness of using the prior sentence to enhance the current one.

Table X

**ANALYSES OF LOW-LEVEL DRUG DEFENDANT¹ "SAFETY VALVES"
USING ALTERNATIVE MEASUREMENTS OF CRIMINAL HISTORY
(October 1, 1991, through September 30, 1992)**

DESCRIPTION	Zero Points			1 Point or Less			2 Points or Less			3 Points or Less		
	N	% ²	% ³	N	% ²	% ³	N	% ²	% ³	N	% ²	% ³
All Drug Cases	16,684	—	100.0	16,684	—	100.0	16,684	—	100.0	16,684	—	100.0
Defendants not meeting safety valve criteria	(13,486)	—	80.8	(12,700)	—	76.1	(12,450)	—	74.6	(11,926)	—	71.5
Defendants meeting safety valve criteria	3,198	—	19.2	3,984	—	23.9	4,234	—	25.4	4,758	—	28.5
Meeting criteria, received substantial assistance departure	(1,029)	32.2	—	(1,290)	32.4	—	(1,382)	32.6	—	(1,560)	32.8	—
Meeting criteria, no substantial assistance departure	2,169	—	13.0	2,694	—	16.2	2,852	—	17.1	3,198	—	19.2
Definitely affected	125	6.3	0.8	155	6.3	0.9	167	6.4	1.0	200	6.8	1.2
Possibly affected	601	30.2	3.6	752	30.4	4.5	807	30.8	4.8	902	30.7	5.4
Combined definitely/possibly affected	726	36.5	4.4	907	36.6	5.4	974	37.2	5.8	1,102	37.5	6.6
Not affected	1,262	63.5	7.6	1,571	63.4	9.4	1,646	62.8	9.9	1,840	62.5	11.0
(Missing information)	(181)	(—)	(—)	(216)	(—)	(—)	(232)	(—)	(—)	(256)	(—)	(—)

¹In fiscal year 1992, 16,684 drug cases were sentenced under the guidelines. Cases that meet the criminal history standard shown above and: i) were convicted under a mandatory minimum statute; ii) had no dangerous weapon; iii) had no aggravating role in the offense; and iv) in which no death or serious bodily injury resulted.

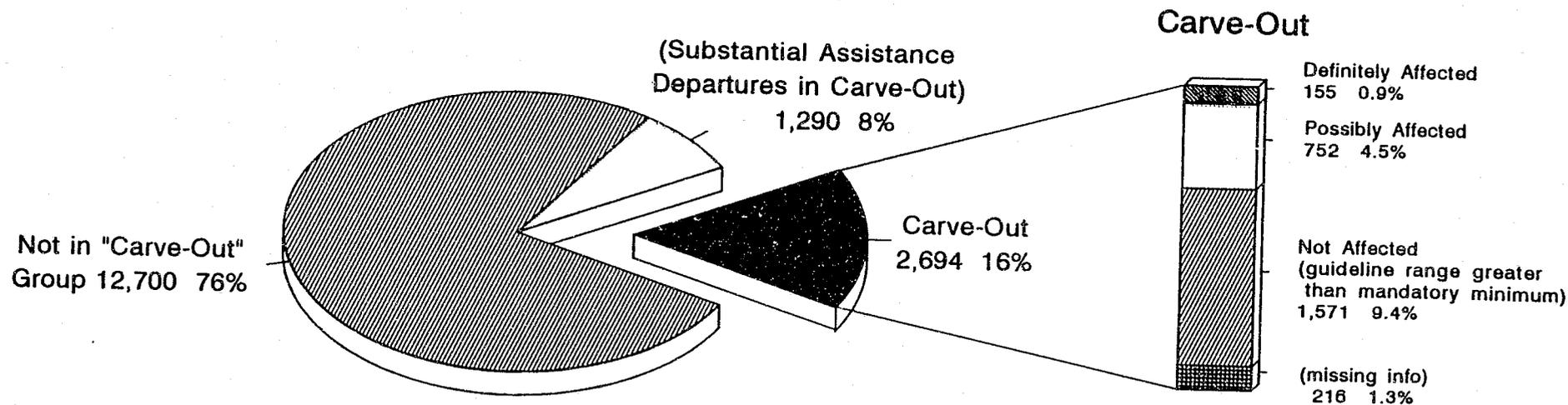
²Percent of carve-out.

³Percent of all drug cases.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92.

IMPACT PROJECTION OF MANDATORY MINIMUM "CARVE-OUT": Qualifying Defendants with Not More than One Criminal History Point

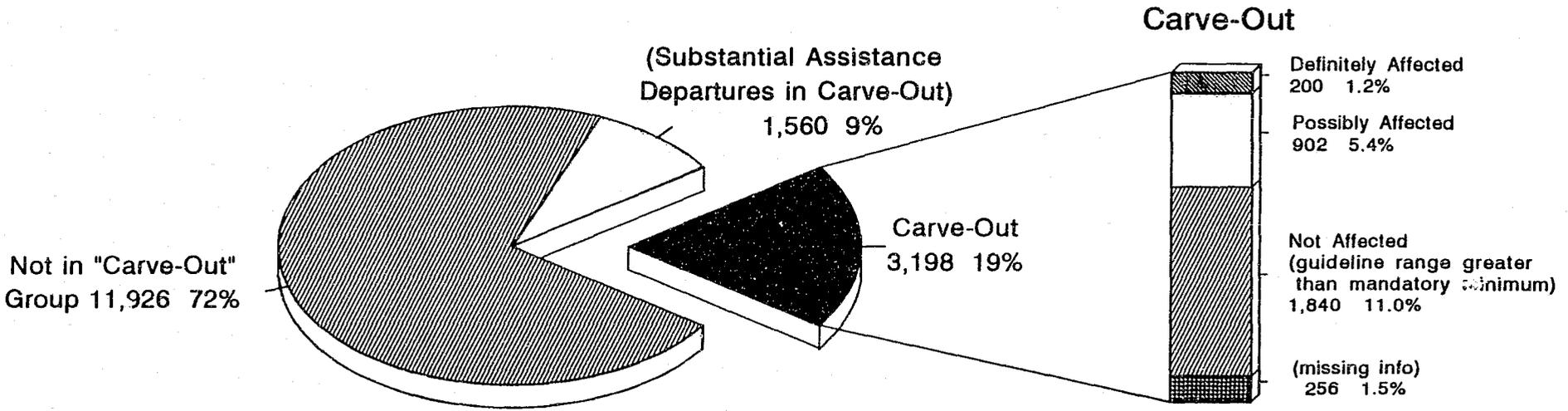
Drug Trafficking Cases Sentenced in FY 1992
(N=16,684)



*Drug mandatory minimum cases with mitigating factors.

IMPACT PROJECTION OF MANDATORY MINIMUM "CARVE-OUT": Qualifying Defendants with Not More than Three Criminal History Points

Drug Trafficking Cases Sentenced in FY 1992
(N=16,684)



*Drug mandatory minimum cases with mitigating factors.

level⁵⁶ drug offenders were street-level dealers and 20 percent were mid-level dealers.⁵⁷ The study also found that the quantity of drugs involved in the offense does not correlate with a defendant's functional role in the way that might be expected. Notably, street-level dealers tended to be involved with smaller drug quantities than defendants who functioned as couriers or had more peripheral roles in the offense.⁵⁸

The Commission attempted to estimate the combined limiting effect of proposed section 2404's prohibition of drug sellers, owners, and financiers in conjunction with the provision's criminal history criterion. As with the above-described analysis of the criminal history provision in isolation, this analysis focused on a detailed examination of characteristics for the pool of defendants who appeared to meet all criteria in S. 1596 and were definitely impacted by that proposal. Using this approach, it was found that about 50 percent of qualifying, definitely impacted defendants under S. 1596 would be disqualified under section 2404 as passed by the Senate because (1) they would be considered drug sellers, owners, or financiers, or (2) they had one criminal history point, or zero criminal history points coupled with a prior violent or drug trafficking conviction resulting in imprisonment. Extrapolating these findings to all affected drug defendants, it would appear that the safety valve passed by the Senate would definitely impact about .4 percent of all drug cases and potentially impact another 2.3 percent; therefore, the combined impact of the proposal would extend to about 2.7 percent of all drug cases.

2. *Application difficulties.* A principal motivating concern for the Commission's 1993 legislative proposal permitting courts to sentence drug defendants in accordance with the guideline system, notwithstanding any statutory minimum, was the need to reconcile and simplify application of the two competing sentencing systems of mandatory minimums and the guidelines. The safety valve proposal introduced as S. 1596 and initially considered as part of the Senate crime bill remained reasonably faithful to this goal, although it embodied a narrower reconciliation limited to low-level, non-violent defendants with minimal criminal histories. As amended by the Senate, section 2404 achieves less of the originally sought reconciliation objective, although it moves in the desired direction.

Application of the provision would be complicated by (1) the sheer number of determinations that must be made by the court, often involving criteria different from those used under the sentencing guidelines, and (2) the lack of clarity in the proposal's language. Critical terms such as "crime of violence" and "drug trafficking offense" are not defined by

⁵⁶For purposes of the study, the Department classified as "low-level" those "drug offenders with a minimal or no prior criminal history whose offense did not involve sophisticated criminal activity and whose offense behavior was not violent." *Id.*, Executive Summary, at 2.

⁵⁷U.S. Dept. of Justice, *supra* note 51, at 31.

⁵⁸*Id.*, at 45.

and others with peripheral roles.⁶¹ In a similar vein, the Commission's analyses of drug defendants found no clear, consistent relationship between drug selling and relative culpability. Particularly when applied to crack cocaine defendants, a categorical exclusion of all owner-sellers is likely to impact disproportionality on: (1) Black defendants, (2) those who tend to trade in relatively small quantities, and (3) those who sell to support a personal drug abuse habit.

Recommendations

The Commission strongly supports a well-crafted provision to more effectively harmonize the often conflicting systems of statutory mandatory minimum penalties and the sentencing guidelines. Legislation that moves substantially in this direction for drug offenses will:

- make sentences more proportionate and fair,
- simplify the sentencing process,
- reduce the number of trials sought by defendants subject to statutory minimums who see "nothing to lose" from exercising their constitutional trial rights, thereby facilitating a reallocation of scarce resources to the prosecution, trial, and sentencing of crimes posing the greatest risk to society, and
- reduce demands on scarce prison resources, while maintaining tough guideline sentences for drug law violators.

The Commission recommends that proposed section 2404 be modified to:

- encompass a greater number of low-level drug defendants by relaxing modestly the criminal history criterion⁶² and removing the exclusion of all drug owners, sellers, and financiers,
- simplify its application and enhance its compatibility with the guideline system that judges also must use, and

⁶¹U.S. Dept. of Justice, *supra*, note 51, at 45.

⁶²For example, consideration should be given to permitting defendants to qualify under the safety valve even if they have a low guideline criminal history, particularly if the exclusion of all defendants with a prior crime of violence or drug trafficking conviction resulting in imprisonment is retained.

● A number of technical and conforming amendments to title 21, United States Code, that were contained in S. 1596 should be incorporated into the provision to ensure that the penalty statutes for drug offenses are properly coordinated with the proposed safety valve provisions.

Miscellaneous Sentencing Provisions

- Sec. 405. Revocation of Supervised Release.**
- Sec. 406. Revocation of Probation.**
- Sec. 2401. Imposition of Sentence.**
- Sec. 2402. Technical Amendment to Mandatory Conditions of Probation.**
- Sec. 2403. Supervised Release After Imprisonment.**

The Sentencing Commission strongly supports enactment of sections 405—406 and 2401—2403 concerning revocation of probation and supervised release. These provisions contain Commission recommendations clarifying the statutory provisions pertaining to revocation of probation and supervised release. Clarification of the existing statutes has become necessary in light of case law that appears to be at odds with congressional intent and sound sentencing practices. The proposed provisions have passed both Houses of Congress in largely identical form on several prior occasions and the Commission is unaware of any significant opposition to them.⁶³

⁶³The Commission has drafted analyses of prior versions of these provisions and can make them available should a further explanation be deemed helpful.