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Report to the Congress:

## Analysis of Penalties for Federal Rape Cases

(as directed by section 40112 of Public Law 103-322)

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U.S. Department of Justice  
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UNITED STATES SENTENCING COMMISSION  
March 1995

**REPORT TO CONGRESS:  
ANALYSIS OF PENALTIES FOR FEDERAL RAPE CASES**

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**I. INTRODUCTION**

**A. The Statutory Directive**

Section 40112 of the Violent Crime Control and Law Enforcement Act of 1994 directs the United States Sentencing Commission to submit a report to Congress "containing an analysis of federal rape sentencing, accompanied by comment from independent experts in the field, describing

(1) comparative Federal sentences for cases in which the rape victim is known to the defendant and cases in which the rape victim is not known to the defendant;

(2) comparative Federal sentences for cases on Federal territory and sentences in surrounding states; and

(3) an analysis of the effect of rape sentences on populations residing on Federal territory relative to the impact of other Federal offenses in which the existence of Federal jurisdiction depends upon the offense's being committed on Federal territory."<sup>1</sup>

This section of the act further directs the Commission to review and amend as necessary guidelines for aggravated sexual abuse (§2A3.1) and sexual abuse (§2A3.2) to address four concerns: (1) enhancing sentences if more than one offender is involved in the offense; (2) reducing unwarranted disparities between offenders who are known versus unknown by the victim; (3) making federal penalties commensurate with state penalties; and (4) considering the general problem of recidivism, severity of the offense, and devastating effects on survivors.

**B. Summary of Findings**

The following conclusions are based on the Commission's review of federal sexual assault offenses:

- Federal rape cases involving multiple assailants are rare. Only five such cases were sentenced during FY 1993 and each involved two assailants.
- Approximately 15 percent of federal sexual assault defendants had a prior conviction for sexual misconduct. Average sentences for these defendants are approximately 85 months

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<sup>1</sup> Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §40112, 108 Stat. 1796, 1903 (1994).

longer than defendants without prior sex offense convictions. The longer sentences result from both a higher criminal history score as well as differences in the statute of conviction.

- The guidelines do not distinguish between defendants known or unknown by victims. Commission data indicate that this factor is associated with differences in sentence length, with known defendants receiving, on average, shorter sentences. In 1992, the Commission amended the guidelines to better ensure that defendants whose actual offense conduct, as opposed to charged conduct, involves rape receive sentences according to the severity of their actual conduct. While too early to assess fully this amendment's impact, preliminary analysis indicates that differences in length of sentence between defendants known versus unknown to the victim are likely to diminish.
- Comparison of current federal rape sentences with state sentences indicates that federal offenders can expect to serve a longer period of prison confinement.
- The average federal sentence imposed during FY 1993 for rape conduct was higher than the average sentences imposed for robbery or assault cases, but lower than cases involving murder.
- Expert comment received to date has indicated that sentence length should be determined by the severity of the attack and the extent of the injury to the victim regardless of whether the assailant was known or unknown to the victim. Additionally, comment indicates that there appears to be no justification to increase federal sentences for rape and other sex offenses above current levels.

### **C. Organization of the Report**

Part II of the report provides background on the issues addressed. Part III discusses the operation of the relevant sentencing guidelines, specifically §§2A3.1 (Criminal Sexual Abuse) and 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)). Part IV compares federal and state penalties for sexual assault, while Part V reviews Sentencing Commission data. Part VI analyzes public comment and expert opinion on the issues addressed by the report.

## **II. BACKGROUND**

Rape is a growing problem in the United States. There has been some question whether the dramatic increases in numbers of rapes represent an actual increase or an increased willingness on the part of victims to report such cases. The numbers, however, are staggering. In 1993, 100,200 forcible rapes were attempted and 40,730 were completed.<sup>2</sup> From 1981 to 1991, the nation

experienced a 28-percent increase in the number of rapes reported.<sup>3</sup> By comparison, the population of the United States grew by only 11.9 percent during that ten-year period.

A recent National Crime Victimization Survey – Violence Against Women (NCVS–VAW) found that rape is seriously underreported to authorities.<sup>4</sup> The survey estimates that 173,000 rapes occurred during 1991, a figure 62-percent greater than the number actually reported.

The NCVS–VAW reports that 55 percent of rapes are committed by someone known to the victim. Rapes committed by strangers are associated with a greater level of violence than are rapes in which the victim knew the assailant. Furthermore, rapists who are strangers were more often armed with a weapon (29%) compared to non-strangers (17%). Sixty percent of women raped by strangers reported injury compared to 40 percent of women raped by non-strangers.<sup>5</sup> Rape most typically involves a lone offender. According to the NCVS–VAW, from 1987 through 1991, 90 percent of rapes involved a single attacker.

Rape crimes account for a small proportion of total convictions processed in state and federal courts. Rape accounted for 2.2 percent (n=18,024) of the 829,344 state felony convictions sentenced in 1991.<sup>6</sup> Because federal jurisdiction for rape generally is limited only to those offenses committed on Indian Tribal or federal territory, substantially fewer rape cases are prosecuted in the federal courts. During 1993, rape conduct was found in 97 sentenced cases, accounting for just 0.2 percent of the 42,013 federal cases sentenced under the guidelines that year.

### III. OPERATION OF THE SENTENCING GUIDELINES

Rape offense are sentenced under guidelines 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). Each guideline is discussed in turn.

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<sup>2</sup> Bureau of Justice Statistics, U. S. Dep't of Justice, Sourcebook of Criminal Justice 1993 (Kathleen Maguire and Ann L. Pastore, eds., 1994).

<sup>3</sup> Bureau of Justice Statistics, U. S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1992 (Kathleen Maguire *et al.* eds., 1993).

<sup>4</sup> Ronet Bachman, U. S. Dep't of Justice, Violence Against Women: A National Victimization Survey Report (1994).

<sup>5</sup> *Id.* at 12.

<sup>6</sup> Bureau of Journal Statistics, U. S. Dep't of Justice, *supra* note 2, at 535, tbl. 5.55.

A. §2A3.1

This guideline applies to convictions for aggravated sexual abuse, 18 U.S.C. § 2241, the most serious federal sex offense, and to convictions for sexual abuse, 18 U.S.C. § 2242. These provisions were codified as part of the Sexual Abuse Act of 1986, which revised and recodified previously existing federal rape statutes. These sections prohibit engaging in "sexual acts" in the special maritime and territorial jurisdiction of the United States or a federal prison in circumstances involving force or threats or the administering of a drug, intoxicant, or other similar substance. Subsection (c) of section 2241 makes it an offense to knowingly engage in a sexual act with a person under 12 years old, or to attempt to do so. It proscribes non-coercive conduct in which "older more mature persons take advantage of others whose capability to make judgments about sexual activity has not matured."<sup>7</sup> Aggravated sexual abuse carries a statutory maximum term of life imprisonment; sexual abuse has a maximum penalty of 20 years.

Guideline 2A3.1 has a base offense level of 27 and "represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement [of 4 levels] is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon."<sup>8</sup> The guideline provides for a 2-level enhancement if the victim is less than 16 years of age and a 4-level enhancement if the victim is less than 12 years of age. If the victim was in the custody, care, or supervisory control of the defendant, the guideline provides for a 2-level increase. The guideline also provides for sentence enhancements for permanent, life threatening, or serious bodily injury, and abduction. For any given case, the sentencing guidelines call for life imprisonment if each adjustment is applied, regardless of prior criminal history. Finally, the guideline provides for a cross-reference to the murder guideline if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 (first degree murder).

B. §2A3.2

As originally enacted in 1986, criminal sexual abuse of a minor (statutory rape) carried a statutory maximum penalty of five years. In 1990, Congress increased the statutory maximum to 15 years. The commentary to §2A3.2 states that "[t]his section applies to sexual acts that would be lawful but for the age of the victim." The guideline's base offense level of 15 can be increased by two levels if the victim was in the custody, care, or supervisory control of the defendant. The guideline also provides a cross-reference to §2A3.1 if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse.

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<sup>7</sup> H. R. Rep. No. 594, 99th Cong. 2d Sess. 15 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6186, 6195.

<sup>8</sup> USSG §2A3.1, comment. (backg'd.)

C. §2A3.4

This guideline applies to convictions for abusive sexual contact, 18 U.S.C. § 2244. This statute, like the others promulgated under the Sexual Abuse Act of 1986, has limited federal jurisdiction and proscribes conduct involving "sexual contact rather than sexual act." "Sexual contact" is defined as the "intentional touching either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."<sup>9</sup> The statutory maximum penalties are ten years' imprisonment if to do so would violate section 2241;<sup>10</sup> three years' imprisonment if to do so would violate section 2242; two years' imprisonment if to do so would violate subsection (a) of section 2243; and six months' imprisonment if to do so would violate subsection (b) of section 2243.

The base offense under §2A3.4 is 16 if the offense is committed by means set forth in 18 U.S.C. § 2241 (a) or (b); 12 if the offense is committed by the means set forth in 18 U.S.C. § 2242; and 10 otherwise. The guideline also provides a 4-level enhancement if the victim is under 12, and a 2-level enhancement if the victim was at least 12 but under 16. A 2-level enhancement is provided if the victim was in the custody, care, or supervisory control of the defendant. The background commentary suggests a 6-level downward departure in cases of consensual sexual contact, "[i]f the defendant and the victim are similar in sexual experience."<sup>11</sup> The guideline also provides for a cross reference to §2A3.1 if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. §§ 2241 or 2242).

The specific factors delineated by Congress for review in this report are currently addressed by the guidelines in the following manner:

1. **Multiple Assailants**

The sexual abuse guidelines do not provide enhancements based solely upon the fact that multiple assailants committed the offense. If, however, a defendant played a leadership role in a sexual offense involving multiple assailants, an enhancement under §3B1.1 (Aggravating Role) would be applicable. The role enhancement can increase a defendant's sentence between 25 and 50 percent.

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<sup>9</sup> 18 U.S.C. § 2245 (3).

<sup>10</sup> The maximum penalty was increased from five years to ten years in 1988.

<sup>11</sup> Background Commentary to §2A3.4.

**2. Known versus Unknown Assailant**

The guidelines do not distinguish between offenders known to the victim versus those who are not. Currently, the aggravated sexual abuse guideline provides an enhancement for an abuse of a position of trust when the victim is in the "custody, care, or supervisory control of the defendant."<sup>12</sup>

**3. Offender Recidivism**

The guidelines address recidivism concerns in Chapter Four (Criminal History and Criminal Livelihood) by assessing the defendant's criminal record, including the number of prior convictions, the length of prior sentences, their recency, whether the current offense occurred while the defendant was under criminal justice supervision for a prior conviction, and whether a prior conviction was for a crime of violence (§4A1.1). Additionally, the career offender provision in Chapter Four provides enhanced penalties for repeat offenders who engage in crimes of violence or controlled substance offenses (§4B1.1). Crimes of violence include sexual abuse offenses committed with violence or force or threat of force (§4B1.2(1)). To be classified as a career offender under the guidelines, the defendant must have committed a qualifying violent or drug offense and have at least two prior convictions for some combination of crimes of violence or controlled substance offenses.

To illustrate the impact of the criminal history assessment, an offender in the lowest criminal history category sentenced under guideline 2A3.1 has a sentencing range of 70-87 months. If this offender instead has a criminal history score in the highest category, the applicable guideline range would increase to 130-162 months. If the offender is classified as a career offender, the guideline range would increase to 360 months to life imprisonment. The criminal history guidelines do not specifically take into account similarity between the current offense and past offenses, although in certain situations an additional increase under §4A1.1(f) for prior violent offenses would pertain. Consequently, although the sexual nature of any prior offense is not considered specifically, the guidelines address, to a limited degree, prior violence in general.

**IV. COMPARISON OF FEDERAL AND STATE PENALTIES FOR SEXUAL ASSAULT**

Sections 2241-2245 of title 18, United States Code, criminalize sex offenses committed within federal jurisdiction. These statutes cover a variety of behavior including rape, sexual contact, incest, and child molestation. Section 2241, Aggravated Sexual Abuse, covers a spectrum of behavior ranging from sexual contact (touching) to sexual penetration and is distinguished from other federal sex offenses by the level of violence or threat of violence involved.

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<sup>12</sup> See USSG §2A3.1(b)(3). For cases illustrating the application of this enhancement, see *U.S. v. Merritt*, 982 F.2d 305 (8th Cir. 1992), *cert. denied*, 61 U.S.L.W. (1993) and *U.S. v. Castro-Romero*, 964 F.2d 942 (9th Cir. 1992).

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State sex offense laws cover a wide range of behavior that can be broader than that captured by federal statutes. Each state has a specific criminal statute to address this offense conduct, although it may be referred to by other terms (*e.g.* sexual assault, sexual battery, criminal sexual conduct, gross sexual imposition). The common element across all statutes is forcible sexual penetration, however slight. Additionally, states classify and penalize criminal sexual offenses using a variety of schemes, making comparison across states and to the federal system difficult. A number of states classify sexual offenses by degree or severity. This classification is dependent upon a number of factors, including possession of a weapon, serious bodily injury, age of the victim, multiple offenders, mental or physical capacity of the victim, or multiple instances of rape.

A comparison of rape penalties is further complicated by the variations in state sentencing systems. Some states use an indeterminate sentencing structure under which offenders generally receive a sentence range and a parole system determines actual release dates. Some states have sentencing guidelines that operate in conjunction with an indeterminate structure, and others have a determinate structure under which offenders receive a fixed sentence and no parole. Other states have some combination of determinate sentences and parole. Yet other states have sentencing guidelines that operate under a determinate structure. The federal system has sentencing guidelines, determinate sentences, and **no** parole. This makes a comparison of federal and state penalties difficult. For example, in states that have some form of indeterminate sentencing, penalties imposed for rape may appear to be more severe than their federal counterpart. However, a defendant sentenced to 20 years in a state with a parole system may actually serve only six years, whereas a defendant who receives a 20-year federal sentence will serve approximately 17.<sup>13</sup>

Of the 50 states, two territories, and the District of Columbia surveyed, 20 (37.0%) provide for a maximum term of life imprisonment for rape. Twenty-four (45.3%) have a maximum penalty of 20 years or more. The federal system provides a maximum punishment of life imprisonment without possibility of parole for offenders convicted of aggravated sexual assault.

Several states enhance rape sentences for defendants with prior convictions for sex offenses. Such convictions generally are accounted for by either an increase in the degree or severity level of the crime (*e.g.*, from rape to aggravated rape, or from sexual assault in the second degree to sexual assault in the first degree) or an increase in the minimum or maximum term of imprisonment available. In most cases, states included these enhancements either within the rape offense statute or within a separate penalty provision for habitual or repeat sex offenders. States that do not have habitual or repeat sex offender provisions often have a general habitual offender statute that enhances the available term of imprisonment depending on the number of prior felony or violent felony convictions.

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<sup>13</sup> Federal defendants serving imprisonment sentences of more than one year can qualify for a "good time" reduction of up to 54 days per year. See 18 U.S.C. § 3624(b).

V. SENTENCING COMMISSION DATA ANALYSIS

All cases with a conviction for sexual abuse in the FY 1993 Commission dataset were reviewed and coded for this report. In addition, cases involving convictions for other crimes of violence were included to determine the extent to which a crime that involved sexual abuse may result in a conviction under some other statute unrelated to sexual abuse. Finally, pornography cases were reviewed to determine whether sexual assault or abuse occurred in those cases.<sup>14</sup>

Each case was reviewed to code additional defendant and victim information, including: prior sexual misconduct (more broadly defined than that which is countable under the guidelines' criminal history score); date of last prior sexual conviction; length of prior sentences for sexual abuse convictions; whether the defendant was known or unknown to the victim; number of offenders; presence of sexually transmitted diseases; and use of a weapon. Victim-specific information coded included age, whether the victim was in the care of defendant, and injuries sustained. Information describing the geographical location of the crime also was coded.

Before reporting the findings, it is important to emphasize again the context in which federal sexual offenses occur. In order to be prosecuted in federal court, the offense must occur on a federal reservation, in a federal prison, or otherwise within the special maritime or territorial jurisdiction of the United States; otherwise, sexual offenses are state crimes. In general, this means that federal sexual offenses take place on Native American lands, military installations, national parks, and territorial property. Consequently in FY93, 97 guideline cases were identified in which a rape occurred as part of the offense behavior.<sup>15</sup> Sixty-nine of the 97 sexual assault cases (70.4%) occurred on Native American lands; ten cases (10.2%) occurred on military installations; and two (2.0%) occurred in national parks. For the remaining 18 cases (18.4%), location could not be determined

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<sup>14</sup>The following selection criteria were employed:

- 1) Cases involving the sexual abuse guidelines, namely §§2A3.1 (Criminal Sexual Abuse: Attempt to Commit Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact);
- 2) Cases involving 18 U.S.C. §§ 2241 (Aggravated Sexual Abuse), 2242 (Sexual Abuse), 2252 (Certain Activities Relating to Material Involving the Sexual Exploitation of Minors), and 2258 (Failure to Report Child Abuse) as a statute of conviction;
- 3) Cases in which the offense type is sexual abuse; and
- 4) Cases that involve §§2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder: Attempted Murder), 2A2.2 (Aggravated Assault) and 2A2.3 (Minor Assault) as the guideline that drives the sentence.

<sup>15</sup> All subsequent analyses are based upon these 97 cases; however, missing information for some analyses reduces this number. For each analysis, the number of available cases will be noted. The small number of cases severely limits the ability to perform robust analysis while controlling for offense and offender characteristics.

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Table 1 displays the various guidelines applied based upon the statutes of conviction for 94 cases in which sentencing information was available. The majority of cases (58.2%) were sentenced under guideline 2A3.1 (Criminal Sexual Abuse), with an average sentence of 189.4 months. The next most frequently applied guidelines were §§2A3.4 (Abusive Sexual Contact, 22.0%) and 2A3.2 (Statutory Rape, 14.3%). Average sentences for these offenses were 22.4 and 35.9 months, respectively. As the data suggests, substantial variation exists in length of sentence based upon the guideline applied.

**Table 1**  
**GUIDELINES APPLIED AND AVERAGE SENTENCES**  
**FOR FEDERAL SEXUAL ASSAULT CASES\***  
**Special Coding Project**

(October 1, 1993 through September 30, 1994)

GUIDELINE APPLIED	NUMBER	PERCENT	SENTENCE (in months)	
			MEAN	MEDIAN
<b>TOTAL</b>	<b>91</b>	<b>100.0</b>	<b>127.5</b>	<b>97.0</b>
<b>Criminal Sexual Abuse</b>	53	58.2	189.4	168.0
<b>Abusive Sexual Contact</b>	20	22.0	22.4	18.0
<b>Sexual Exploitation of a Minor</b>	2.0	2.2	142.5	142.5
<b>Statutory Rape</b>	13	14.3	35.9	24.0
<b>Aggravated Assault</b>	2.0	2.2	75.0	75.0
<b>Kidnapping</b>	1	1.1	211.0	211.0

\*Six cases were excluded due to one or more of the following conditions: missing sentence information (3) or missing guideline applied information (3).

SOURCE: U.S. Sentencing Commission, 1993 Data File, MONFY93.

## A. General Demographic Characteristics

All 97 defendants in the study were male with an average age of 31.2 years. The youngest offender was 19 years old and the oldest was 71. Sixty-nine defendants (71.1%) are Native Americans. Twelve (12.4%) defendants are White, 11 (11.3%) are Black, and the remaining five are Asian (5.2%). Approximately half (49.5%) of the defendants reported not completing high school. Only one defendant (1.1%) completed college. Forty-two percent of the 97 federal sexual assault cases occurred in two federal judicial districts (Arizona, n=23, 23.7% and South Dakota, n=18, 18.6%). Twenty-six districts account for the remaining 56 cases, with each of these districts reporting five or fewer cases.

### 1. Number of Assailants

Consistent with the research literature, federal rape crimes most often involve a single assailant. Of the 97 sexual assault cases, 92 (94.8%) involved one offender, with the remaining five involving two attackers. In four of the five multiple assailant cases, the victim knew the defendant. Two of the rapes occurred on Native American lands and one occurred on a military base. For two cases, the location of the rape was reported as "on a road," but the type of federal lands could not be determined. Age of the victim was reported in four of the assaults (ages 10, 15, 26, 27 years).

### 2. Victim Bodily Injury

The 94 sexual assault cases with sufficient information available were sentenced under six different guidelines. Fifty-three of the cases (56.4%)<sup>16</sup> were sentenced under guideline 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). This guideline contains enhancements for serious and permanent or life threatening bodily injury to the victim. Of the 53 cases, seven (13.2%) received sentence enhancements for bodily injury. In four of these seven cases, the victim's age was reported (4, 10, 11, 15 years). The 15-year-old victim was assaulted by two assailants. In six of the seven cases, the defendant was known to the victim, and two of these six received a "custody and care" enhancement suggesting the perpetrators was a family member or daycare provider.

### 3. Defendant Recidivism

Ninety-five cases had information on the offender's criminal history score. For these cases, the average score is 1.9 (median score=1), suggesting that, for the most part, these defendants had little or no prior criminal record. In 13 of 93 cases (14.0%), the defendant had a prior criminal history of sexual misconduct and complete sentencing information was available. The average

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<sup>16</sup> Three of the 97 original cases lacked complete sentencing information, resulting in a sample size of 94.

sentence for these cases was 191.7 months compared to an average sentence of 111.2 months for cases in which no prior criminal history of sexual misconduct was noted (n=80). None of the offenders was classified as a career offender.

#### 4. Known versus Unknown Defendants

The victim knew the defendant in 83.6 percent of the cases (n=81). This is significantly higher than the 55 percent reported by the NCVS-VAW data.<sup>17</sup> In 14 cases (14.3%), the defendant was unknown, and in two cases (2.0%) this information could not be determined. The average prison sentence imposed on defendants known to the victim was 103.6 months (n=79). This is substantially less than the average of 253.7 months (n=14) imposed for cases in which the defendant was unknown to the victim.

Because of the small number of cases in which the defendant was not known to the victim, robust analyses that simultaneously control for other factors associated with sentence length are not possible. However, given this limitation, it does not appear that difference in average sentence length can readily be explained by differences in bodily injury to the victim or the presence of prior sex offenses. The number of prior criminal convictions of any type may account for a portion of this difference. Under the sentencing guidelines, offenders are assigned a criminal history category from one to six based upon the seriousness and recency of past criminal convictions; the higher the category, the higher the range of sentence. Generally, unknown defendants receive longer prison sentences than known defendants at each base offense level. However, contributing to the overall difference in average length of sentence between known and unknown defendants is the greater proportion of unknown defendants who merit higher criminal history scores. Among defendants unknown to the victim (n=14), five (35.7%) had a criminal history category of five or six and are thus subject to longer sentences under the applicable guideline range (average sentence=442.6 months). In comparison, only three of 78 (3.8%) defendants who were known to the victim have a criminal history category of five or six (average sentence=190 months).

Examining offense of conviction provides additional information on the differences in sentence length. Table 2 presents information on the distribution of sentencing guidelines applied for defendants, known and unknown to the victim. The first three guidelines presented are specific to sexual offenses. Substantial differences exist in the base offense level depending on the guideline applied. Criminal Sexual Abuse, with a base offense level of 27,<sup>18</sup> has a substantially higher offense

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<sup>17</sup> Bureau of Justice Statistics, U. S. Dep't of Justice, *supra* note 4, at 11.

<sup>18</sup> Base offense level of 27 provides a guideline sentencing range of 70 to 87 months for defendants with a criminal history score of 1.

level than either Statutory Rape<sup>19</sup> or Abusive Sexual Contact.<sup>20</sup> For cases in which the defendant is unknown to the victim, 12 of 13 (92.3%) of the defendants are sentenced under the more punitive guideline. For defendants known to the victim and sentenced under any sex crime guideline, a much smaller proportion of cases (41 of 73, 56.2%) was sentenced under this more punitive guideline.

Thirty-two defendants, known to the victim, were sentenced at the lower base offense levels listed in the table (levels 10 through 16), while only one defendant (7.7%), unknown to the victim, was sentenced at these lower levels. For these cases, the average sentence imposed was 32 months if the defendant was known compared to 18 months for the sole unknown defendant. Forty-four defendants, known to the victim, were sentenced under guidelines with base offense levels at level 24 or above; a level comparable to the majority of cases in which the defendant was unknown to the victim. For these defendants, the average sentence imposed was 159.6 months, compared to a substantially longer average sentence of 292.8 months if the defendant was unknown.

As described in Section III, guidelines 2A3.2 and 2A3.4 provide for a cross reference to §2A3.1 if the offense involved criminal sexual abuse or attempts to commit criminal sexual abuse. This is particularly relevant to known versus unknown defendants because as reported above, known defendants are less likely to be sentenced under the more punitive guideline. The cross reference to the more punitive guideline was created as a result of a prior Commission review of sexual offense cases. The review found that "cases sentenced under §2A3.2 and §2A3.4 clearly involved conduct that would more appropriately be covered under an offense guideline applicable to more serious sexual abuse cases".<sup>21</sup> The effective date for application of the cross reference was November 1, 1992. Of the 53 federal cases sentenced under §2A3.1 during 1993, seven (13.2%) were the result of application of the cross reference. Information on date of offense was available in 40 of the 43 cases identified as containing rape conduct but not sentenced under §2A3.1. In 36 (90.0%) of these cases, the offense conduct occurred prior to the effective date of the cross reference. Of the four cases in which the offense conduct occurred after November 1, 1992, three contained factors suggesting the application of the cross reference was not appropriate.<sup>22</sup>

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<sup>19</sup> Base offense level of 15 provides a guideline sentencing range of 18 to 24 months for defendants with a criminal history score of 1.

<sup>20</sup> Base offense level can range between 10 (guideline sentencing range of 6 to 12 months for defendants with a criminal history score of 1) and 16 (guideline sentencing range of 21 to 27 months for defendants with a criminal history score of 1).

<sup>21</sup> USSG, App. C, Amend. 444.

<sup>22</sup> Of these three cases, in one no penetration occurred; in a second the offense was reported after November 1, 1992 but the conduct occurred one year earlier; and in the third the victim was intoxicated and could not remember if she consented to the act.

Federal sexual assault sentences, therefore, differ by whether the defendant was known versus unknown to the victim. These differences appear to be the result of differences in criminal history category (with more unknown defendants having a higher category than known defendants) and differences in statutes of conviction (with more unknown defendants being convicted of statutes that result in the application of higher base offense levels). The development of the cross reference to §2A3.1 attempts to punish offenders consistent with actual offense conduct. The Commission's review of cases indicates that it has been applied appropriately. Because the cross reference has been in place a relatively short period of time, it is premature to evaluate the impact on sentence length and its potential impact on sentence differences between offenders who are known versus unknown to the victim.

### 5. Comparison of Federal and State Sentences for Sexual Assault

Federal sentences imposed under the guidelines are not subject to reduction through parole. In general, the difference between the sentence imposed and the sentence actually served reflects only the earned accrual of good conduct time credit not exceeding 54 days per year (15%). Most states continue to provide early release through parole or have greater availability of good conduct or program-participation credits through which sentences can be shortened. These differences make state/federal comparisons in sentence length difficult. Comparisons of sentences imposed will not distinguish these practices and may result in a conclusion regarding difference (or direction of difference) that does not reflect accurately the amount of time a defendant will be imprisoned. A better comparison is an estimate of time served in prison.

Comparison of federal rape sentences with state sentences nationally can be performed using a recent national survey of federal and state prison inmates conducted by the U.S. Department of Justice, Bureau of Justice Statistics (BJS). This 1991 survey interviewed approximately 14,000 state prisoners and 6,600 federal prisoners, selected as representative of the total offender population in the United States in 1991.<sup>23</sup> Because the data were aggregated from a nationwide sample, information on specific state practices is unavailable as is information that would permit comparison of specific offense behaviors or offender characteristics.

The BJS survey collected data on state sentences and estimates of time to be served for various offenses, including "sexual assault." Its information on state sentences was compared to Commission data on rape offenders sentenced during FY 1993. The BJS estimate of average time to be served by state inmates for sexual assault is 95 months. This compares to Commission data on 1993 federal inmates of an average time to be served of 106 months. This difference of 11 months represents a 12-percent differential in sentencing. That is, federal rape offenders will serve 12 percent more time in prison than their counterparts sentenced at the state level. Because application of the

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<sup>23</sup> Caroline W. Harlow, U. S. Dep't of Justice, Comparing Federal and State Prison Inmates, 1991 5, tbl. 6 (1991).

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cross reference to §2A3.1 generally will lengthen sentences, this differential in time to be served may increase as the number of cases eligible for application of the cross reference increase.

The largest proportion of federal rape offenders are sentenced in two states — Arizona (n=23, 23.7%) and South Dakota (n=18, 18.6%). These two states were polled, and state sentencing information on rape offenders was gathered.

Arizona recently has enacted truth-in-sentencing provisions eliminating parole in all cases, and in select crimes eliminating the application of sentence reduction through good conduct credits. Sexual assault is one of the specific offenses for which sentence reduction through application of good conduct credits has been eliminated. Since these changes have been implemented, 77 cases have been sentenced for sexual assault; the mean<sup>24</sup> sentence imposed (and to be served in its entirety) is 9.6 years.<sup>25</sup> This is nine percent longer than the estimated 8.8 years (106 months) that federal rape offenders serve. However, the information on sexual assault sentences in Arizona and on federal rape sentences was derived by different methods. Data on Arizona sentences include only those cases sentenced for a conviction of sexual abuse. The Commission's dataset includes cases sentenced under this charge as well as other, less serious charges in which rape conduct was present. The Commission's goal for use of its dataset was to examine sentencing factors associated with rape conduct regardless of the ultimate charge of conviction. A more appropriate comparison to the Arizona data would be to limit federal cases to only those defendants sentenced for criminal sexual abuse (n=53). These cases are estimated to serve an average sentence of 13.4 years (161.0 months). Using these more comparable cases, federal sentences are 40 percent longer.

South Dakota provided information from an "in-house" project titled "South Dakota Sex Offender Project," conducted during 1987 through 1989.<sup>26</sup> This project was conducted similarly to the federal case analysis described in this report. That is, cases were identified to include rape conduct regardless of the ultimate charge of conviction. The authors report that the median sentence for rape offenders included in the study was 6.4 years. The 91 federal defendants sentenced during FY 1993 will serve a median sentence of approximately 6.9 years (82.4 months) after sentence reduction for good conduct credits. South Dakota has indeterminate sentencing and the availability

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<sup>24</sup> The term "mean" is statistical nomenclature for average. This more scientific term is used here to distinguish the values used to compare federal sentences with sentences as reported by Arizona and South Dakota. Arizona provided mean (average) sentence information and South Dakota provided median sentence information. Both are used in statistics to summarize the central tendency of a distribution of numbers. Each is slightly different. It is appropriate to compare "mean" score with "mean" score or alternately "median" score with "median" score, however, "mean" score should not be compared with "median" score.

<sup>25</sup> Roy Holt, Director, Statistical Analysis Center, Arizona Criminal Justice Commission. Personal communication.

<sup>26</sup> J. Whipple, G. Leonardson, M. Terca, D. Hollingsworth, T. Del Grosso, and D. Gromer, "South Dakota Sex Offender Project," South Dakota Statistical Analysis Center, Division of Criminal Investigation, Office of the Attorney General, Criminal Justice Training Center, Pierre, South Dakota. (1990).

of parole. Without accounting for parole or the application of good conduct credits in the South Dakota data, federal rape offenders currently serve a slightly greater amount of time.<sup>27</sup> To the extent that parole or the application of good conduct credits reduces rape sentences in South Dakota, differences in length of sentence served in prison between that system and the federal system will increase.

In summary, comparison of current federal rape sentences with state sentences indicates that federal offenders can expect to serve a longer period of prison confinement. Furthermore, it is expected that average federal sentences for rape will increase as a greater proportion of cases become subject to the 1992 cross-reference amendment. Assuming no change in state sentencing practices, it is anticipated that differences between federal and state rape sentences will become larger.

**6. Comparison of Rape Sentences with other Federal Crimes in which  
Jurisdiction depends on the Offense being Committed on Federal Land**

Federal sentences imposed for crimes in which federal jurisdiction results from the crime's commission on federal lands are presented in Table 3. The crimes are ranked from the highest sentence to the lowest sentence. The average federal sentence imposed during FY 1993 for rape conduct was higher than the average sentences imposed for robbery or assault cases and lower for cases involving murder. As a greater proportion of cases become subject to the 1992 cross reference amendment, it is expected that rape sentences may grow closer in length to murder sentences and further in length from robbery and assault cases.

**VI. EXPERT AND PUBLIC COMMENT**

In response to congressional directive to seek comment from independent experts, the Commission has sought input from individuals and organizations with expertise and interest in the above topics. To date, comment has been received from the Rape Crisis Center; National Organization for Victim Assistance; Crime Victims Research and Treatment Center; and the American Civil Liberties Union (ACLU).

Comment from the victim assistance organizations focused on the issue of differential sentencing for defendants who are known versus unknown to the victim. Each commented that distinctions in sentencing based upon this factor are unwarranted. Two of these organizations<sup>28</sup> also

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<sup>27</sup> The South Dakota Board of Pardons and Parole could not provide an estimate of time to be served by rape offenders. However, they reported that generally, rape offenders are not paroled without completing their specialized treatment program which has very limited access. Additionally, they reported that after completing this program, a rape offender would not be considered for parole until the last two or three years of the sentence.

<sup>28</sup> National Organization for Victim Assistance and Crime Victims Research and Treatment Center.

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commented that sentence length should be based upon the extent of the injury to the victim regardless of the relationship between the victim and the assailant.

Comment from the ACLU addressed the issue of comparability of sentencing for rape and other sex offenses compared to similarly aggravated crimes. Their analysis concluded that: "[i]n the absence of any indication that sentencing for rape and other sex offenses is lenient or treated less seriously than other similarly aggravated offenses, there is no justification for increasing the sentences for these offenses"<sup>29</sup>

Contact has been made with seven additional individuals or organizations with expertise and interest in federal sentencing of rape defendants. To date that comment has not been received.

Through The Federal Register, additional comment was solicited on these issues as well as several related issues:

**Issue for Comment:** Section 40112 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider appropriate amendments to §§2A3.1 (Aggravated Sexual Abuse) and 2A3.2 (Sexual Abuse) to address four concerns: (1) enhancing the sentence if more than one defendant is involved in the offense; (2) reducing unwarranted disparity between defendants who are known by the victim and those who are unknown by the victim; (3) making federal penalties commensurate with state penalties; and (4) considering the general problem of recidivism, severity of offense, and devastating effects on survivors. The provision also requires the preparation of a report to Congress analyzing federal rape sentences and obtaining comment from independent experts on: (1) comparative federal sentences between assailants who were known versus unknown to their victims; (2) comparative federal sentences with those of states; and (3) the effect of rape sentences on Native American and U.S. military populations relative to the impact for other federal offenses on these populations. This report is to be submitted to Congress by March 13, 1995.

The Commission invites comment on any aspect of this directive or any amendment to the guidelines appropriate to address this directive. Specifically, comment is requested on whether §2A3.1 (Criminal Sexual Abuse) should be amended to include an enhancement for more than one assailant. If such a factor is added, comment is requested as to the weight to

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<sup>29</sup> Submitted in response to January 13, 1995 request for comment. Memorandum dated November 14, 1990 titled Are rape and other sex offenses treated as seriously as similarly aggravated crimes in sentencing and length of time served in jail and prison? drafted in response to an earlier version of the Violence Against Women Act.

be given to that factor and how its inclusion should affect the application of an adjustment for the defendant's role in the offense under Chapter Three, Part B. Comment is further invited as to whether the guidelines adequately account for the seriousness of the sexual abuse offense (including the effects on the victim of sexual abuse) and how any suggested changes should be applied. Currently, through special offense characteristics and other instructions in §2A3.1, the guidelines consider the degree of bodily injury, age of victim, sexual abuse of a person held within a correctional facility, use of a dangerous weapon, circumstances in which the defendant holds a supervisory or custodial role, circumstances in which the victim was abducted, and death of the victim. The Commission invites comment on additional factors that might appropriately be considered and the weights such factors should be given.

As part of the ongoing, 1994-95 amendment process, the Commission carefully will consider the advice of experts, written public comment, and testimony at its March 14, 1995, public hearing on proposed amendments before making final decisions on these issues. Should this process support the need for amendments to address more effectively the harms associated with sexual assaults, the Commission intends to promulgate any needed amendments and submit them to Congress for review no later than May 1, 1995.

Table 2

**GUIDELINES APPLIED FOR SEXUAL ASSAULT CASES  
BY VICTIM'S KNOWLEDGE OF THE DEFENDANT\***  
Sex Crime Coding Project  
(October 1, 1993 through September 30, 1994)

GUIDELINE	Base Offense Level	VICTIM'S KNOWLEDGE OF DEFENDANT					
		DEFENDANT UNKNOWN			DEFENDANT KNOWN		
		Number	Percent	Mean Sentence (in months)	Number	Percent	Mean Sentence (in months)
<b>TOTAL</b>		13	100.0	271.7	76	100.0	105.8
<b>Criminal Sexual Abuse</b>	27	12	92.3	292.8	41	53.9	159.1
<b>Statutory Rape</b>	15	0	0.0	-	12	15.8	37.4
<b>Abusive Sexual Contact</b>	10-16	1	7.7	18.0	18	23.7	23.6
<b>Aggravated Assault</b>	15	0	0.0	-	2	2.6	75.0
<b>Kidnapping</b>	24	0	0.0	-	1	1.3	211.0
<b>Sexual Exploitation of a Minor</b>	25	0	0.0	-	2	2.6	142.5

\*Eight cases were excluded due to one or more of the following conditions: missing guideline applied information (3), missing prison sentence information (3), or missing information as to the defendant's knowledge of the victim (5).

SOURCE: U.S. Sentencing Commission, 1993 Data File, MONFY93.

**Table 3**

**COMPARISON OF SELECTED FEDERAL SENTENCES IN WHICH FEDERAL JURISDICTION  
IS THE RESULT OF THE LOCATION OF THE CRIME  
(October 1, 1993 through September 30, 1994)**

<b>CURRENT OFFENSE</b>	<b><u>AVERAGE SENTENCE IMPOSED</u></b>	<b><u>ESTIMATE OF SENTENCE TO BE SERVED</u></b>
	Mean Sentence (in months)	Mean Sentence (in months)
<b>Murder</b>	311.0	270.9
<b>Sexual Assault</b>	124.8	106.0
<b>Robbery</b>	74.8	65.3
<b>Assault</b>	61.1	51.1

SOURCE: U.S. Sentencing Commission, 1993 Datafile, MONFY93