

MANDATORY MINIMUM PENALTIES FOR IDENTITY THEFT OFFENSES

IN THE
**FEDERAL CRIMINAL
JUSTICE SYSTEM**

UNITED STATES SENTENCING COMMISSION
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MANDATORY MINIMUM PENALTIES FOR IDENTITY THEFT OFFENSES
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1 Introduction



Introduction

This publication is the fifth in the Commission's series on mandatory minimum penalties. In 2017, the Commission published its *Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System (2017 Overview Publication)*¹ and subsequently issued three publications providing detailed analyses of the application of mandatory minimum penalties to specific offense types—drugs in October 2017; firearms in March 2018; and the use of recidivist enhancements for drug traffickers under 21 U.S.C. § 851 in July 2018.² These publications build on the Commission's 2011 *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011 Mandatory Minimum Report)*,³ which provided detailed historical analyses of the evolution of federal mandatory minimum penalties, scientific literature on the topic, and extensive analysis of the Commission's own data, public comment, and expert testimony. These publications highlight recent trends in the charging of offenses carrying mandatory minimum penalties and provide updated sentencing data demonstrating the impact of those penalties.

This publication focuses on the application of mandatory minimum penalties specific to identity theft offenses. As used in this publication, the term “identity theft offenses” refers to the offenses established at 18 U.S.C. § 1028 (general identity theft) and 18 U.S.C. § 1028A (aggravated identity theft), as well as any other offense sentenced under the fraud guideline, §2B1.1, that received the 2-level enhancement for identity theft conduct.⁴

Only the aggravated identity theft statute, 18 U.S.C. § 1028A, carries a mandatory minimum penalty. Other identity theft offenses do not carry a mandatory minimum penalty.

Identity theft offenses represent a small portion of the federal caseload, and section 1028A cases represent a small portion of all cases involving a mandatory minimum penalty. However, section 1028A convictions have increased both as a number and as a percentage of cases involving a mandatory minimum penalty since the Commission began collecting data on these offenses.

Using fiscal year 2016 data, this publication includes analyses of 18 U.S.C. § 1028A, which provides for a two-year mandatory minimum penalty, as compared to identity theft offenses that do not carry mandatory minimum penalties, as well as the impact of these offenses on the Federal Bureau of Prisons (BOP) population. Where appropriate, the publication highlights changes and trends since the Commission's 2011 *Mandatory Minimum Report*.



2 Key Findings



Key Findings

Building directly on its previous reports and the analyses set forth in the 2017 *Overview Publication*, this publication examines the use and impact of mandatory minimum penalties for identity theft offenses.

As part of this analysis, the Commission makes the following key findings:

Key Findings

1. Mandatory minimum penalties for identity theft offenses are applied less often in the federal system compared to other mandatory minimum penalties.

- Offenders convicted under section 1028A comprised only 1.6 percent (n=978) of federal offenders sentenced in fiscal year 2016.
- Section 1028A offenses accounted for 7.2 percent of offenses carrying a mandatory minimum penalty in fiscal year 2016.

2. However, the use of section 1028A mandatory minimum penalties against identity theft offenders has become more prevalent.

- Of the cases involving identity theft offenses, slightly more than half (53.4%) were convicted under section 1028A, while 46.6 percent were convicted of an identity theft offense that did not carry a mandatory minimum penalty.
- The percentage of identity theft offenders convicted under section 1028A has steadily increased, more than doubling from 21.9 percent in fiscal year 2006 to 53.4 percent in fiscal year 2016. This percentage is more than ten percentage points higher than reported in the Commissions 2011 *Mandatory Minimum Report*, when it was 42.6 percent.
- Section 1028A aggravated identity theft offenses also increased as a portion of all offenses carrying a mandatory minimum penalty, from 4.0 percent in fiscal year 2010 to 7.2 percent in fiscal year 2016.

Key Findings

3. Sentences imposed pursuant to section 1028A are longer than sentences imposed for identity theft offenses not carrying a mandatory minimum penalty.

- In fiscal year 2016, the average sentence length for offenders convicted of at least one count under section 1028A was more than double the average sentence length for offenders convicted of an identity theft offense not carrying a mandatory minimum penalty (51 months compared to 22 months).
- Identity theft offenders convicted of at least one count under section 1028A had a longer average sentence than offenders convicted of an identity theft offense not carrying a mandatory minimum penalty even if they received relief from the mandatory minimum penalty length (32 months compared to 22 months).

4. In addition, other charging and plea decisions also play a role in the application and impact of identity theft mandatory minimum penalties.

- The majority of section 1028A offenders (88.7%) were also convicted of at least one other felony offense, which is consistent with the statutory requirement that an offender must have “knowingly transferred, possessed, or used a means of identification of another person during and in relation to any enumerated felony violation.”
- Conversely, 11.3 percent were convicted of an offense under section 1028A alone, although those cases necessarily involved another federal offense for which they were not charged and convicted.
- The average sentence for offenders who were convicted under section 1028A and another statute was more than double the average sentence for offenders convicted only under section 1028A (54 months compared to 22 months).





Key Findings

5. A small percentage of section 1028A offenders are convicted of multiple counts under the statute. When they are, courts frequently exercise their discretion to impose concurrent sentences, in whole or in part, for additional counts under the statute.

- In fiscal year 2016, 89.2 percent (n=872) of offenders convicted under section 1028A were convicted of a single count, and 10.8 percent (n=106) were convicted of multiple counts under the statute.
- For those offenders convicted of multiple counts under section 1028A, the court exercised its discretion to impose sentences for additional 1028A counts concurrently in the overwhelming majority of cases (89.6%).
- Even though courts limit the impact of convictions for multiple counts under section 1028A by imposing concurrent sentences, offenders convicted of multiple counts under section 1028A still had a longer average sentence than offenders convicted of a single count under the statute (74 months compared to 48 months). The longer sentence length was due to the fact that such offenders were also more likely to have been convicted of another offense (for which section 1028A requires a consecutively-imposed sentence) than offenders convicted of a single 1028A count.

6. The section 1028A mandatory minimum penalty impacts Black offenders more than any other racial group.

- Black offenders were convicted under section 1028A at a higher rate than any other racial group. In fiscal year 2016, Black offenders represented 49.8 percent of all identity theft offenders, yet accounted for 58.7 percent of offenders convicted under section 1028A.
- Black offenders' proportion of those convicted under section 1028A in fiscal year 2016 (58.7%) represented a substantial increase from fiscal year 2010, when they represented 40.2 percent of such offenders. Conversely, White offenders became a smaller proportion of identity theft offenders convicted under section 1028A, having fallen by nearly half (from 32.8% in fiscal year 2010 to 18.7% in fiscal year 2016).
- Black offenders were also convicted under section 1028A at the highest rate when considering identity theft offenders within each racial group. In fiscal year 2016, a majority (63.1%) of Black identity theft offenders were convicted under section 1028A, which was higher than the rate for White offenders (47.8%), Other Race offenders (42.0%), and Hispanic offenders (41.1%).
- Black offenders were also most likely to be convicted of multiple counts under section 1028A, comprising 58.5 percent of such offenders, followed by White offenders (25.5%), Hispanic offenders (13.2%), and Other Race offenders (2.8%).

3 Identity Theft
Mandatory
Minimums



Statutory Mandatory Minimum Provisions Applicable to Federal Identity Theft Offenders

Federal identity theft offenders are primarily convicted of offenses under 18 U.S.C. §§ 1028A (aggravated identity theft) and 1028 (general identity theft). Only section 1028A carries a mandatory minimum penalty. This section provides a brief overview of these two provisions.

18 U.S.C. § 1028A

Section 1028A of title 18, United States Code, provides enhanced punishment for aggravated identity theft, including a two-year mandatory minimum penalty.⁵ This provision, which was enacted in the Identity Theft Penalty Enhancement Act of 2004,⁶ prohibits knowingly transferring, possessing, or using, a “means of identification” of another person during and in relation to any enumerated felony violation.⁷ A “means of identification” means “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual.”⁸ The enumerated felony offenses include theft offenses,⁹ offenses involving false statements and fraud,¹⁰ offenses related to nationality and citizenship,¹¹ offenses related to passports and visas,¹² and immigration offenses.¹³

Section 1028A requires that the mandatory minimum two-year term of imprisonment be imposed consecutively to “any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony

during which the means of identification was transferred, possessed, or used.”¹⁴ The statute directs the court not to reduce any sentence for the underlying felony, assuming the defendant is convicted separately of the underlying felony, to “compensate for, or otherwise take into account, any separate term of imprisonment” to be imposed for a violation of section 1028A.¹⁵

The statute allows the court discretion to sentence a defendant convicted of multiple counts under section 1028A to terms that run consecutively or concurrently. As described above, the sentencing court must impose the two-year mandatory minimum penalty for the first section 1028A count consecutively to any sentence imposed for the underlying felony offense.¹⁶ However, the court may, in its discretion, run the sentence for any additional section 1028A counts “concurrently, in whole or in part, [] with another term of imprisonment that is imposed by the court at the same time . . . for an additional violation of [section 1028A].”¹⁷ Thus, section 1028A allows but does not require that multiple counts of conviction be served consecutively, or “stacked” with one another. This structure differs from 18 U.S.C. § 924(c) (relating to using or possessing firearms in furtherance of drug trafficking or crimes of violence), which requires a sentencing court to impose consecutive sentences for both the underlying offense and any additional counts under section 924(c).¹⁸

Other Identity Theft Statutes

Other statutes penalize conduct that is similar to aggravated identity theft, but these statutes do not carry mandatory minimum penalties. The general identity theft statute, 18 U.S.C. § 1028, proscribes a broader range of identity theft activities than section 1028A.¹⁹ Thus, all conduct that violates section 1028A also violates section 1028,²⁰ but some conduct that violates section 1028 does not violate section 1028A.²¹ Additionally, in some circumstances, conduct covered by the aggravated identity theft statute may be punishable under various fraud offense statutes that do not carry mandatory minimum penalties.²²

The exercise of prosecutorial discretion in charging identity theft offenses is limited to some degree by the differing proof requirements of the aggravated identity theft offense, compared to other identity theft offenses. In *Flores-Figueroa v. United States*,²³ the Supreme Court held that to establish the element in section 1028A that the defendant “knowingly” transferred, possessed, or used a means of identity of another person, the government must prove that the defendant both knew that he or she was transferring, possessing, or using a means of identification *and* knew that the means of identification in fact belonged to another person.²⁴ Although a similar proof requirement exists under the general identity theft statute insofar as the government alleges the defendant violated section 1028(a)(7) (“knowingly transfers, possesses or uses, without lawful authority, a means of identity of another person”), other sections of the general identity theft offense, other fraud statutes, and

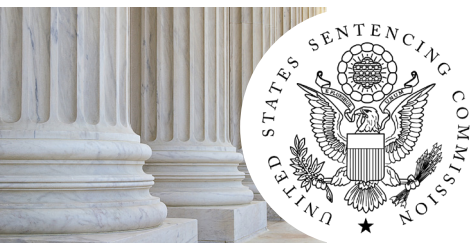
the guidelines’ identity-theft enhancement impose less stringent proof requirements than section 1028A.²⁵

Guideline Provisions

The guideline provision applicable to convictions of an offense under section 1028A, §2B1.6, reflects the statute’s mandatory penalty, providing that “the guideline sentence is the term of imprisonment required by statute.”²⁶ The guideline also provides a non-exhaustive list of factors for the court to consider in exercising its discretion when sentencing on multiple counts under section 1028A. The factors are: (1) the nature and seriousness of the underlying offenses (*e.g.*, whether the underlying offenses are crimes of violence; (2) whether the underlying offenses are able to be grouped for guidelines purposes; and (3) whether the purposes of sentencing as specified at 18 U.S.C. § 3553(a)(2) “are better achieved by imposing a concurrent or consecutive sentence.”²⁷

USSG §2B1.1 applies to identity theft offenders generally, including non-aggravated identity theft, fraud, and other offenses. It establishes a 2-level enhancement if the offense involved “the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification” or “the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification.”²⁸ Conduct that would trigger the guideline enhancement is also generally punishable under section 1028A.²⁹ The guideline also





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provides incremental enhancements based on the amount of loss incurred in the offense,³⁰ an enhancement of two, four, or six levels based on the number of victims involved and amount of financial hardship caused,³¹ and an increase for sophisticated means.³²

Statutory and Guideline Relief Provisions

Offenders may receive relief from the aggravated identity theft mandatory minimum penalty if the prosecution files a motion based on the defendant's "substantial assistance" pursuant to 18 U.S.C. § 3553(e).³³ When such motion is filed, section 3553(e) authorizes the court to impose a sentence below the mandatory minimum penalty.

As directed by Congress, the Commission incorporated this statutory mechanism for relief from mandatory minimum penalties into the guidelines. USSG §5K1.1 authorizes a departure from the guideline range if the offender provided substantial assistance to law enforcement and the government files a motion to that effect.³⁴ Even where §5K1.1 applies, however, the court can only sentence below the mandatory minimum penalty when the government also files a motion pursuant to 18 U.S.C. § 3553(e).³⁵



4 Data Analysis

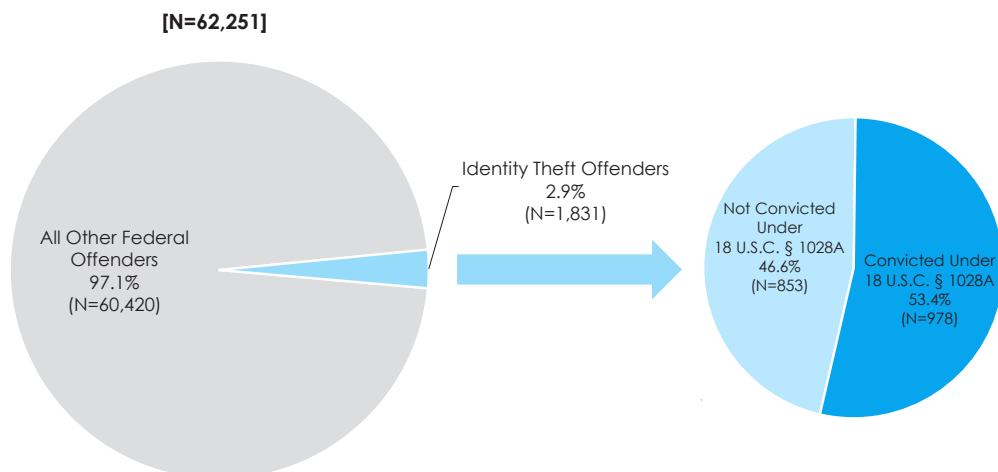


The Commission's Updated Study of Identity Theft Mandatory Minimum Penalties

In its 2011 *Mandatory Minimum Report*, the Commission made several recommendations to Congress regarding the use of, and improvement to, mandatory minimum penalties generally and with respect to the four major offense types. However, the Commission noted that it was “difficult to issue specific findings and recommendations regarding the operation of section 1028A” because the offense of aggravated identity theft was relatively new, having been established in 2004.³⁶ The Commission did note, however, that “some of the problems associated with mandatory minimum penalties for other offenses are not observed, or are not as pronounced, in identity theft offenses” because, relative to other mandatory minimum penalties, section

1028A provides for a two-year penalty and allows for concurrent sentences of multiple counts.³⁷ As a result, unlike other mandatory minimum penalties, sentences imposed under section 1028A were comparable to sentences imposed for similar offenses that do not carry a mandatory minimum penalty. Additionally, in contrast to other offenses carrying mandatory minimum penalties, demographic differences in the application of section 1028A were not observed at that time. While the Commission noted that there appeared to be some inconsistencies in the application of section 1028A across judicial districts, these appeared attributable to the new nature of the statute. The Commission thus determined that specific conclusions or recommendations were difficult to make with respect to identity theft mandatory minimum penalties at that time.³⁸

Figure 1. Identity Theft Offenders Convicted Under 18 U.S.C. § 1028A
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission 2016 Datafile, USSCFY2016.

Since the 2011 *Mandatory Minimum Report*, the Commission has continued its study of the scope, use, and impact of mandatory minimum penalties in the federal system, providing regular updates through the issuance of Quick Facts publications, as well as in testimony before Congress. The Commission provides this publication to update the information and analyses in its 2011 *Mandatory Minimum Report* and to further inform discussion of the Commission's recommendations regarding the use of mandatory minimum penalties for identity theft offenses.

Focusing on offenses carrying an identity theft mandatory minimum penalty, this publication analyzes 62,251 cases from the Commission's fiscal year 2016 datafile,³⁹ identifying relevant offender and offense characteristics, including demographic data and basic criminal history information. This publication provides comparisons between all identity theft offenders, offenders convicted of at least one count of aggravated identity theft under section 1028A, offenders convicted of multiple counts under section 1028A, and offenders who remained subject to section 1028A's mandatory minimum penalty at sentencing. The Commission also provides data about sentencing outcomes involving application of the section 1028A mandatory minimum penalty. Where appropriate, this publication highlights key changes between the data set forth in the Commission's 2011 *Mandatory Minimum Report* and the fiscal year 2016 sentencing data.

The Commission intends that the data in this publication will further inform the ongoing discussion regarding mandatory minimum penalties among Congress, the Department of Justice, and others.

Recent Trends in Mandatory Minimum Penalties

As discussed in the 2017 *Overview Publication*, the prevalence of convictions for an offense carrying any mandatory minimum penalty among all federal offenders decreased in fiscal year 2016. From fiscal years 1991 to 2013, the percentage of federal offenders convicted of an offense carrying a mandatory minimum penalty fluctuated between 26.0 percent and 31.9 percent. Over the past three years, however, the percentage has decreased, to 21.9 percent in fiscal year 2016.

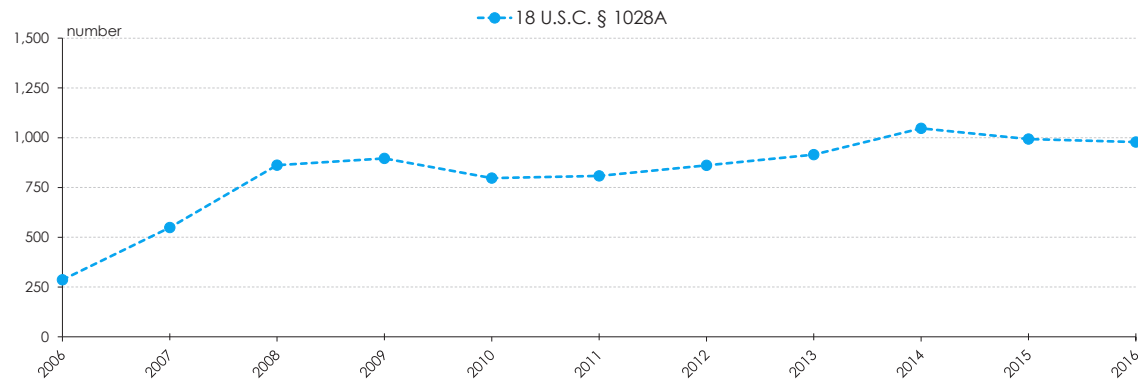
While the percentage of offenders convicted of an offense carrying a mandatory minimum penalty steadily decreased, the percentage of offenders subject to a mandatory minimum at sentencing remained relatively stable during the same time period, falling only slightly from 14.5 percent in fiscal year 2010 to 13.4 percent in fiscal year 2016. This is because offenders in recent years have been increasingly less likely to receive relief from a mandatory minimum penalty through a substantial assistance motion or application of the statutory safety valve. In fiscal year 2016, 38.7 percent offenders convicted of an offense carrying a mandatory minimum penalty received relief, down from 46.7 percent in 2010.⁴⁰





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Figure 2. Number of Offenders Convicted Under 18 U.S.C. § 1028A
Fiscal Years 2006 - 2016



SOURCE: U.S. Sentencing Commission 2006 through 2016 Datafiles, USSCFY2006-USSCFY2016.

Overall Prevalence of Identity Theft Offenses and Section 1028A Aggravated Identity Theft

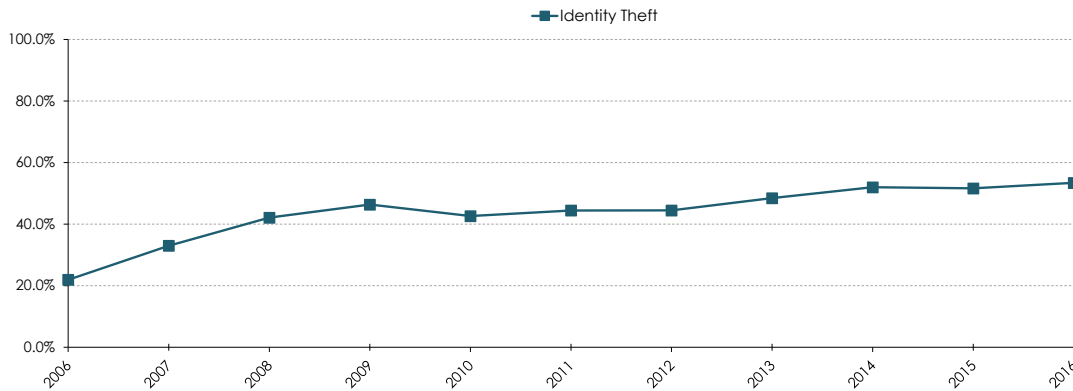
How Often Are Offenders Convicted Under 18 U.S.C. § 1028A?

Identity theft offenses continued to constitute a small percentage of federal criminal cases overall. In fiscal year 2016, of the 62,251 offenders sentenced and included in this analysis, 2.9 percent (n=1,831) were identity theft offenders. Of the 1,831 cases involving identity theft offenses, slightly more than half (53.4%, n=978) were convicted under section 1028A, while 46.6 percent (n=853) were convicted of an identity theft offense that did not carry a mandatory minimum penalty. The 978 offenders convicted under section 1028A thus represent only 1.6 percent of federal offenders sentenced in 2016.

As reflected in Figure 2, the number of section 1028A offenders generally and their portion of the federal caseload overall has remained relatively stable since the Commission's 2011 *Mandatory Minimum Report*. After a rapid increase between fiscal years 2006 (n=286) and 2009 (n=896), the number of offenders more gradually increased to a high of 1,047 offenders in fiscal year 2014 (the only year with more than 1,000 offenders convicted), before decreasing to 978 offenders in fiscal year 2016.

The changes in the number of offenders convicted under the statute correlates with increased use of the section 1028A mandatory minimum penalties as a prosecutorial tool against identity theft offenders. As shown in Figure 3, the percentage of identity theft offenders convicted under section 1028A has steadily increased since shortly after the statute was enacted, more than doubling from 21.9 percent in fiscal year 2006 to 53.4 percent in fiscal year 2016. The percentage of identity

Figure 3. Identity Theft Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
Fiscal Years 2006 - 2016

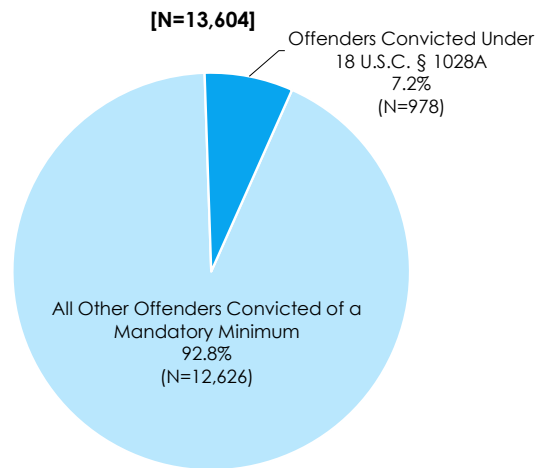


SOURCE: U.S. Sentencing Commission, 2006 through 2016 Datafiles, USSCFY06 – USSCFY16.

theft offenders convicted under section 1028A has also increased since the Commission's last report on mandatory minimum penalties. In fiscal year 2010, fewer than half of identity theft offenders (42.6%, n=797) were convicted under section 1028A. In fiscal year 2016, that percentage has risen to more than half, with 53.4 percent of identity theft offenders convicted under section 1028A.

Section 1028A aggravated identity theft offenses also increased as a portion of all offenses carrying mandatory minimum penalties. Section 1028A offenses accounted for 7.2 percent of offenses carrying a mandatory minimum penalty in fiscal year 2016, increasing from 4.0 percent in 2010.

Figure 4. Offenders Convicted of an Identity Theft Offense Carrying a Mandatory Minimum Penalty
Fiscal Year 2016

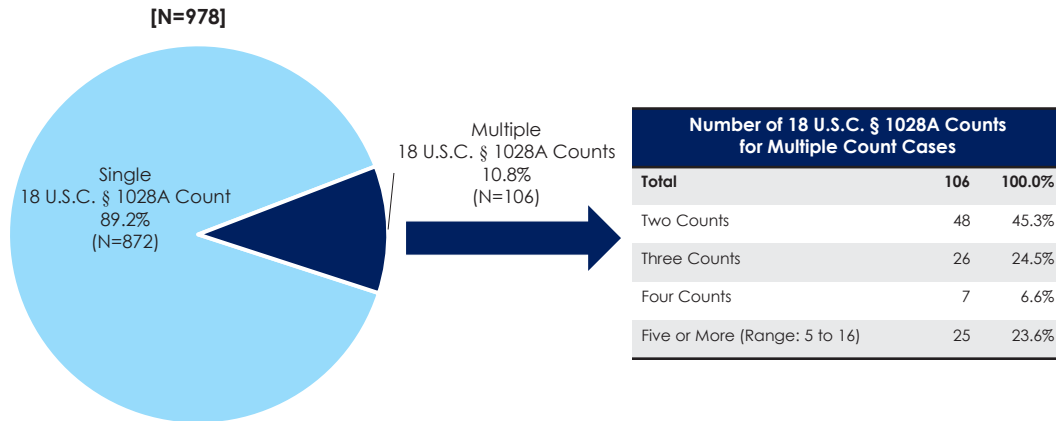


SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



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Figure 5. Offenders Convicted of Multiple Counts Under 18 U.S.C. § 1028A
Fiscal Years 2006 - 2016



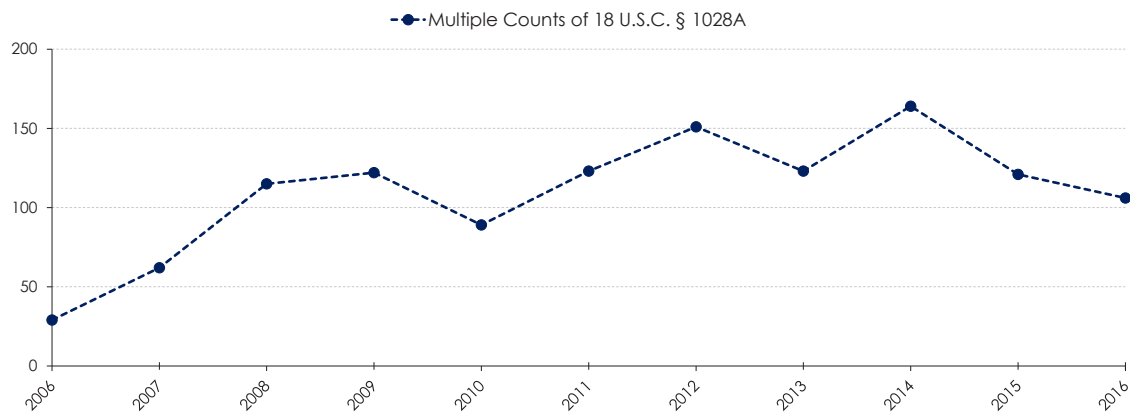
SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

How Often Are Offenders Convicted of Multiple Counts Under 18 U.S.C. § 1028A?

Of the 978 offenders convicted of aggravated identity theft, 872 (89.2%) were convicted of a single count, and 106 (10.8%) were convicted of multiple counts under the statute. Of the 106 offenders convicted of multiple counts under

section 1028A, nearly half were convicted of two such counts (45.3%; n=48), while 26 were convicted of three such counts, seven were convicted of four such counts, and 25 were convicted of five or more (with a high of 16 counts for a single offender).

Figure 6. Offenders Convicted of Multiple Counts Under 18 U.S.C. § 1028A
Fiscal Years 2006 - 2016



SOURCE: U.S. Sentencing Commission 2006 through 2016 Datafiles, USSCFY2006-USSCFY2016.

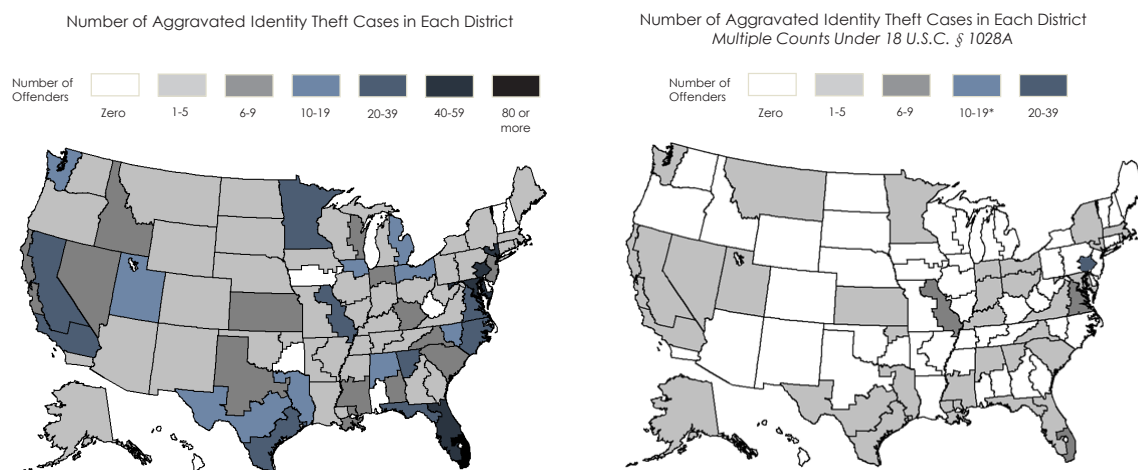
The number of offenders convicted of multiple counts under section 1028A has fluctuated but has remained a relatively small percentage of all offenders convicted under the statute. As with the number of all offenders convicted under section 1028A, the number of offenders convicted of multiple counts has generally increased during the time the Commission has collected data on these offenses, peaking at 164 offenders in fiscal year 2014 (from 29 in 2006) and decreasing to 106 in fiscal year 2016.

Where Were Offenders Convicted of Offenses Under Section 1028A?

Cases involving a conviction under section 1028A were primarily concentrated in three circuits. Of the 978 cases in fiscal year 2016, the most—slightly more than one-third (34.7%; n=339)—were from district courts in

the Eleventh Circuit. The next largest portions came from district courts in the Fourth Circuit (14.0%; n=137) and Ninth Circuit (9.8%; n=96). Thus, over half (58.5%; n=572) of the 978 cases involving the aggravated identity theft mandatory minimum penalty were from district courts in those three circuits. This is consistent with fiscal year 2010, when 54.3 percent (n=433) of the 797 section 1028A cases were from the district courts of these same three circuits. However, the percentage that were from district courts in the Eleventh Circuit has increased substantially, from 23.8 percent (n=190) in fiscal year 2010. The other cases were distributed throughout the remaining circuits, with the fewest from the district courts in the First Circuit (2.4%; n=23), and the District of Columbia Circuit, which did not have any section 1028A cases.

Figure 7. Geographic Distribution of Offenders Convicted Under 18 U.S.C. § 1028A
Fiscal Year 2016



* There were zero districts with 10-19 cases involving multiple counts of conviction under 18 U.S.C. § 1028A.
SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



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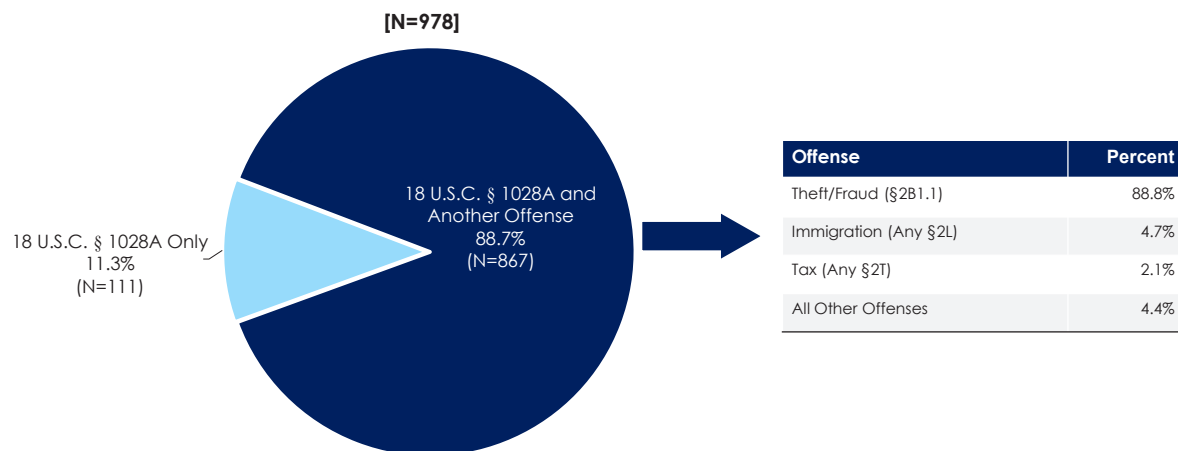
Cases involving a conviction under section 1028A were more geographically dispersed when viewed at the district level. Nonetheless, a disproportionately large number of cases came from eight districts. The Southern District of Florida had substantially more cases involving a conviction of an offense under section 1028A than any other district. Of the 978 cases in fiscal year 2016 involving a conviction under section 1028A, 203 (20.8%) were from the Southern District of Florida. Six other districts reported 30 or more cases of a conviction under section 1028A: 50 in the Southern District of New York (5.1%); 48 in the District of Maryland (4.9%); 45 in the Middle District of Florida (4.6%); 43 in the Eastern District of Pennsylvania (4.4%); 36 in the Eastern District of Virginia (3.7%); and 34 in the Northern District of Georgia (3.5%). Sixty-one districts had between one and ten cases involving a conviction of an offense under section 1028A and eight districts had no such cases.

The Commission further analyzed the geographic distribution of cases involving multiple convictions under section 1028A. Only the Third Circuit had more than 20 (n=23) cases in which a defendant was convicted of multiple counts under section 1028A. The Fourth, Ninth, and Eleventh Circuits each had between ten and twenty such cases—accounting for more than two-thirds (67.9%) of all multiple count cases in fiscal year 2016—while the rest of the circuits had fewer than ten cases with multiple counts under section 1028A.⁴¹

Other Counts of Conviction

As noted above, in order to be convicted under section 1028A, an offender must have “knowingly transferred, possessed, or used a means of identification of another person *during and in relation to any enumerated*

Figure 8. Offenders Convicted Under 18 U.S.C. § 1028A by Additional Offenses of Conviction
Fiscal Year 2016



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

felony violation.” Consistent with this statutory language, the majority of section 1028A offenders—88.7 percent—were also convicted of at least one other felony offense. Of the 867 offenders convicted under section 1028A and of at least one other felony offense, the majority—88.8 percent—were sentenced under §2B1.1 (n=770).⁴² The remaining offenders were sentenced under the guidelines applicable to immigration offenses (4.7%, n=41),⁴³ tax offenses (2.1%, n=18),⁴⁴ or other offenses (4.4%, n=38).⁴⁵

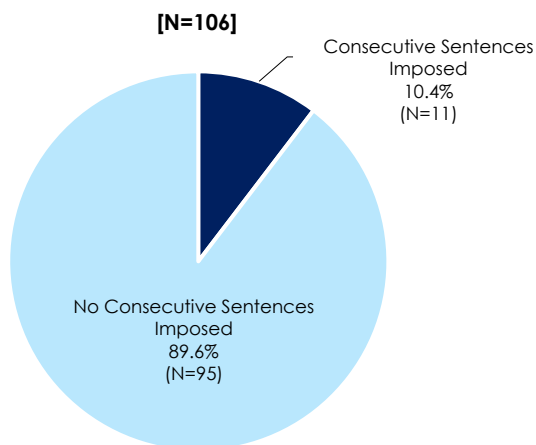
Although 11.3 percent (n=111) of section 1028A offenders were not convicted of another offense, those cases necessarily involved another federal offense for which they could have been, but were not, prosecuted. The majority—83.8 percent—of the 111 offenders convicted only under section 1028A in fiscal year 2016, had felony violations that, if convicted, would have been sentenced under §2B1.1. The remaining offenders had felony

violations that, if convicted, would have been sentenced under an immigration (15.3%) or firearms (0.9%) guideline.⁴⁶ Of the 93 offenders whose felony violations would have resulted in sentences under §2B1.1, the most common offense types were fraud against a financial institution (29.0%), identity theft (26.9%), and credit card fraud (23.7%).⁴⁷

Sentencing Multiple Counts of Conviction

As discussed above, section 1028A provides sentencing courts the option of imposing concurrent sentences, in whole or in part, in cases with multiple counts of conviction under the statute. Overall, sentencing courts generally opted for imposing concurrent terms of imprisonment. In fiscal year 2016, for the majority—89.6 percent—of the 106 offenders convicted of multiple counts under section 1028A, the sentences imposed for the additional counts of conviction were imposed concurrently.

Figure 9. Sentences Imposed for Offenders Convicted of Multiple Counts Under 18 U.S.C. § 1028A
Fiscal Year 2016



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



Even when imposing consecutive terms of imprisonment, courts continued to use their discretion with respect to the number of terms imposed consecutively and the length of those terms. First, for the 11 cases in which courts imposed consecutive sentences for the additional section 1028A counts, terms were imposed consecutively on *all* of the additional counts in six cases,⁴⁸ while in the remaining five cases only some of the terms were imposed consecutively to one another.⁴⁹

Second, courts did not always impose full 24-month terms when imposing consecutive terms for multiple counts. While courts did most often (in 8 of the 11 cases⁵⁰) impose the entire 24-month term to run consecutively to other sentences for additional counts of conviction under section 1028A, in three cases only part of the 24-month sentence was imposed consecutively, with the rest imposed

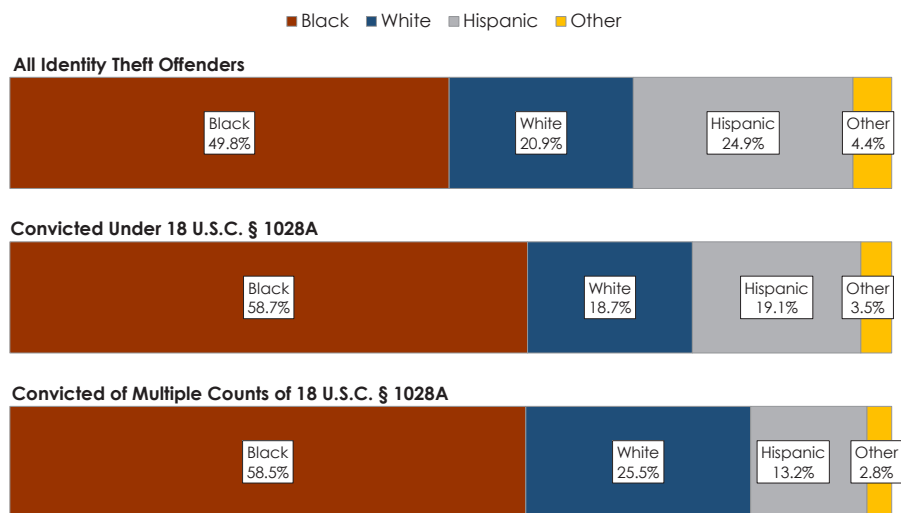
concurrently to another sentence.⁵¹ In each of these three cases, courts imposed 12-month consecutive sentences.

Offender Demographics

Race, Gender, and Citizenship

Black offenders were convicted under section 1028A at a higher rate than any other racial group. As demonstrated in Figure 10, in fiscal year 2016, Black offenders were 49.8 percent of all identity theft offenders, but 58.7 percent of offenders convicted under section 1028A. Smaller percentages of White offenders (18.7% compared to 20.9%) and Hispanic offenders (19.1% compared to 24.9%) were convicted under section 1028A as compared with their portion of identity theft offenders overall.

Figure 10. Race of 18 U.S.C. § 1028A Offenders Compared to All Other Identity Theft Offenders
Fiscal Year 2016



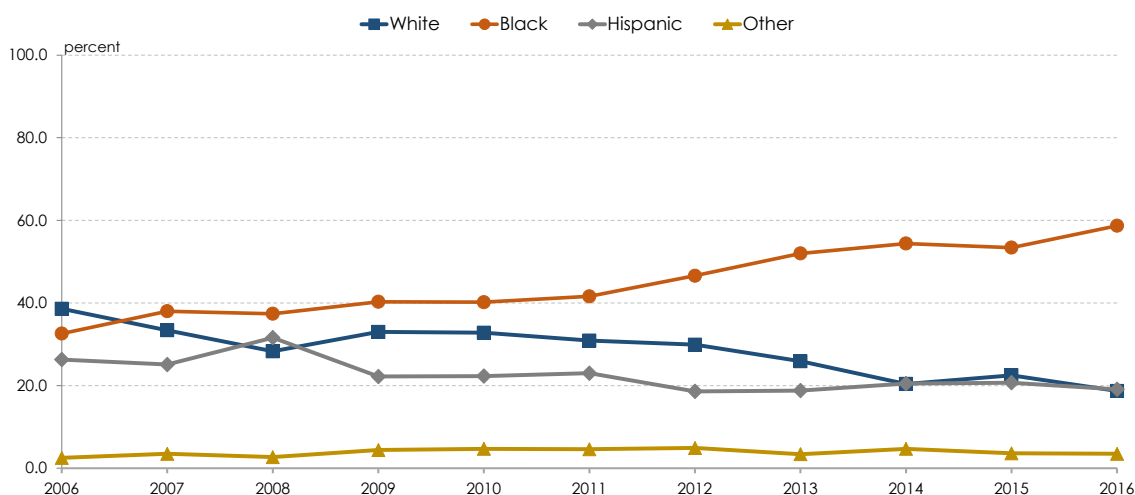
SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

While Black offenders have generally comprised the largest proportion of both identity theft offenders as a whole and those convicted under section 1028A, their percentage of each group has steadily increased over time. In fiscal year 2010, 40.2 percent of identity theft offenders convicted under section 1028A were Black offenders, which was relatively consistent with the percentage of Black identity theft offenders overall (39.6%). By fiscal year 2016, however, Black offenders constituted 49.8 percent of all identity theft offenders, while their proportion of those convicted under section 1028A increased at an even faster pace. As reflected in Figure 11, Black offenders represented a majority of identity theft offenders convicted under section 1028A, at 58.7 percent, in fiscal year 2016. Conversely, White offenders have become an increasingly smaller proportion of identity

theft offenders convicted under section 1028A, having decreased by nearly half from 32.8 percent in fiscal year 2010 to 18.7 percent in fiscal year 2016. White offenders also became a smaller proportion of identity theft offenders overall, decreasing from 30.0 percent to 20.9 percent during the same time period.

Another way to analyze the application of section 1028A among racial groups is to compare the percentage of identity theft offenders in each racial group who were convicted under 1028A. Using this approach (reflected in Figure 12), a majority (63.1%) of Black identity theft offenders were convicted under section 1028A. This rate was higher than the rate for White offenders (47.8%), Other Race offenders (42.0%), and Hispanic offenders (41.1%).

Figure 11. Race of 18 U.S.C. § 1028A Offenders
Fiscal Years 2006 - 2016

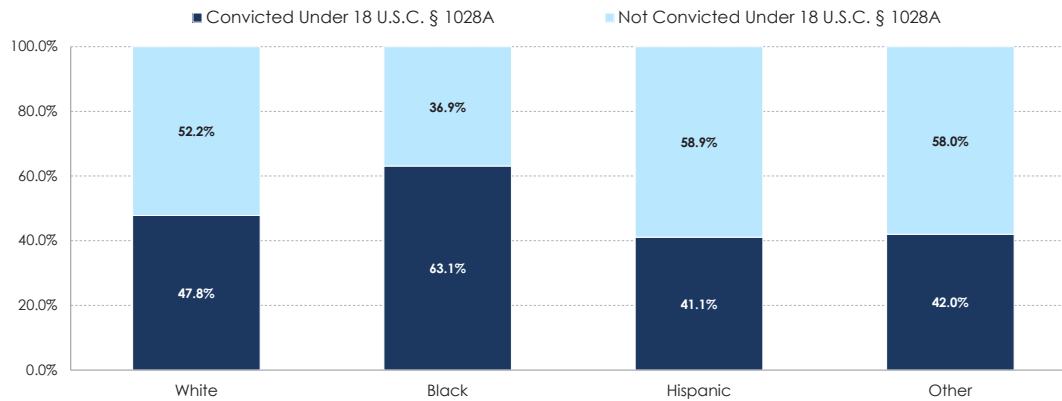


SOURCE: U.S. Sentencing Commission 2006-2016 Datafiles, USSCFY2006 -USSCFY2016.



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Figure 12. Percent of Identity Theft Offenders with 18 U.S.C. § 1028A Conviction
By Race
Fiscal Year 2016



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

Black offenders were also most likely to be convicted of multiple counts under section 1028A, comprising 58.5 percent of such offenders. White offenders were convicted of multiple counts under section 1028A at a higher rate than they were convicted of at least one count under section 1028A (25.5% compared to 18.7%), while the opposite was true for Hispanic offenders (13.2% of those convicted of multiple counts under section 1028A compared to 19.1% of offenders convicted of at least one count under section 1028A).

The majority (78.6%) of offenders convicted under section 1028A were United States Citizens. Male offenders were convicted under section 1028A more frequently than female offenders, accounting for 72.6 percent of offenders convicted under section 1028A. However, female offenders comprised a much larger percentage (27.4%) of section 1028A offenders than they did of offenders convicted of any offense carrying a mandatory minimum penalty (10.0%).

Table 1. Race of Identity Theft Offenders
Fiscal Year 2016

	All Identity Theft Offenders	Convicted Under 18 U.S.C. § 1028A	Subject to Mandatory Minimum Penalty	Convicted of Multiple Counts Under 18 U.S.C. § 1028A
Total Number of Offenders	1,831	978	824	106
RACE				
White	20.9%	18.7%	19.2%	25.5%
Black	49.8%	58.7%	58.5%	58.5%
Hispanic	24.9%	19.1%	19.5%	13.2%
Other	4.4%	3.5%	2.8%	2.8%

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

Table 2. Gender and Citizenship of Identity Theft Offenders
Fiscal Year 2016

	All Identity Theft Offenders	Convicted Under 18 U.S.C. § 1028A	Subject to Mandatory Minimum Penalty	Convicted of Multiple Counts Under 18 U.S.C. § 1028A
Total Number of Offenders	1,831	978	824	106
GENDER				
Male	70.6%	72.6%	74.6%	70.8%
Female	29.4%	27.4%	25.4%	29.2%
CITIZENSHIP				
U.S. Citizen	73.1%	78.6%	78.4%	87.7%
Non-U.S. Citizen	26.9%	21.4%	21.6%	12.3%

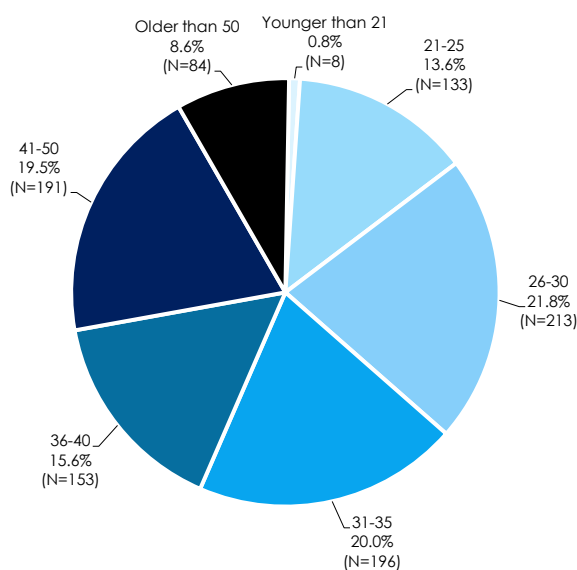
SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Age

The average age for section 1028A offenders was 36 years. Offenders convicted under section 1028A were fairly evenly distributed throughout age brackets 26 through 50, with fewer younger than 21 (0.8%; n=8), 21 through

25 (13.6%; n=133), or older than 50 (8.6%; n=84). Combined, offenders younger than 21, ages 21 to 25, and older than 50, accounted for less than one-quarter of all offenders convicted under section 1028A.

Figure 13. Age of Offenders Convicted Under 18 U.S.C. § 1028A
Fiscal Year 2016



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



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Table 3. Criminal History of Offenders with a Conviction Under 18 U.S.C. § 1028A
Fiscal Year 2016

	All Identity Theft Offenders	Convicted Under 18 U.S.C. § 1028A	Subject to Mandatory Minimum Penalty	Convicted of Multiple Counts Under 18 U.S.C. § 1028A
Total Number of Offenders	1,831	978	812	106
CRIMINAL HISTORY CATEGORY				
I	51.7%	45.0%	44.3%	37.7%
II	11.2%	12.9%	12.8%	10.4%
III	15.2%	16.8%	17.6%	16.0%
IV	8.4%	9.8%	9.5%	12.3%
V	4.7%	5.8%	5.8%	7.6%
VI	8.8%	9.7%	10.0%	16.0%

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

Criminal History

Nearly half (45.0%) of offenders convicted under section 1028A were in Criminal History Category I, the lowest criminal history category. The next largest groups were in Criminal History Category III (16.8%) and Criminal History Category II (12.9%), with less than ten percent in each of the higher criminal history categories. Offenders convicted under section 1028A had more criminal history than identity theft offenders generally. More than half (51.7%) of all identity theft offenders were in Criminal History Category I, with slightly smaller portions in each of the other criminal history categories than those of offenders convicted under section 1028A.

The distribution of criminal history categories in fiscal year 2016 is largely consistent with that of fiscal year 2010. However, in fiscal year 2016, smaller percentages of section 1028A offenders were in the higher criminal history categories V and VI (9.7% compared to 15.0% in CHC VI and 5.8% compared to 8.0% in CHC V).

A larger proportion of offenders convicted of multiple counts under section 1028A were in Criminal History Category IV, V, and VI. For multiple count offenders, 35.9 percent were in Criminal History Category IV, V, and VI, combined, while only 25.3 percent of those convicted of at least one offense under section 1028A were in these higher categories.

Offense Characteristics

Given the differing and broad nature of the types of underlying offenses forming the basis of an identity theft conviction, it is difficult to compare relevant offense characteristics. In order to make such a comparison, this section considers only those identity theft offenders sentenced pursuant to §2B1.1 because of another count of conviction. Accordingly, this analysis does not include identity theft offenders whose only count of conviction was of an offense under section 1028A or, by virtue of another count of conviction, were sentenced pursuant to a guideline provision other than §2B1.1.⁵²

Table 4. Guideline Sentencing Characteristics of Identity Theft Offenders Sentenced under §2B1.1 (Theft/Fraud) Fiscal Year 2016

	Not Convicted Under 18 U.S.C. § 1028A	Convicted Under 18 U.S.C. § 1028A	Relief from Mandatory Minimum Penalty	Subject to Mandatory Minimum Penalty
Total Number of Offenders	764	770	134	636
SENTENCING CHARACTERISTICS				
Harmed Victims Financially	48.4%	66.6%	64.9%	67.0%
Used Sophisticated Means	19.0%	20.9%	21.6%	20.8%
Median Loss Amount	\$84,114	\$189,000	\$246,303	\$185,890

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

Of the 978 offenders convicted of an offense under section 1028A in fiscal year 2016, 770 offenders were also convicted of another offense for which they were sentenced pursuant to §2B1.1 and are therefore included in this analysis. For comparison purposes, a nearly equal number of identity theft offenders (n=764) were convicted of an offense sentenced under §2B1.1 but were not convicted under section 1028A.

As reflected in Table 4, there were notable differences among offenders convicted under section 1028A and those who were not. The median loss was more than double for offenders convicted under section 1028A (\$189,000) than for offenders who were not (\$84,114). Similarly, the rate of application for both the victims and sophisticated means enhancement was higher for those also convicted under section 1028A.⁵³

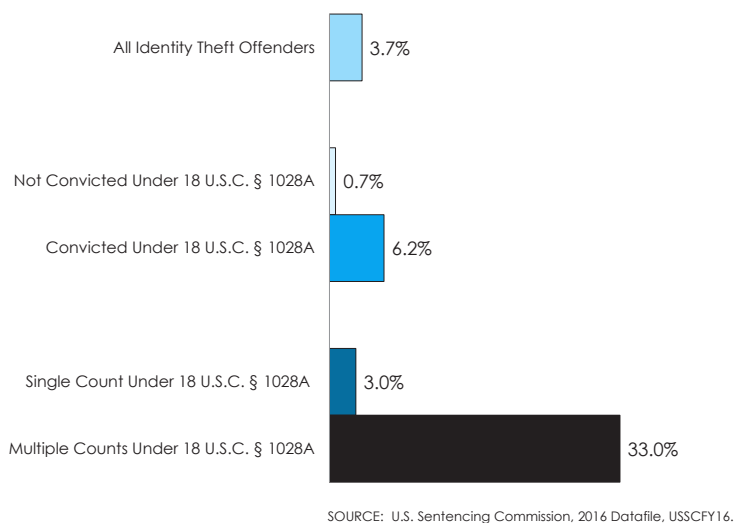
Considering offenders convicted under section 1028A, with the exception of the median loss amount, there were negligible differences in the severity of offenses committed by offenders who were relieved of the mandatory penalty and offenses committed by those who were not relieved of the mandatory penalty. Of these 770 offenders, 82.6 percent (n=636) were subject to the section 1028A mandatory penalty at sentencing, while 17.4 percent (n=134) were relieved of the mandatory penalty. The percentage of offenders in each group receiving enhancements for causing financial harm and using sophisticated means differed by less than three percentage points. The median loss amount, however, was higher for those relieved of the penalty than those subject to the penalty at sentencing. Offenders subject to the mandatory penalty had a median loss amount of \$185,890, while offenders relieved of the mandatory penalty had a median loss amount of \$246,303.





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Figure 14. 18 U.S.C. § 1028A Conviction Status of Identity Theft Offenders by Percent of Offenders Going to Trial
Fiscal Year 2016



Plea and Trial Rates

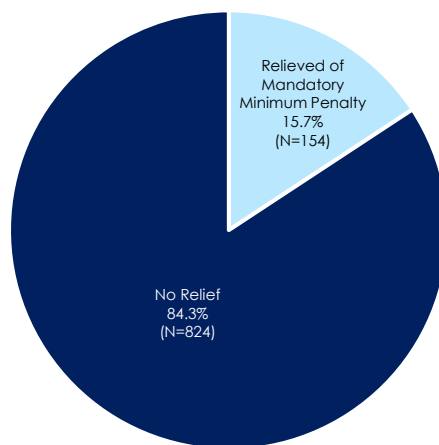
Offenders convicted under section 1028A were considerably more likely to proceed to trial than identity theft offenders who were not convicted of section 1028A, and slightly more likely than offenders convicted of any offense carrying any mandatory minimum penalty (5.2%). In fiscal year 2016, 6.2 percent (n=61) of offenders convicted under section 1028A proceeded to trial, compared to 0.7 percent (n=6) of identity theft offenders not convicted under section 1028A. By contrast, only 2.7 percent of all federal offenders proceeded to trial.

Offenders convicted of multiple counts under section 1028A were even more likely to proceed to trial (33.0%).

Relief from Mandatory Minimum Penalties

In fiscal year 2016, nearly one-sixth (15.7%, n=154) of offenders convicted under section 1028A were relieved of the mandatory minimum penalty at sentencing pursuant to 18 U.S.C. § 3553(e) for rendering substantial assistance to the government. Offenders convicted under section 1028A received a substantial assistance departure at a slightly higher rate than offenders convicted of an identity theft offense not carrying a mandatory minimum (12.8%), and offenders convicted of multiple counts under section 1028A (14.2%).

Figure 15. 18 U.S.C. § 1028A Offenders Relieved of Mandatory Minimum Penalty
Fiscal Year 2016

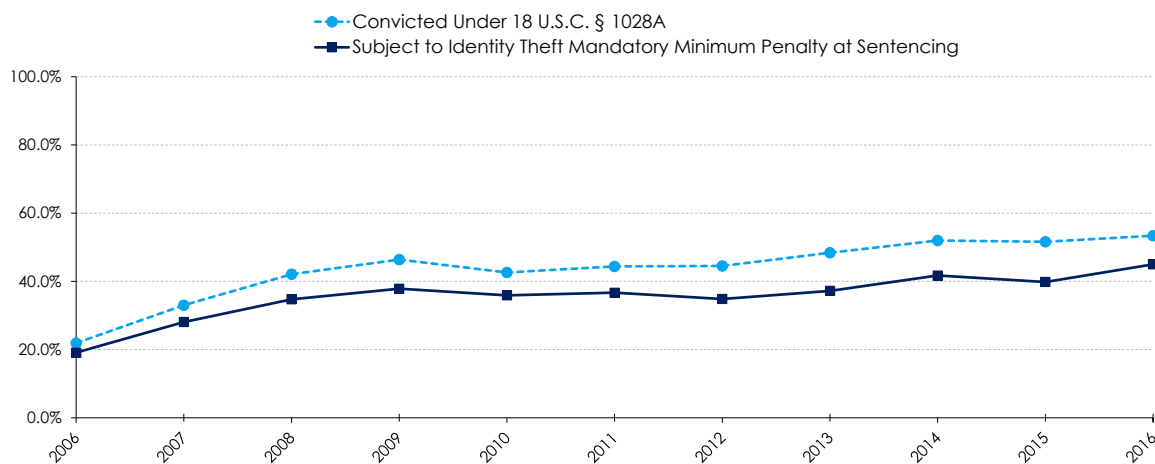


SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

The percentage of identity theft offenders who remained subject to the mandatory minimum penalty at sentencing increased at a similar rate as the rate of convictions under

the statute increased, more than doubling from 19.1 percent in 2006, to 45.0 percent in fiscal year 2016.

Figure 16. Percent of Identity Theft Offenders Convicted Under 18 U.S.C. § 1028A and Subject to Mandatory Minimum at Sentencing
Fiscal Years 2006 - 2016

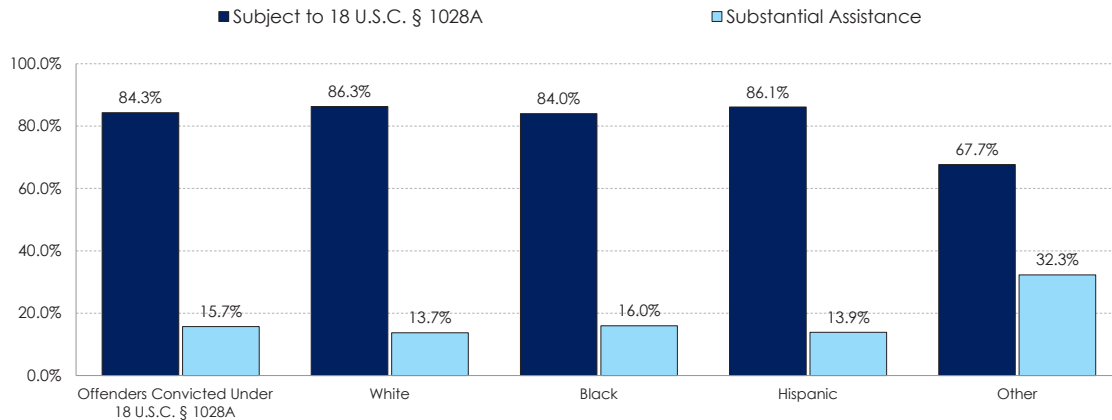


SOURCE: U.S. Sentencing Commission 2006 through 2016 Datafiles, USSCFY2006-USSCFY2016.



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Figure 17. Percent of Offenders Convicted Under 18 U.S.C. § 1028A Who Were Relieved of the Penalty by Race
Fiscal Year 2016



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

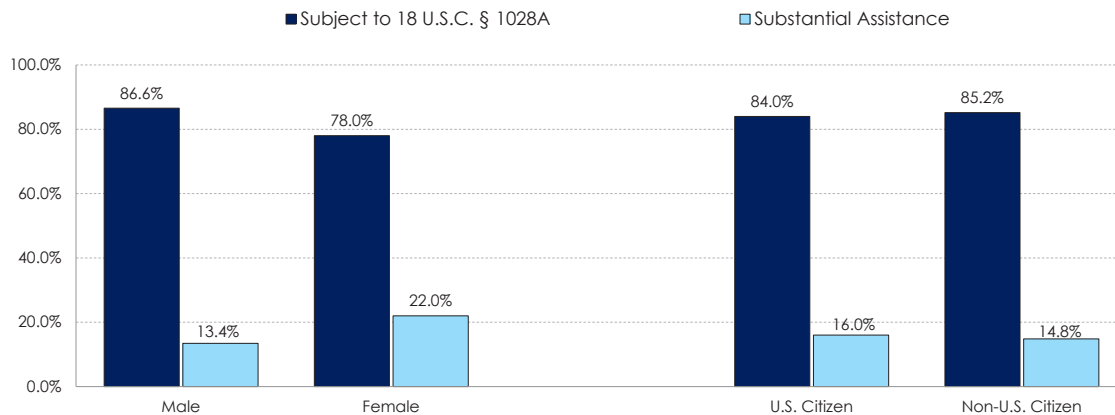
Demographics

The relief rates between Black (16.0%), White (13.7%), and Hispanic offenders (13.9%) varied by less than three percentage points. Other Race offenders received relief at a much higher rate (32.3%). However, Other Race offenders represented a very small portion of offenders convicted under section 1028A

(of 34 offenders total, 11 were relieved of the mandatory minimum penalty).⁵⁴

Female offenders convicted under section 1028A received relief from the mandatory minimum penalty more often than male offenders (22.0% compared to 13.4%).

Figure 18. Percent of Offenders Convicted Under 18 U.S.C. § 1028A Who Were Relieved of the Penalty by Gender and Citizenship
Fiscal Year 2016



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

United States citizens and non-United States citizens obtained relief from the mandatory minimum penalty at nearly equal rates (16.0% compared to 14.8%).

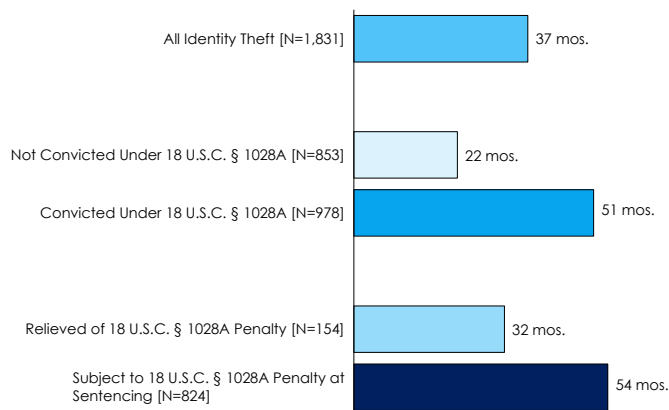
Sentencing of Identity Theft Offenders

Average Sentence Length

The Commission compared the average sentence length for identity theft offenders convicted of an offense other than under section 1028A, offenders convicted of at least one offense under section 1028A, and offenders convicted of multiple counts under section 1028A. For offenders convicted of at least one offense under section 1028A, the Commission further compared the average sentence length for offenders subject to and relieved from application of the mandatory minimum penalty under section 1028A.

Identity theft offenders convicted of an offense under section 1028A had longer sentences than identity theft offenders not convicted of an offense under section 1028A, regardless of whether they received relief from the mandatory minimum penalty at sentencing. In fiscal year 2016, the average sentence for offenders convicted of at least one count under section 1028A was more than double the average sentence length for offenders convicted of an identity theft offense not carrying a mandatory minimum penalty (51 months compared to 22 months). Identity theft offenders convicted of at least one count under section 1028A and subject to the mandatory minimum penalty at sentencing had a slightly longer average sentence of 54 months, while those who were relieved of the mandatory minimum penalty had an average sentence of 32 months.

Figure 19. Average Sentence Length for Identity Theft Offenders and Status of Relief from the Mandatory Minimum Penalty Fiscal Year 2016

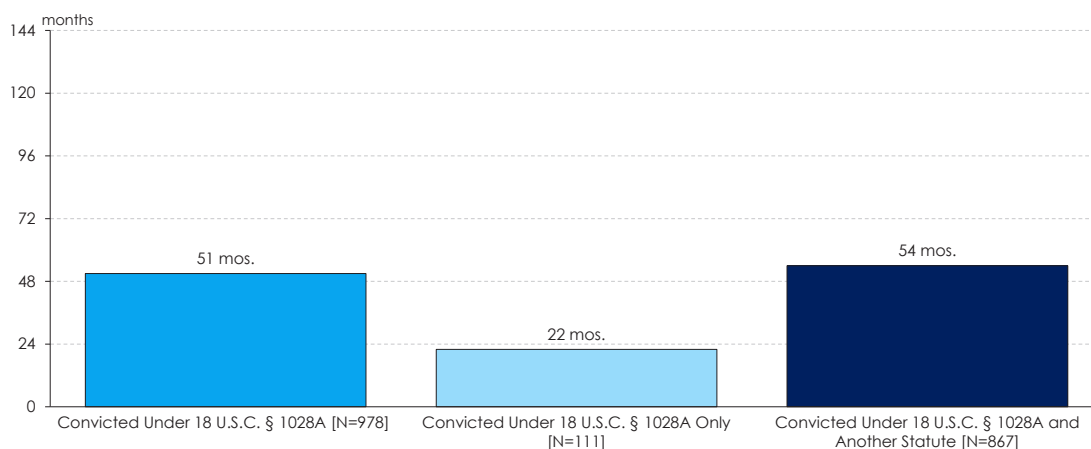


SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



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Figure 20. Average Sentence Length for Offenders Convicted Under 18 U.S.C. § 1028A and Another Statute Fiscal Year 2016

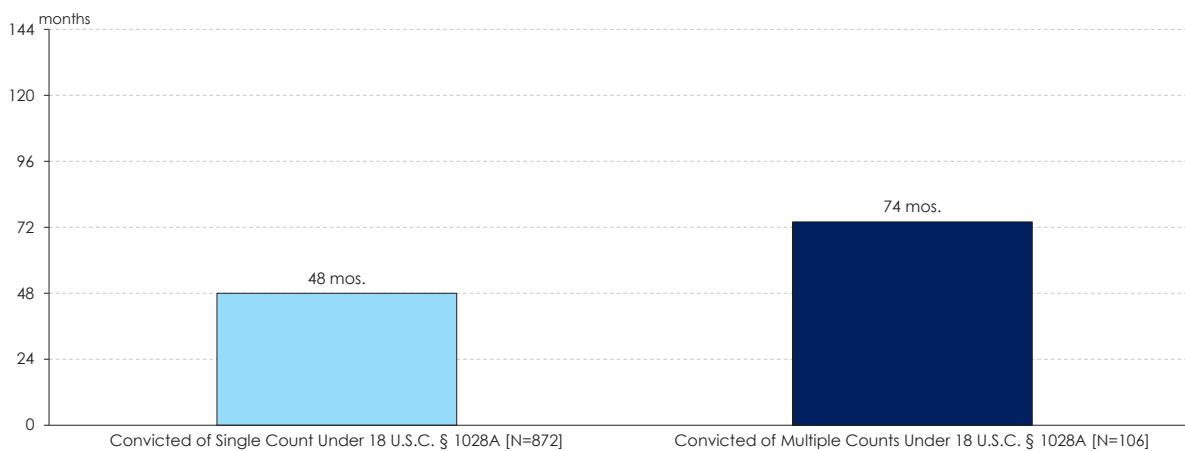


SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

As noted previously, 11.3 percent of offenders were convicted under section 1028A *only*, while 88.7 percent were convicted of both an offense under section 1028A and another offense. As shown in Figure 20, the average sentence was more than double for offenders who were convicted under section

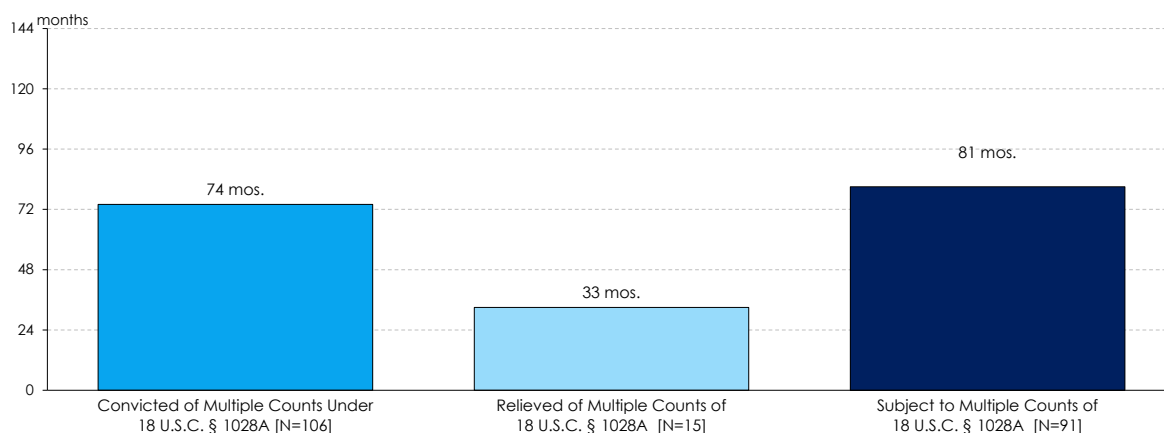
1028A and another statute compared to the average sentence for offenders convicted under section 1028A *only* (54 months compared to 22 months). This difference reflects the statutory requirements that the penalty for section 1028A be imposed consecutively to any other term of imprisonment imposed on the offender and that

Figure 21. Average Sentence Length for Offenders Convicted of Single and Multiple Counts Under 18 U.S.C. § 1028A Fiscal Year 2016



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

Figure 22. Average Sentence Length for Offenders Convicted of Multiple Counts Under 18 U.S.C. § 1028A
By Status of Relief from the Mandatory Minimum Penalty
Fiscal Year 2016



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

the term imposed for the underlying offense not be reduced to compensate for the mandatory section 1028A penalty.

As shown in Figure 21, offenders convicted of multiple counts under section 1028A had longer sentences than any other category. In fiscal year 2016, the average sentence for offenders convicted of multiple counts under section 1028A was 74 months, more than two years longer than those offenders convicted of a single count under section 1028A (48 months).

The longer sentence length for those with multiple counts is likely attributable to two factors. First, courts sentenced some offenders (10.4%) with multiple counts consecutively for each section 1028A count.⁵⁵ Additionally, offenders who were also convicted of another offense were more likely to have faced multiple counts under section 1028A. Of the offenders

with a conviction for another offense, 12.0 percent were convicted of multiple counts under section 1028A, while only 1.8 percent of offenders without additional conduct were convicted of multiple counts under 1028A. As noted above, the statute prescribes longer sentences for these offenders because the sentence for the section 1028A count must be imposed consecutively to the sentence for the underlying count of conviction.

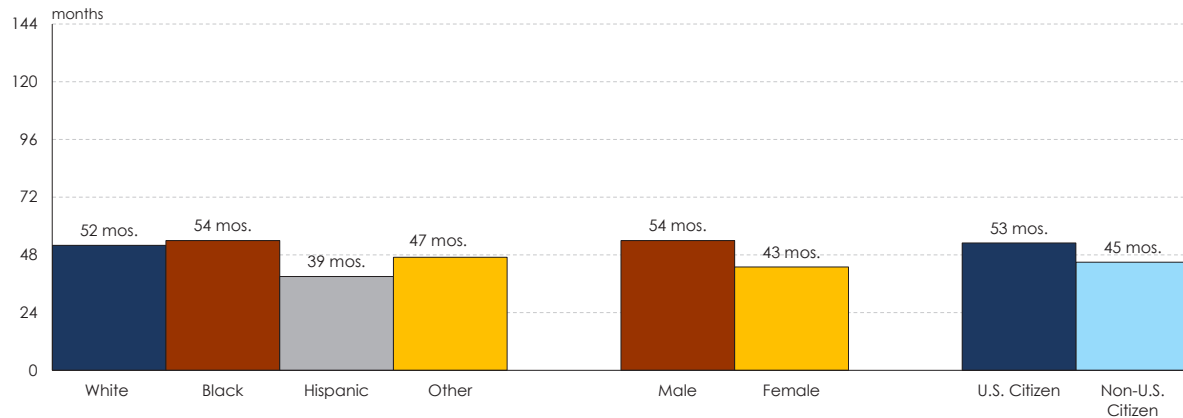
Relief had a notable impact on sentences for offenders convicted of multiple counts under section 1028A. Offenders convicted of multiple counts under section 1028A and subject to the mandatory minimum at sentencing had average sentences of 81 months. Offenders convicted of multiple counts under section 1028A and relieved of the mandatory minimum penalty at sentencing had average sentences of 33 months.





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Figure 23. Average Sentence Length for Offenders Convicted Under 18 U.S.C. § 1028A
By Selected Demographic Characteristics
Fiscal Year 2016



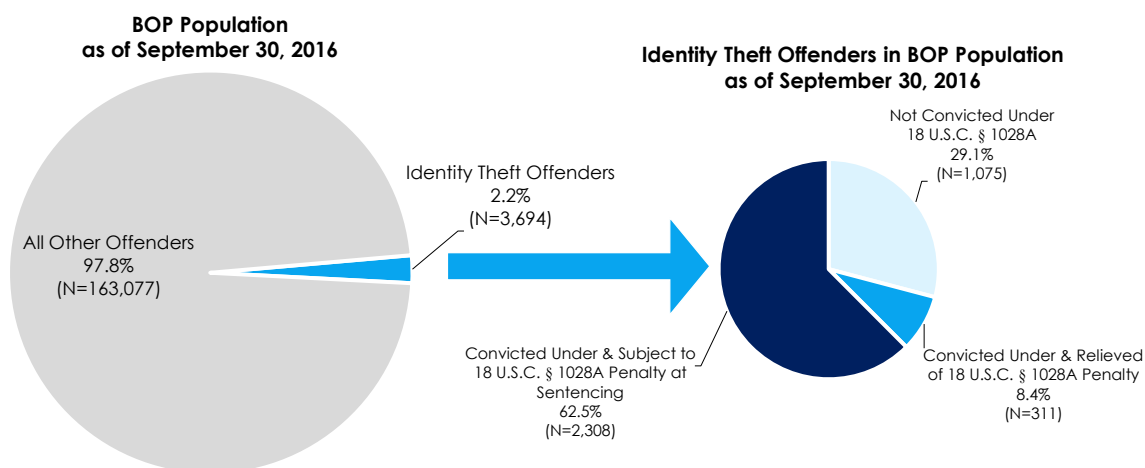
SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Demographics

The Commission also compared the average length of sentences imposed by race, citizenship, and gender. Black offenders had the longest average sentence (54 months), closely followed by White Offenders (52 months), and then Other Race offenders (47 months). Hispanic offenders had the shortest average sentence length (39 months). While Black offenders continued to have the longest average sentence and Hispanic offenders the shortest, this represents a change from fiscal year 2010 when Other Race and Black offenders received average sentences that were somewhat longer (54 and 53 months, respectively) than their White and Hispanic counterparts (45 and 40 months, respectively).

The average sentence for male offenders was almost one year longer than the average sentence for female offenders (54 months compared to 43 months), while the average sentence for United States Citizens was eight months longer than the average sentence for non-United States Citizens (53 months compared to 45 months).

Figure 24. Identity Theft Offenders in the Bureau of Prisons Population
At the End of Fiscal Year 2016

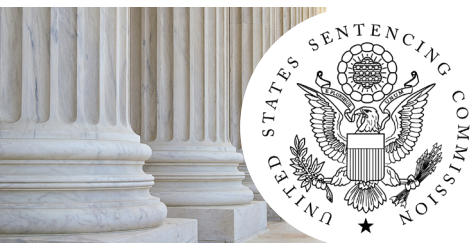


SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafile, USSCBOP.

Identity Theft Offenders in the Federal Prison Population

There have been significant changes to the federal prison population over the past 25 years. There was a steady increase in the total number of offenders in the federal prison population from 1995 through 2012,⁵⁶ which was the result of several factors, including the scope and use of mandatory minimum penalties.⁵⁷ However, in recent years, this trend has reversed. Since the high point at the end of 2012, the number of federal inmates fell to 196,455 on December 31, 2015.⁵⁸

Identity theft offenders accounted for slightly more than two percent (2.2%, n=3,694) of the federal prison population as of September 30, 2016. Of identity theft offenders in prison, the majority (62.5%, n=2,308) were convicted under section 1028A and remained subject to the mandatory minimum penalty at sentencing, while more than one-quarter (29.1%, n=1,075) were convicted of an identity theft offense under a statute other than section 1028A. Only a small percentage of identity theft offenders in prison (8.4%, n=311) were convicted of an offense under section 1028A and relieved of the mandatory minimum penalty, which would be expected given that the rates of relief are relatively low and the mandatory minimum penalty is relatively short.



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5 Conclusion



Conclusion

Since the Commission's 2011 *Mandatory Minimum Report*, offenders convicted of an offense carrying a mandatory minimum penalty for identity theft continued to represent a small portion of both the federal caseload and those cases involving any mandatory minimum penalty. However, the use of section 1028A mandatory minimum penalties has increased. Since the 2011 report, the percentage of identity theft offenders convicted under section 1028A increased by nearly ten percentage points, from 42.6 percent to 53.4 percent (and more than doubled since the Commission began collecting data on these offenses in fiscal year 2006). Section 1028A aggravated identity theft offenses also increased as a portion of all offenses carrying a mandatory minimum penalty, from 4.0 percent in 2010 to 7.2 percent in fiscal year 2016.

At the time that it published the 2011 *Mandatory Minimum Report*, the Commission noted that it was "difficult to issue specific findings and recommendations regarding the operation of section 1028A" because the offense of aggravated identity theft was relatively new, having been established in 2004. With the benefit of additional time and data, however, there are now certain notable trends with respect to the use of section 1028A.

In particular, in the 2011 report, the Commission noted that, in contrast with other offenses carrying mandatory minimum penalties, there were not demographic differences in the application of section 1028A. Specifically, at that time, Black offenders and White offenders each comprised relatively similar proportions of those offenders convicted under section 1028A (40.2% compared to 32.8%). Moreover, each group's proportion of aggravated identity theft offenders was consistent with their proportion of identity theft offenders as a whole. Black offenders represented 39.7 percent of identity theft offenders overall and 40.2 percent of those convicted under section 1028A. Similarly, White offenders represented 29.9 percent of all identity theft offenders and 32.8 percent of section 1028A offenders in fiscal year 2010.

This relationship has now changed. By fiscal year 2016, while Black offenders constituted 49.8 percent of all identity theft offenders, they represented 58.7 percent of identity theft offenders convicted under section 1028A. Conversely, White offenders have become an increasingly smaller proportion of identity theft offenders convicted under section 1028A, having decreased by nearly half from 32.8 percent in fiscal year 2010 to 18.7 percent in fiscal year 2016, a decrease larger than their respective decrease in identity theft offenders overall. Consistent with these shifts, a majority (63.1%) of Black identity theft offenders were convicted under section 1028A, a rate notably higher than the rate for White offenders (47.8%), Other Race offenders (42.0%), and Hispanic offenders (41.1%).



Endnotes



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1 U.S. SENTENCING COMM’N, OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL
JUSTICE SYSTEM (July 2017) [hereinafter 2017 OVERVIEW PUBLICATION], *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

2 U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL
JUSTICE SYSTEM (Oct. 2017), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf; U.S. SENTENCING COMM’N, MANDATORY MINIMUM
PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Mar. 2018) [hereinafter 2018
FIREARMS PUBLICATION], *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf; APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED
PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS (July 2018), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf.

3 U.S. SENTENCING COMM’N, 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL
CRIMINAL JUSTICE SYSTEM [hereinafter 2011 MANDATORY MINIMUM REPORT], *available at* <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

4 USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property;
Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments
Other than Counterfeit Bearer Obligations of the United States). The enhancement for identity theft is found at
§2B1.1(b)(11)(C). There are other offense types, particularly immigration offenses, in which an offender may have
engaged in identity theft or similar conduct but was not convicted of identity theft under section 1028 or aggravated
identity theft under section 1028A. *See, e.g.*, USSG §§2L2.1 (Trafficking in a Document Relating to Naturalization,
Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship
or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) and 2L2.2
(Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use;
False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly
Using a United States Passport). Those cases are not included in the analyses for this publication because they are
not convictions under an identity theft statute, and the guideline provisions applicable to such offenses do not include
enhancements for identity theft. As a result, there is no reliable way to identify such cases as having involved identity
theft. The Commission’s analysis of identity theft offenses, therefore, may be under-inclusive.

5 18 U.S.C. § 1028A(a)(1). Subsection (a)(2) provides for a mandatory five-year penalty if the defendant
“during and in relation to any felony [terrorism offense] enumerated in section 2332b(g)(5)(B), knowingly transfer[red],
possess[ed], or use[d], without lawful authority, a means of identification of another person or a false identification
document.” This provision and the five-year penalty were applied in only one case in fiscal year 2016 and are
therefore not discussed in this publication.

6 Pub. L. No. 108-275, § 2, 118 Stat. 831 (2004).

7 18 U.S.C. § 1028A(a)(1).

8 The term “means of identification” means “any name or number that may be used, alone or in conjunction

with any other information, to identify a specific individual,” and includes names, social security numbers, dates of birth, driver’s license numbers, government identification numbers, employer or taxpayer identification numbers, biometric data (*e.g.*, fingerprint, voice print, retina or iris image), electronic identifying information, or access device.” 18 U.S.C. § 1028(d)(7). The term access device means “any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number . . . or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value” 18 U.S.C. § 1029(e)(1).

9 18 U.S.C. § 1028A(c)(1) (listing 18 U.S.C. § 641 (relating to theft of public money, property, or rewards), 18 U.S.C. § 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), and 18 U.S.C. § 664 (relating to theft from employee benefit plans)).

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

11 18 U.S.C. § 1028A(c)(2) (listing 18 U.S.C. § 911 (relating to false personation of citizenship)); 18 U.S.C. § 1028A(c)(6) (any provision in chapter 69 of title 18, United States Code (relating to nationality and citizenship)).

12 18 U.S.C. § 1028A(c)(7) (listing any provision in chapter 75 of title 18, United States Code (relating to passports and visas)).

13 18 U.S.C. § 1028A(c)(9) (listing section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. §§ 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card)); 18 U.S.C. § 1028A(c)(10) (listing any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. § 1321 et seq.) (relating to various immigration offenses)).

14 18 U.S.C. § 1028A(b)(2).

15 *Id.* § 1028A(b)(3).

16 *Id.* § 1028A(a)(1).

17 *Id.* § 1028A(b)(4).

18 *See* 18 U.S.C. § 924(c); *Deal v. United States*, 508 U.S. 129 (1993). For further discussion of the “stacking”





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requirement and its impact on sentencing of firearms offenders, see 2018 FIREARMS PUBLICATION, *supra* note 2, at 8–9, 19–20, 27, 32–33, 35.

19 *See* 18 U.S.C. § 1028(a).

20 For example, a person violates section 1028 if he or she, among other acts, “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit . . . or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.” 18 U.S.C. § 1028(a)(7). *See* United States v. Bonilla, 579 F.3d 1233 (11th Cir. 2009) (concluding that the defendant’s indictment and conviction of both identity theft in violation of section 1028(a)(7) and aggravated identity theft in violation of section 1028A(a)(1) violated the Double Jeopardy Clause).

21 For example, in addition to using a means of identification in connection with certain offenses, section 1028 proscribes the unlawful production or transfer of an identification document, authentication feature, or a false identification document. *See* 18 U.S.C. § 1028(a)(1) & (2). This conduct does not necessarily give rise to criminal liability for aggravated identity theft under section 1028A.

22 *See, e.g.*, 18 U.S.C. § 1029 (access device fraud), 18 U.S.C. § 1343 (wire fraud), and 42 U.S.C. § 408 (a)(7) (fraudulent use of a social security account number).

23 556 U.S. 646 (2009).

24 *Id.* at 657.

25 *See, e.g.*, United States v. Foster, 740 F.3d 1202, 1206 & n.3 (concluding that because section 1028(a)(7) is identical to 1028A(a)(1), the two provisions require the same level of intent and citing United States v. Berry, 369 F. App’x 500, 501–02 (4th Cir. 2010) and United States v. Bruguier, 735 F.3d 754, 760 (8th Cir. 2013) (*en banc*) for the same proposition).

26 USSG §2B1.6 (Aggravated Identity Theft).

27 USSG §2B1.6, comment. (n.1(B)).

28 USSG §2B1.1(b)(11)(C).

29 The guideline enhancement requires the commission of an underlying offense, that is, an offense covered by the §2B1.1 guideline. Those offenses include many of the enumerated felonies in section 1028A, such as mail fraud, wire fraud, bank fraud, and various social security frauds. Second, many, though not all, of the acts that trigger the guideline enhancement requires the commission of an underlying offense, that is, an offense covered by the §2B1.1 guideline. Those offenses include many of the enumerated felonies in section 1028A, such as mail fraud, wire fraud, bank fraud, and various social security frauds. The enhancement and section 1028A are not entirely coextensive.

For example, if the offender used the means of identification only to purchase consumer goods or merely forged a signature to cash a stolen check, he or she may have committed aggravated identity theft, but §2B1.1(b)(11)(C) likely would not apply. *See* USSG §2B1.1, comment. (n.10(C)(ii)&(iii)).

30 USSG §2B1.1(b)(1).

31 USSG §2B1.1(b)(2).

32 USSG §2B1.1(b)(10).

33 *See* 18 U.S.C. § 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.”).

34 *See* USSG §5K1.1.

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

36 2011 MANDATORY MINIMUM REPORT, *supra* note 3, at 366–67.

37 *Id.* at 366.

38 *Id.*

39 In fiscal year 2016, the Commission’s datafile included 67,742 cases and, of those cases, the Commission received complete guideline application information and sufficient documentation for analysis in the 62,251 cases considered for this publication. The methodology used in this publication, with respect to records collection and data analysis, is described in detail in the 2017 *Overview Publication*, *supra* note 1, at 28.

40 *Id.* at 29.

41 The highest number of cases with multiple counts of conviction under section 1028A was in the Eastern District of Pennsylvania (n=23; 21.7%), followed by the Southern District of Florida (n=9; 8.5%). A complete distribution of offenders convicted under section 1028A is provided for each circuit and district in Appendix A.

42 Of these offenses, more than half (50.3%) were categorized as identity theft and nearly one-quarter were (24.0%) credit card fraud. The rest were fraud against a financial institution (14.7%) or “other” (11.0%).



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43 These offenses were sentenced under a guideline at Chapter Two, Part L.

44 These offenses were sentenced under a guideline at Chapter Two, Part T. Some tax-related offenses pertaining to claims for false or fraudulent refunds of income tax are governed by the guidelines pertaining to fraud. These offenses are included in the 88.8% of identity theft offenders sentenced under §2B1.1.

45 Offenses included within the “other” category were sentenced under a range of guidelines: §§2A3.5, 2A6.2, 2B3.1, 2B3.2, 2B5.1, 2C1.1, 2D1.1, 2E1.1, 2K2.1, 2M6.1, and 2S1.1.

46 Offenders convicted of only a section 1028A offense are sentenced pursuant to USSG §2B1.6 (Aggravated Identity Theft) which states, in part, that “the guideline sentence is the term of imprisonment required by statute.” Because there is no other offense of conviction, there is no Chapter Two guideline or substantive statutes of conviction to indicate the nature of the other underlying conduct. In order to determine the nature of the underlying felony offense, the Commission reviewed charging documents related to the section 1028A count for each case to determine which of the enumerated statutes was implicated in that count and assigned cases to an offense category.

47 The offense types for the remaining offenders (20.4%) were embezzlement/theft, government benefits, healthcare, immigration, money laundering, mortgage, and tax.

48 The total number of counts in these six cases ranged from a low of two to a high of five.

49 The total number of counts in these five cases ranged from a low of three to a high of 14.

50 The total number of counts in these eight cases ranged from a low of two to a high of 14.

51 The total number of counts in these three cases ranged from a low of two to a high of five.

52 The amount of the loss and number of victims are not available for those offenders because the applicable guideline provisions did not call for the sentencing court to make those calculations to determine the offense level.

53 In 2015, the Commission amended the loss table in §2B1.1 (to account for inflation), as well as the enhancements for causing financial harm to victims (§2B1.1(b)(2)) and for using sophisticated means (§2B1.1(b)(10)(c)). See USSG App. C, amend. 791 (effect. Nov. 1, 2015) (loss table); USSG App. C, amend. 792 (effect. Nov. 1, 2015) (financial harm to victims and sophisticated means enhancements). The victims table was revised to specifically incorporate financial hardship to victims and reduce the number of victims required to trigger the enhancement, and the sophisticated means enhancement was amended to clarify that application of the enhancement requires that the defendant intentionally caused the conduct by using sophisticated means. USSG App. C, amend. 792. Although the data in Table 4 includes only fiscal year 2016 data, it reflects both offenders sentenced under the amended *Guidelines Manual*, as well as offenders sentenced under an earlier, unamended version, because USSG §1B1.11 requires that the court use the manual in effect on the date the defendant committed the offense rather than on the date of sentencing if use of the latter would violate the *ex post facto* clause of the United States Constitution. See §1B1.11(b)(1). In fiscal

year 2016 the majority (82.5%) of identity theft offenders sentenced under §2B1.1 were sentenced under the amended version of the guideline.

To assure that the trends reflected in Table 4 were not impacted by the 2015 amendment, the Commission separately analyzed the same data for those offenders sentenced under both the pre- and post-amendment version of §2B1.1. Although there were minor differences in the specific application rates of each guideline provision, the overall relationship between identity theft offenders convicted under and not convicted under section 1028A remains consistent. When analyzing only those offenders sentenced using the amended provisions, the median loss amount was more than double for offenders convicted under section 1028A compared to those not facing the mandatory minimum penalty (\$192,003 compared to \$86,393). The rates of application for both the victims and sophisticated means enhancements were likewise higher for those convicted under section 1028A (67.5% compared to 50.2%, and 19.8% compared to 17.1%, respectively).

54 The “Other Race” category includes offenders of Native American, Alaskan Native, and Asian or Pacific Islander origin. Of the offenders analyzed for this study, there were 2,472 offenders identified as “Other Race” offenders: 1,084 (43.8%) were of Asian/Pacific Islander origin, 1,175 (47.5%) were Native-American/Alaskan Native, and 213 (8.7%) were of other origin. For offenders convicted under section 1028A in fiscal year 2016, the “Other Race” category consists of Asian/Pacific Islander (n=26), other origin (n=7), and Native-American/Alaskan Native (n=1).

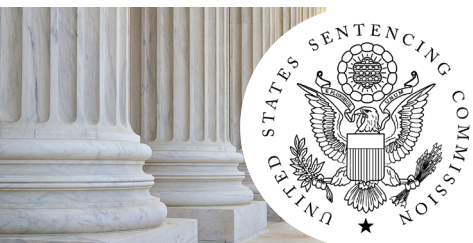
55 *See supra* at 20.

56 These population figures were obtained from the Bureau of Prisons data and reflect complete population figures. The remaining federal prison population analysis in this section is based on matching the BOP data with Commission data and therefore may reflect fewer offenders.

57 *See* 2011 MANDATORY MINIMUM REPORT, at Ch.4. In the 2011 *Mandatory Minimum Report*, the Commission noted that these factors have included changes to mandatory minimum penalties themselves, both in terms of number and scope, as well as other systemic changes to the federal criminal justice system, such as the expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, and higher rates of imposition of sentences of imprisonment. *See id.*

58 *See* 2017 OVERVIEW PUBLICATION, *supra* note 1, at 48–49.





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Appendix



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Table A-1. Identity Theft Offenders and Convictions under 18 U.S.C. § 1028A By Circuit and District
Fiscal Year 2016

CIRCUIT District	All Identity Theft Offenders		Offenders with 18 U.S.C. § 1028A Convictions		Offenders with Multiple Counts of Conviction of 18 U.S.C. § 1028A	
	Number	Percent ¹	Number	Percent ²	Number	Percent ³
Total	1,831	2.9	978	53.4	106	10.8
D.C. CIRCUIT	4	1.6	0	0.0	0	0.0
District of Columbia	4	1.6	0	0.0	0	0.0
FIRST CIRCUIT	56	2.9	23	41.1	3	13.0
Maine	4	2.0	1	25.0	0	0.0
Massachusetts	17	3.7	5	29.4	1	20.0
New Hampshire	10	5.7	0	0.0	0	0.0
Puerto Rico	22	2.2	16	72.7	1	6.3
Rhode Island	3	3.3	1	33.3	1	100.0
SECOND CIRCUIT	112	3.4	62	55.4	4	6.5
Connecticut	1	0.3	1	100.0	0	0.0
New York						
Eastern	19	2.5	2	10.5	0	0.0
Northern	8	2.9	5	62.5	1	20.0
Southern	68	5.3	50	73.5	3	6.0
Western	16	3.6	4	25.0	0	0.0
Vermont	0	0.0	0	0.0	0	0.0
THIRD CIRCUIT	104	5.1	57	54.8	23	40.4
Delaware	2	2.9	0	0.0	0	0.0
New Jersey	24	3.7	7	29.2	0	0.0
Pennsylvania						
Eastern	56	9.8	43	76.8	23	53.5
Middle	9	3.0	3	33.3	0	0.0
Western	13	3.6	4	30.8	0	0.0
Virgin Islands	0	0.0	0	0.0	0	0.0
FOURTH CIRCUIT	198	4.4	137	69.2	13	9.5
Maryland	52	7.9	48	92.3	4	8.3
North Carolina						
Eastern	23	4.2	20	87.0	0	0.0
Middle	15	3.6	13	86.7	0	0.0
Western	16	2.5	9	56.3	1	11.1
South Carolina	29	4.7	7	24.1	1	14.3
Virginia						
Eastern	50	6.1	36	72.0	6	16.7
Western	9	3.0	3	33.3	1	33.3
West Virginia						
Northern	3	1.0	1	33.3	0	0.0
Southern	1	0.5	0	0.0	0	0.0

Table A-1 continued. Identity Theft Offenders and Convictions under 18 U.S.C. § 1028A By Circuit and District
Fiscal Year 2016

CIRCUIT District	All Identity Theft		Offenders with 18 U.S.C. § 1028A Convictions		Offenders with Multiple Counts of Conviction of 18 U.S.C. § 1028A	
	Number	Percent ¹	Number	Percent ²	Number	Percent ³
FIFTH CIRCUIT	254	1.7	82	32.3	7	8.5
Louisiana						
Eastern	18	5.5	6	33.3	1	16.7
Middle	24	15.0	4	16.7	1	25.0
Western	15	7.2	2	13.3	0	0.0
Mississippi						
Northern	4	2.5	3	75.0	0	0.0
Southern	17	7.5	6	35.3	1	16.7
Texas						
Eastern	37	4.6	14	37.8	2	14.3
Northern	34	2.6	9	26.5	0	0.0
Southern	42	0.7	27	64.3	1	3.7
Western	63	1.1	11	17.5	1	9.1
SIXTH CIRCUIT	145	3.3	52	35.9	7	13.5
Kentucky						
Eastern	16	3.7	8	50.0	0	0.0
Western	8	2.8	4	50.0	4	100.0
Michigan						
Eastern	31	3.6	10	32.3	0	0.0
Western	14	4.4	4	28.6	0	0.0
Ohio						
Northern	20	3.6	14	70.0	2	14.3
Southern	21	4.4	3	14.3	1	33.3
Tennessee						
Eastern	16	2.2	5	31.3	0	0.0
Middle	9	4.4	1	11.1	0	0.0
Western	10	2.2	3	30.0	0	0.0
SEVENTH CIRCUIT	80	3.6	37	46.3	2	5.4
Illinois						
Central	6	2.3	3	50.0	0	0.0
Northern	25	4.0	10	40.0	0	0.0
Southern	4	1.3	3	75.0	0	0.0
Indiana						
Northern	19	6.7	9	47.4	1	11.1
Southern	4	1.2	3	75.0	1	33.3
Wisconsin						
Eastern	17	5.7	8	47.1	0	0.0
Western	5	4.0	1	20.0	0	0.0





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Table A-1 continued. Identity Theft Offenders and Convictions under 18 U.S.C. § 1028A By Circuit and District
Fiscal Year 2016

CIRCUIT District	All Identity Theft Offenders		Offenders with 18 U.S.C. § 1028A Convictions		Offenders with Multiple Counts of Conviction of 18 U.S.C. § 1028A	
	Number	Percent ¹	Number	Percent ²	Number	Percent ³
EIGHTH CIRCUIT	169	3.6	63	37.3	8	12.7
Arkansas						
Eastern	1	0.3	1	100.0	0	0.0
Western	6	2.4	3	50.0	0	0.0
Iowa						
Northern	4	1.2	4	100.0	0	0.0
Southern	4	1.2	0	0.0	0	0.0
Minnesota	43	8.9	27	62.8	1	3.7
Missouri						
Eastern	58	7.8	22	37.9	7	31.8
Western	18	2.2	2	11.1	0	0.0
Nebraska	27	5.1	1	3.7	0	0.0
North Dakota	3	0.8	1	33.3	0	0.0
South Dakota	5	1.2	2	40.0	0	0.0
NINTH CIRCUIT	193	1.8	96	49.7	18	18.8
Alaska	3	1.8	3	100.0	2	66.7
Arizona	6	0.1	1	16.7	0	0.0
California						
Central	62	7.2	20	32.3	4	20.0
Eastern	34	5.2	24	70.6	3	12.5
Northern	21	4.9	7	33.3	2	28.6
Southern	8	0.4	3	37.5	0	0.0
Guam	3	4.6	2	66.7	0	0.0
Hawaii	1	0.7	0	0.0	0	0.0
Idaho	12	4.7	6	50.0	0	0.0
Montana	5	1.6	5	100.0	3	60.0
Nevada	16	4.1	7	43.8	1	14.3
Northern Mariana Islands	0	0.0	0	0.0	0	0.0
Oregon	6	1.7	5	83.3	0	0.0
Washington						
Eastern	2	0.7	1	50.0	0	0.0
Western	14	3.2	12	85.7	3	25.0
TENTH CIRCUIT	70	1.0	30	42.9	3	10.0
Colorado	12	2.6	2	16.7	0	0.0
Kansas	7	1.5	6	85.7	1	16.7
New Mexico	7	0.1	4	57.1	0	0.0
Oklahoma						
Eastern	3	3.0	0	0.0	0	0.0
Northern	7	3.3	4	57.1	1	25.0
Western	19	6.4	2	10.5	0	0.0
Utah	13	2.1	11	84.6	1	9.1
Wyoming	2	0.9	1	50.0	0	0.0

Table A-1 continued. Identity Theft Offenders and Convictions under 18 U.S.C. § 1028A By Circuit and District
Fiscal Year 2016

CIRCUIT District	All Identity Theft Offenders		Offenders with 18 U.S.C. § 1028A Convictions		Offenders with Multiple Counts of Conviction of 18 U.S.C. § 1028A	
	Number	Percent ¹	Number	Percent ²	Number	Percent ³
ELEVENTH CIRCUIT	446	7.9	339	76.0	18	5.3
Alabama						
Middle	22	14.6	9	40.9	0	0.0
Northern	18	5.4	11	61.1	2	18.2
Southern	1	0.3	0	0.0	0	0.0
Florida						
Middle	71	5.1	45	63.4	2	4.4
Northern	30	12.4	27	90.0	2	7.4
Southern	239	11.2	203	84.9	9	4.4
Georgia						
Middle	7	2.3	5	71.4	0	0.0
Northern	53	10.1	34	64.2	3	8.8
Southern	5	1.8	5	100.0	0	0.0

¹ The percent of identity theft offenders is presented as a share of all federal offenders included in the study for each location.

² The percent of offenders with a conviction under 18 U.S.C. § 1028A is presented as a share of all identity theft offenders included in the study for each location.

³ The percent of offenders with multiple counts of conviction under 18 U.S.C. § 1028A is presented as a share of all identity theft offenders with at least one conviction under 18 U.S.C. § 1028A for each location.



