

Results of Survey of United States District Judges January 2010 through March 2010



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Introduction

The Sentencing Reform Act of 1984¹ significantly changed the manner in which offenders convicted of federal crimes are punished by eliminating the system of indeterminate sentencing then in use, including the use of parole, and instituting in its place a system of determinate sentencing. Through the SRA, Congress created the United States Sentencing Commission as an independent agency in the judicial branch of government.

The SRA provided that the principal purposes of the Commission are to —

(1) establish sentencing policies and practices for the federal criminal justice system that —

- incorporate the purposes of sentencing (*i.e.*, just punishment, deterrence, incapacitation, and rehabilitation);
- provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar criminal characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors; and
- reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process; and

(2) develop the means of measuring the degree to which sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.²

The Commission accomplishes the first purpose principally through the promulgation of federal sentencing guidelines, informed in that effort by its ongoing research and data analysis activities. The Commission's research and data collection, and its dissemination of the results of that activity, also contribute significantly to accomplishing the second purpose.

In providing the authority by which the Commission could accomplish these purposes, Congress also authorized the Commission to collect and disseminate information regarding the effectiveness of sentences imposed; assist and serve in a consulting capacity to the federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices; and make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters.³

¹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2019 (1987) (hereinafter SRA).

² 28 U.S.C. § 991(b).

³ See 28 U.S.C. § 995(a)(12), (16), (20).

To mark the 25th anniversary of the SRA, the Commission sought information from a wide range of persons and groups with a role in the federal criminal justice system about sentencing practices in general and the federal sentencing guidelines in particular. The federal sentencing guidelines were in effect as a mandatory system for 16 years and have now been in effect as an advisory system for five years, which is sufficient time for federal judges to have assessed the merits and shortcomings of the advisory system.⁴ Over a ten-month period, the Commission conducted a series of regional public hearings on federal sentencing practices and the guidelines. The Commission held seven hearings and received testimony from more than 135 witnesses. Among the witnesses were United States circuit and district judges, representatives of the United States Department of Justice, federal public defenders and other defense counsel, probation officers, researchers and other academics, law enforcement officials, and representatives of public interest and advocacy groups.

Although these hearings were extensive, the Commission sought to provide an opportunity to receive broader input on many of the issues raised at the hearings from as many district judges as possible, and to capture this input in a systematized and quantifiable way. To do this, the Commission undertook a survey of all United States district judges concerning their views and opinions on sentencing practices. The Commission contracted with Abt Associates, a professional research firm, and its affiliate, Abt SRBI, a professional survey firm (collectively “Abt”), to conduct the survey.⁵ This is the first survey of federal judges to elicit their views about federal sentencing under an advisory guidelines system. On several prior occasions, the Commission has used surveys to canvass federal judges and others about their opinions on federal sentencing issues.⁶

The Commission’s 2010 survey asked questions grouped into five broad areas: (1) statutory and structural sentencing issues; (2) sentencing hearings; (3) guideline application issues; (4) departures; and (5) general assessments. Judges were provided an opportunity to offer written comments in addition to or to expand upon their answers to the survey questions. A copy of the survey is attached to this report as Appendix A.

How the Survey Was Conducted

The Commission reviewed its prior surveys of federal judges and developed a series of draft questions for the 2010 survey. The draft questions were provided to Abt, which modified

⁴ United States v. Booker, 543 U.S. 220 (2005).

⁵ Abt was selected to conduct this survey after a competitive procurement process. The Commission decided to engage the services of a professional research and survey firm in order to draw upon the expertise of such a firm in survey research and design, as well as its ability to distribute, receive, and tabulate a large number of survey responses in a short period of time. By using an outside research organization for this purpose, the Commission was able to maintain the confidentiality of all survey participants yet also ensure that responses were received from a representative group of judges.

⁶ LINDA DRAZGA MAXFIELD, UNITED STATES SENTENCING COMMISSION, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES (2003); MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER’S 1996 SURVEY (1997); UNITED STATES SENTENCING COMMISSION, A NATIONAL SAMPLE SURVEY, PUBLIC OPINION ON SENTENCING FEDERAL CRIMES (1995).

the questions for a survey format and organized them into a structured questionnaire. On January 4, 2010, Abt sent an electronic mail to all district court judges inviting them to complete the questionnaire online and providing an Internet link to the questionnaire. On January 13, Abt sent a follow-up reminder invitation also by electronic mail. Abt sent a paper copy of the questionnaire to each judge who did not complete the survey online by January 20 and to any other judge who requested to receive the report in paper format, along with a cover letter from the chair of the Commission asking the judge to complete the survey. Judges who received the paper survey could complete it online or by mailing the paper questionnaire to Abt.

On February 17, Abt mailed another paper copy of the survey and the cover letter to those judges who had not completed the survey in either format. Also on February 17, Abt sent an additional reminder by electronic mail to judges who had not responded to the survey. Abt staff again made reminder telephone calls on February 23–24.

During the survey period, approximately 50 judges asked to be excluded from the survey because they were no longer active judges, had sentenced no criminal offenders in the last two years, or for other reasons. Those judges have been omitted from the data analysis presented in this report.

Judges submitted their survey responses directly to Abt, either through the website Abt created for the survey or by mailing the paper questionnaire directly to Abt. All responses were kept confidential. In order to further maintain confidentiality, Abt did not provide any information to the Commission as to which judges had or had not completed the survey but only the overall number of judges who responded. In its final report to the Commission about its work, Abt provided only aggregate data to the Commission as to the responses to the survey. No individual responses were provided apart from the written comments that some judges included in their survey response. Abt did not identify the names of the judges who made these comments.

Response Rate to the Survey

The survey period formally ended on March 1, 2010; however, all responses delivered to Abt by March 31, 2010, were included in its report to the Commission. Abt reported to the Commission that, of the 942 judges to whom the survey was sent and who did not ask to be excluded from the survey, 639 responded to Abt. This represents a 67.8 percent response rate to the survey.

The judges who responded to the survey presided over a significant portion of the cases in which federal offenders were sentenced during fiscal years 2008 and 2009. During this two-year period, district court judges imposed original sentences on 146,511 individual federal criminal offenders.⁷ Based on an analysis performed by Abt, the 639 judges who responded to the survey sentenced 116,183, or 79 percent, of these offenders. Of the 50 judges who sentenced

⁷ This number represents offenders convicted of felonies and Class A misdemeanors under federal law.

the most individual offenders during the two-year period from fiscal year 2008 to fiscal year 2009, the response rate was even higher. Of the judges in this group, 43 responded to the survey. This represents an 86 percent response rate by these judges. Together, these 43 judges account for 31 percent of all offenders sentenced nationally during that period.

By grouping all serving district court judges into four groups for analytical purposes by the number of offenders on whom each judge imposed sentence during the two-year period, Abt was able to determine whether the judges who are most experienced in criminal matters responded to the survey at a significant rate. Abt's analysis shows that, in fact, the more criminal cases a judge handled, the more likely he or she was to respond to the survey. For example, among the 25 percent of all judges who sentenced the most offenders during the two-year period, 80 percent responded to the survey, a rate higher than the overall response rate to the survey. The judges in this group account for 62 percent of all offenders sentenced during fiscal years 2008 and 2009. The response rate for judges in the middle two groups (half of all the judges) ranged from 67 to 69 percent. Together, the judges in these groups imposed sentence on 34 percent of all individual offenders sentenced during this period. The response rate among the judges in the last group of judges, the 25 percent of judges sentencing the fewest offenders during the two-year period, remained substantial, although lower, at 46 percent. The judges in this group imposed sentence on four percent of all offenders sentenced during the two-year period.

Survey Results

Below is a series of tables that set out the results of the Commission's survey of district court judges. These results present the answers given to the specific questions posed in the survey instrument.

I. Statutory and Structural Issues

Question 1. Mandatory Minimums

Table 1. Was the mandatory minimum sentence generally appropriate for these offenses?

| | Appropriate | Too Low | Too High | Total | Number | N/A | Missing |
|---------------------------------------|-------------|---------|----------|-------|--------|-----|---------|
| | Percent | | | | | | |
| All Offenses With A Mandatory Minimum | 38% | 0% | 62% | 100% | 513 | 65 | 61 |
| Drug Trafficking | | | | | | | |
| <i>Heroin</i> | 55 | 2 | 43 | 100% | 495 | 121 | 23 |
| <i>Powder Cocaine</i> | 52 | 4 | 44 | 100% | 585 | 32 | 22 |
| <i>Crack Cocaine</i> | 23 | 1 | 76 | 100% | 593 | 25 | 21 |
| <i>Methamphetamine</i> | 53 | 4 | 44 | 100% | 531 | 84 | 24 |
| <i>Marijuana</i> | 43 | 3 | 54 | 100% | 530 | 86 | 23 |
| Firearms Offenses | | | | | | | |
| <i>Under 18 USC § 924(c)</i> | 61 | 2 | 38 | 100% | 584 | 32 | 23 |
| <i>Under 18 USC § 924(e)</i> | 59 | 2 | 39 | 100% | 566 | 52 | 21 |
| Child Pornography | | | | | | | |
| <i>Production</i> | 67 | 10 | 23 | 100% | 510 | 113 | 16 |
| <i>Distribution</i> | 57 | 6 | 37 | 100% | 555 | 69 | 15 |
| <i>Receipt</i> | 26 | 2 | 71 | 100% | 585 | 40 | 14 |
| Other Child Exploitation Offenses | 68 | 6 | 26 | 100% | 420 | 195 | 24 |
| Aggravated Identity Theft | 54 | 18 | 27 | 100% | 487 | 130 | 22 |

Note. "Number" refers to respondents who answered question with other than a "N/A" response. "N/A," or "not applicable," means that respondent had not sentenced a defendant convicted post-Kimbrough/Gall. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 2. Safety Valve

Table 2. The statutory safety valve should be expanded to include:

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree | Total | Number | Missing |
|--------------------------------------------------------------------------------------------------------------------------------|---------------------------|---------------------------|----------------|------------------------------|------------------------------|--------------|---------------|----------------|
| | Percent | | | | | | | |
| Drug trafficking offenders who have 2 or 3 criminal history points (<i>i.e.</i> , those in Criminal History Category II) | 30% | 36% | 12% | 14% | 8% | 100% | 630 | 9 |
| Drug trafficking offenders who have 4, 5, or 6 criminal history points (<i>i.e.</i> , those in Criminal History Category III) | 10 | 12 | 18 | 26 | 34 | 100% | 630 | 9 |
| All Offenses With a Mandatory Minimum | 40 | 29 | 13 | 10 | 8 | 100% | 625 | 14 |
| Drug Trafficking | 44 | 32 | 12 | 8 | 4 | 100% | 613 | 26 |
| Firearms Offenses | | | | | | | | |
| <i>Under 18 USC § 924(c)</i> | 31 | 28 | 15 | 16 | 10 | 100% | 615 | 24 |
| <i>Under 18 USC § 924(e)</i> | 30 | 27 | 16 | 15 | 12 | 100% | 615 | 24 |
| Child Pornography | | | | | | | | |
| <i>Production</i> | 20 | 14 | 16 | 20 | 31 | 100% | 618 | 21 |
| <i>Distribution</i> | 25 | 19 | 15 | 18 | 23 | 100% | 618 | 21 |
| <i>Receipt</i> | 43 | 28 | 13 | 7 | 8 | 100% | 618 | 21 |
| Other Child Exploitation Offenses | 19 | 15 | 28 | 15 | 23 | 100% | 608 | 31 |
| Aggravated Identity Theft | 23 | 23 | 26 | 15 | 13 | 100% | 617 | 21 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 3. Opinions about Possible Statutory Changes and Structural Changes to the Guidelines

Table 3. Which response best reflects your view of the following statements?

| | Percent | | | | Total | Number | Missing |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|----------------------------|-------|--------|---------|
| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Strongly Disagree | | | |
| Congress should amend 28 USC § 994(b)(2) to allow broader ranges on the Sentencing Table. | 24% | 27% | 36% | 10% | 100% | 625 | 14 |
| The sentencing guidelines should be “de-linked” from statutory mandatory minimum sentences (i.e., the guideline ranges should be set by the Commission independently from mandatory minimum sentences). | 34 | 24 | 19 | 14 | 100% | 628 | 11 |
| The number of categories in the loss table in USSG §2B1.1 should be decreased by broadening the monetary ranges. | 14 | 23 | 37 | 19 | 100% | 626 | 13 |
| The number of drug quantity ranges in the Drug Quantity Table in USSG §2D1.1 should be decreased by broadening the quantity ranges. | 14 | 21 | 33 | 24 | 100% | 624 | 15 |
| The number of criminal history categories in the Sentencing Table should be decreased. | 4 | 6 | 24 | 42 | 100% | 627 | 12 |
| The number of offense levels in the Sentencing Table should be decreased. | 6 | 10 | 27 | 39 | 100% | 627 | 12 |
| Some of the more generic SOC adjustments (e.g., weapon use, victim injury) in Chapter Two of the <i>Guidelines Manual</i> should be moved to Chapter Three. | 3 | 12 | 77 | 5 | 100% | 621 | 18 |

Note. “Number” refers to respondents who answered question. “Missing” means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 4. “Good Time”

Table 4. The maximum amount of good time credit allowable should be:

| | Percent | Number |
|-----------|---------|--------|
| Unchanged | 65 | |
| Reduced | 3 | |
| Increased | 31 | |
| Total | 100 | |
| Number | | 625 |
| Missing | | 14 |

Note. “Number” refers to respondents who answered question. “Missing” means that respondent did not provide any information about this question.

II. Sentencing Hearings

Question 5. Relevant Conduct

Table 5. What should be considered “relevant conduct” for purposes of sentencing?

| | Proportion of Respondents Indicating Agreement Percent | Number |
|-------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|--------|
| All reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity? | 79 | 639 |
| Conduct that was charged in a count that was later dismissed? | 31 | 639 |
| Uncharged conduct that is presented at trial or admitted by the defendant in court? | 77 | 639 |
| Uncharged conduct referenced only in the presentence report? | 32 | 639 |
| Acquitted conduct? | 16 | 639 |

Question 6. Standard of Proof**Table 6. What do you think should be the standard of proof for each type of fact to be established at sentencing?**

| | Preponderance | Clear and Convincing | Beyond a Reasonable Doubt | Total | Number | Missing |
|--------------------------------------------------------|---------------|----------------------|---------------------------|-------|--------|---------|
| | Percent | | | | | |
| Facts establishing the base offense level | 69% | 14% | 17% | 100% | 630 | 9 |
| Facts supporting adjustments to the base offense level | 75 | 17 | 8 | 100% | 630 | 9 |
| Facts supporting departures | 85 | 13 | 2 | 100% | 631 | 8 |
| Facts supporting variances | 87 | 11 | 2 | 100% | 630 | 9 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 7. Crime Victims

Table 7. Which response best reflects your view of the following statements?

| | Percent | | | | | Total | Number | Missing |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|-------|--------|---------|
| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree | | | |
| The interests of crime victims generally are adequately protected under current federal sentencing procedures. | 34% | 45% | 9% | 10% | 2% | 100% | 626 | 13 |
| Presence reports should be required to include information a victim wishes to be included in the report. | 19 | 35 | 16 | 17 | 13 | 100% | 630 | 9 |
| Portions of presentence reports, including descriptions of the offense conduct and guideline calculations, should be disclosed to victims. | 9 | 26 | 20 | 24 | 22 | 100% | 631 | 8 |
| Victims should have the opportunity to comment on the presentence report, including on disputed guidelines factors, before the sentence is imposed. | 5 | 17 | 10 | 31 | 37 | 100% | 630 | 9 |
| Congress should amend the restitution statutes to more broadly define the term "victim" to include persons who suffer any harm, injury, or loss that would have not occurred but for the defendant's crime. | 10 | 36 | 20 | 21 | 13 | 100% | 630 | 9 |
| Congress should amend the restitution statutes to more broadly provide for compensation to victims, including for emotional distress or other consequential harm or loss that the victim suffered as a result of the defendant's crime. | 7 | 23 | 18 | 27 | 24 | 100% | 628 | 11 |
| Courts should have the authority to order restitution to victims in all cases. | 26 | 40 | 20 | 7 | 7 | 100% | 627 | 12 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

III. Guideline Application

Question 8. Appropriateness of Guideline Ranges

Table 8. Is the guideline range generally appropriate for each following type of offense?

| | Yes | No—Too Low | No—Too High | Total | Number | N/A | Missing |
|-----------------------------------|---------|---------------|----------------|-------|--------|-----|---------|
| | Percent | | | | | | |
| Murder | 89% | 9% | 2% | 100% | 143 | 474 | 22 |
| Manslaughter | 78 | 21 | 1 | 100% | 107 | 504 | 28 |
| Assault | 83 | 12 | 5 | 100% | 282 | 330 | 27 |
| Fraud | 65 | 24 | 10 | 100% | 594 | 20 | 25 |
| Larceny/Theft/Embezzlement | 70 | 21 | 9 | 100% | 570 | 47 | 22 |
| Drug Trafficking | | | | | | | |
| <i>Heroin</i> | 65 | 3 | 32 | 100% | 475 | 150 | 14 |
| <i>Powder Cocaine</i> | 65 | 6 | 30 | 100% | 599 | 26 | 14 |
| <i>Crack Cocaine</i> | 28 | 2 | 70 | 100% | 592 | 34 | 13 |
| <i>Methamphetamine</i> | 60 | 6 | 34 | 100% | 539 | 84 | 16 |
| <i>Marijuana</i> | 54 | 5 | 41 | 100% | 553 | 72 | 14 |
| <i>Ecstasy</i> | 65 | 4 | 30 | 100% | 430 | 193 | 16 |
| <i>Oxycodone</i> | 64 | 6 | 29 | 100% | 384 | 235 | 20 |
| Child Pornography | | | | | | | |
| <i>Production</i> | 72 | 13 | 16 | 100% | 450 | 173 | 16 |
| <i>Distribution</i> | 62 | 8 | 30 | 100% | 530 | 93 | 16 |
| <i>Receipt</i> | 28 | 3 | 69 | 100% | 570 | 72 | 14 |
| <i>Possession</i> | 26 | 3 | 70 | 100% | 576 | 46 | 17 |
| Other Child Exploitation Offenses | 72 | 12 | 16 | 100% | 348 | 258 | 33 |
| Firearms | 70 | 7 | 23 | 100% | 591 | 29 | 19 |
| Alien Smuggling | 67 | 21 | 12 | 100% | 395 | 225 | 19 |
| Illegal Reentry into the U.S. | 55 | 11 | 34 | 100% | 592 | 32 | 15 |

Note. "Number" refers to respondents who answered question with other than a "N/A response." "N/A", or "not applicable," means that respondent had not sentenced a defendant convicted post-Kimbrough/Gall. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 9. Role in the Offense

Table 9. Which answer best reflects your view of the following statements?

| | <u>Strongly Agree</u> | <u>Somewhat Agree</u> | <u>Neutral</u> | <u>Somewhat Disagree</u> | <u>Strongly Disagree</u> | <u>Total</u> | <u>Number</u> | <u>Missing</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------|--------------------------|--------------------------|--------------|---------------|----------------|
| | Percent | | | | | | | |
| The distinction between a "minor" and "minimal" participant should be explained more clearly. | 31% | 35% | 23% | 9% | 2% | 100% | 624 | 15 |
| The distinction between an "organizer/leader" and a "manager/supervisor" should be explained more clearly. | 28 | 38 | 23 | 8 | 2 | 100% | 625 | 14 |
| The range of adjustments based on role in the offense should be increased (<i>i.e.</i> , allow adjustments for role in the offense greater than 4 levels). | 15 | 32 | 28 | 19 | 6 | 100% | 623 | 16 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 10. Criminal History Calculation

Table 10. Which response best reflects your view of the following statements?

| | Percent | | | | Total | Number | Missing |
|--------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------|--------|---------|
| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | | | |
| The combined impact of "recency" points and "status" points under USSG §4A1.1(d) and (e) should be reduced. | 9% | 19% | 55% | 12% | 5% | 619 | 20 |
| Misdemeanor careless or reckless driving should always be excluded from criminal history computations. | 17 | 25 | 19 | 30 | 8 | 627 | 12 |
| Misdemeanor driving without a license or with a revoked or suspended license should always be excluded from criminal history computations. | 17 | 28 | 16 | 29 | 9 | 627 | 12 |
| Misdemeanor insufficient funds check should always be excluded from criminal history computations. | 16 | 23 | 22 | 33 | 6 | 629 | 10 |
| Misdemeanor disorderly conduct or disturbing the peace should always be excluded from criminal history computations. | 11 | 19 | 21 | 40 | 8 | 627 | 12 |
| Misdemeanor loitering offenses should always be excluded from criminal history computations. | 25 | 30 | 19 | 22 | 4 | 628 | 11 |
| Misdemeanor public intoxication offenses should always be excluded from criminal history computations. | 19 | 29 | 19 | 27 | 6 | 628 | 11 |
| Offenses committed prior to age 18 should always be excluded from criminal history computations. | 10 | 18 | 13 | 39 | 21 | 628 | 11 |
| Sentences resulting from tribal court convictions should be included in criminal history computations. | 12 | 24 | 45 | 10 | 9 | 623 | 16 |
| The applicable time periods for counting prior offenses under USSG §4A1.2(e) (i.e., the "decay factor") should be shortened. | 4 | 15 | 31 | 32 | 18 | 627 | 12 |
| The career offender provisions at USSG §§4B1.1 and 4B1.2 should be amended to apply only to offenders described in 28 USC § 994(h). | 9 | 22 | 43 | 18 | 9 | 624 | 15 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 11. Availability of Sentence Types

Table 11. Do you believe the following sentences should be made *more* available for each offense?

| | Straight Probation | | Probation with Community or Home Confinement | | Split Sentencing of Imprisonment and Community or Home Confinement | | Number |
|-----------------------------------|--------------------|----|----------------------------------------------|----|--------------------------------------------------------------------|----|--------|
| | 1% | 5% | 1% | 5% | 1% | 5% | |
| Murder | | | | | | | 639 |
| Manslaughter | 2 | 17 | 3 | 17 | | | 639 |
| Assault | 8 | 33 | 12 | 33 | | | 639 |
| Fraud | 14 | 43 | 22 | 43 | | | 639 |
| Larceny/Theft/Embezzlement | 15 | 44 | 24 | 44 | | | 639 |
| Drug Trafficking | | | | | | | |
| <i>Heroin</i> | 8 | 28 | 11 | 28 | | | 639 |
| <i>Powder Cocaine</i> | 9 | 33 | 14 | 33 | | | 639 |
| <i>Crack Cocaine</i> | 9 | 34 | 13 | 34 | | | 639 |
| <i>Methamphetamine</i> | 9 | 32 | 13 | 32 | | | 639 |
| <i>Marijuana</i> | 19 | 40 | 22 | 40 | | | 639 |
| <i>Ecstasy</i> | 11 | 32 | 15 | 32 | | | 639 |
| <i>Oxycodone</i> | 10 | 32 | 14 | 32 | | | 639 |
| Child Pornography | | | | | | | |
| <i>Production</i> | 4 | | 5 | 17 | | | 639 |
| <i>Distribution</i> | 5 | 22 | 8 | 22 | | | 639 |
| <i>Receipt</i> | 15 | 39 | 20 | 39 | | | 639 |
| <i>Possession</i> | 19 | 41 | 23 | 41 | | | 639 |
| Other Child Exploitation Offenses | 6 | 18 | 7 | 18 | | | 639 |
| Firearms | 3 | 33 | 11 | 33 | | | 639 |
| Alien Smuggling | 6 | 22 | 9 | 22 | | | 639 |
| Illegal Reentry into the U.S. | 14 | 21 | 11 | 21 | | | 639 |

Note. "Number" refers to respondents who answered question.

Question 12. Supervised Release

Table 12a. Which response best reflects your view of the following statements?

| | Appropriate | | Too Low | | Too High | | Total | Number | Missing |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|----|---------|----|----------|----|---------|--------|---------|
| | Percent | | Percent | | Percent | | Percent | | |
| The number of cases in which the guidelines provide for supervised release generally is: | 87% | 7% | 7% | 7% | 628 | 11 | 100% | 628 | 11 |
| The lengths of the terms of supervised release terms provided by the guidelines generally are: | 87 | 7 | 6 | 6 | 631 | 8 | 100% | 631 | 8 |
| The ranges of punishment for violations of supervised release provided by the policy statements in Chapter Seven, Part B of the <i>Guidelines Manual</i> generally are: | 77 | 16 | 7 | 7 | 629 | 10 | 100% | 629 | 10 |

| | Strongly Agree | | Somewhat Agree | | Neutral | | Somewhat Disagree | | Strongly Disagree | | Total | Number | Missing |
|---------------------------------------------------------------------------------------|----------------|-----|----------------|-----|---------|-----|-------------------|------|-------------------|----|---------|--------|---------|
| | Percent | | Percent | | Percent | | Percent | | Percent | | Percent | | |
| The minimum terms of supervised release provided in USSG §5D1.2 should be eliminated. | 10% | 21% | 35% | 22% | 13% | 624 | 15 | 100% | 624 | 15 | 100% | 624 | 15 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

IV. Departures and Variances

Question 13. Factors to Consider at Sentencing

Table 13. Relevance of various characteristics at sentencing.

| | Is Ordinarily Relevant to Within-Range Determination | Is Ordinarily Relevant to Departure and/or Variance Considering Affirmatively | Never Relevant | Number |
|----------------------------------------------------------------------------------|------------------------------------------------------|-------------------------------------------------------------------------------|--------------------------------------------|--------|
| | Percent of Judges Responding Affirmatively | Percent of Judges Responding Affirmatively | Percent of Judges Responding Affirmatively | |
| Age | 57% | 67% | 0% | 639 |
| Education | 46 | 48 | 5 | 639 |
| Vocational Skills | 41 | 41 | 6 | 639 |
| Mental Condition | 65 | 79 | 0 | 639 |
| Emotional Condition | 51 | 60 | 3 | 639 |
| Physical Condition | 51 | 64 | 1 | 639 |
| Drug Dependence | 50 | 49 | 5 | 639 |
| Alcohol Dependence | 48 | 47 | 5 | 639 |
| Gambling Addiction | 38 | 39 | 10 | 639 |
| Employment Record | 62 | 65 | 2 | 639 |
| Family Ties and Responsibilities | 57 | 62 | 2 | 639 |
| Community Ties | 46 | 49 | 5 | 639 |
| Dependence on Criminal Livelihood | 56 | 55 | 12 | 639 |
| Stress Related to Military Service | 48 | 64 | 4 | 225* |
| Civic, Charitable, or Public Service | 52 | 60 | 2 | 639 |
| Employment-Related Contributions | 43 | 47 | 9 | 639 |
| Prior Good Works | 55 | 62 | 3 | 639 |
| Lack of Guidance as a Youth | 49 | 49 | 7 | 639 |
| Disadvantaged Upbringing | 48 | 50 | 7 | 639 |
| Diminished Capacity | 66 | 80 | 0 | 639 |
| Voluntary Disclosure of Offense | 70 | 74 | 0 | 639 |
| Post-Sentencing Rehabilitative Efforts | 51 | 57 | 6 | 639 |
| Post-Offense Rehabilitative Efforts | 61 | 70 | 1 | 639 |
| Aberrant Behavior | 64 | 74 | 1 | 639 |
| Exceptional Efforts to Fulfill Restitution Obligations | 62 | 75 | 1 | 639 |
| Undue Influence Related to Affection, Relationship, or Fear of Other Offender(s) | 57 | 68 | 3 | 639 |

Note. *Data for "stress related to military service" was collected from judges who responded on paper questionnaires and was erroneously omitted from the online survey. "Number" refers to respondents who answered question. Percents do not sum to 100% because many judges responded affirmatively to more than one condition.

Question 14. Departure Provisions

Table 14. Which response best reflects your view of the following reasons for not relying on departure provisions?

| | Percent | Number | Missing |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|---------|--------|---------|
| Not applicable/no such cases in past two years | 13% | 637 | 2 |
| The <i>Guidelines Manual</i> does not contain a departure provision that adequately reflects the reason for the sentence outside the guideline range. | 76 | 556 | 0 |
| Departure policy statements in the <i>Guidelines Manual</i> were too restrictive. | 65 | 556 | 0 |
| Circuit case law regarding departures was too restrictive. | 35 | 556 | 0 |
| Departure policy statements are inconsistent with the factors under 18 USC § 3553(a). | 41 | 556 | 0 |
| Departures are subject to heightened procedural requirements (e.g., notice requirements under Fed. R. Crim. P. 32(h)). | 28 | 556 | 0 |
| Departures are subject to stricter appellate review than variances. | 38 | 556 | 0 |

Note. "Number" refers to respondents who indicated their agreement to any of the statements. "Percent" refers to the proportion of that number who indicated their agreement to the corresponding statement. "Missing" refers to respondents who provided no opinion about any of the statements in question 14. Thirteen percent (or 81) of the 637 non-missing judges indicated that this question was not applicable because they had no such cases during past two years. These 81 judges were therefore excluded from the sample for the remaining statements, leaving 556 judges. Because judges were asked to check any statement that they agreed with, percents sum to more than 100%.

Question 15. Substantial Assistance

Table 15. For each statement, which response best reflects your view?

| | Percent | | | | Total | Number | Missing |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------|--------|---------|
| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | | | |
| Congress should amend 18 USC § 3553(e) to authorize judges to sentence a defendant below the applicable statutory mandatory minimum to reflect a defendant's substantial assistance, even if the government does not make a motion. | 25% | 29% | 11% | 18% | 100% | 633 | 6 |
| The Commission should amend USSG §5K1.1 to authorize judges to sentence below the applicable guideline range to reflect a defendant's substantial assistance, even if the government does not make a motion. | 25 | 29 | 12 | 18 | 100% | 632 | 7 |
| The Federal Rules of Criminal Procedure should be amended to authorize judges to reduce a defendant's sentence under Rule 35(b) if the defendant, after sentencing, provides the required assistance, even if the government does not make a motion. | 22 | 26 | 15 | 21 | 100% | 633 | 6 |
| The Commission should amend USSG §5K1.1 to provide additional guidance regarding the extent to which a court may depart under that provision (i.e., provide specific guidance on the number of offense levels recommended for departures based on the factors enumerated in USSG §5K1.1). | 14 | 28 | 20 | 20 | 100% | 630 | 9 |
| The Commission should amend USSG §5K1.1 to provide additional guidance regarding evaluation of the nature and extent of the assistance provided. | 15 | 30 | 22 | 18 | 100% | 632 | 7 |
| The Commission should amend USSG §5K1.1 to provide additional guidance regarding evaluation of the results obtained through the assistance provided. | 15 | 27 | 23 | 20 | 100% | 632 | 7 |
| In determining the extent of a reduction below the statutory mandatory minimum under 18 USC § 3553(e) or Fed. R. Crim. P. 35(b), the court's consideration should not be limited to the nature of the defendant's substantial assistance but also should include consideration of the factors at 18 USC § 3553(a). | 33 | 30 | 14 | 13 | 100% | 631 | 8 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

V. General Assessment

Question 16. Sentencing Disparities

Table 16. Ranking of factors thought to contribute to disparities.

| | Percent of Respondents | | | | | Number | Missing |
|-------------------------------------------------------------------------------------|------------------------|-----|----|----|----|--------|---------|
| | 1 | 2 | 3 | 4 | 5 | | |
| Statutory Mandatory Minimums | 33% | 12% | 7% | 6% | 5% | 598 | 41 |
| Charging Decisions | 32 | 25 | 9 | 8 | 6 | 598 | 41 |
| Judicial Discretion | 11 | 7 | 7 | 10 | 13 | 598 | 41 |
| Regional Differences | 7 | 9 | 12 | 10 | 16 | 598 | 41 |
| Substantial Assistance Practices under USSG §5K1.1 | 5 | 10 | 16 | 13 | 9 | 598 | 41 |
| Early Disposition Programs ("fast track") | 4 | 5 | 7 | 4 | 5 | 598 | 41 |
| Plea Agreements: Fact Bargaining | 4 | 9 | 8 | 9 | 8 | 598 | 41 |
| Variances | 3 | 6 | 6 | 8 | 10 | 598 | 41 |
| Binding Plea Agreements under Fed. R. Crim. P. 11 (c)(1)(C) | 3 | 9 | 8 | 5 | 6 | 598 | 41 |
| Substantial Assistance Practices under 18 USC § 3553(e) | 3 | 4 | 9 | 6 | 4 | 598 | 41 |
| Substantial Assistance Practices under Fed R. Crim P. 35 | 2 | 1 | 5 | 4 | 4 | 598 | 41 |
| Differing Circuit Case Law (e.g., different interpretations of "crime of violence") | 2 | 3 | 4 | 7 | 9 | 598 | 41 |
| Non Government-Sponsored Departures | 1 | 2 | 3 | 2 | 4 | 598 | 41 |
| Lack of Substantive Appellate Reasonableness Review | 1 | 1 | 2 | 2 | 4 | 598 | 41 |

Note. "Number" refers to respondents who ranked at least one factor. "Missing" includes respondents who did not rank any factor listed in question 16. "Percent of respondents" refers to the proportion of responding judges (598) who ranked the factor according to their perceived order of significance (1 through 5 only). Judges frequently assigned the same rank (e.g., 1) to several different factors, so that column percents do not sum to 100%. Row percents do not sum to 100% because some judges did not assign a 1 through 5 rank to each listed factor. For example, 37% of the judges did not rank statutory mandatory minimums within the top five factors, which may be interpreted either as their having no opinion about this factor or that they believed that it ranks below 5 in significance.

Question 17. General Assessment of Guidelines and Federal Sentencing

Table 17. Which response best reflects your view of the following statements?

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree | Total | Number | Missing |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|-------|--------|---------|
| | Percent | | | | | | | |
| Overall, the federal sentencing guidelines have reduced unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. | 32% | 46% | 6% | 9% | 7% | 100% | 629 | 10 |
| Overall, the federal sentencing guidelines have increased certainty in meeting the purposes of sentencing. | 30 | 46 | 9 | 10 | 6 | 100% | 630 | 9 |
| Overall, the federal sentencing guidelines have increased fairness in meeting the purposes of sentencing. | 22 | 45 | 10 | 14 | 10 | 100% | 630 | 9 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 18. Reporting of Sentencing Data

Table 18. Which response best reflects your view of the statement about reporting sentencing data?

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree | Total | Number | Missing |
|---------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|-------|--------|---------|
| | Percent | | | | | | | |
| The Commission should report judge-specific sentencing data as a means to promote transparency in sentencing. | 10% | 14% | 23% | 15% | 38% | 100% | 634 | 5 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

Question 19. Purposes of Sentencing

Table 19. Which of the following sentencing systems do you think best achieves the purposes of sentencing?

| | Percent | Number |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|--------|
| No guidelines, such as the system in effect before the federal sentencing guidelines became effective in 1987. | 8% | |
| Mandatory guidelines, such as the system in effect before the Supreme Court's decision in <i>United States v. Booker</i> , 543 U.S. 220 (2005). | 3 | |
| The current advisory guidelines system. | 75 | |
| A system of mandatory guidelines that comply with the Sixth Amendment (e.g., with facts supporting sentencing enhancements found by a jury beyond a reasonable doubt or admitted by the defendant) and have broader sentencing ranges than currently exist, coupled with fewer statutory mandatory minimum sentencing provisions. | 14 | |
| Total | 100% | |
| Number | | 634 |
| Missing | | 5 |

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question.

visited on 2/15/2012

**APPENDIX A
SURVEY INSTRUMENT**

2010 Survey of Judges on the Federal Sentencing Guidelines



2010 Survey of Judges on The Federal Sentencing Guidelines

Purpose of Survey:

Upon the 25th anniversary of the Sentencing Reform Act of 1984, the United States Sentencing Commission is seeking information from members of the federal judiciary about sentencing practices in general and the federal sentencing guidelines in particular. During the past year, the Commission has been conducting a series of regional public hearings on federal sentencing practices and the guidelines and has heard from various stakeholders in the federal criminal justice system, including several federal district and appellate judges. This survey is intended to provide an opportunity to receive broader input from as many federal district judges as possible. The Commission intends to issue a report with possible recommendations for statutory and guideline changes in part based on the findings from the hearings and this survey.

The questions in this survey address a wide variety of sentencing issues and will be divided into the following categories: (1) statutory and structural sentencing issues; (2) sentencing hearings; (3) guideline application issues; (4) departures and variances; and (5) general assessments. You also will be given an opportunity at the end of the questionnaire to offer comments. Statutes cited in the survey are included in this packet for your convenience.

Confidentiality:

Information obtained about you from this questionnaire will be held in confidence; you will not be identified in any presentation of the results. Only your confidential study identification number will appear on these questionnaire pages. Identification numbers will be used solely to track response rates and allow for reminders to those judges who do not initially respond. The results of the survey will be reported only in the aggregate. Geographical differences in results may be reported, but responses from individual judges will not be identified.

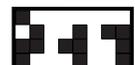
Directions:

- Please fill in the circles completely and do not use check marks.
- Please use a soft lead pencil in case you wish to change an answer.
- When you have completed the questionnaire, please return it in the enclosed postage-paid envelope to: **2010 Survey of Judges, c/o Abt SRBI, Inc. 55 Wheeler Street; Cambridge, MA 02138.**
- If you have any questions about the survey, please call the Commission's general counsel, Kenneth Cohen at 202-502-4523.

Thank you for taking the time to complete this survey. Your input is important to the Commission.



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I. Statutory and Structural Issues

1. Consider cases you have sentenced that involved a statutory mandatory minimum provision. Indicate below whether you feel the mandatory minimum sentence was generally appropriate, generally too low, or generally too high for the following types of offenses. (Please mark "N/A" for "not applicable" if you have not sentenced a defendant convicted of the offense post-Kimbrough/Gall.)

| | Appropriate | Too Low | Too High | N/A |
|---------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| All offenses with a Mandatory Minimum | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Drug Trafficking | | | | |
| Heroin | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Powder Cocaine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Crack Cocaine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Methamphetamine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Marijuana | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Firearms Offenses | | | | |
| under 18 U.S.C. § 924 (c) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| under 18 U.S.C. § 924 (e) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Child Pornography | | | | |
| Production | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Distribution | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Receipt | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other Child Exploitation Offenses | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Aggravated Identity Theft | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |



2. Under 18 U.S.C. § 3553(f), often referred to as the "safety valve," a court must impose a sentence without regard to statutory mandatory minimum penalties for certain drug trafficking offenses if certain criteria are met. Below is a list of statements about possible changes to the statutory safety valve. For each statement, fill in the circle that best reflects your view.

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|
| The statutory safety valve should be expanded to include drug trafficking offenders who have 2 or 3 criminal history points (i.e., those in Criminal History Category II). | ① | ② | ③ | ④ | ⑤ |
| The statutory safety valve should be expanded to include drug trafficking offenders who have 4, 5, or 6 criminal history points (i.e., those in Criminal History Category III). | ① | ② | ③ | ④ | ⑤ |
| A safety valve provision should be provided for the following types of offenses: | | | | | |
| All offenses with a mandatory minimum | ① | ② | ③ | ④ | ⑤ |
| Drug Trafficking | ① | ② | ③ | ④ | ⑤ |
| Firearms Offenses | | | | | |
| under 18 U.S.C. § 924 (c) | ① | ② | ③ | ④ | ⑤ |
| under 18 U.S.C. § 924 (e) | ① | ② | ③ | ④ | ⑤ |
| Child Pornography | | | | | |
| Production | ① | ② | ③ | ④ | ⑤ |
| Distribution | ① | ② | ③ | ④ | ⑤ |
| Receipt | ① | ② | ③ | ④ | ⑤ |
| Other Child Exploitation Offenses | ① | ② | ③ | ④ | ⑤ |
| Aggravated Identity Theft | ① | ② | ③ | ④ | ⑤ |



3. Below is a list of statements about possible statutory changes and structural changes to the guidelines. For each statement, fill in the circle that best reflects your view.

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Congress should amend 28 U.S.C. § 994(b)(2) to allow broader ranges on the Sentencing Table. | <input type="radio"/> |
| The sentencing guidelines should be "de-linked" from statutory mandatory minimum sentences (i.e., the guideline ranges should be set by the Commission independently from mandatory minimum sentences). | <input type="radio"/> |
| The number of categories in the loss table in USSG §2B1.1 should be decreased by broadening the monetary ranges. | <input type="radio"/> |
| The number of drug quantity ranges in the Drug Quantity Table in USSG §2D1.1 should be decreased by broadening the quantity ranges. | <input type="radio"/> |
| The number of criminal history categories in the Sentencing Table should be decreased. | <input type="radio"/> |
| The number of offense levels in the Sentencing Table should be decreased. | <input type="radio"/> |
| Some of the more generic SOC adjustments (e.g., weapon use, victim injury) in Chapter Two of the <i>Guidelines Manual</i> should be moved to Chapter Three. | <input type="radio"/> |

4. Under 18 U.S.C. § 3624(b), offenders serving a term of imprisonment of more than one year may receive credit toward the service of that sentence if the offender displays exemplary compliance with institutional disciplinary regulations. Under current law, offenders may receive up to 54 days of such "good time" credit each year.

**Do you believe the maximum amount of good time credit allowable should be:
(Please mark only one choice)**

- Unchanged
- Reduced
- Increased



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II. Sentencing Hearings

**5. In your view, what should be considered "relevant conduct" for purposes of sentencing?
Please mark all that apply.**

- All reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity.
- Conduct that was charged in a court that was later dismissed.
- Uncharged conduct that is presented at trial or admitted by the defendant in court.
- Uncharged conduct referenced only in the Presentence Report.
- Acquitted conduct.

6. Please indicate what you think the standard of proof should be for each type of fact to be established at sentencing.

| | Preponderance | Clear and convincing | Beyond a reasonable doubt |
|--------------------------------------------------------|-----------------------|-----------------------|---------------------------|
| Facts establishing the base offense level | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Facts supporting adjustments to the base offense level | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Facts supporting departures | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Facts supporting variances | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

7. Below is a list of statements about possible changes relating to how federal sentencing protects the interests of crime victims. For each statement or possible change, fill in the circle that best reflects your view.

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|
| The interests of crime victims generally are adequately protected under current federal sentencing procedures. | ① | ② | ③ | ④ | ⑤ |
| Presentence reports should be required to include information a victim wishes to be included in the report. | ① | ② | ③ | ④ | ⑤ |
| Portions of presentence reports, including descriptions of the offense conduct and guidelines calculations, should be disclosed to victims. | ① | ② | ③ | ④ | ⑤ |
| Victims should have the opportunity to comment on the presentence report, including on disputed guideline factors, before the sentence is imposed. | ① | ② | ③ | ④ | ⑤ |
| Congress should amend the restitution statutes to more broadly define the term "victim" to include persons who suffer any harm, injury, or loss that would have not occurred but for the defendant's crime. | ① | ② | ③ | ④ | ⑤ |
| Congress should amend the restitution statutes to more broadly provide for compensation to victims, including for emotional distress or other consequential harm or loss that the victim suffered as a result of the defendant's crime. | ① | ② | ③ | ④ | ⑤ |
| Courts should have the authority to order restitution to victims in all cases. | ① | ② | ③ | ④ | ⑤ |



III. Guideline Application

8. Considering cases in which you have sentenced defendants in the last two years (i.e., since the Supreme Court's decisions in *Kimrough v. United States*, 552 U.S. ___, 128 S. Ct. 558 (Dec. 11, 2007), and *Gall v. United States*, 552 U.S. ___, 128 S. Ct. 586 (Dec. 11, 2007)), indicate if you felt the applicable guideline range was generally appropriate, generally too low, or generally too high for the following types of offenses. (Please mark "N/A" for "not applicable" if you have not sentenced a defendant convicted of the offense post-Kimrough/Gall.)

| | Appropriate | Too Low | Too High | N/A |
|-----------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Murder | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Manslaughter | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Assault | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Fraud | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Larceny/Theft/Embezzlement | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Drug Trafficking | | | | |
| Heroin | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Powder Cocaine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Crack Cocaine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Methamphetamine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Marijuana | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Ecstasy | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Oxycodone | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Child Pornography | | | | |
| Production | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Distribution | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Receipt | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Possession | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other Child Exploitation Offenses | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Firearms | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Alien Smuggling | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Illegal Reentry into the U.S. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

9. Below is a list of statements about possible changes to the guidelines concerning role in the offense (USSG §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role)). For each statement, fill in the circle that best reflects your view.

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|----------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|-------------------------|-------------------------|-------------------------|-------------------------|
| The distinction between a "minor" and "minimal" participant should be explained more clearly. | <input type="radio"/> ① | <input type="radio"/> ② | <input type="radio"/> ③ | <input type="radio"/> ④ | <input type="radio"/> ⑤ |
| The distinction between an "organizer/leader" and a "manager/supervisor" should be explained more clearly. | <input type="radio"/> ① | <input type="radio"/> ② | <input type="radio"/> ③ | <input type="radio"/> ④ | <input type="radio"/> ⑤ |
| The range of adjustments based on role in the offense should be increased (i.e., allow adjustments for role in the offense greater than 4 levels). | <input type="radio"/> ① | <input type="radio"/> ② | <input type="radio"/> ③ | <input type="radio"/> ④ | <input type="radio"/> ⑤ |



10. Below is a list of statements about possible changes relating to how the Criminal History Category is calculated under Chapter Four of the *Guidelines Manual*. For each statement, fill in the circle that best reflects your view.

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|--------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|
| The combined impact of "recency" points and "status" points under USSG §4A1.1(d) and (e) should be reduced. | ① | ② | ③ | ④ | ⑤ |
| Misdemeanor careless or reckless driving should always be excluded from criminal history computations. | ① | ② | ③ | ④ | ⑤ |
| Misdemeanor driving without a license or with a revoked or suspended license should always be excluded from criminal history computations. | ① | ② | ③ | ④ | ⑤ |
| Misdemeanor insufficient funds check should always be excluded from criminal history computations. | ① | ② | ③ | ④ | ⑤ |
| Misdemeanor disorderly conduct or disturbing the peace should always be excluded from criminal history computations. | ① | ② | ③ | ④ | ⑤ |
| Misdemeanor loitering offenses should always be excluded from criminal history computations. | ① | ② | ③ | ④ | ⑤ |
| Misdemeanor public intoxication offenses should always be excluded from criminal history computations. | ① | ② | ③ | ④ | ⑤ |
| Offenses committed prior to the age eighteen should always be excluded from criminal history computations. | ① | ② | ③ | ④ | ⑤ |
| Sentences resulting from tribal court convictions should be included in criminal history computations. | ① | ② | ③ | ④ | ⑤ |
| The applicable time periods for counting prior offenses under USSG §4A1.2(e) (i.e., the "decay factor") should be shortened. | ① | ② | ③ | ④ | ⑤ |
| The career offender provisions at USSC §§4B1.1 and 4B1.2 should be amended to apply only to offenders described in 28 U.S.C. § 994(h). | ① | ② | ③ | ④ | ⑤ |



11. The sentencing guidelines are required by statute to provide a means to determine the type of sentence to impose: probation, a fine, or a term of imprisonment. Accordingly, the Sentencing Table is divided into zones that determine the availability of the type of guideline sentence to impose. Please indicate whether you believe the following types of alternative sentences should be made more available for each offense type. For each offense type, fill in the circle for each type of sentence, if any, that you believe should be made more available. If you do not think a particular type of sentence should be made more available, leave the circles blank.

| | Straight Probation | Probation with Community or Home Confinement | Split Sentencing of Imprisonment and Community or Home Confinement |
|-----------------------------------|-----------------------|----------------------------------------------|--------------------------------------------------------------------|
| Murder | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Manslaughter | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Assault | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Fraud | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Larceny/Theft/Embezzlement | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Drug Trafficking | | | |
| Heroin | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Powder Cocaine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Crack Cocaine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Methamphetamine | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Marijuana | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Ecstasy | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Oxycodone | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Child Pornography | | | |
| Production | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Distribution | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Receipt | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Possession | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other Child Exploitation Offenses | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Firearms | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Alien Smuggling | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Illegal Reentry into the U.S. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

12. Below is a list of questions and statements about possible changes relating to supervised release. For each question or statement, fill in the circle that best reflects your view.

| | Appropriate | Too Low | Too High |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|
| The number of cases in which the guidelines provide for supervised release generally is... | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The lengths of the terms of supervised release terms provided by the guidelines generally are... | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The ranges of punishment for violations of supervised release provided by the policy statements in Chapter Seven, Part B of the <i>Guidelines Manual</i> generally are... | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|---------------------------------------------------------------------------------------|-------------------------|-------------------------|-------------------------|-------------------------|-------------------------|
| The minimum terms of supervised release provided in USSG §5D1.2 should be eliminated. | <input type="radio"/> ① | <input type="radio"/> ② | <input type="radio"/> ③ | <input type="radio"/> ④ | <input type="radio"/> ⑤ |



IV. Departures and Variances

13. For each offender characteristic listed below, fill in the appropriate circle to indicate each way in which you think this factor should be considered at sentencing. Fill in as many circles as needed in each row to express your views.

| Policy Statement where applicable | Characteristic | Ordinarily relevant to within-range determination | Not ordinarily relevant to within-range determination | Ordinarily relevant to departure and/or variance consideration | Not ordinarily relevant to departure and/or variance consideration | Never relevant |
|-----------------------------------|----------------------------------------------------------------------------------|---------------------------------------------------|-------------------------------------------------------|----------------------------------------------------------------|--------------------------------------------------------------------|-----------------------|
| 5H1.1 | Age | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.2 | Education | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.2 | Vocational Skills | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.3 | Mental Condition | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.3 | Emotional Condition | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.4 | Physical Condition | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.4 | Drug Dependence | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.4 | Alcohol Dependence | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.4 | Gambling Addiction | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.5 | Employment Record | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.6 | Family Ties and Responsibilities | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.6 | Community Ties | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.9 | Dependence on Criminal Livelihood | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| | Stress Related to Military Service | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.11 | Civic, Charitable, or Public Service | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.11 | Employment-related Contributions | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.11 | Prior Good Works | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.12 | Lack of Guidance as a Youth | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5H1.12 | Disadvantaged Upbringing | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5K2.13 | Diminished Capacity | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5K2.16 | Voluntary Disclosure of Offense | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5K2.19 | Post-Sentencing Rehabilitative Efforts | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| | Post-Offense Rehabilitative Efforts | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5K2.20 | Aberrant Behavior | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| | Exceptional Efforts to Fulfill Restitution Obligations | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| | Undue Influence related to affection, relationship, or fear of other offender(s) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |



14. Considering cases in which you have sentenced defendants in the last two years (i.e., since the Supreme Court's decisions in *Kimbrough v. United States*, 552 U.S. ___, 128 S. Ct. 558 (Dec. 11, 2007), and *Gall v. United States*, 552 U.S. ___, 128 S. Ct. 586 (Dec. 11, 2007)), and in which the sentence imposed constituted a variance from the applicable guideline range, indicate the reason why you chose not to rely on a departure provision in the *Guidelines Manual*. Please select all that apply. (Please mark "N/A for not applicable if you have not imposed a sentence that constituted a variance post-Kimbrough/Gall.)

- N/A
- The *Guidelines Manual* does not contain a departure provision that adequately reflects the reason for the sentence outside the guideline range.
- Departure policy statements in the *Guidelines Manual* were too restrictive.
- Circuit case law regarding departures was too restrictive.
- Departure policy statements are inconsistent with the factors under 18 U.S.C. § 3553(a).
- Departures are subject to heightened procedural requirements(e.g., notice requirements under Fed. R. Crim. P. 32(h)).
- Departures are subject to stricter appellate review than variances.

15. Below is a list of statements and/or possible changes relating to substantial assistance. For each statement or possible change, fill in the circle that best reflects your view.

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|
| Congress should amend 18 U.S.C. § 3553(e) to authorize judges to sentence a defendant below the applicable statutory mandatory minimum to reflect a defendant's substantial assistance, even if the government does not make a motion. | ① | ② | ③ | ④ | ⑤ |
| The Commission should amend USSG §5K1.1 to authorize judges to sentence below the applicable guideline range to reflect a defendant's substantial assistance, even if the government does not make a motion. | ① | ② | ③ | ④ | ⑤ |
| The Federal Rules of Criminal Procedure should be amended to authorize judges to reduce a defendant's sentence under Rule 35(b) if the defendant, after sentencing, provides the required assistance, even if the government does not make a motion. | ① | ② | ③ | ④ | ⑤ |
| The Commission should amend §5K1.1 to provide additional guidance regarding the extent to which a court may depart under that provision (i.e., provide specific guidance on the number of offense levels recommended for departures based on the factors enumerated in USSG 5K1.1). | ① | ② | ③ | ④ | ⑤ |
| The Commission should amend §5K1.1 to provide additional guidance regarding evaluation of the nature and extent of the assistance provided. | ① | ② | ③ | ④ | ⑤ |
| The Commission should amend §5K1.1 to provide additional guidance regarding evaluation of the results obtained through the assistance provided. | ① | ② | ③ | ④ | ⑤ |
| In determining the extent of a reduction below the statutory mandatory minimum under 18 U.S.C. § 3553(e) or Fed. R. Crim. P. 35(b), the court's consideration should not be limited to the nature of the defendant's substantial assistance but also should include consideration of the factors at 18 U.S.C. § 3553(a). | ① | ② | ③ | ④ | ⑤ |



V. General Assessment

16. To the extent, if any, you believe unwarranted sentencing disparities exist, indicate the 5 most significant contributors from the following list of factors in rank order (1 indicates the most significant contributor; 5 indicates the 5th most significant contributor). Please select only 5 from the list below.

| | Rank 1 thru 5 |
|-------------------------------------------------------------------------------------|----------------------|
| Statutory mandatory minimums | <input type="text"/> |
| Charging decisions | <input type="text"/> |
| Plea agreements | |
| Binding plea agreements under Fed. R.Crim.P.11 (c)(1)(C) | <input type="text"/> |
| Fact bargaining | <input type="text"/> |
| Substantial assistance practices | |
| Under 18 U.S.C. § 3553(e) | <input type="text"/> |
| Under USSG §5K1.1 | <input type="text"/> |
| Under Fed. R. Crim. P. 35 | <input type="text"/> |
| Early disposition programs ("fast track") | <input type="text"/> |
| Judicial Discretion | <input type="text"/> |
| Non-government-sponsored departures | <input type="text"/> |
| Variances | <input type="text"/> |
| Lack of substantive appellate reasonableness review | <input type="text"/> |
| Differing circuit case law (e.g., different interpretations of "crime of violence") | <input type="text"/> |
| Regional differences | <input type="text"/> |

17. Below is a list of statements regarding federal sentencing and the guidelines in general. For each statement, fill in the circle that best reflects your view.

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|
| Overall, the federal sentencing guidelines have reduced unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. | ① | ② | ③ | ④ | ⑤ |
| Overall, the federal sentencing guidelines have increased certainty in meeting the purposes of sentencing. | ① | ② | ③ | ④ | ⑤ |
| Overall, the federal sentencing guidelines have increased fairness in meeting the purposes of sentencing. | ① | ② | ③ | ④ | ⑤ |



18. Below is a statement regarding the reporting of federal sentencing data. Fill in the circle that best reflects your view.

| | Strongly Agree | Somewhat Agree | Neutral | Somewhat Disagree | Strongly Disagree |
|---------------------------------------------------------------------------------------------------------------|----------------|----------------|---------|-------------------|-------------------|
| The Commission should report judge-specific sentencing data as a means to promote transparency in sentencing. | ① | ② | ③ | ④ | ⑤ |

19. Which of the following sentencing systems do you think best achieves the purposes of sentencing? Please mark only one choice.

- No guidelines, such as the system in effect before the federal sentencing guidelines became effective in 1987.
- Mandatory guidelines, such as the system in effect before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).
- The current advisory guidelines system.
- A system of mandatory guidelines that comply with the Sixth Amendment (e.g., with facts supporting sentencing enhancements found by a jury beyond a reasonable doubt or admitted by the defendant) and have broader sentencing ranges than currently exist, coupled with fewer statutory mandatory minimum sentencing provisions.

20. Clarification and/or Comments

The Commission welcomes all comments that you believe will help the Commission in its analysis of how the current guidelines system is meeting the statutory purposes of sentencing. You are also encouraged to provide your thoughts regarding the statutory definitions of the purposes of sentencing, problem areas you are experiencing with sentences under the guidelines, research areas you would like to see the Commission address or any other topic you wish to raise. *Attach additional paper if needed.*

Thank you for taking the time to complete this questionnaire. Your input is important to the Commission. Please mail this completed questionnaire in the postage-paid envelope as soon as possible. Please return questionnaire to: **2010 Survey of Judges, c/o Abt SRBI, Inc. 55 Wheeler Street; Cambridge, MA 02138**



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