



United States Sentencing Commission
July 2022

OLDER OFFENDERS in the Federal System



United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002
www.ussc.gov

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Ex Officio

Jonathan J. Wroblewski
Ex Officio



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Office of Research and Data

July 2022

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Lindsey Jeralds, M.A.
Research Associate

Julie Zibulsky, J.D.
Assistant General Counsel

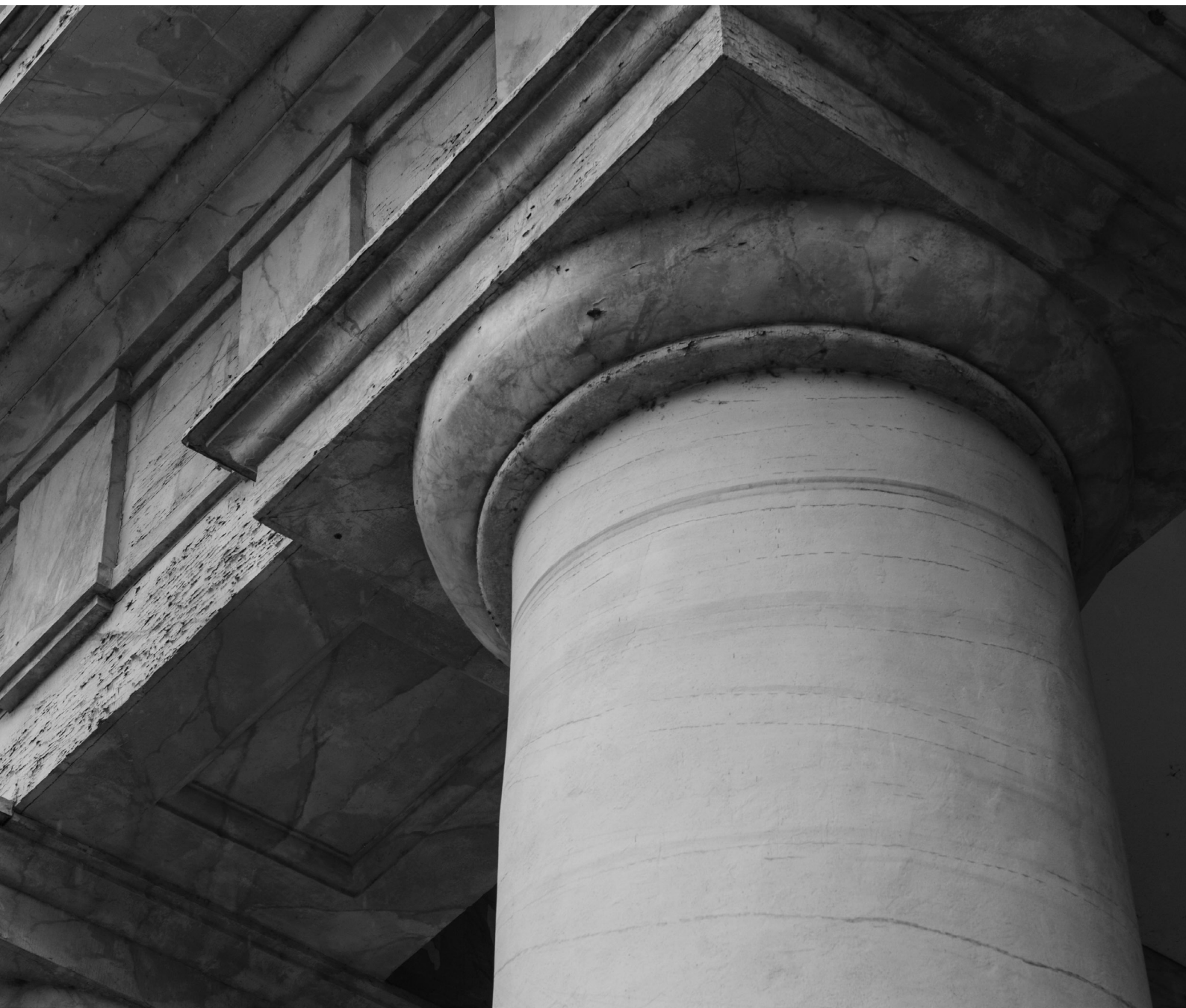


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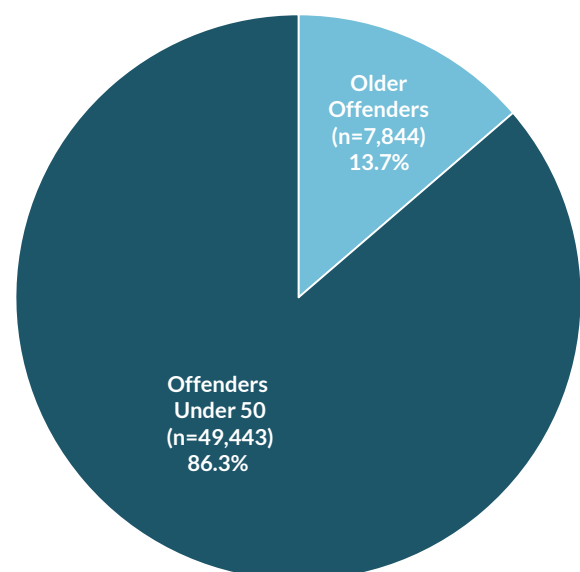
1 Introduction

The United States Census Bureau estimates that roughly one-third of U.S. persons are 50 years of age or older.¹ However, less than 14 percent (13.7%) of all federal offenders sentenced in fiscal year 2021 were in this age group (Figure 1). The federal sentencing guidelines specifically state that age may be a consideration at sentencing, yet there is little information published about older federal offenders or how they are sentenced. In this report, the United States Sentencing Commission (the “Commission”) presents information on offenders who were aged 50 or older at the time they were sentenced in the federal system.

Congress requires courts to consider several factors when determining the appropriate sentence to be imposed in federal cases, among them the “history and characteristics of the defendant.”² The sentencing guidelines also specifically authorize judges to consider an offender’s age when determining whether to depart from the federal sentencing guidelines.³

This report provides an analysis of the relatively small number of older offenders who are sentenced each year for a federal felony or Class A misdemeanor offense. In particular, the report examines older federal offenders who were sentenced in fiscal year 2021 and the crimes they committed, then assesses whether age was given a special consideration at sentencing. This report specifically focuses on three issues that could impact the sentencing of older offenders: age and infirmity, life expectancy, and the risk of recidivism.

**Figure 1. Proportion of Federal Older Offenders
Fiscal Year 2021**



Defining Older Offenders

The Commission used two approaches to define “older offenders” in the federal system. First, the Commission reviewed existing literature on age and offending. Researchers most frequently use 50 years of age⁴ or older to define the term “older” offenders.⁵ Though other ages have been used in the literature, such as 65, this age is typically used when discussing “elderly” offenders, as opposed to older offenders.⁶

Previous studies provided three salient reasons for defining older offenders as aged 50 or older:

1) Most offenders are young and therefore could feel relatively old at a younger age and physical changes may stand out earlier;⁷

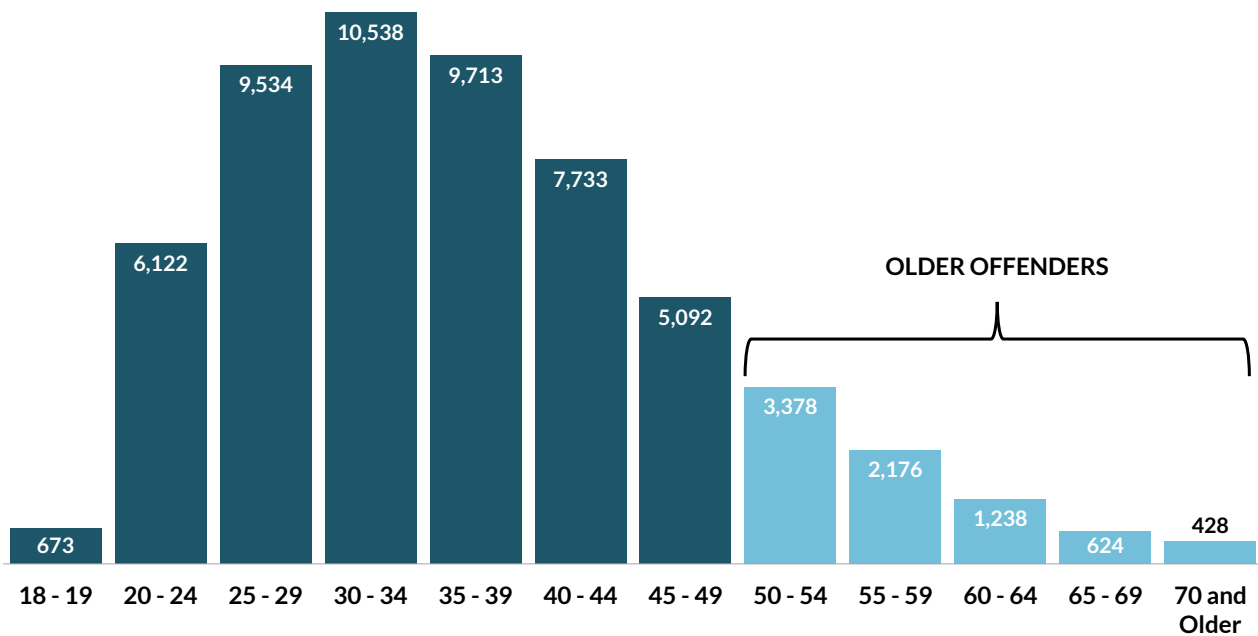
2) The aging process accelerates once an offender is incarcerated⁸ and offenders can feel relatively old at a younger age⁹ and physical changes may stand out earlier;¹⁰

3) Decline in cognitive functioning—as a marker of aging—begins most prevalently around the age of 50.¹¹

Second, the Commission also used a data-based approach to define older offenders. Looking at the age distribution of offenders in the federal system, the average offender age is 37 (median age 35 years old)—a statistic that has been relatively stable over the past five years.

The age distribution of offenders begins to skew starting around age 50, with offenders at or over this age outside the normal age distribution of most federal offenders (Figure 2).

**Figure 2. Age Distribution of Federal Offenders
Fiscal Year 2021**



2 Key Findings

1 Older offenders commit fraud and sexual offenses at higher rates than all other offenders.

- Older offenders had roughly three times the rate of fraud offenses (17.8%) and a greater proportion of sex offenses (7.3%), compared to offenders under age 50 (6.4% and 4.1%, respectively).
- The rate of offenders committing sex offenses increased incrementally as the age of the offender increased. Offenders 70 and older committed sex offenses at nearly three times the rate (11.9%) of offenders under the age of 50 (4.1%)

2 Roughly 40 percent (40.7%) of older offenders had a physical disability prior to arrest for the instant offense.

- The rate of offenders with a disability increased incrementally as offenders' age at sentencing increased, so that roughly two-thirds (63.3%) of offenders 70 and older had a physical disability.

3 About one-third (31.2%) of older offenders had used drugs or misused prescription drugs in the year prior to arrest.

- Among older drug users, the most used substances were marijuana (32.4%) and methamphetamine (28.5%).

4 Older offenders have less extensive criminal histories, compared to all other federal offenders.

- More than half (52.5%) of older offenders were in Criminal History Category (CHC) I, the lowest criminal history category, compared to 37.5 percent of offenders under 50 years of age.

5 The overwhelming majority (80.1%) of older offenders were sentenced to prison. However, older offenders were also more likely to receive fines and alternative sentences, compared to offenders under age 50.

- The oldest offenders were the most likely to receive an alternative sentence or fine; roughly a third (31.3%) of offenders 65 through 69 and more than 40 percent (42.1%) of offenders 70 and older received an alternative sentence or fine.
- The oldest offenders were most likely to have received sentences that exceed life expectancy. Nearly forty percent (38.6%) of offenders who were sentenced at 70 years of age or older received a sentence that exceeds their life expectancy, compared to 7.1 percent of offenders 65 through 69, and less than one percent of offenders under the age of 50.

6 In fiscal year 2021, a nearly equal proportion of older offenders (36.7%) were sentenced within the guideline range as received a below range variance (35.5%).

- The proportion of offenders receiving variances increased as an offender's age at sentencing increased, with the oldest offenders being the most likely to receive a variance.
- Offenders 65 and older were nearly as likely to receive a variance (48.9%) as they were to receive a sentence under the *Guidelines Manual* (51.1%).

7 The recidivism rate of older offenders (21.3%) was less than half that of offenders under the age of 50 (53.4%).

- As offenders' age at sentencing increased, recidivism rates decreased.
- Recidivism events for older offenders were less serious, compared to offenders under the age of 50.
- Older offenders take a longer time to recidivate, compared to their younger peers.

3

Legal Background

Consideration of Age Under the Guidelines Manual and Statutory Sentencing Factors

In the Sentencing Reform Act of 1984, Congress directed the Commission to consider whether certain enumerated factors—including a defendant’s age—“have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance.”¹² The *Guidelines Manual* identifies both age and physical condition as potentially relevant sentencing factors, although it does not define what constitutes “older” or “advanced” age.¹³

Specifically, §5H1.1 provides that age “may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.”¹⁴ With respect to older age specifically, §5H1.1 further provides that “[a]ge may be a reason

to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.”¹⁵

Another provision, §5H1.4, similarly provides that the defendant’s physical condition may be a reason to depart downward if the condition “is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines,” such as “in the case of a seriously infirm defendant [for whom] home detention may be as efficient as, and less costly than, imprisonment.”¹⁶

Likewise, 18 U.S.C. § 3553(a), which lists the factors courts must consider when imposing a sentence, includes similar offender characteristics.¹⁷ Section 3553(a) requires the court to consider “the history and characteristics of the defendant” and “the need for the sentence

imposed to provide . . . medical care[] or other correctional treatment in the most effective manner.”¹⁸ The same section also requires that the sentencing court consider pertinent policy statements issued by the Commission.¹⁹

District courts typically have considered three age-related factors in determining an appropriate sentence: physical limitations or infirmity, life expectancy, and reduced rates of recidivism. However, the weight an offender’s age is afforded in the court’s sentencing decision varies depending on the circumstances of the individual offender and the nature of the offense.

Older Age and Infirmity

An offender’s older age and infirm status may be relevant when determining the type of sentence to impose and the appropriate length of that sentence, but courts often deny a request for a downward departure or variance, or grant only a modest one, to defendants whose conditions can be managed within the correctional facility. For example, the Seventh Circuit upheld a 78-month sentence of imprisonment for a 60-year-old wire fraud defendant who suffered from asthma, an irregular heartbeat, and fused vertebrae in her spine.²⁰ Rejecting the defendant’s argument that the district

court had not properly considered her age and condition, the Seventh Circuit concluded that the sentence was reasonable because these factors “were not exceptional.”²¹

Typically, age and infirmity justified a downward departure or variance in cases involving relatively serious physical conditions.²² For example, the Eighth Circuit upheld a three-year probationary sentence for a 56-year-old drug trafficking defendant who suffered from a long list of serious physical and mental health conditions.²³ He had undergone multiple heart surgeries and a graft bypass surgery in his right lower leg, suffered from severe coronary artery disease, severe vascular disease, asthma, post-traumatic stress disorder, sleep apnea, diabetes, nerve root disease, and bronchitis, and was “taking eleven prescription drugs and multiple forms of eye drops.”²⁴

Life Expectancy and De Facto Life Sentences

As with other age-related considerations, courts consider an offender’s life expectancy as one of many factors weighed in the sentencing decision. The issue of life expectancy is relevant among older offenders because they generally have a shorter life expectancy

than younger offenders.²⁵ The Commission uses the term “*de facto* life sentence” to refer to a sentence so long that the sentence is, for all practical purposes, a life sentence.²⁶ Previous Commission research has defined a *de facto* life sentence as 470 months or more; however, for some older offenders, even a relatively short term-of-years sentence will exceed the offender’s life expectancy and is, therefore, the functional equivalent of a life sentence.²⁷ Recognizing that “death in prison is not to be ordered lightly,” courts often consider evidence of life expectancy in cases in which a sentence may amount to a life sentence.²⁸ Although courts often afford special consideration to offenders facing sentences that potentially exceed their life expectancy,²⁹ courts also regularly conclude that such sentences are reasonable when considered in the context of the specific defendant’s circumstances.³⁰

Older Age and Recidivism

Courts often acknowledge the lower risk of recidivism among older offenders, which is a consideration at sentencing. However, age can “cut both ways in the sentencing calculus.”³¹ Courts reason that while the “propensity to engage in criminal activity declines with age,” engaging in criminal activity at an older age may be evidence that the defendant is

“one of the few oldsters who will continue to engage in criminal activity until they drop.”³² For example, the Seventh Circuit affirmed a 78-month, bottom-of-the-range sentence for a 70-year-old offender who was convicted of possession of a firearm by an unlawful user of a controlled substance.³³ The court explained that the offender was “devoted to guns and drugs,” hosted “parties in his home at which he and his guests consume[d] crack cocaine and marijuana,” and was “in good health” and “physically capable of continuing indefinitely to engage in the illegal activities for which he was convicted and sentenced.”³⁴

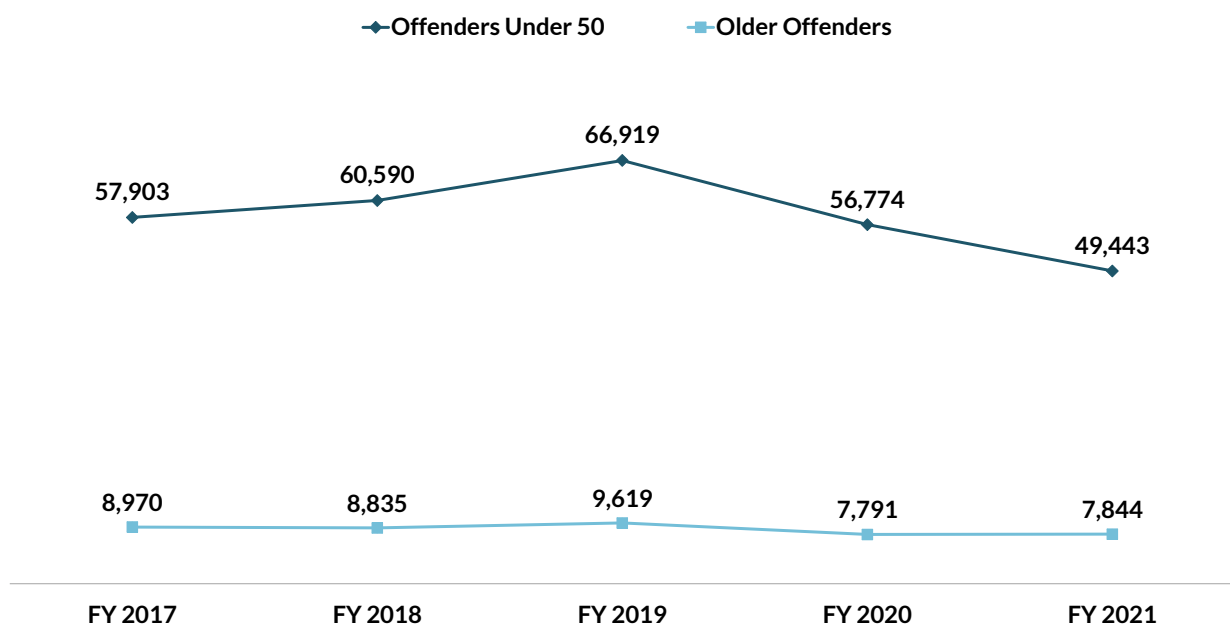
Commission studies have repeatedly demonstrated an inverse relationship between age and recidivism: as an offender’s age at sentencing increased, the rate of a later rearrest decreased.³⁵ Further, for those older offenders who were rearrested, a longer amount of time elapsed between the offender’s release from prison and rearrest,³⁶ and the offenses committed after release were less serious, compared to younger offenders.³⁷

4 Older Offenders in the Federal System

Between fiscal years 2017 and 2021, federal courts sentenced a total of 334,688 offenders for a felony or Class A misdemeanor. Of these offenders, 43,059 (12.9%) were older offenders. The proportion of older offenders in the federal system has been relatively steady across the past five fiscal years,

accounting for no more than 14 percent of all federal offenders sentenced in any given year (Figure 3). In fiscal year 2021, the Commission received sentencing information on 57,287 felony or Class A misdemeanor offenses.³⁸ Of those offenders, 7,844 (13.7%) were sentenced at 50 years of age, or older.

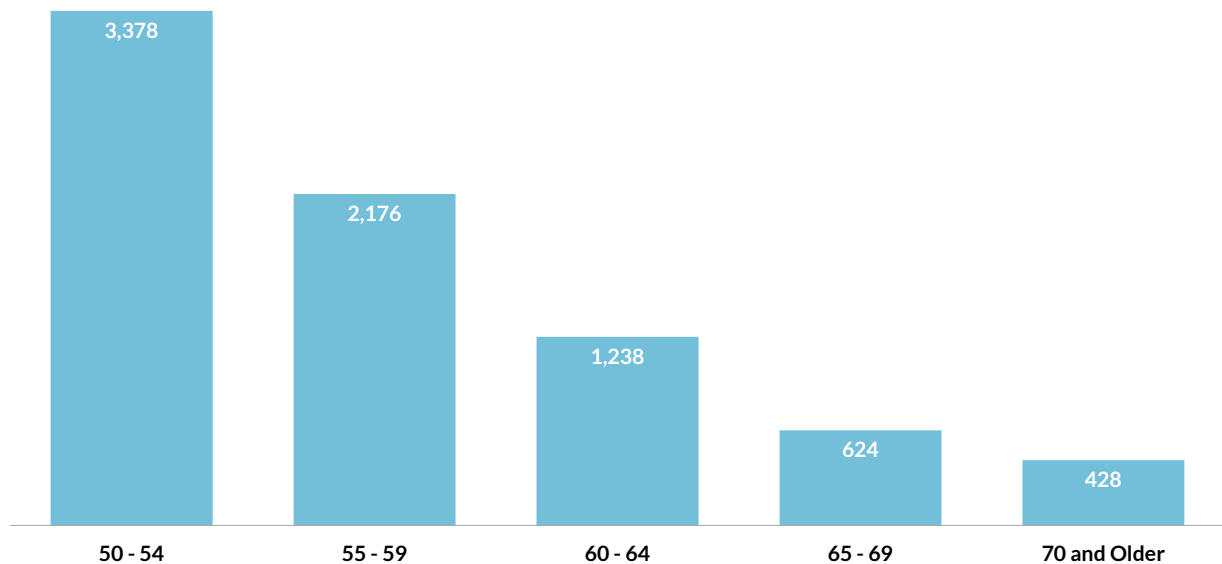
Figure 3. Older Offenders in the Federal Caseload Over Time
Fiscal Years 2017 – 2021



Older offenders sentenced in fiscal year 2021 ranged in age from 50 to 88 with an average age of 57 years. As depicted in Figure 4, the number of offenders decreased as the age of the

offender increased. The greatest number of older offenders were age 50 through 54 (n=3,378). By comparison, there were relatively few (n=428) offenders aged 70 and older.

**Figure 4. Distribution of Older Offenders by Age Categories
Fiscal Year 2021**

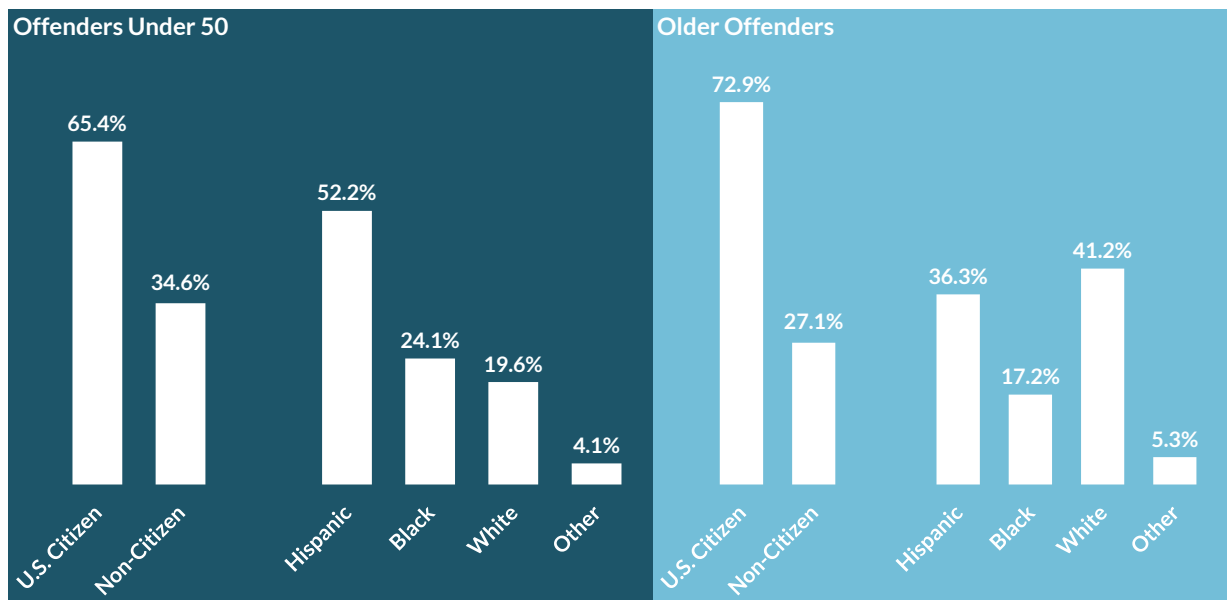


Older Offender Demographics

Demographic characteristics of older offenders, such as citizenship and race and ethnicity, differed from the rest of the federal offender population. Fewer older offenders were non-citizens (27.1%), compared to all other offenders (34.6%) (Figure 5). The racial composition of older

offenders also differed from that of the rest of the federal population. Older offenders were twice as likely to be White (41.2%) than offenders under the age of 50 (19.6%). Fewer older offenders were Hispanic (36.3%) or Black (17.2%), compared to offenders under the age of 50 (52.2% and 24.1%, respectively).

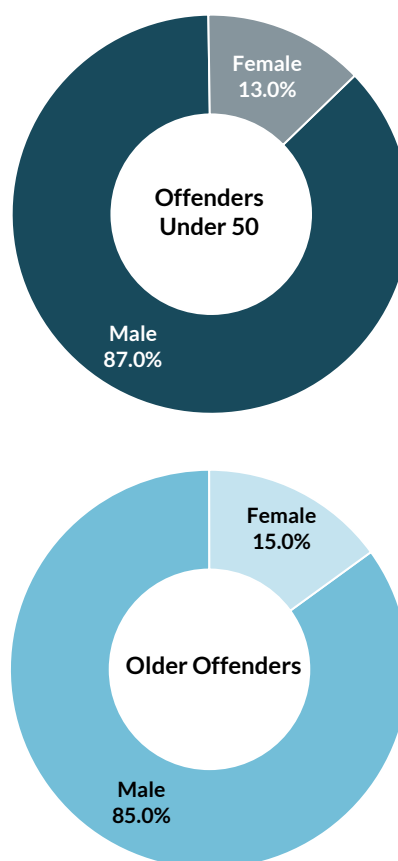
Figure 5. Demographic Characteristics by Age Category
Fiscal Year 2021



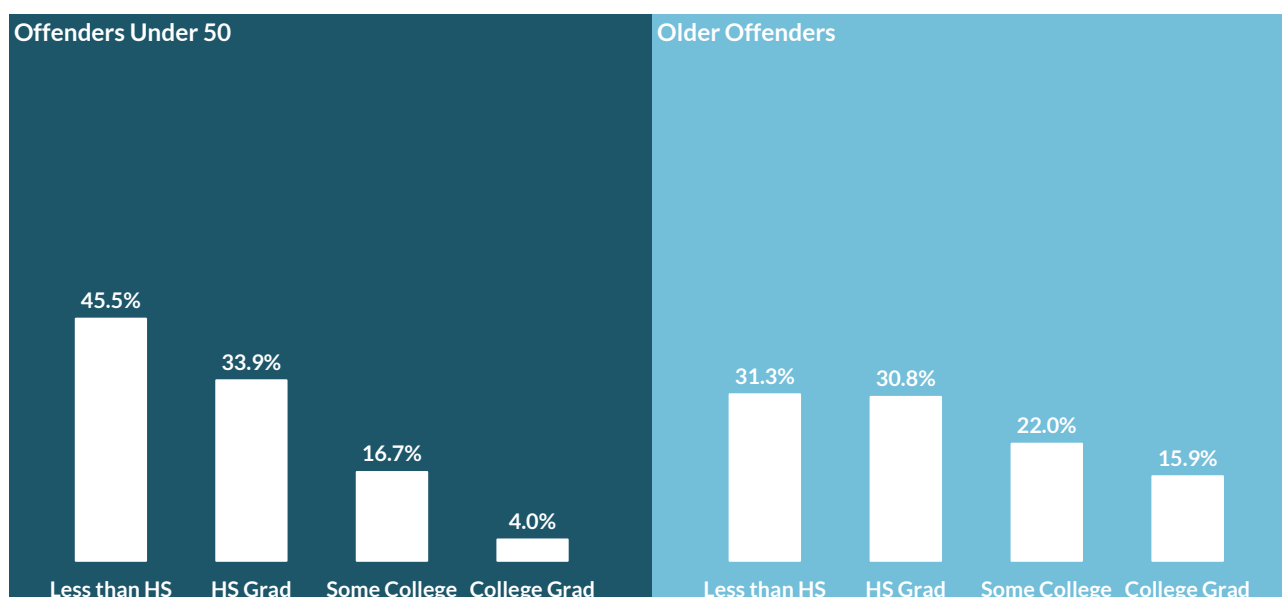
The gender composition of older offenders was nearly identical to that of all other federal offenders (Figure 6). Eighty-five percent (85.0%) of older offenders were male in fiscal year 2021, compared to 87.0 percent of offenders under age 50.

Older offenders were also more educated than offenders under the age of 50 (Figure 7). There was nearly three times the rate of college graduates (15.9%) among older offenders, compared to offenders under age 50 (4.0%). Although roughly a third of older offenders (31.3%) had less than a high school education, this is substantially less than the proportion of offenders under the age of 50 with less than a high school education (45.5%).

**Figure 6. Gender by Age Category
Fiscal Year 2021**



**Figure 7. Education by Age Category
Fiscal Year 2021**

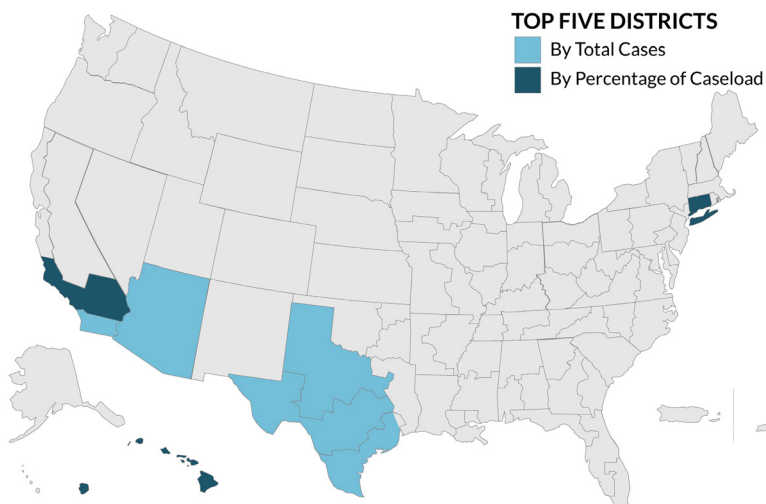


Geographic Dispersion of Older Offenders

Nearly one-third of all older offenders were sentenced within five districts in fiscal year 2021. Consistent with the dispersion of the overall population of offenders, the districts with the greatest number of older offenders in their caseload were predominately along the southwestern U.S.

border: Texas South, Texas West, Arizona, California South, and Texas North (Table 1). These are also the districts with the highest caseloads generally. The districts with the greatest proportion of older offenders in their overall caseload were Guam, Hawaii, New York East, California Central, and Connecticut.³⁹

**Table 1. Top Five Districts for Federal Older Offenders
Fiscal Year 2021**



By Total Cases	
Texas South	875
Texas West	491
Arizona	437
California South	393
Texas North	217

By Percentage of Caseload	
Guam	35.1%
Hawaii	25.6%
New York East	23.7%
California Central	22.4%
Connecticut	22.2%

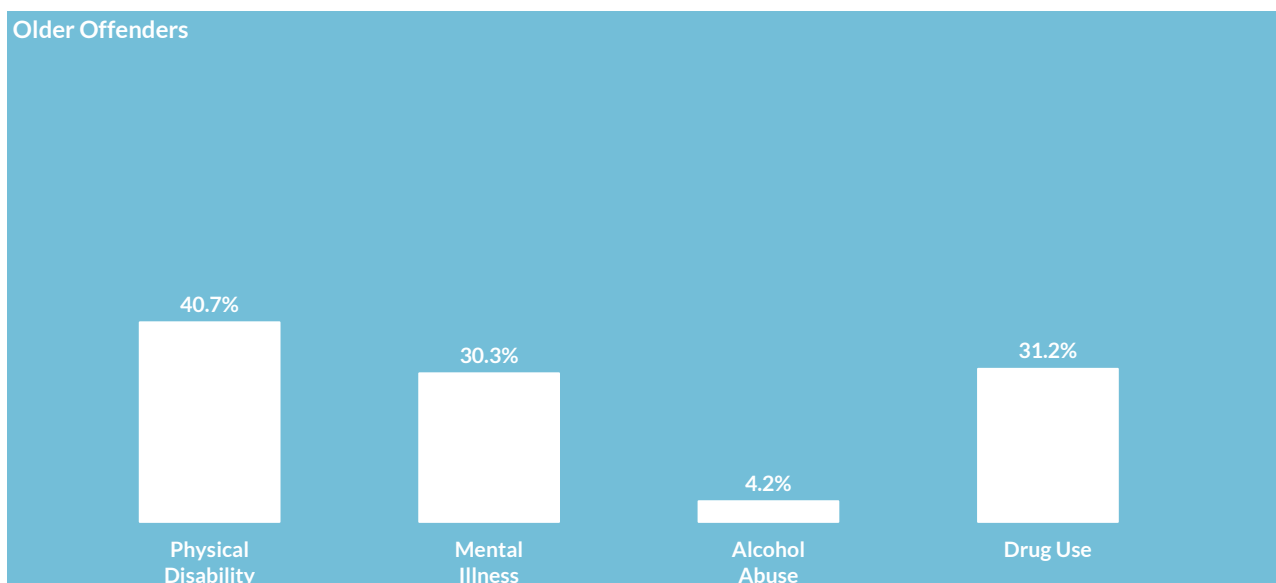
5 Physical and Mental Impairments

The Commission does not regularly collect information on age-related characteristics of offenders, such as infirmity or mental condition.⁴⁰ To explore whether an older offender’s physical or mental impairments, including substance abuse, had an impact at sentencing, the Commission conducted a specialized coding and analysis project. The Commission staff examined the sentencing documents from fiscal year 2021 for all 7,844 federal offenders over the age of 50 and recorded information on offender characteristics, such as physical disability, alcohol abuse, illegal substance use, mental health status, and employment history.

As previously discussed, courts must consider the history and characteristics of an offender at sentencing, including the need for medical care.⁴¹ To determine the extent to which medical care may be required for older offenders, Commission staff reviewed the sentencing documents of all older offenders sentenced in fiscal year 2021 and recorded whether offenders had a physical disability, mental illness, or substance abuse issue.

The Commission found that four in ten older offenders (40.7%) had a physical disability at the time of their arrest (Figure 8). Nearly half (49.6%) of older female offenders had a disability at the time of

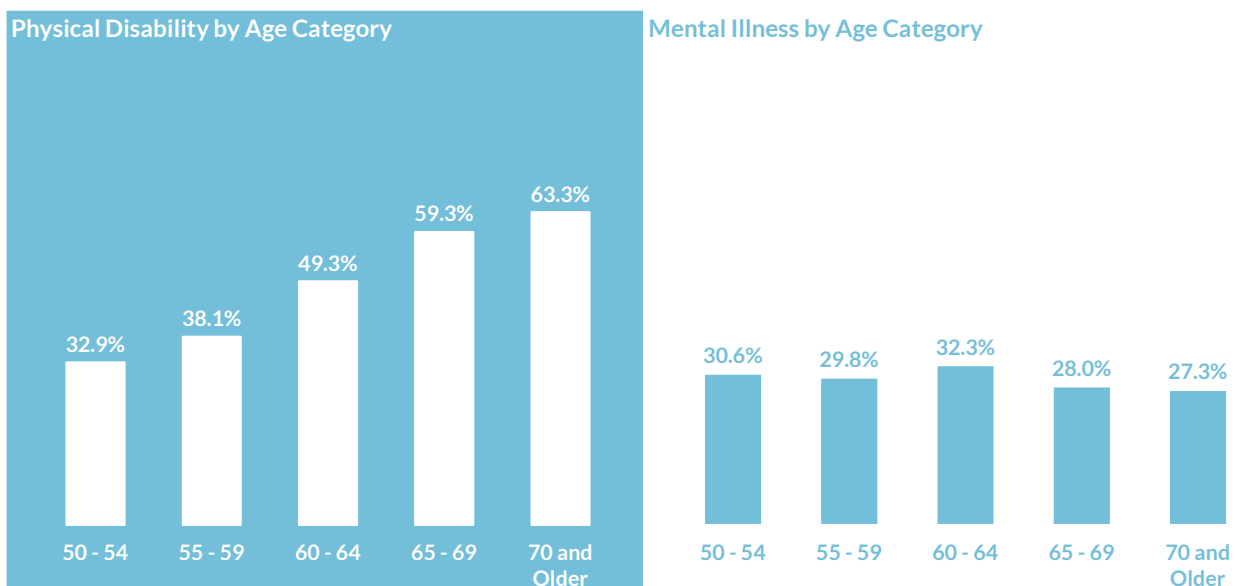
Figure 8. Physical Disability, Mental Illness, and Substance Abuse Among Older Federal Offenders Fiscal Year 2021



arrest.⁴² For the purposes of this report, a physical disability was described as a physical condition that impacted one of the major functions of life, such as breathing, sleeping, walking, eating, or otherwise independently caring for themselves. Offenders who were classified as having a disability needed ongoing medical care prior to their arrest. As the age of offenders increases, the proportion of offenders with a disability also increases (Figure 9). Less than a third of offenders ages 50 through 54 had a physical disability, compared to nearly two-thirds of offenders ages 70 and older (63.3%).

Mental illness was less common among all older offenders, with roughly 30 percent (30.3%) reporting that they suffered from a mental illness prior to arrest for the instant offense. However, half (50.7%) of older female offenders reported receiving a diagnosis or treatment for a mental illness prior to arrest. Unlike physical disability, there was no significant variation by age at arrest in the proportion of offenders with mental illness (Figure 9).

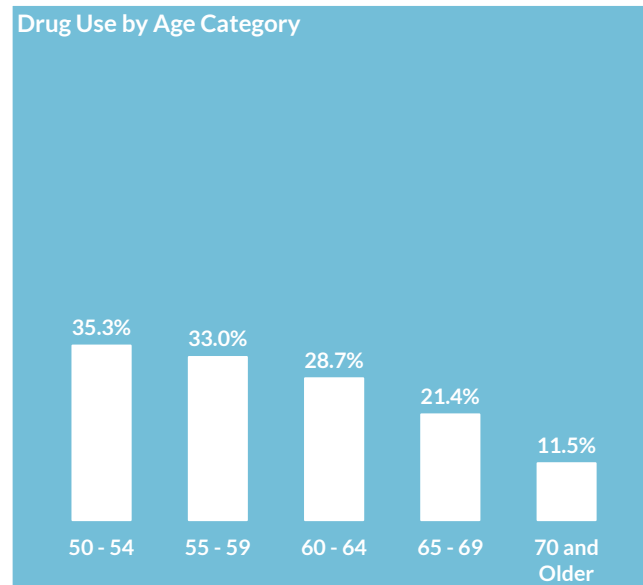
**Figure 9. Physical Disability and Mental Illness Among Older Offenders by Age Category
Fiscal Year 2021**



Drug Use and Alcohol Abuse

In addition to mental and physical impairments, the Commission also recorded if an offender admitted to abusing alcohol or using drugs⁴³ in the 12 months prior to arrest for the instant offense. Relatively few offenders (4.2%) admitted to abusing alcohol or suffering from alcoholism. The rate of admitted drug use was much higher. More than 30 percent (31.2%) of older offenders admitted to using drugs within the 12 months prior to arrest. Drug use decreased with offenders' age at sentencing. More than one-third (35.3%) of offenders 50 through 54 admitted to using illicit drugs in the year prior to arrest, compared to one-in-ten offenders 70 and older (11.5%) (Figure 10). Among older offenders who used drugs in the 12 months prior to arrest, marijuana was the most used drug (32.4%), followed closely by methamphetamine (28.5%) (Figure 11).

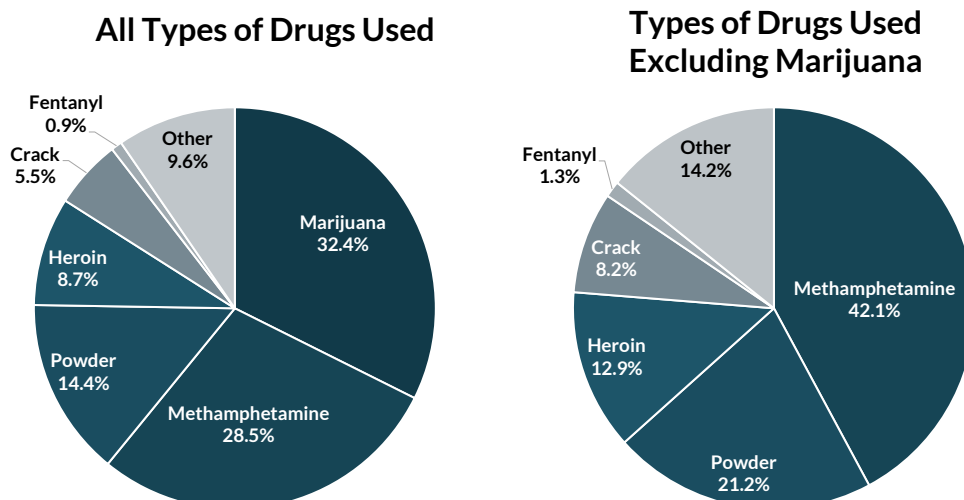
Figure 10. Drug Use 12 Months Prior to Arrest Among Older Offenders by Age Category Fiscal Year 2021



Employment and Financial Dependents

In addition to physical and medical issues among older offenders, the Commission examined employment and the presence of minor children in the offender's home. The majority of older offenders were

Figure 11. Type of Drug Used within 12 Months of Arrest Among Older Offenders Fiscal Year 2021



employed, either full or part-time, at the time of the arrest for their instant offense (Figure 12). Employment rates were highest among offenders under the age of 65 (Figure 13). However, it should be noted that half (50.1%) of offenders 65 through 69 were employed and a substantial minority (41.6%) of offenders 70 and older were employed in a legitimate enterprise in the year prior to the arrest for their instant offense. Less than 15 percent (13.4%) of older offenders had minor children in their homes that they were supporting. The proportion of offenders with minor children in the home was lowest among the oldest offenders. Roughly five percent (5.8%) of offenders 70 and older had minor children in the home at the time of arrest.

**Figure 12. Employment Prior to Arrest Among Older Offenders
Fiscal Year 2021**

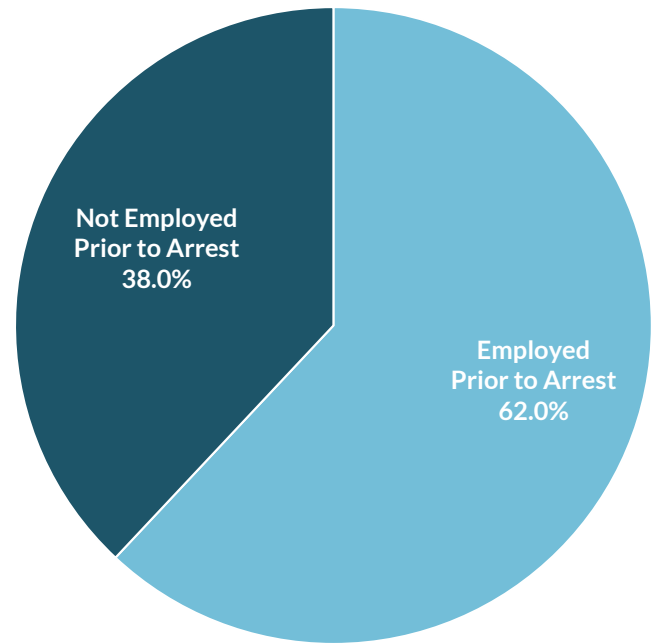
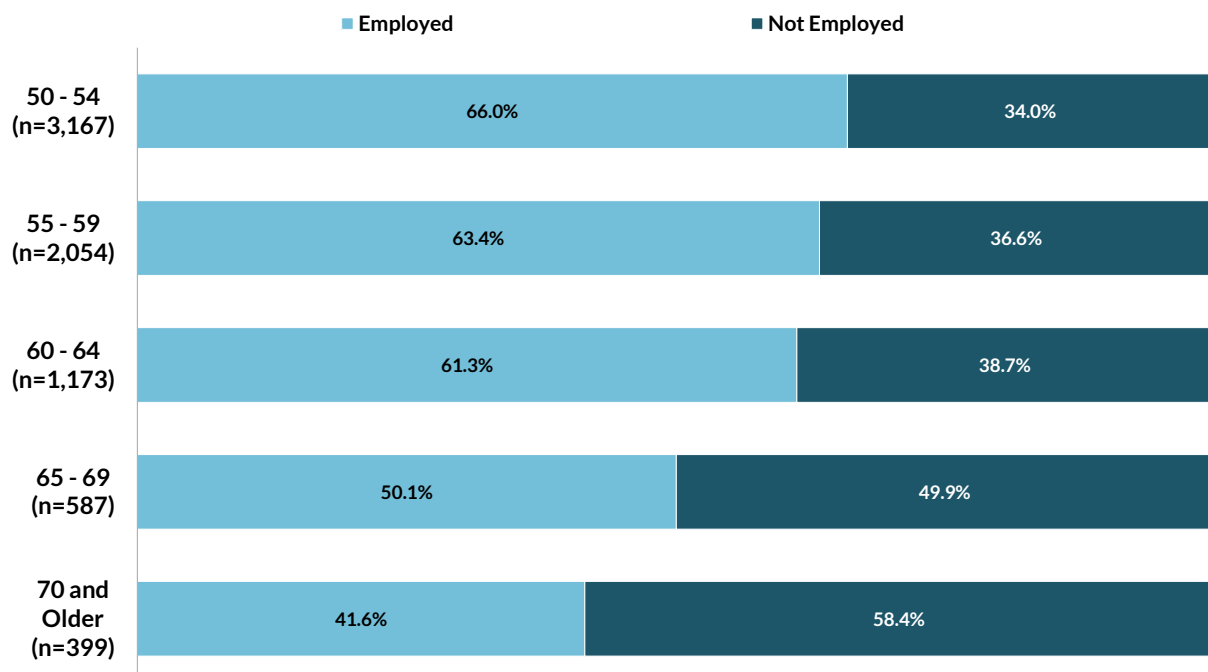


Figure 13. Employment 12 Months Prior to Arrest Among Older Offenders by Age Category

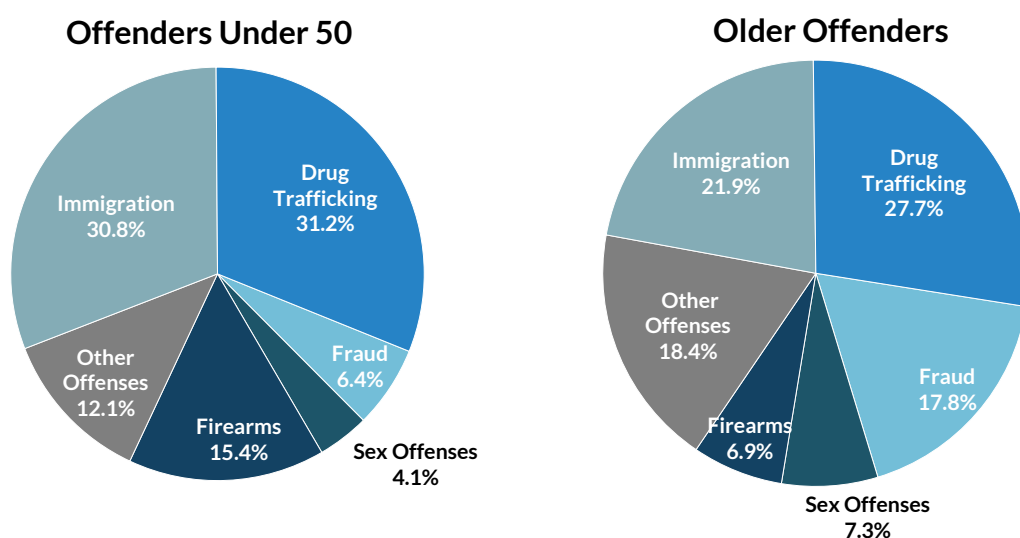


6 Types of Crime Committed by Older Offenders

Drug offenses, immigration offenses, firearms offenses, and fraud offenses are the most common crime types committed by all offenders in the federal system. The same is true of older offenders, but the distribution of these common crime types was different than that of offenders under the age of 50 (Figure 14). In fiscal year 2021, fewer older offenders (21.9%) were sentenced for immigration offenses, compared to all other offenders (30.8%).

Conversely, older offenders had a much larger proportion of fraud offenses (17.8%) and sex offenses (7.3%), compared to offenders under the age of 50 (6.4% and 4.1%, respectively).⁴⁴ Older offenders were sentenced for violent offenses (8.0%) slightly less often than all other offenders (9.8%). Roughly 30 percent of both older offenders (27.7%) and all other offenders (31.2%) were sentenced for a drug trafficking offense.

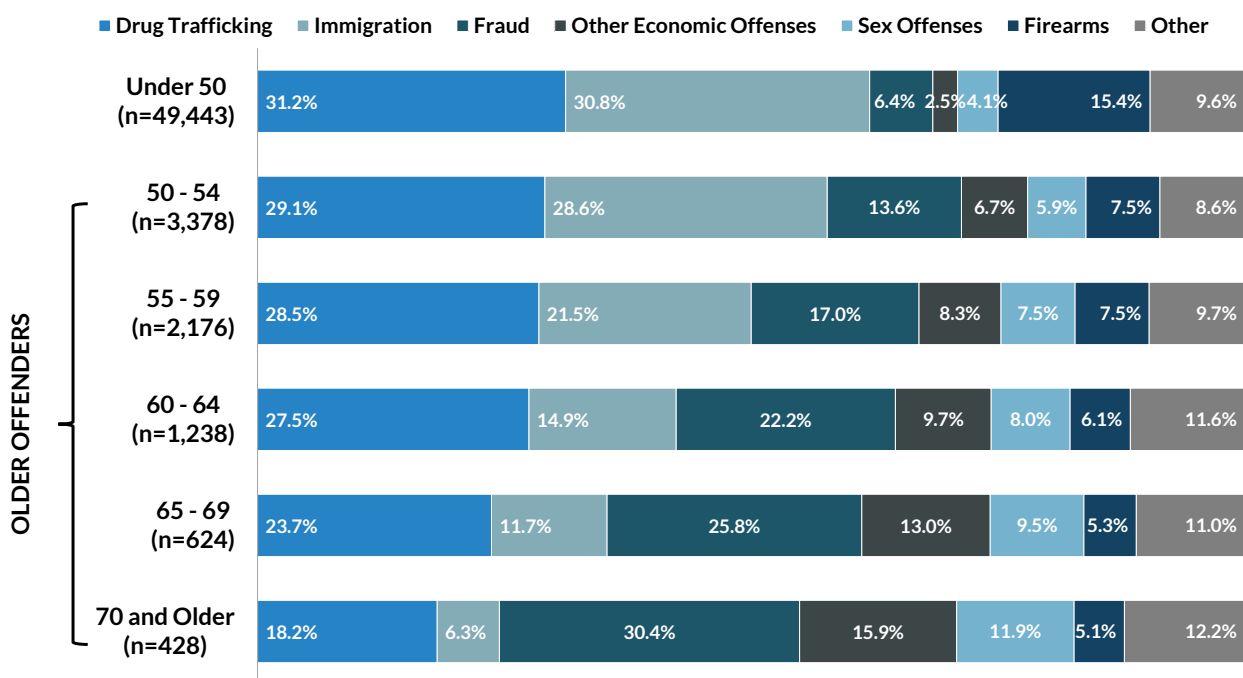
Figure 14. Crime Type by Age Category
Fiscal Year 2021



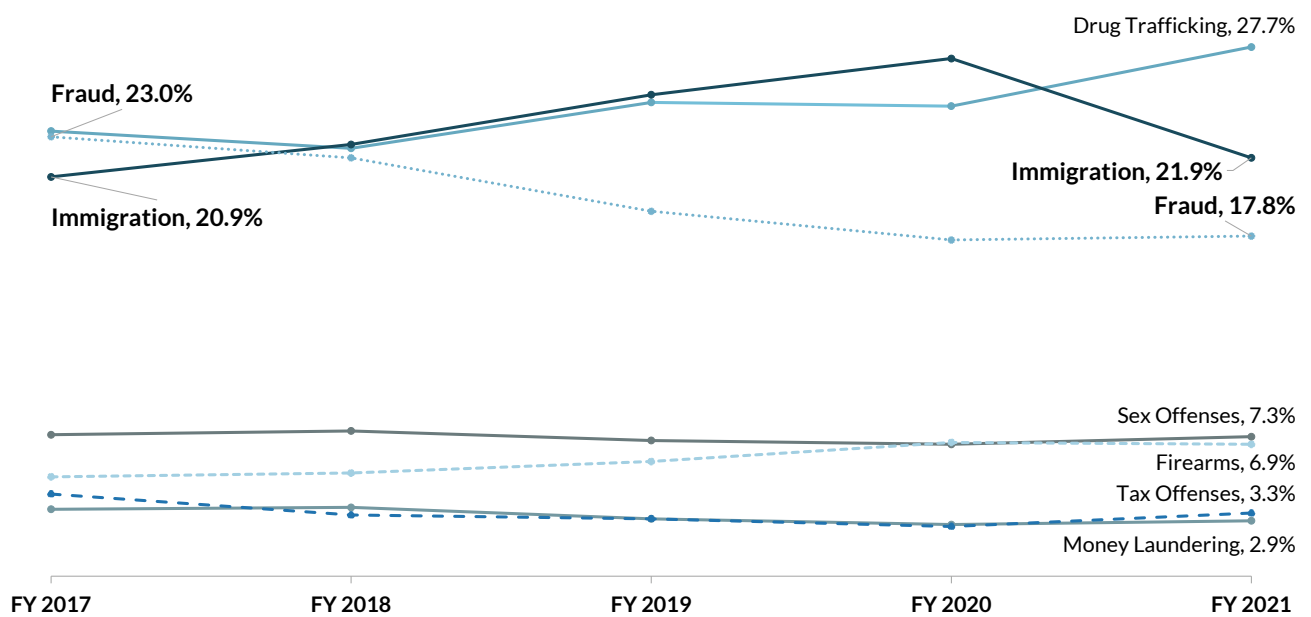
The distribution of the most common crime types shifted as the age of offenders increased. As seen in Figure 15, as offenders aged, they were sentenced more often for fraud, other economic offenses and sexual offenses, and less often for drug, immigration, and firearms offenses. More than 15 percent (15.4%) of offenders under the age of 50 were firearms offenders, three times the rate of firearms offenders seen among the oldest offenders (5.1%). Immigration offenses were also less common among the oldest offenders. Approximately 30 percent

(30.8%) of offenders under the age of 50 were immigration offenders, compared to 14.9 percent of offenders aged 60 through 64, and 6.3% of offenders 70 and older. Conversely, nearly a third (30.4%) of offenders 70 and older were sentenced for fraud offenses, which is almost five times the rate of fraud offenses among offenders under the age of 50 (6.4%). Similarly, nearly 12 percent (11.9%) of the oldest offenders were sentenced for sex offenses, which is roughly three times the rate of offenders under the age of 50 (4.1%).

Figure 15. Distribution of Crime Type by Age Category
Fiscal Year 2021



**Figure 16. Crime Type of Federal Older Offenders Over Time
Fiscal Years 2017 – 2021**



The distribution of the types of crimes committed by older offenders has remained fairly consistent over the past five fiscal years (Figure 16). There were slight decreases in the percentage of fraud

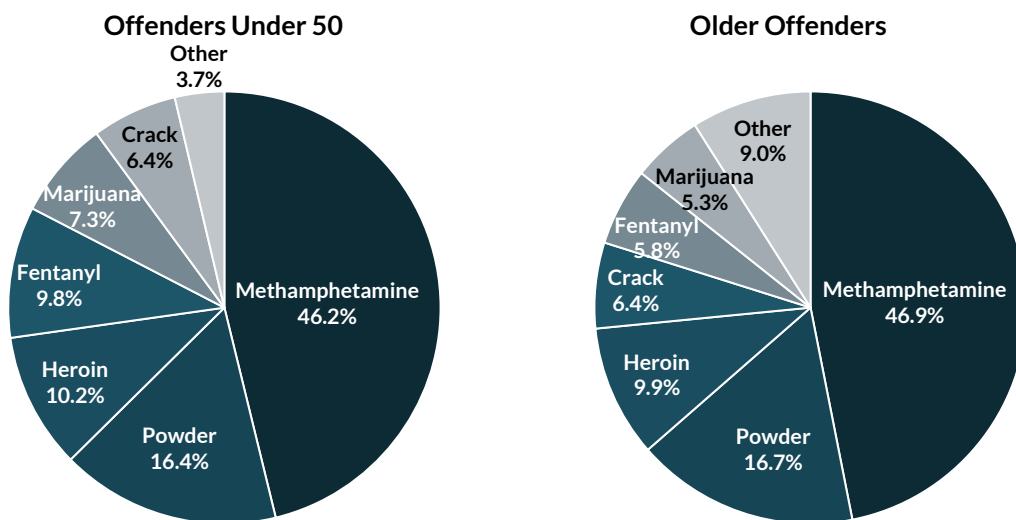
and immigration offenses committed by older offenders, which mirrors a trend seen across the rest of the federal offender population.⁴⁵

Drug Offenses

As discussed earlier, older offenders were nearly as likely to commit drug offenses as all other federal offenders. The drug most commonly involved in drug offenses was methamphetamine for both older offenders (46.9%) and all other

offenders (46.2%). Powder cocaine was the next most common drug for both older offenders (16.7%) and offenders under age 50 (16.4%), followed by heroin (9.9% and 10.2%, respectively). Fewer older offenders (5.8%) committed fentanyl-related drug offenses, compared to all other federal offenders (9.8%) (Figure 17).

**Figure 17. Primary Drug Type by Age Category
Fiscal Year 2021**

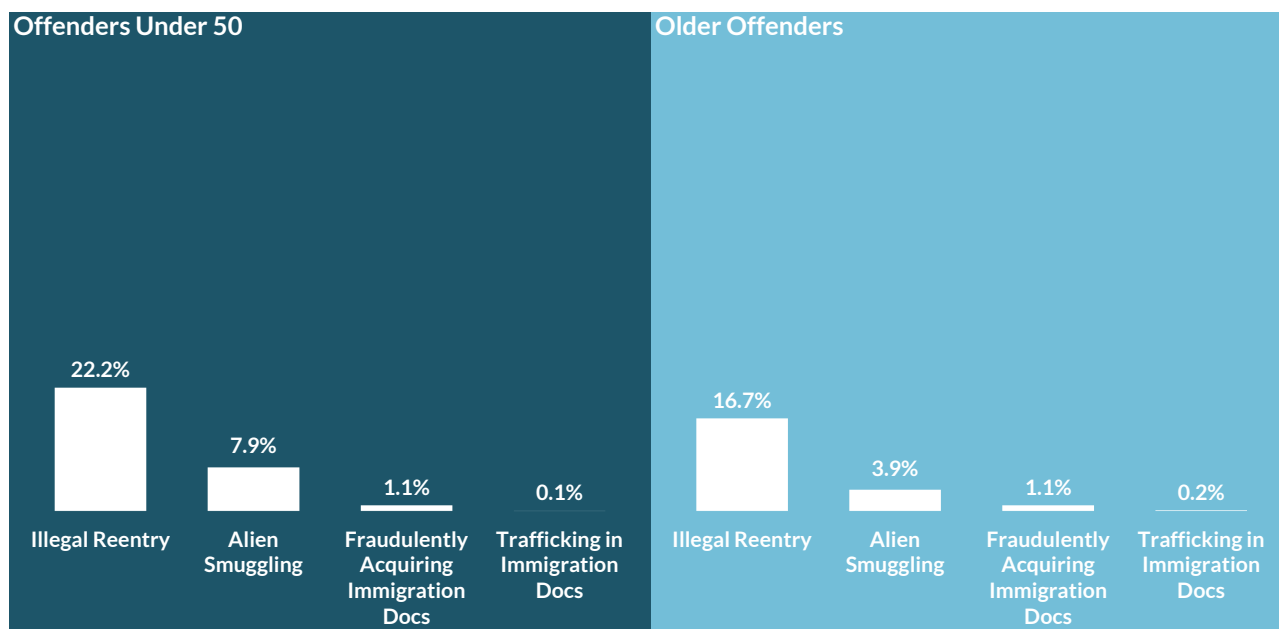


Immigration Offenses

Immigration offenses were the second most common offense type among older offenders (21.9%). Their most common immigration offense was illegal reentry; offenses sentenced under §2L1.2 constituted 16.7 percent of older offenders' offenses (Figure 18). The second most common immigration offense among older offenders was alien smuggling (§2L1.1, 3.9%). Few older offenders (0.2%) were sentenced for trafficking in immigration documents (§2L2.1, 0.2%) or fraudulently acquiring immigration documents (§2L2.2, 1.1%).

Illegal reentry was also the most common immigration offense for offenders under the age of 50 (22.2%; n=10,281). However, compared to their older peers, offenders under the age of 50 were slightly more likely to engage in alien smuggling (7.0%). Few offenders under the age of 50 were sentenced for trafficking in immigration documents (0.1%) or fraudulently acquiring immigration documents (1.1%).

Figure 18. Distribution of Immigration Offenses by Age Category
Fiscal Year 2021

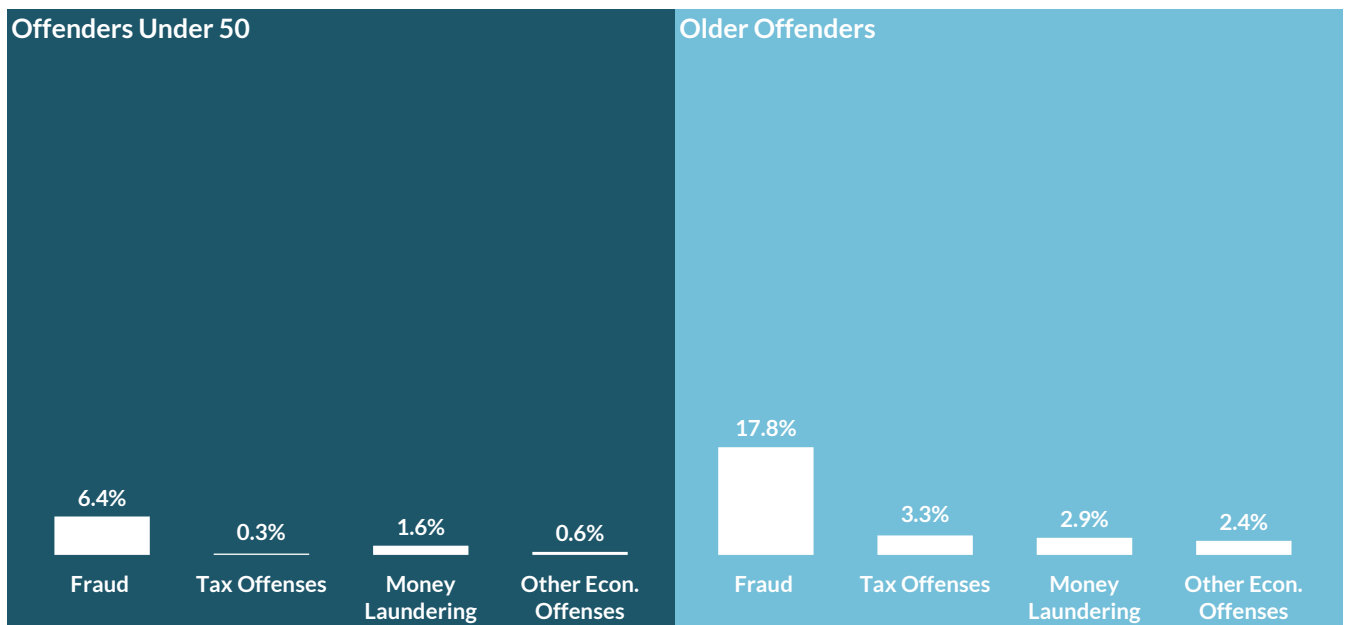


Economic Offenses

Economic offenses were more prevalent among older offenders and were their third most common type of crime. Nearly one in five (17.8%) older offenders were sentenced for fraud in fiscal year 2021 (Figure 19). Other financial crimes collectively constituted an additional 8.6 percent of offenses committed by older offenders and included offenses such as money laundering (2.9%) and tax offenses (0.3%).

By comparison, 6.4 percent of offenders under the age of 50 were sentenced for fraud in fiscal year 2021. Other financial crimes constituted less than three percent (2.5%) of offenses committed by offenders under the age of 50. Relatively few offenders under age 50 were sentenced for money laundering (1.6%) or tax offenses (0.3%).

Figure 19. Distribution of Economic Offenses by Age Category
Fiscal Year 2021

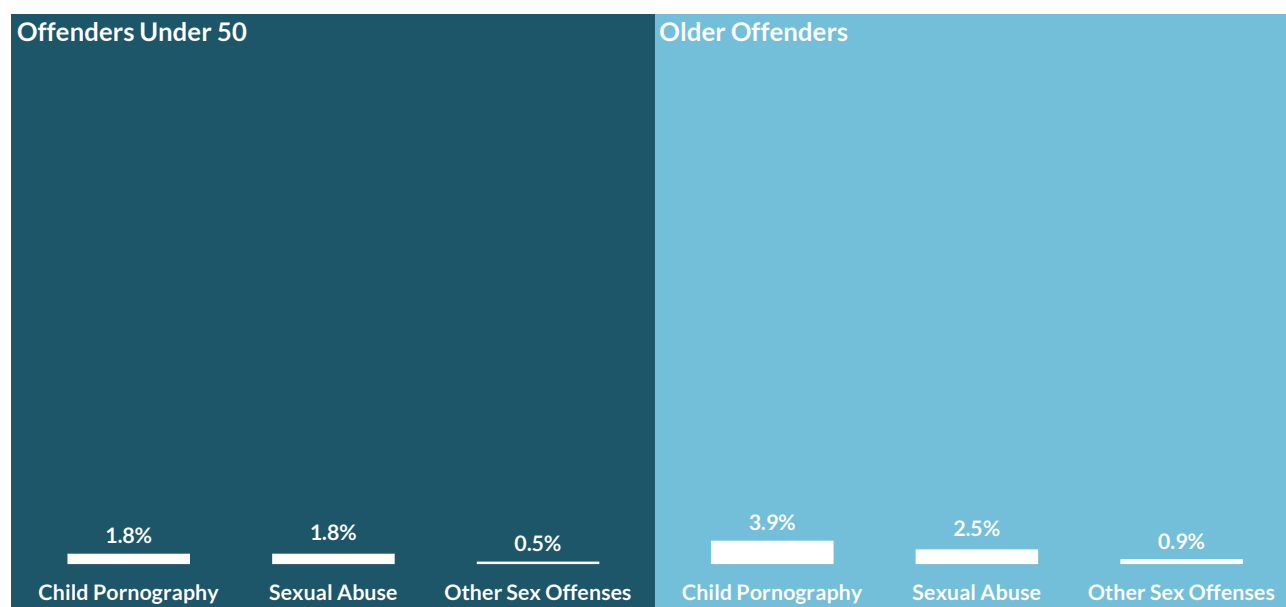


Sex Offenses

Among offenders sentenced in fiscal year 2021, older offenders also were more likely to commit all categories of sexual offenses (7.3%), compared to all other offenders (4.1%). The Commission's previous research on child pornography offenses⁴⁶ demonstrated that these offenders are older than the average

federal offender.⁴⁷ Older offenders were twice as likely to commit child pornography offenses (3.9%), compared to offenders under the age of 50 (1.8%). They were also more likely to commit both sexual abuse offenses (2.5%) and other sex offenses (0.9%), compared to all other federal offenders (1.8% and 0.5%, respectively) (Figure 20).

**Figure 20. Distribution of Sex Offenses by Age Category
Fiscal Year 2021**



7 Criminal History

Older offenders had less extensive criminal histories, compared to all other federal offenders (Figure 21).⁴⁸ More than half (52.5%) of older offenders were in Criminal History Category (CHC) I, the lowest criminal history category. Comparatively, more than one-third (37.5%) of offenders under 50 years of age were in the lowest criminal history category. Criminal history was least extensive among the oldest offenders, 70 and older. Additionally, as offenders age, the average criminal history points decrease from nearly five points for offenders under age 50 to only one point for offenders 70 and older (Figure 22). The number of criminal history events only accounts for offenses that received points under the Guidelines Manual. Some offenses, such as stale criminal history events, do not receive points and therefore are not counted.

Figure 22. Average Criminal History Points by Age Category
Fiscal Year 2021

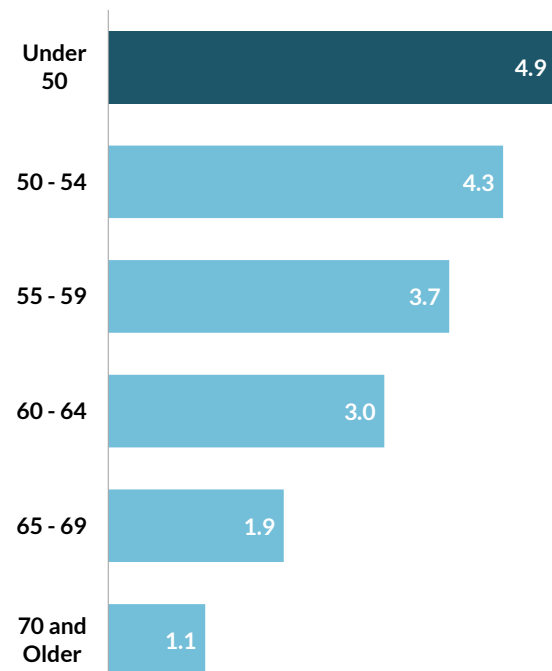
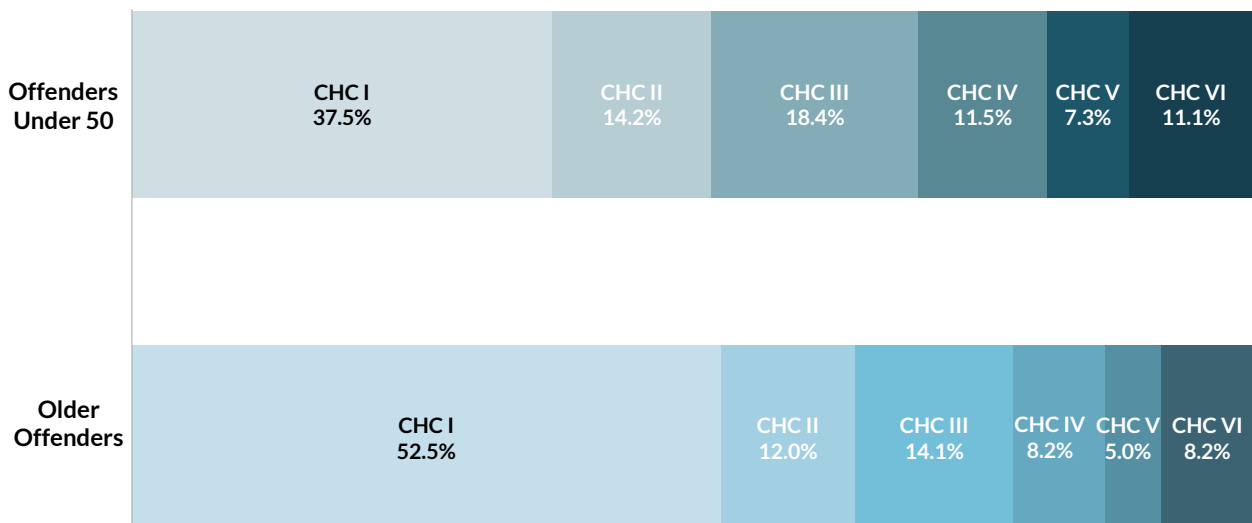
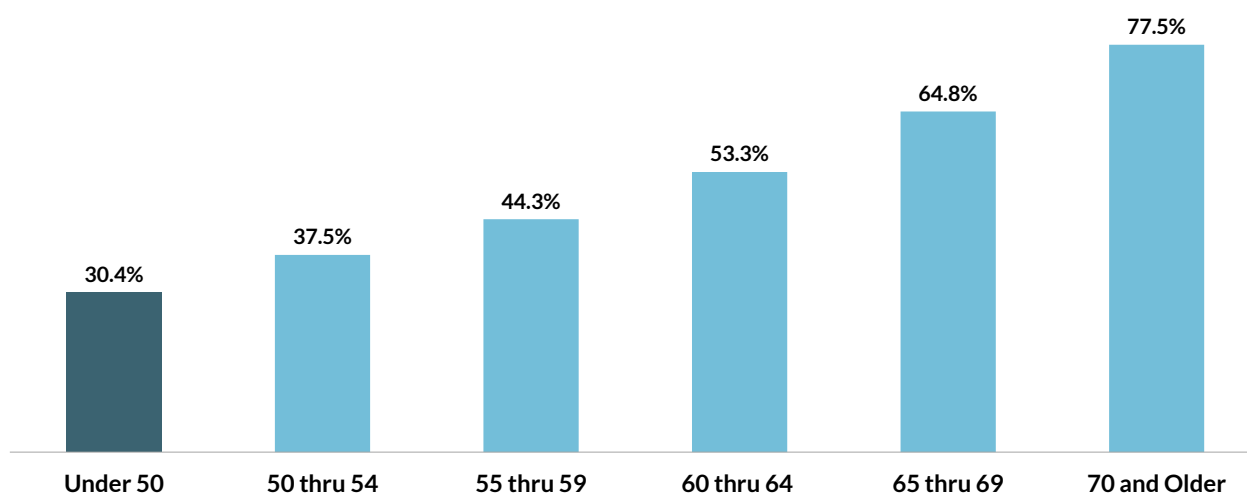


Figure 21. Criminal History Category by Age Category
Fiscal Year 2021



**Figure 23. Percentage of Offenders with Zero Criminal History Points by Age Category
Fiscal Year 2021**



Conversely, as offenders age, the rate of offenders with zero criminal history points increases (Figure 23). Less than one-third (30.4%) of offenders under the age of 50 had zero criminal history points. Comparatively, more than three-quarters (77.6%) of offenders 70 and older had zero criminal history points.

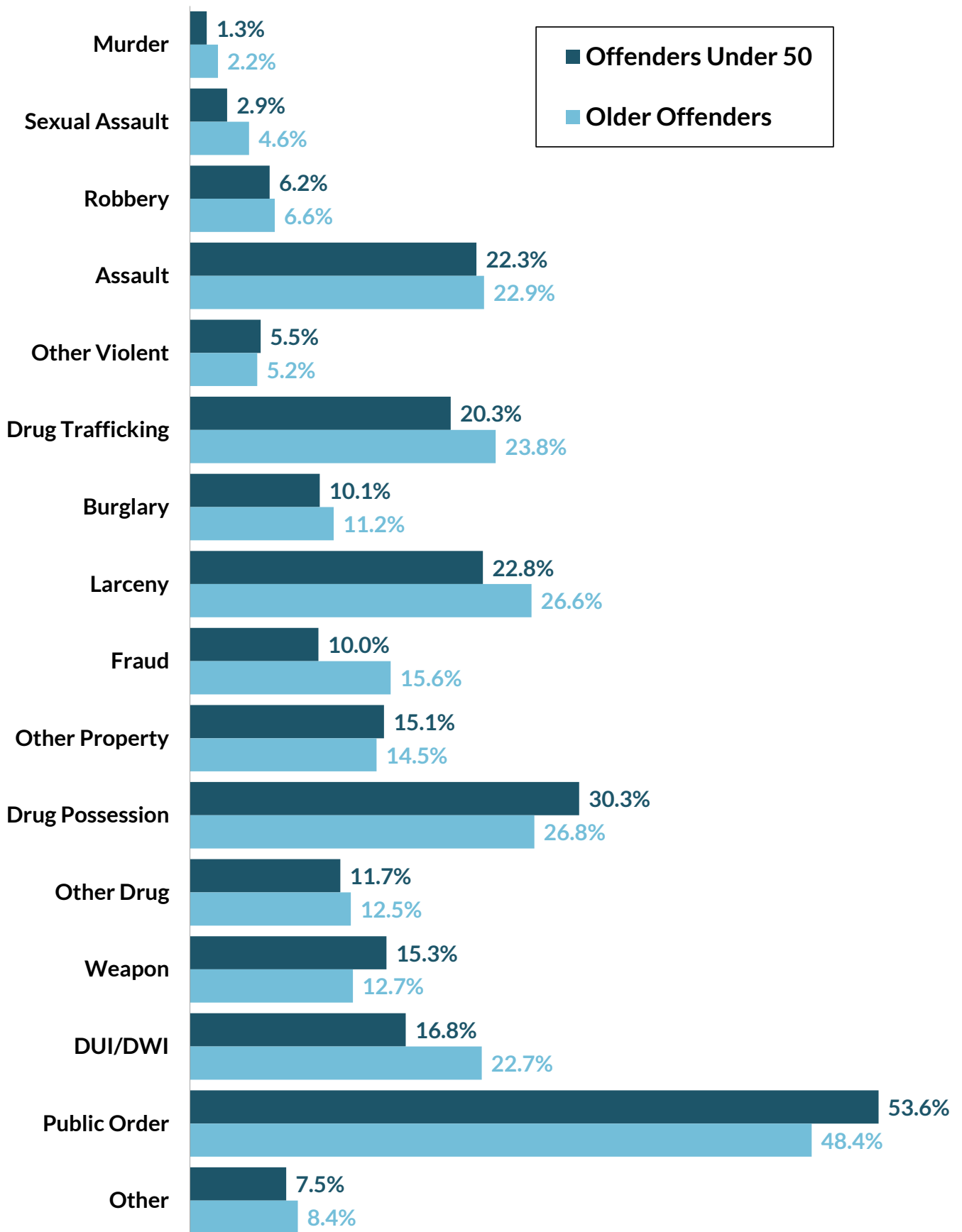
As with criminal history points, the mean number of adult criminal history events—prior convictions—decreased as the offender’s age increased. Offenders

ages 50 through 54 had an average of 6 criminal history events, compared to an average of two criminal history events for the offenders 70 years of age and older. The most common types of criminal history events for older offenders were public order offenses (48.4%), drug possession (26.8%), and larceny (26.6%) (Figure 24). In reviewing the criminal histories of older offenders, the Commission found that most had no juvenile events in their criminal history records.

Table 2. Rate of Criminal History Events of Older Offenders, Fiscal Year 2021

	Adult Criminal History	
	Mean Number of Adult CH Events	Median Number of Adult CH Events
Offenders Under 50	4.7	3
Offenders 50 thru 54	6.4	4
Offenders 55 thru 59	6.1	3
Offenders 60 thru 64	5.4	2
Offenders 65 thru 69	3.5	1
Offenders 70 and Older	2.4	0

Figure 24. Criminal History Events by Age Category
Fiscal Year 2021



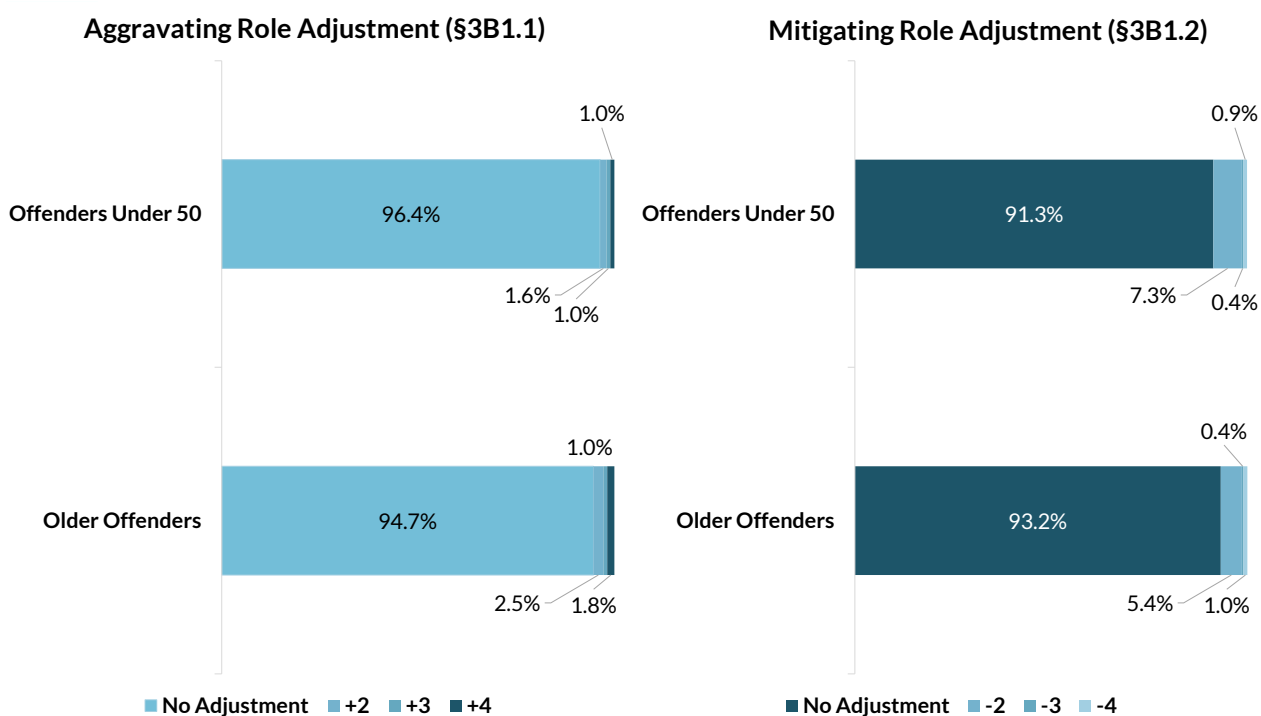
8 Offense Characteristics

Aggravating and Mitigating Role Adjustments

The guidelines set forth offense level adjustments based on a defendant's role in the offense.⁴⁹ Older offenders (5.3%) received an aggravating role adjustment under §3B1.1 as frequently as offenders under age 50 (3.6%) (Figure 25). This adjustment is based on the offender's role in the offense as an organizer, leader, manager, or supervisor.⁵⁰

Older offenders (6.8%) received a mitigating role adjustment under §3B1.2 slightly less frequently than offenders under age 50 (8.6%). This adjustment decreases an offender's base offense level for having minor or minimal participation in the offense conduct.⁵¹

**Figure 25. Chapter Three Role Adjustments by Age Category
Fiscal Year 2021**



Older offenders received an aggravating role adjustment under §3B1.1 as frequently as offenders under age 50.

Career Criminal Status

Although they had less extensive criminal histories, nearly the same proportion of older offenders (2.2%) received career offender status under §4B1.1 as did offenders under the age of 50 (2.3%).⁵² Career offenders have at least two prior felony convictions for either a crime of violence or a controlled substance offense and are automatically assigned to CHC VI, the highest criminal history category.⁵³

Equal proportions of older offenders (0.5%) and offenders under age 50 (0.5%) also were assigned armed career criminal status under §4B1.4.⁵⁴ Offenders who are sentenced under the Armed Career Criminal Act (ACCA) are subject to a mandatory minimum sentence of 15 years if they are convicted under 18 U.S.C. § 922(g) and have at least three prior felony convictions for a serious drug offense or a violent felony.⁵⁵

9 Sentencing Older Offenders

Like the offense characteristics and criminal histories, sentencing patterns for older federal offenders differed from those of offenders under the age of 50. The trial rate of older offenders was higher than that of offenders under the age of 50 and increased as the age of the offender increased (Figure 26). Although relatively

few (3.1%) older offenders were sentenced after a trial, their trial rate was twice that of offenders under the age of 50 (1.5%). Offenders in the oldest age categories had an even higher trial rate. Roughly six percent (6.1%) of offenders 70 or older had their cases decided at trial, twice the rate of older offenders as a whole (Figure 27).

Figure 26. Disposition Type by Age Category
Fiscal Year 2021

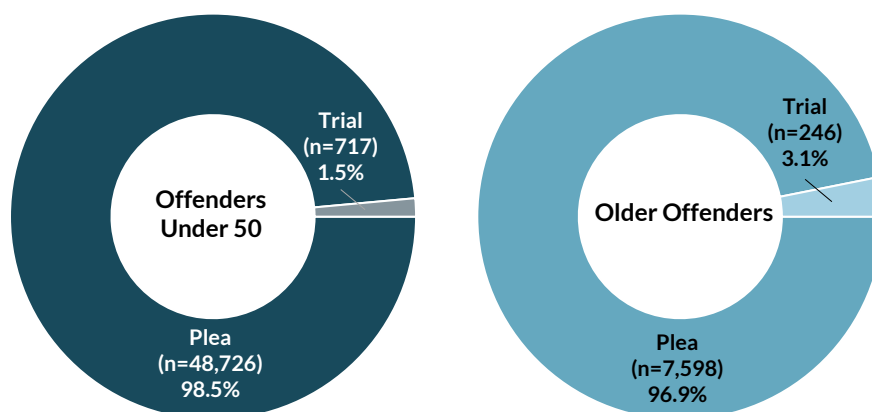
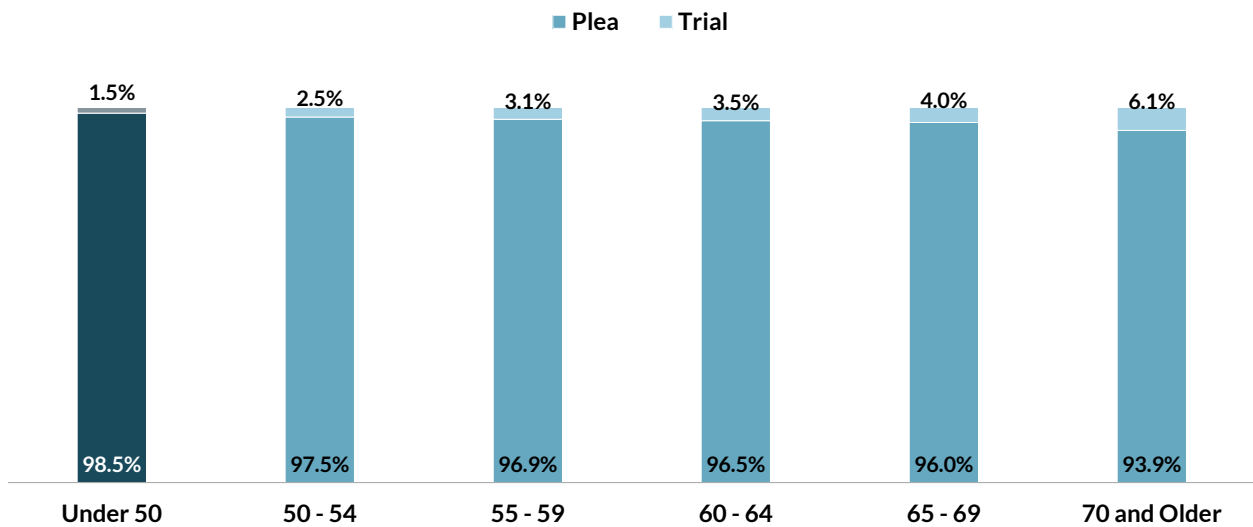


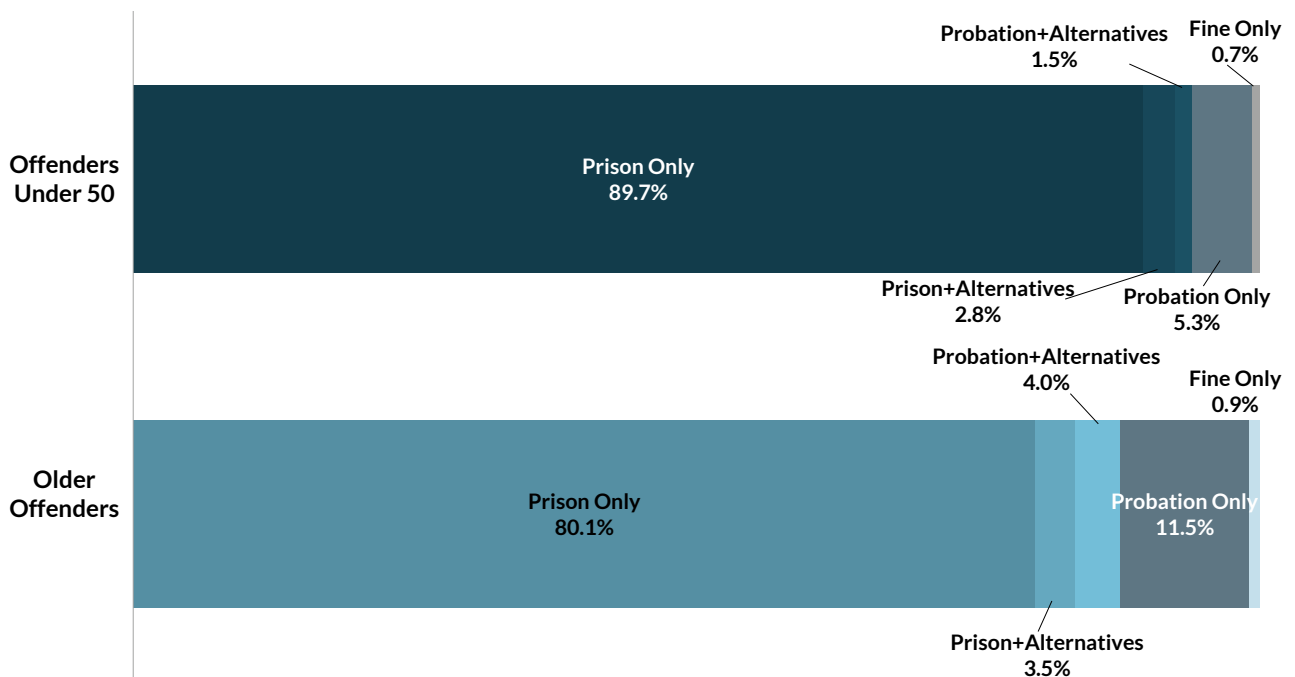
Figure 27. Disposition Type by Age Category
Fiscal Year 2021



Older offenders were also more likely to receive fines and alternative sentences, compared to offenders under age 50 (Figure 28). Although a large majority of both older offenders (80.1%) and offenders

under the age of 50 (89.7%) received a sentence of imprisonment, twice as many older offenders (11.5%) received probation only, compared to all other offenders (5.3%).

Figure 28. Sentence Imposed by Age Category
Fiscal Year 2021

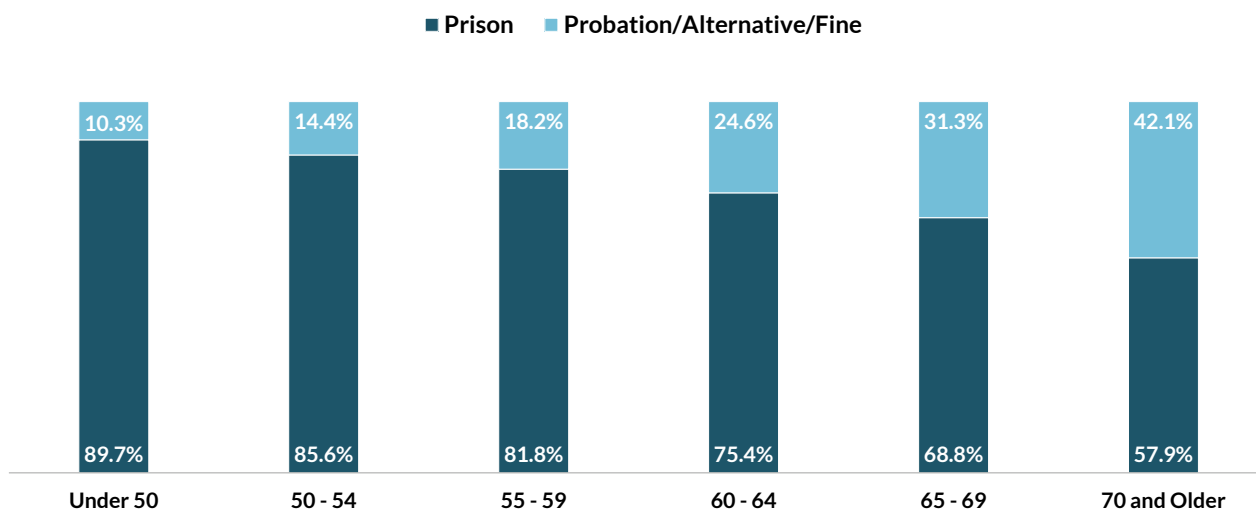


The use of alternative sentences dramatically increased as offenders' age increased. Nearly a third (31.3%) of offenders ages 65 through 69 and more than 40 percent (42.1%) of offenders 70 and older received probation, a fine, or other alternative to incarceration sentence in fiscal year 2021 (Figure 29).

Average Guideline Minimum and Average Sentence Imposed

Older offenders had both an average guideline minimum and average sentence imposed that was nearly identical to that of all other federal offenders (Table 3). Older offenders had an average guideline

Figure 29. Sentence Imposed by Age Category
Fiscal Year 2021



minimum of 65 months, only one month shorter than the average guideline minimum for offenders under age 50 (66 months). The average sentence imposed for older offenders was 47 months in fiscal year 2021, compared to 50 months for offenders under the age of 50.

Both the average guideline minimum and average sentence imposed indicate that older offenders receive sentences of a similar length to those of all other federal offenders. For all older offender age categories, the gap between the average guideline minimum and average

Table 3. Sentencing Statistics by Age Category
Fiscal Year 2021*

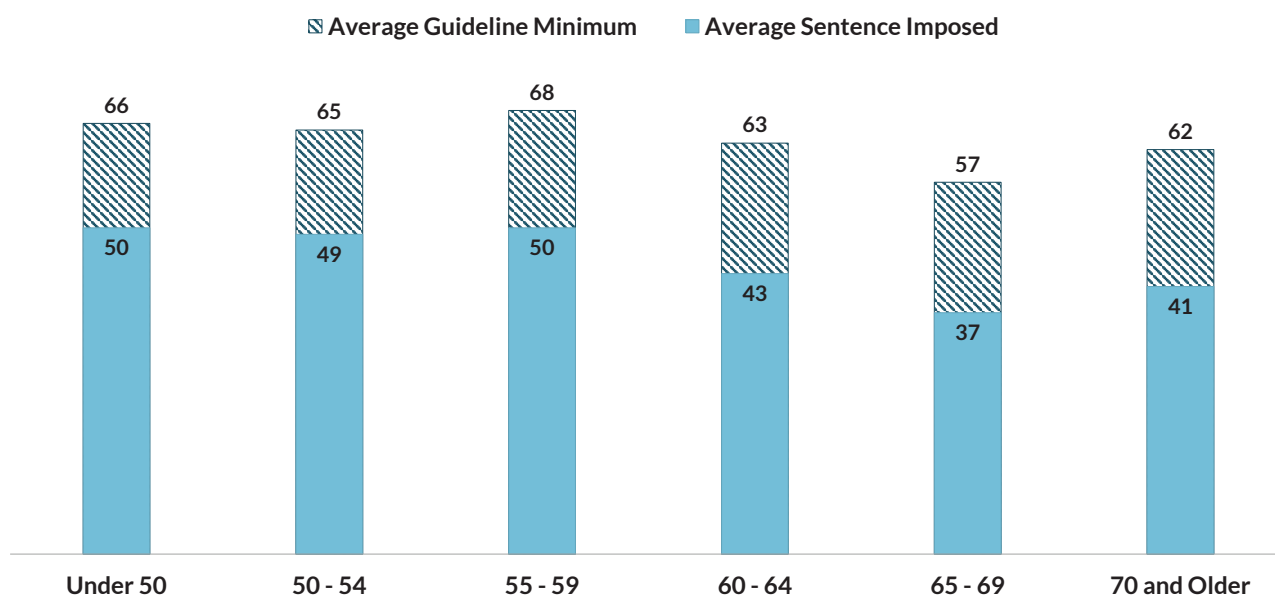
	Offenders Under 50	Older Offenders
Average Final Offense Level	19	20
Average Criminal History Category	2.7	2.3
Average Guideline Minimum (months)	66	65
Average Sentence (months)	50	47

*Guideline Minimum is capped at 470 months.

sentence imposed does not substantively widen, compared to all other offenders. The gap does widen slightly as offenders age; offenders aged 50 to 54 had a gap of 16 months between the average guideline

minimum and average sentence imposed, compared to offenders over the age of 70 who had a gap of 21 months between the average guideline minimum and average sentence imposed (Figure 30).

Figure 30. Average Guideline Minimum* and Average Sentence Imposed by Age Category Fiscal Year 2021

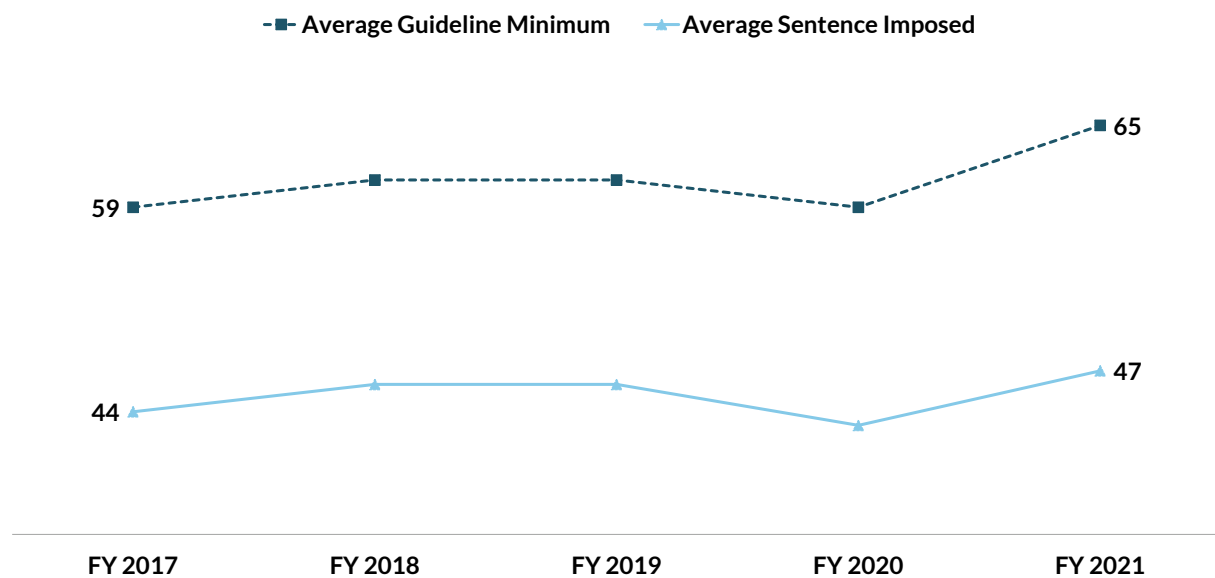


*Guideline Minimum is capped at 470 months.

Older offenders' average guideline minimum and average sentence imposed have remained relatively stable over time (Figure 31). The average guideline minimum for older offenders increased slightly from 59 months in fiscal year 2017

to 65 months in fiscal year 2021. Similarly, the average sentence imposed increased slightly for older offenders from 44 months in fiscal year 2017 to 47 months in fiscal year 2021.

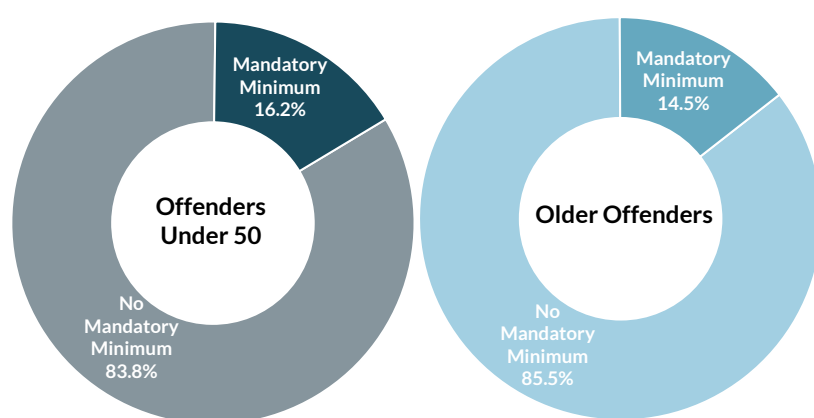
Figure 31. Average Guideline Minimum* and Average Sentence Imposed for Federal Older Offenders
Fiscal Years 2017 – 2021



*Guideline Minimum is capped at 470 months.

Similar proportions of older offenders (14.5%) and offenders under age 50 (16.2%) were subject to a mandatory minimum penalty at sentencing (Figure 32). The average sentence for older offenders with a mandatory minimum penalty was 143 months, four months longer than that for offenders under the age of 50 (139 months) (Table 4). Older offenders received relief from a mandatory minimum at nearly the same rate as offenders under the age of 50 (45.5% and 46.6%, respectively).⁵⁶

**Figure 32. Mandatory Minimum Penalty at Sentencing by Age Category
Fiscal Year 2021**



**Table 4. Average and Median Sentences by Age Category
Fiscal Year 2021**

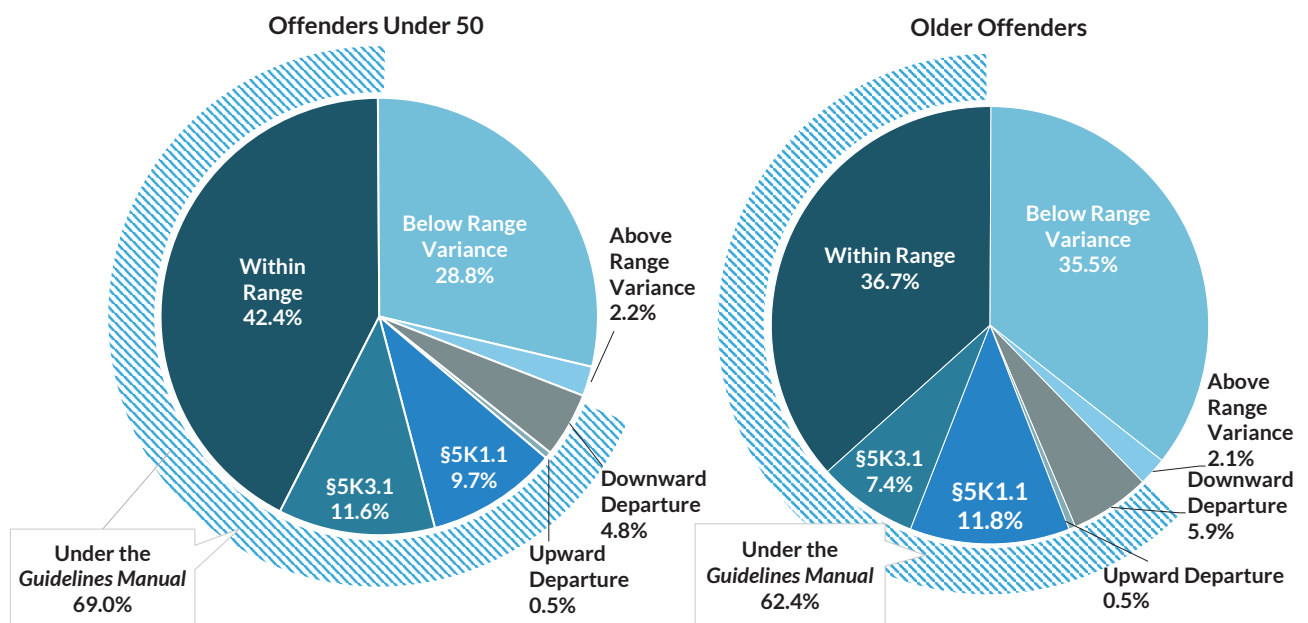
Offenders Under 50			Older Offenders		
Overall Sentence (months)			Overall Sentence (months)		
	Average	50		Average	47
	Median	27		Median	24
Mandatory Minimum Applied (months)			Mandatory Minimum Applied (months)		
	Average	139		Average	143
	Median	120		Median	120
No Mandatory Minimum Penalty (months)			No Mandatory Minimum Penalty (months)		
	Average	33		Average	30
	Median	18		Median	16

Sentence Relative to the Guideline Range

In fiscal year 2021, slightly more than one-third (36.7%) of older offenders were sentenced within the guideline range (Figure 33). A nearly equal proportion

(35.5%) of older offenders received a below range variance. By comparison, more offenders under the age of 50, (42.4%) were sentenced within the guideline range and fewer (28.8%) received a below range variance.

Figure 33. Sentence Relative to the Guideline Range by Age Category
Fiscal Year 2021

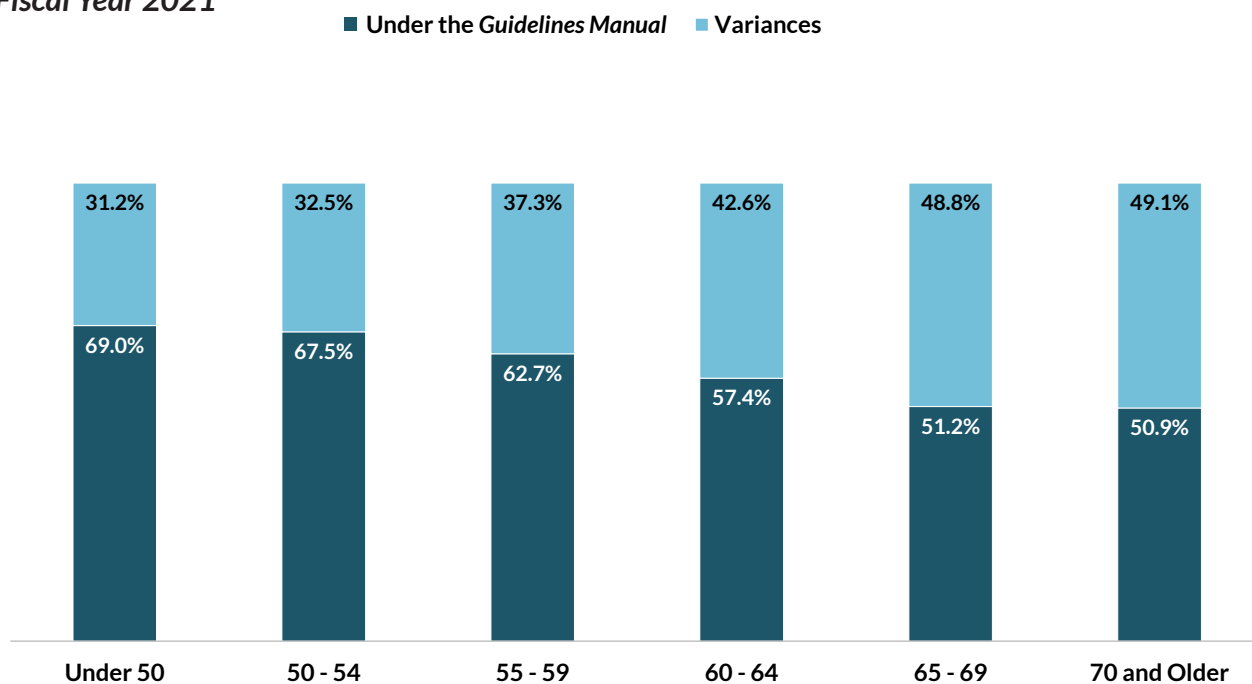


The proportion of offenders receiving variances increased as an offender's age range increased (Figure 34). A majority (69.0%) of offenders under the age of 50 were sentenced under the *Guidelines Manual*. The proportion of offenders sentenced under the *Guidelines Manual* decreased to about half for offenders 65

years or older. These oldest offenders were nearly as likely to receive a variance (48.8% and 49.1%) as they were to receive a sentence under the *Guidelines Manual*.

Older offenders were more likely to receive departures and variances based on age, physical condition, and the need for medical treatment, compared to

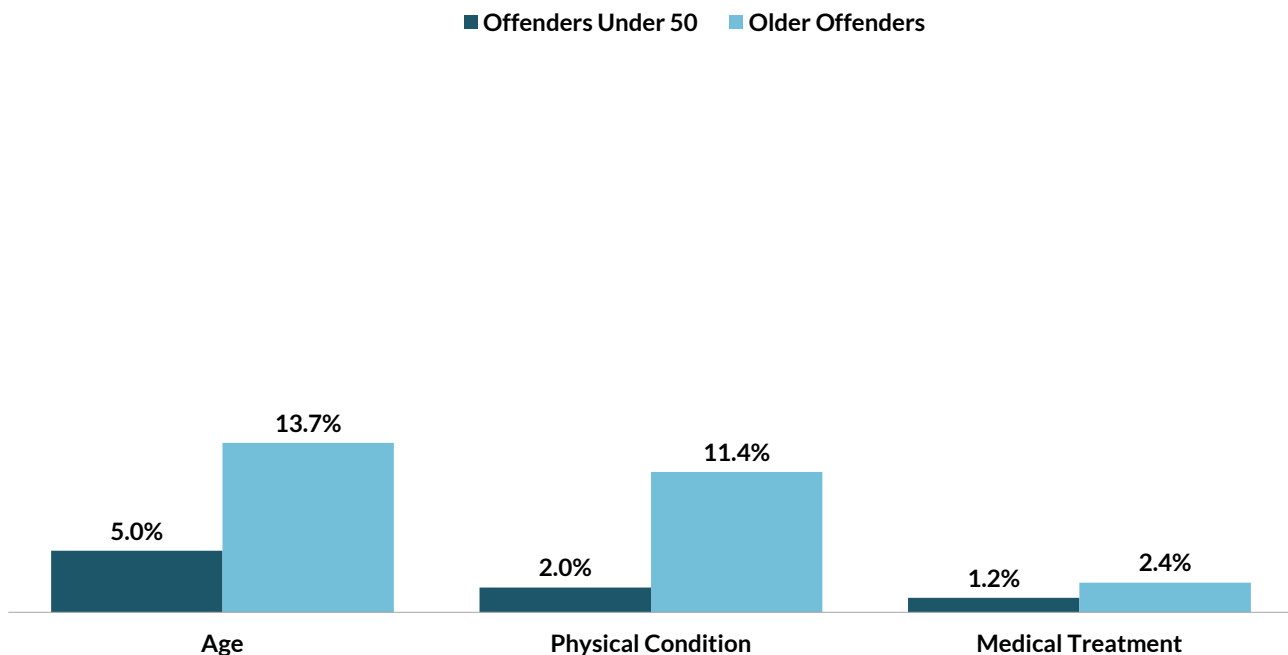
Figure 34. Sentences Under the Guidelines Manual by Age Category
Fiscal Year 2021



offenders under the age of 50 (Figure 35). Approximately 14 percent (13.7%) of older offenders received a variance or departure because of their age. By comparison, only 5.0 percent of offenders under the age of 50 received a variance or departure for their age—presumably for their youth; their median age was 24. More than one-in-ten (11.4%) older offenders received a variance

or departure based on their physical condition, compared to only 2.0 percent of offenders under age 50. Although relatively few older offenders (2.4%) received a departure or variance because of the need for medical treatment, this was twice the rate of offenders under 50 (1.2%).

Figure 35. Departure and Variance Reasons by Age Category
Fiscal Year 2021

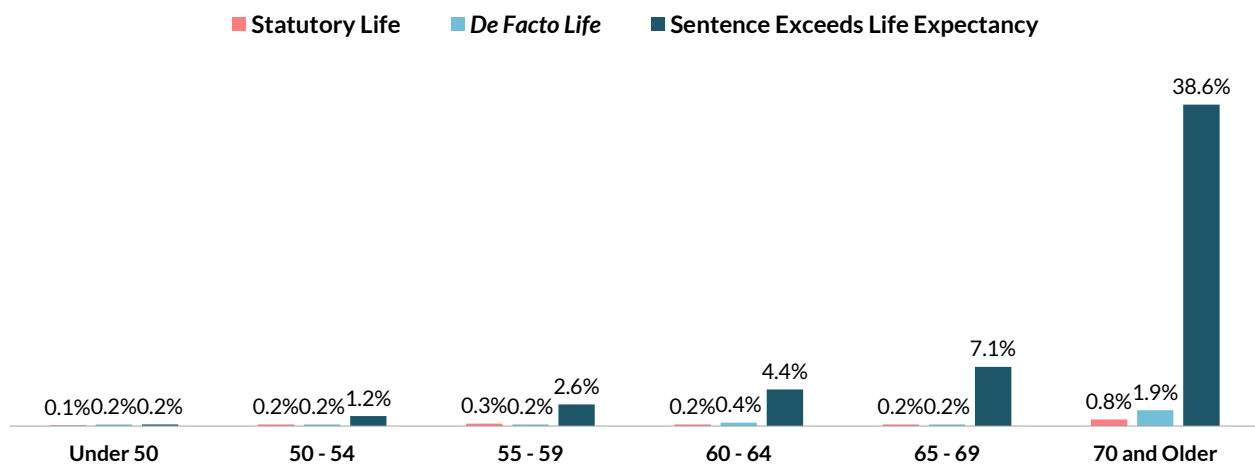


Life Sentences

Less than one percent (0.1%) of all federal offenders received a statutory life sentence in fiscal year 2021. Similarly, few offenders (0.2%) received a sentence sufficient in length to qualify as a de facto life sentence.⁵⁷ Although these sentences were similarly uncommon among older offenders, the oldest offenders—70 and older—received both statutory life sentences (0.8%) and de facto life sentences (1.9%) at more than twice the rate of all other offenders (Figure 36).

For the oldest federal offenders, even a relatively short sentence could exceed life expectancy.⁵⁸ Of course, the older an offender is at the time of sentencing, the more likely they are to receive a sentence that exceeds their life expectancy. For example, while only 1.2 percent of offenders ages 50 through 54 receive sentences that exceed their life expectancy, the proportion doubles to 4.4 percent for offenders ages 60 through 64 and increases again to 7.0 percent for offenders ages 65 through 69. More than one-third (38.6%) of offenders ages 70 and older received a sentence that exceeds their life expectancy.

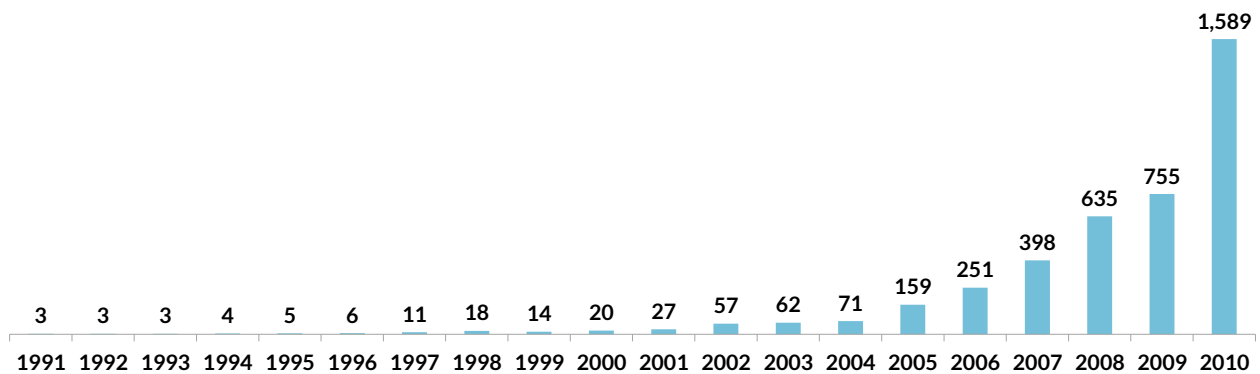
Figure 36. Rate of Offenders Receiving Life Sentences by Age Category
Fiscal Year 2021



10

Recidivism of Older Offenders

Figure 37. Calendar Year of Original Federal Sentencing for Older Offenders Released in 2010



The Commission routinely studies recidivism among federal offenders as part of its continuing duty to collect, analyze, and report sentencing data.⁵⁹ In this section of the report, the Commission examines the recidivism rates of older offenders released in 2010.

This section of the report uses data from the Commission's ongoing recidivism studies to provide a comprehensive analysis of the recidivism of all federal offenders who were released from federal prison in 2010.⁶⁰ The data used in this section combines data regularly collected by the Commission with data compiled as part of a data-sharing agreement with the Federal Bureau of Investigation's (FBI) Criminal Justice Information Services Division.⁶¹ The study group in this section comprised 32,135 offenders who satisfied the following criteria:

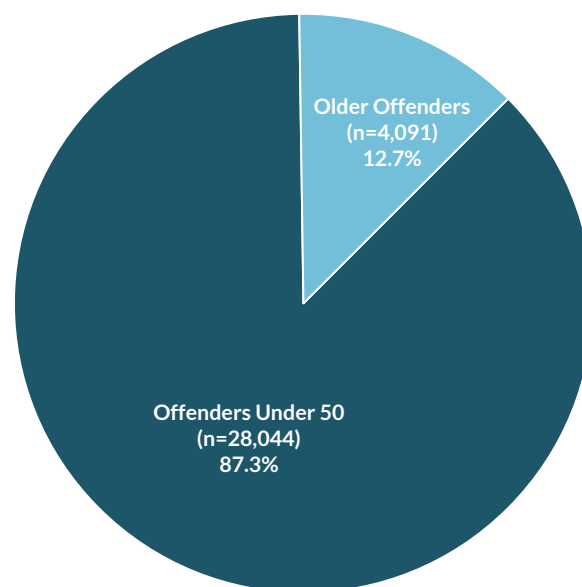
- United States citizens;
- re-entered the community in 2010 after discharging their sentence of incarceration or being placed on probation;
- not reported dead, escaped, or detained;⁶²
- have valid FBI numbers which could be located in criminal history repositories (in at least one state, the District of Columbia, or federal records).

There were 4,091 older offenders in the recidivism study group,⁶³ that is, offenders who were at least 50 years of age at sentencing (Figure 37). They constituted 12.7 percent of the 2010 release cohort (Figure 38).

Defining Recidivism

This section of the report examines the recidivism rates of older offenders during the eight-year follow-up period.⁶⁴ Recidivism “refers to a person’s relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime.”⁶⁵ In this report, the Commission used rearrest as its recidivism event because it is the measure of recidivism used most by federal agencies in recent recidivism studies.⁶⁶ Additionally, federal agencies use rearrest as the primary measure of recidivism because it is a more reliable measure than reconviction and reincarceration, due to the incomplete nature of disposition data.⁶⁷

Figure 38. Distribution of Older Offenders in 2010 Recidivism Cohort



**Table 5. Recidivism Rates by Age Category
Release Cohort 2010**

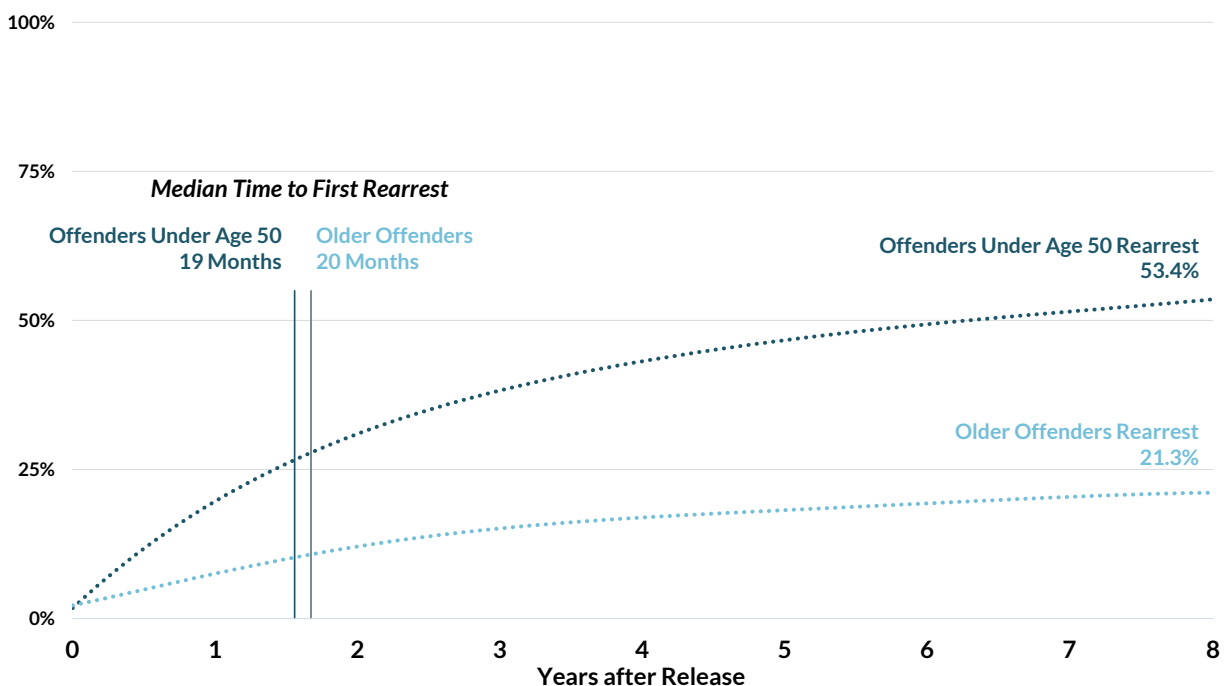
	Offenders Under 50 (n=28,044)	Older Offenders (n=4,091)
Percent Rearrested	53.4%	21.3%
Median Time to Recidivism Event	19 Months	20 Months
Median Number of Recidivism Events	3	1
Most Common Post-Release Event	Assault (21.2%)	Probation/Parole/ Supervised Release Violation (16.0%)

Recidivism Findings

The recidivism rate of older offenders (21.3%) was less than half that of offenders under the age of 50 (53.4%) (Table 5).⁶⁸ Older offenders also had a small median number of recidivism events (one), compared to offenders under the age of 50 (three). Older offenders also had a longer median time to recidivism (20 months), compared to offenders under the age of 50 (19 months) (Figure 38).

The recidivism rate of older offenders was less than half that of offenders under the age of 50.

Figure 39. Time to Recidivism by Age Category
Release Cohort 2010

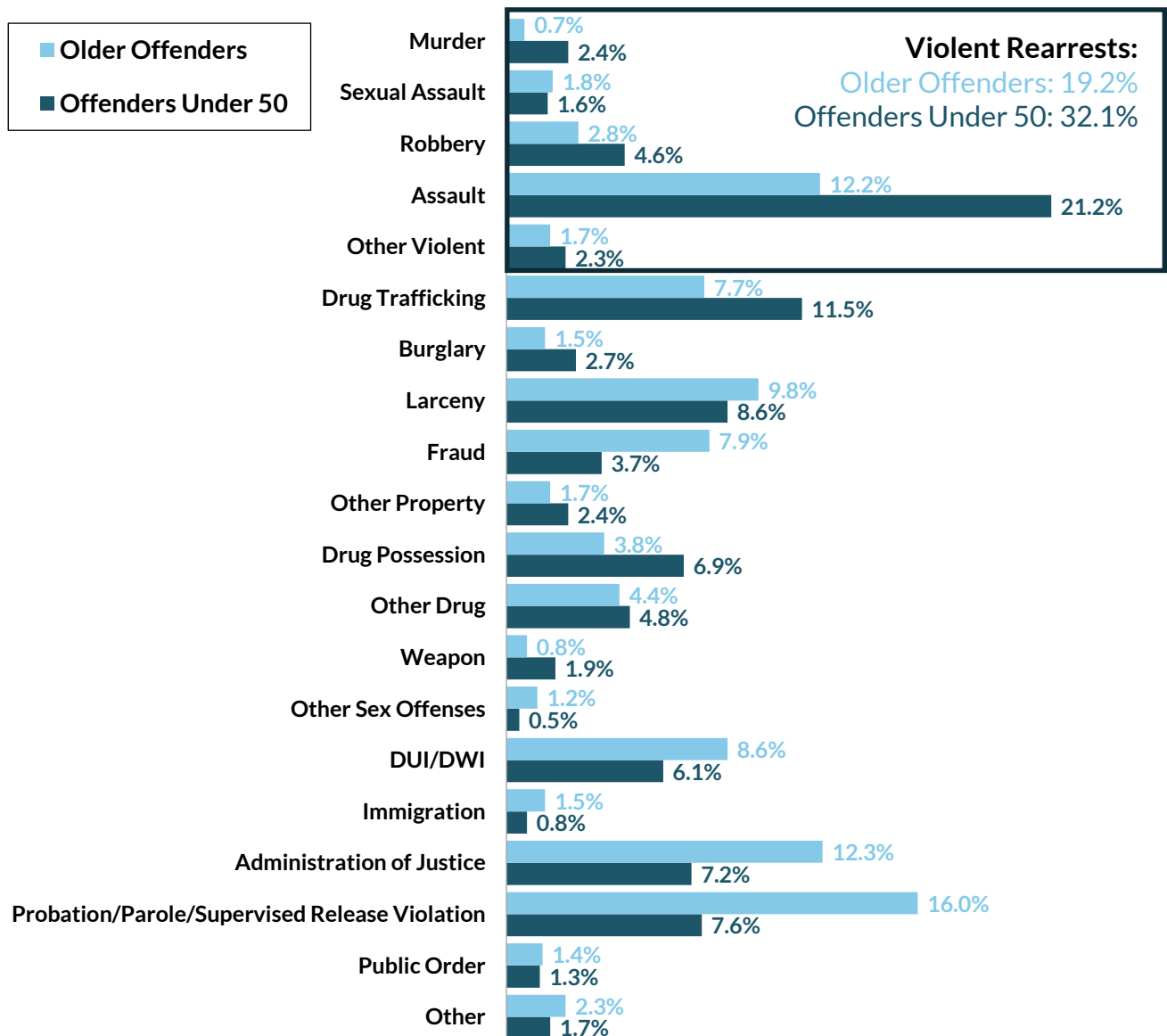


Recidivism Event Type

The older offenders in the 2010 release cohort recidivated for less serious crimes than offenders under the age of 50. The most common recidivism events for older offenders were supervision violations (16.0%) and administration of justice offenses (12.3%). Older offenders had a

lower rate of violent recidivism (19.2%) compared to offenders under the age of 50 (32.1%) (Figure 40). Assault was the most common violent offense for both groups of offenders, but older offenders were rearrested for assault (12.2%) nearly half as often as offenders under the age of 50 (21.2%).

Figure 40. Recidivism Event Type by Age Category
Release Cohort 2010



11 Conclusion

In fiscal year 2021, 13.7 percent of federal offenders were age 50 or older at the time of sentencing. The Commission's study found that older offenders have different offender and offense characteristics compared to offenders under the age of 50. Older offenders had a higher rate of economic and sexual offenses compared to other federal offenders. They were also more likely to be white and college educated than other federal offenders. A substantial portion of older offenders had a physical disability or mental illness prior to arrest for their instant offense. The proportion of offenders with a physical disability increased as offenders' age at sentencing increased. Nearly two-thirds of offenders ages 70 and older had a physical disability prior to arrest for their federal offense.

Courts sentence older federal offenders differently, as well. Older offenders were also more likely to receive sentences that vary from the guidelines. The oldest federal offenders were just as likely to receive a variance as they were to receive a sentence under the guidelines. Courts also granted older offenders departures and variances for physical conditions and age at twice the rate of all other offenders. Although they received variances at a higher rate than offenders under the age of 50, older offenders were more likely to receive sentences that exceeded their life expectancy.

Appendix A

Figure A-1. Older Offenders by Federal District, Fiscal Year 2021

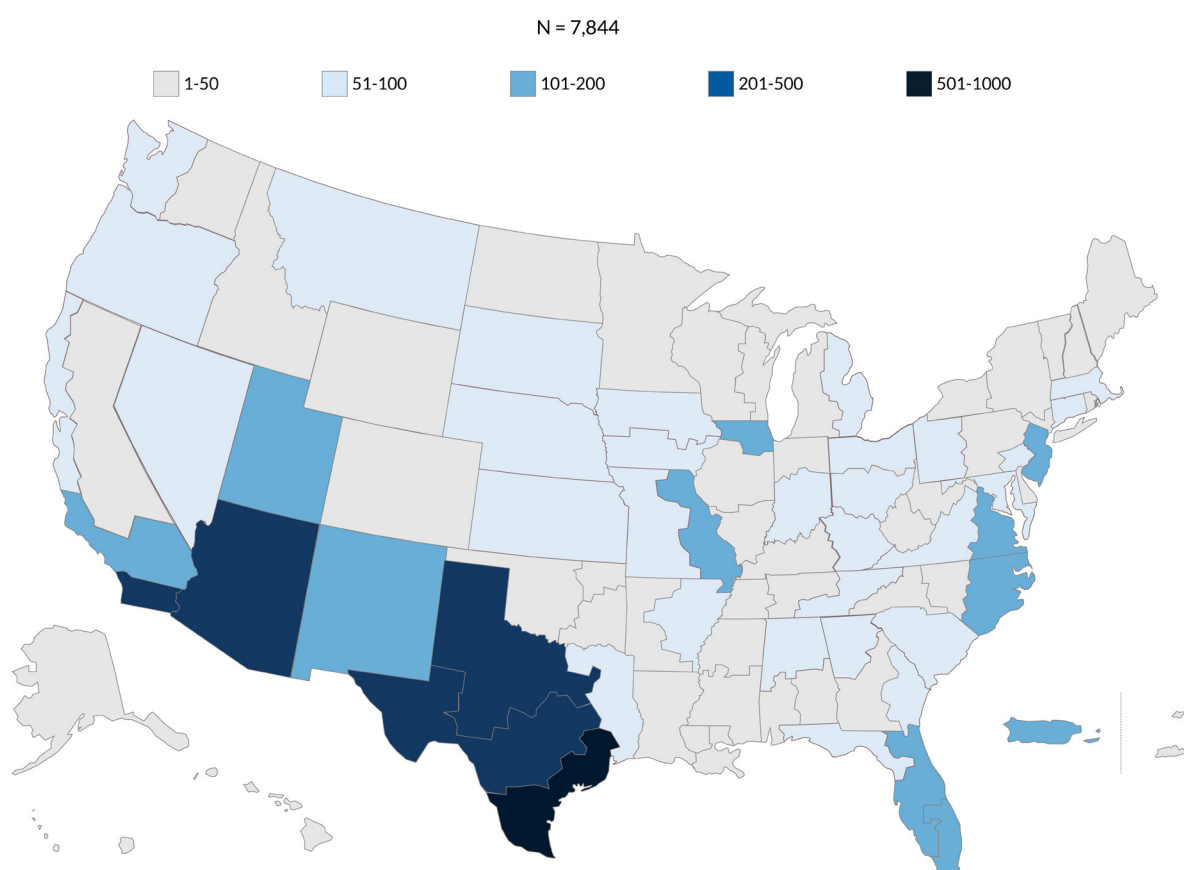


Figure A-2. Older Offender Characteristics by Gender

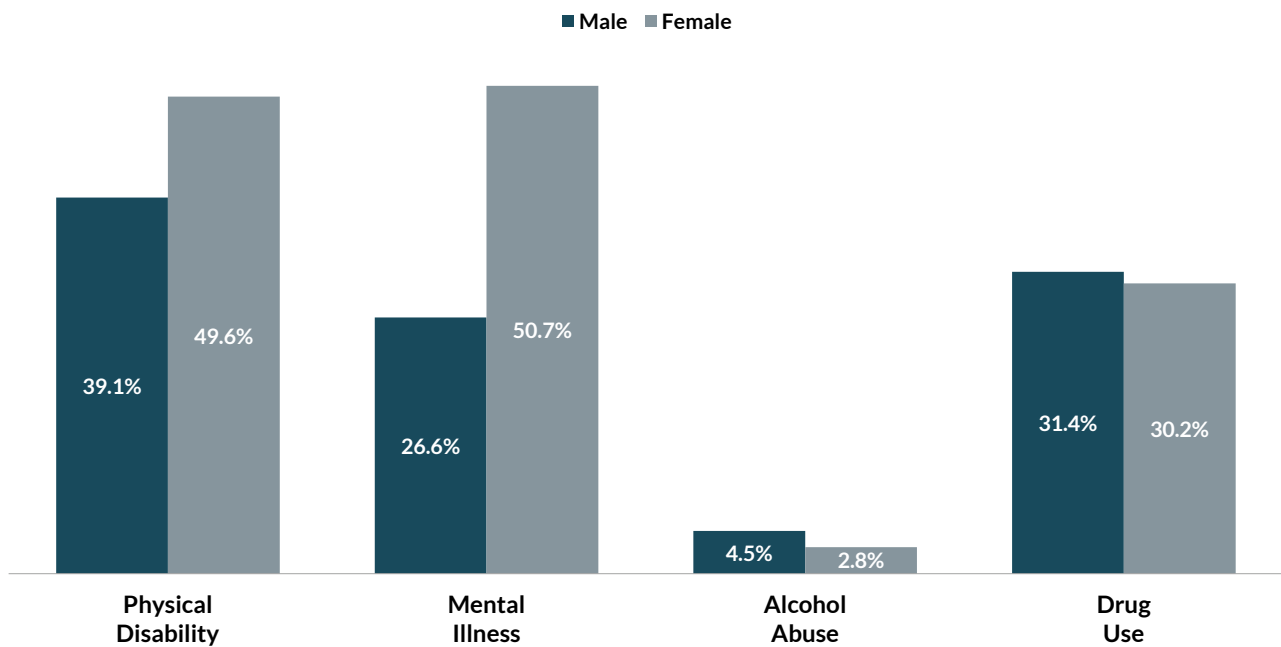
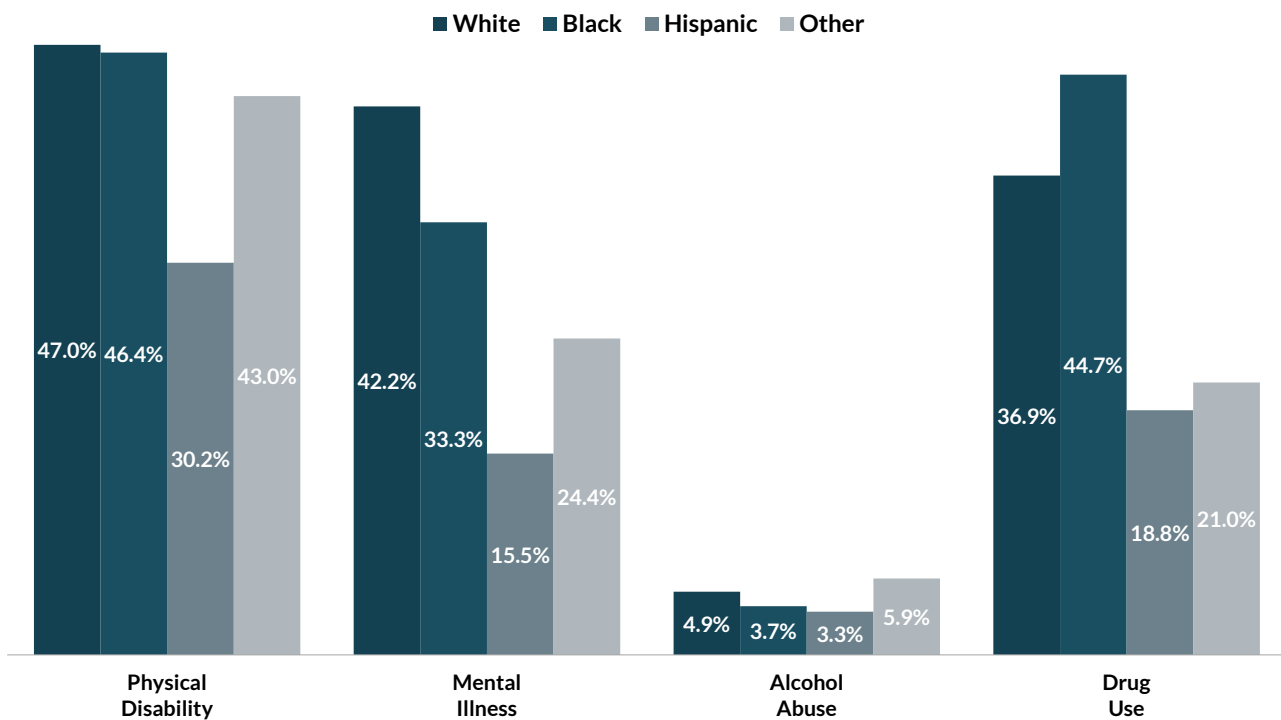


Figure A-3. Older Offender Characteristics by Race



**Table A-1. Type of Crime by Age Category,
Fiscal Year 2021**

	Under 50		50 - 54		55 - 59	
	N	%	N	%	N	%
Administration of Justice	421	0.9	34	1	29	1.3
Antitrust	1	0.0	2	0.1	0	0.0
Arson	73	0.1	3	0.1	2	0.1
Assault	624	1.3	16	0.5	15	0.7
Bribery or Corruption	119	0.2	40	1.2	22	1.0
Burglary or Trespassing	60	0.1	1	0.0	2	0.1
Child Pornography	907	1.8	96	2.8	88	4.0
Commercialized Vice	77	0.2	16	0.5	9	0.4
Drug Possession	276	0.6	10	0.3	10	0.5
Drug Trafficking	15,436	31.2	984	29.1	621	28.5
Environmental	105	0.2	15	0.4	17	0.8
Extortion and Racketeering	82	0.2	13	0.4	9	0.4
Firearms	7,609	15.4	252	7.5	160	7.4
Food and Drug	27	0.1	8	0.2	2	0.1
Forgery or Copyright Infringement	115	0.2	8	0.2	9	0.4
Fraud or Theft or Embezzlement	3,175	6.4	461	13.6	369	17.0
Immigration	15,217	30.8	967	28.6	468	21.5
Individual Rights	44	0.1	10	0.3	7	0.3
Kidnapping	83	0.2	4	0.1	4	0.2
Manslaughter	51	0.1	3	0.1	1	0.0
Money Laundering	798	1.6	88	2.6	63	2.9
Murder	239	0.5	11	0.3	3	0.1
National Defense	177	0.4	12	0.4	10	0.5
Obscenity or Other Sex Offenses	230	0.5	29	0.9	17	0.8
Prison Offenses	478	1.0	30	0.9	13	0.6
Robbery	1,157	2.3	50	1.5	50	2.3
Sex Abuse	866	1.8	75	2.2	58	2.7
Stalking or Harassing	162	0.3	22	0.7	13	0.6
Tax	165	0.3	78	2.3	70	3.2
Other	669	1.4	40	1.2	35	1.6

**Table A-1. Type of Crime by Age Category,
Fiscal Year 2021 (Continued)**

	60 - 64		65 - 69		70 and Older	
	N	%	N	%	N	%
Administration of Justice	16	1.3	5	0.8	7	1.6
Antitrust	1	0.1	2	0.3	0	0.0
Arson	0	0.0	1	0.2	0	0.0
Assault	7	0.6	4	0.6	2	0.5
Bribery or Corruption	34	2.7	17	2.7	15	3.5
Burglary or Trespassing	0	0.0	1	0.2	0	0.0
Child Pornography	52	4.2	39	6.3	33	7.7
Commercialized Vice	5	0.4	3	0.5	4	0.9
Drug Possession	6	0.5	5	0.8	2	0.5
Drug Trafficking	341	27.5	148	23.7	78	18.2
Environmental	19	1.5	10	1.6	7	1.6
Extortion and Racketeering	5	0.4	4	0.6	3	0.7
Firearms	75	6.1	33	5.3	22	5.1
Food and Drug	4	0.3	2	0.3	4	0.9
Forgery or Copyright Infringement	1	0.1	2	0.3	2	0.5
Fraud or Theft or Embezzlement	275	22.2	161	25.8	130	30.4
Immigration	185	14.9	73	11.7	27	6.3
Individual Rights	3	0.2	3	0.5	2	0.5
Kidnapping	0	0.0	1	0.2	0	0.0
Manslaughter	1	0.1	0	0.0	0	0.0
Money Laundering	33	2.7	27	4.3	19	4.4
Murder	4	0.3	0	0.0	0	0.0
National Defense	8	0.6	6	1.0	4	0.9
Obscenity or Other Sex Offenses	16	1.3	5	0.8	1	0.2
Prison Offenses	8	0.6	2	0.3	1	0.2
Robbery	25	2.0	9	1.4	9	2.1
Sex Abuse	31	2.5	15	2.4	17	4.0
Stalking or Harassing	15	1.2	5	0.8	2	0.5
Tax	47	3.8	32	5.1	29	6.8
Other	21	1.7	9	1.4	8	1.9

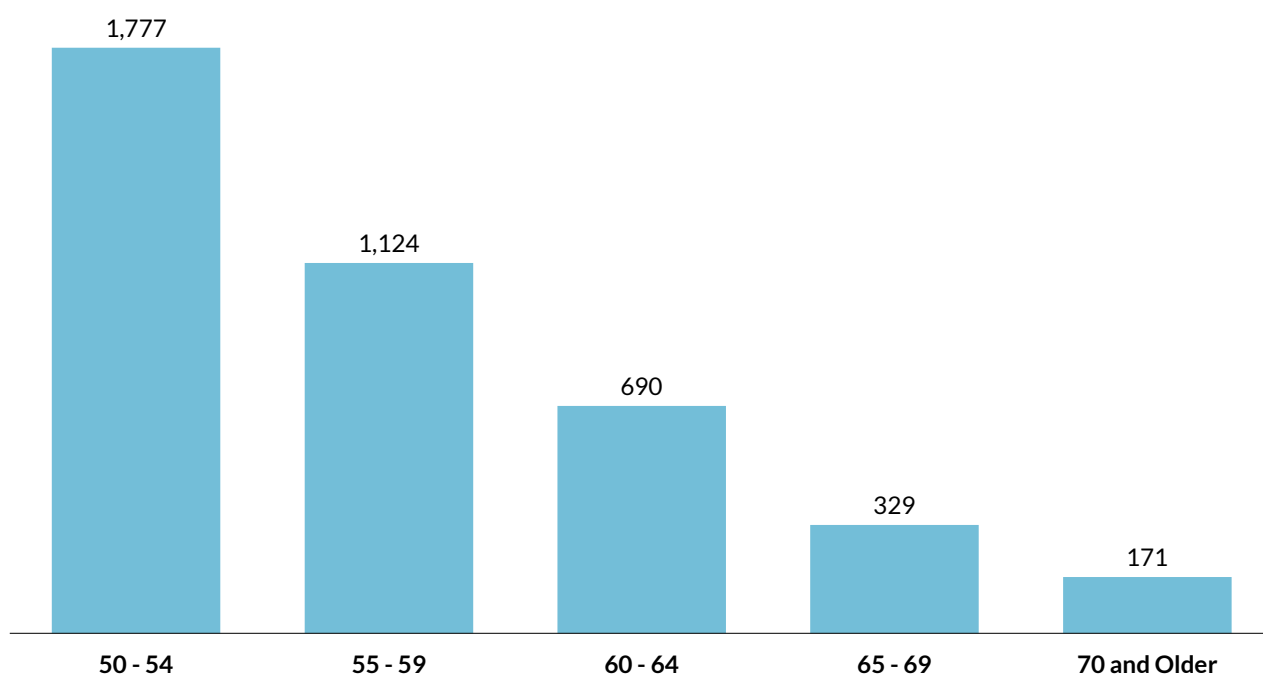
Appendix B

Demographic Characteristics of Older Offenders Recidivism Cohort

Most (70.9%) of the older offenders released in 2010 were under the age of 60, with relatively few being in the oldest age category, 70 and older (4.2%) (Figure B-1). Their median age at sentencing was 56 years of age and their median age at release was 58 years of age.

The older offenders released in 2010 were predominately White (64.6%) and male (82.2%). Likewise, offenders in the release cohort who were under the age of 50 at sentencing were mostly male (82.8%) but had nearly equal proportions of White offenders (37.8%) and Black offenders (38.0%) (Table B-1).

**Figure B-1. Age Distribution of Older Offenders
2010 Release Cohort**



**Table B-1. Demographic Characteristics by Age Category
2010 Release Cohort**

Offenders Under 50 (n=28,026)			Older Offenders (n=4,091)		
Race/Ethnicity¹	N	%	Race/Ethnicity¹	N	%
White	10,573	37.8	White	2,638	64.6
Black	10,651	38.0	Black	830	20.3
Hispanic	5,378	19.2	Hispanic	431	10.6
Other	1,402	5.0	Other	186	4.6
Gender²	N	%	Gender²	N	%
Male	23,206	82.8	Male	3,362	82.2
Female	4,818	17.2	Female	729	17.8
Age³			Age³		
Median Age at Sentencing	31 years		Median Age at Sentencing	57 years	
Median Age at Release	35 years		Median Age at Release	59 years	
Sentence Length⁴			Sentence Length⁴		
Average	54 months		Average	31 months	
Median	37 months		Median	18 months	

¹ Race was missing for 18 offenders.

² Gender was missing for 18 offenders.

³ Age at Sentencing and Release were missing for 18 offenders.

⁴ Sentence Length was missing for 18 offenders.

NOTE: The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

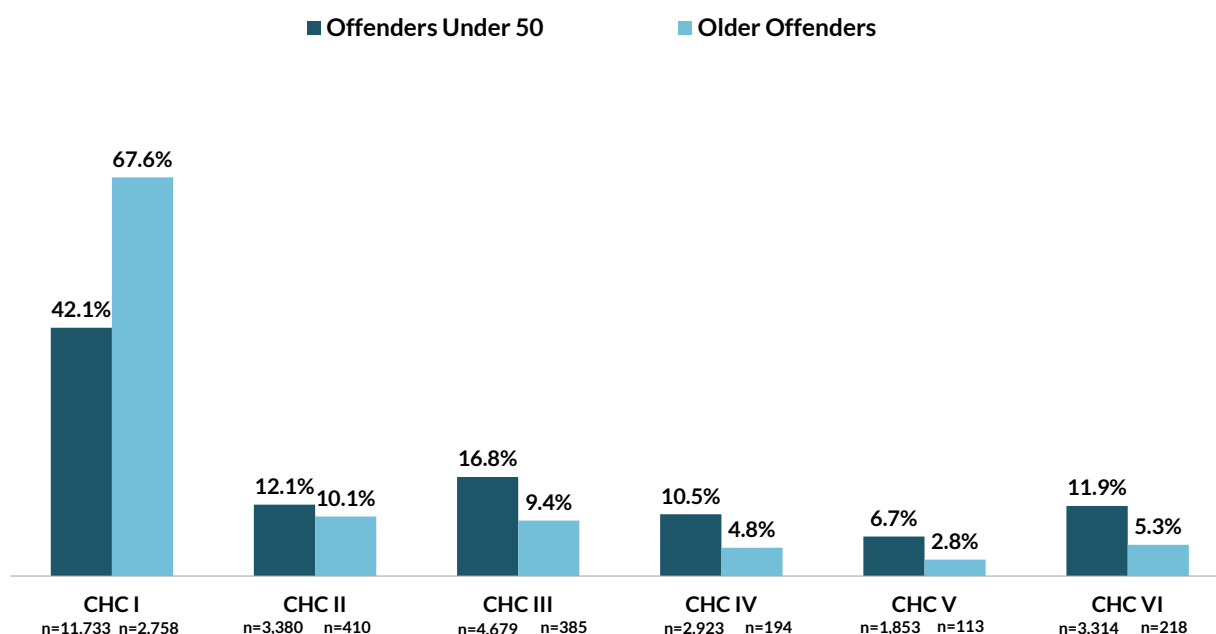
Totals may not sum to 100.0% due to rounding.

Criminal History

Criminal history is one of the strongest predictors of future recidivism, with more serious criminal history being associated with a greater likelihood of recidivism following release from imprisonment.⁶⁹ There were notable differences between the criminal histories of older offenders and offenders under the age of 50 in this study (Figure B-2). In keeping with the findings

related to older offenders in general, the older offenders in the 2010 release cohort had less extensive criminal histories, compared to all other offenders. Two-thirds (67.6%) of older offenders were in CHC I, the lowest criminal history category. Less than half (42.1%) of offenders under age 50 were in CHC I. Conversely, there were half as many older offenders (5.3%) in CHC VI, the highest CHC, compared to offenders under age 50 (11.9%).

Figure B-2. Criminal History Category by Age Category
Release Cohort 2010

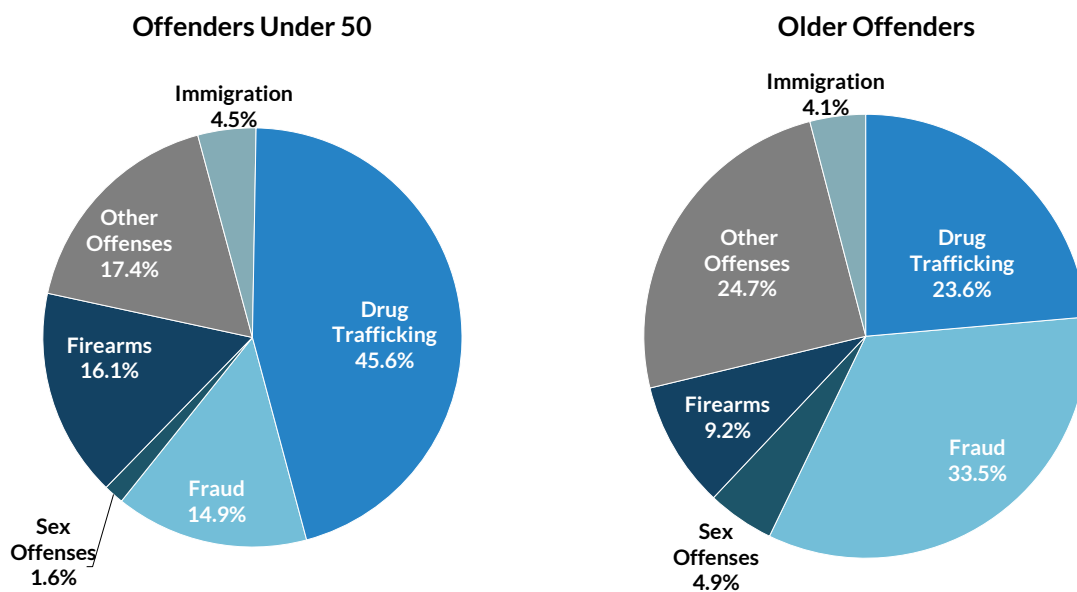


Type of Crime

The distribution of crime types was markedly dissimilar for older offenders in the 2010 release cohort compared to offenders under the age of 50 (Figure B-3). More than one-third (33.5%) of older offenders were sentenced for a fraud offense. By comparison, just under half

(45.9%) of offenders under the age of 50 were drug trafficking offenders. There were nearly half as many firearms offenders (9.2%) among the older offender cohort, compared to offenders under the age of 50 (16.2%). The Commission's previous work on recidivism indicates that firearms offenders have higher recidivism rates compared to all other federal offenders.⁷⁰

**Figure B-3. Primary Offense Type by Age Category
2010 Release Cohort**



Sentence Imposed

Older offenders in the 2010 release cohort were sentenced to probation (29.9%) at twice the rate of offenders under the age of 50 (13.5%) (Figure B-4).

Figure B-4. Sentence Imposed by Age Category
Release Cohort 2010

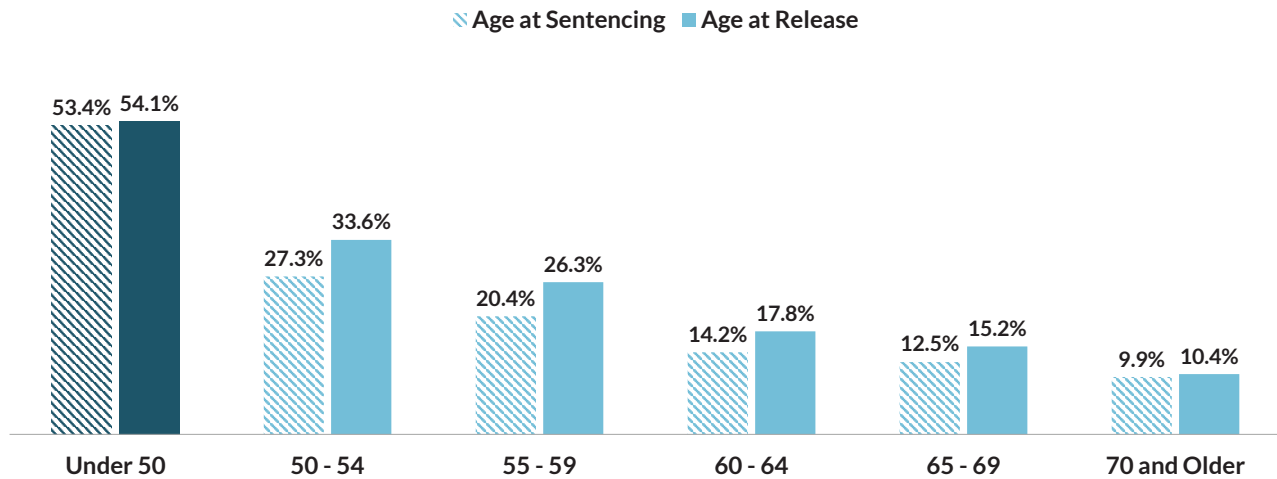


Appendix C

Recidivism Rate for Offenders 50 and Older at Sentencing and Release

Recidivism rates were also low for offenders who were released after the age of 50 (Figure C-1). Though offenders released after age 50 recidivated at a slightly higher rate than offenders sentenced at age 50 or older, rates of recidivism remained low for both groups and steadily decreased with increasing offender age to a low of about ten percent for offenders aged 70 and older.

Figure C-1. Rearrest Rates by Age at Sentencing and Release



Endnotes

- 1 U.S. Census Bureau, *Explore Census Data*, <https://data.census.gov/cedsci/> (last visited May 25, 2022).
- 2 18 U.S.C. § 3553(a)(1).
- 3 See U.S. SENT'G COMM'N, *Guidelines Manual*, §5H1.1 (Nov. 2021) [hereinafter USSG]; see also USSG Ch.5, Pt.H, intro. comment. (“[T]he policy statements indicate that [age and other] characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted.”).
- 4 See Susan J. Loeb & Azza AbuDagga, *Health-Related Research on Older Inmates: An Integrative Review*, 29 RSCH. NURSING & HEALTH 556 (2006).
- 5 See Helene Merkt, Sophie Haesen, Leila Meyer, Reto W. Kressig, Bernice S. Elger & Tenzin Wangmo, *Defining an Age Cut-Off for Older Offenders: A Systematic Review of Literature*, 16 INT’L J. PRISONER HEALTH 95 (2020). The authors conducted a meta-analysis of 100 scholarly articles to determine the mean cutoff age for “older” offenders and the justifications for using that age; 48 studies used the cut off as age 50. *Id.*
- 6 *Id.*
- 7 See Bryce Evan Stoliker & Joseph Varanese, *Spending the Golden Years Behind Bars: Predictors of Mental Health Issues Among Geriatric Prisoners*, 12 VICTIMS & OFFENDERS 718 (2017).
- 8 See Susan Baidawi & Christopher Trotter, *Psychological Distress Among Older Prisoners*, 22 J. CORR. HEALTH CARE 354 (2016).
- 9 See Stoliker & Varanese, *supra* note 7.
- 10 See Robert G. Falter, *Selected Predictors of Health Services Needs of Inmates Over Age 50*, 6 J. CORR. HEALTH CARE 149 (1999).
- 11 See Merkt et al., *supra* note 5.
- 12 Sentencing Reform Act of 1984, Pub. L. No. 98–473, § 217, 98 Stat. 1837, 2020 (codified as amended at 28 U.S.C. § 994).
- 13 See USSG §§5H1.1, 5H1.4.
- 14 USSG §5H1.1.
- 15 *Id.* Prior to 2010, §5H1.1 provided that age was “not ordinarily relevant in determining whether a departure [wa]s warranted.” USSG App. C, amend. 739 (effective Nov. 1, 2010). However, since its original promulgation, §5H1.1 instructed that a downward departure may be appropriate in the case of a defendant who is “elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration.” U.S. SENT’G COMM’N, *Guidelines Manual*, §5H1.1 (Nov. 1987). In 2010 the Commission amended the policy statement to its current form. USSG App. C, amend. 739 (effective Nov. 1, 2010).
- 16 USSG §5H1.4. As with §5H1.1, prior to 2010, §5H1.4 provided that physical condition was “not

ordinarily relevant in determining whether a departure may be warranted.” USSG App. C, amend. 739 (effective Nov. 1, 2010). However, since its original promulgation, §5H1.4 instructed that “an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.” U.S. SENT’G COMM’N, *Guidelines Manual*, §5H1.4 (Nov. 1987). In 1991 it was further amended to provide that a downward departure may be appropriate in the case of, for example, a “seriously infirm defendant” for whom “home detention may be as efficient as, but less costly than, imprisonment.” U.S. SENT’G COMM’N, *Guidelines Manual*, §5H1.4 (Nov. 1991). In 2010, the Commission amended the policy statement to its current form, apart from a subsequent technical amendment. USSG App. C, amend. 739 (effective Nov. 1, 2010).

17 18 U.S.C. § 3553(a) (factors to be considered in imposing a sentence).

18 *Id.* § 3553(a)(1), (a)(1)(D).

19 *Id.* § 3553(a)(5).

20 *United States v. Pilon*, 734 F.3d 649, 655 (7th Cir. 2013).

21 *Id.* at 656; *see also United States v. Gutierrez*, No. 10-CR-3383, 2013 WL 12329917, at *1 (D.N.M. Aug. 23, 2013) (declining to depart downward where the defendant was 65-years-old, in “fair physical health,” and presented no “‘unusual’ considerations, [because] [a]lthough given Defendant’s age, he may well develop age-related health issues in the future, the Guidelines contemplate a downward departure where the defendant is ‘elderly and infirm’ at the time of sentencing, which does not apply here”).

22 *See, e.g., United States v. Bistline*, 720 F.3d 631, 634 (6th Cir. 2013) (“The district court also put an unreasonable amount of weight on [the defendant’s] age and poor health. Although in exceptional cases a court may rely on these factors to support a below-guidelines sentence, they simply ‘cannot justify the sentence imposed here.’ [The defendant’s] age and health issues are not as extraordinary as he and the district court seem to think they are. There are plenty of older convicts with medical conditions of their own in federal prisons.” (internal citations omitted)); *United States v. Moreland*, 703 F.3d 976, 991 (7th Cir. 2012) (“As for age and infirmity, age 59 is not elderly in our society; the elderly do not have a license to commit crime; and adequate medical care is available in federal prisons.” (internal citations omitted)).

23 *United States v. McFarlin*, 535 F.3d 808, 810–11 (8th Cir. 2008).

24 *Id.*

25 *United States v. Wurzinger*, 467 F.3d 649, 651 n.2 (7th Cir. 2006) (“[O]lder people are closer to death and have shorter life expectancies.”).

26 The Commission recognizes a sentence length of 470 months or longer as a “*de facto* life sentence.” *See* GLENN R. SCHMITT & HYUN J. KONFRST, U.S. SENT’G COMM’N, *LIFE SENTENCES IN THE FEDERAL SYSTEM* 10 (2015). Commission materials cited herein are available on the Commission’s website at www.ussc.gov.

27 *See United States v. McDonald*, 981 F.3d 579, 581–82 (7th Cir. 2020) (concluding that defendant’s sentence is not “effectively a life sentence” because his life expectancy exceeded the sentence imposed).

28 *Wurzinger*, 467 F.3d at 652 (stating that “[t]here is a worthy tradition that death in prison is not to be ordered lightly, and the probability that a convict will not live out his sentence should certainly give pause to a sentencing court” and collecting cases recognizing the same).

29 *See McDonald*, 981 F.3d at 581–82; *see also United States v. Lee*, 725 F.3d 1159, 1169 (9th Cir. 2013) (per curiam) (remanding for a series of procedural sentencing errors and also instructing the district court to consider on remand “that for a 72-year old woman, a 96-month sentence is likely to be the equivalent of a life sentence and thus a verdict that [the defendant] will die in prison”).

30 *See, e.g., United States v. Bey*, 748 F.3d 774, 779 (7th Cir. 2014) (“Given the defendant’s age (62) and

poor health, a sentence of 92 months—almost eight years—is admittedly stiff. But it is so far below the bottom of the guidelines range that it cannot be thought excessive. We are pleased to see that the district judge sentenced the defendant as far below the guidelines range as he did in order to avoid imposing a sentence that in the circumstances would be ‘a sentence of life,’ citing a recent opinion of this court expressing concern about sentences so long that they are likely to crowd the prisons with the elderly.”); *United States v. Kincannon*, 567 F.3d 893, 901 (7th Cir. 2009) (affirming a 30-year sentence for a 77-year-old defendant because the defendant’s advanced age “had not deterred or slowed his criminal activity to date”); *Wurzinger*, 467 F.3d at 654 (affirming a sentence that exceeded life expectancy for defendant who had an above-average tendency to commit crime in his old age).

31 *United States v. Pacheco-Martinez*, 791 F.3d 171, 180 (1st Cir. 2015) (affirming sentence at the top of the guideline range for defendant who “had been swindling unwary victims for years” and did not “express any contrition, or apologize to the victims whose life savings he stole”); *see also* *United States v. Johnson*, 685 F.3d 660, 662 (7th Cir. 2012) (“The 70-year-old criminal is a *rara avis*, and by engaging in criminal activity at such an age provides evidence that he may be one of the few oldsters who will continue to engage in criminal activity until they drop.”).

32 *Pacheco-Martinez*, 791 F.3d at 180 (alteration and citation omitted).

33 *Johnson*, 685 F.3d at 661.

34 *Id.* at 662; *see also* *United States v. Johns*, 732 F.3d 736, 741–42 (7th Cir. 2013) (reversing on other grounds but noting that the district court considered the fact that the defendant “was revving up his criminal activity, both the nature and frequency, at an age when other criminals begin to slow down, which suggested ‘a significant danger of recidivism’”); *United States v. Pelletier*, 469 F.3d 194, 204 (1st Cir. 2006) (rejecting 55-year-old defendant’s age-based challenge to 151-month sentence, noting, among other things, that “the court gave significant weight to the defendant’s recidivism, his repeated parole violations, his unexcused flight from supervision, and the fact that he had committed the offense of conviction while on parole”).

35 RYAN COTTER, COURTNEY SEMISCH & DAVID RUTTER, U.S. SENT’G COMM’N, *RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010*, at 24–25 (2021) [hereinafter 2021 *RECIDIVISM OVERVIEW REPORT*]; KIM STEVEN HUNT & BILLY EASLEY II, U.S. SENT’G COMM’N, *THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 22–27* (2017) [hereinafter *RECIDIVISM AGE REPORT*].

36 *See* *RECIDIVISM AGE REPORT*, *supra* note 35, at 22.

37 *See id.* at 22–27, 30.

38 *See* U.S. SENT’G COMM’N, *2021 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 8* (2022) [hereinafter 2021 *SOURCEBOOK*].

39 *See also infra* Figure A-1.

40 As part of this special coding project, the Commission collected data on older offenders beyond the information regularly reported in the Commission’s annual datafile. The Commission regularly collects information for every federal felony and Class A misdemeanor offense sentenced each year, to carry out its various statutory responsibilities. *See* 28 U.S.C. § 995(a)(12), (14)–(16). Sentencing courts are statutorily required to submit five sentencing documents to the Commission within 30 days of entry of judgment in a criminal case: (1) the charging document; (2) the plea agreement; (3) the Presentence Report; (4) the Judgment and Commitment Order; and (5) the Statement of Reasons form. *See* 28 U.S.C. § 994(w)(1). The Commission extracts and codes data from these documents to compile its databases. For each case in its Offender Datafile, the Commission routinely collects sentencing data, demographic variables, statutory information, guideline application decisions, and departure and variance information.

41 *See supra* note 18 and accompanying text.

42 See also *infra* Figure A-2.

43 The Commission defined “drug use” as any use of a drug that is prohibited by federal law, regardless of the legal status in state or local jurisdictions, or the misuse of a legally obtained prescription drug.

44 See Appendix A for a complete table of crimes committed by older offenders.

45 See 2021 SOURCEBOOK, *supra* note 38, at 136, 161.

46 See U.S. SENT’G COMM’N, FEDERAL SENTENCING OF CHILD PORNOGRAPHY: NON-PRODUCTION OFFENSES (2021).

47 *Id.* at 18. The average age of federal offenders sentenced in fiscal year 2021 was 37 years old. See 2021 SOURCEBOOK, *supra* note 30, at 50.

48 The criminal history guidelines and the determination of the offender’s CHC measure the seriousness of the offender’s prior conduct and likelihood to recidivate. Courts determine an offender’s CHC based on a point system which takes into account the length of a sentence imposed for a prior conviction and whether the offender was still serving a sentence in another case while committing the instant offense (e.g., the offender was on probation or parole). See USSG Ch.4, Pt.A.

49 See, e.g., USSG Ch.3, Pt.B.

50 USSG §3B1.1.

51 USSG §3B1.2.

52 A career offender is someone who commits a crime of violence or a controlled substance offense after two prior felony convictions for those crimes. See USSG §4B1.1(a). The sentencing guidelines assign all career offenders to CHC VI and to offense levels at or near the statutory maximum penalty of the offense of conviction. See USSG §4B1.1(b); see also U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016).

53 USSG §4B1.1.

54 USSG §4B1.4; see also USSG §4B1.4, comment. (n.1) (“This guideline applies in the case of a defendant subject to an enhanced sentence under 18 U.S.C. § 924(e). Under 18 U.S.C. § 924(e)(1), a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a ‘violent felony’ or ‘serious drug offense,’ or both, committed on occasions different from one another.”).

55 18 U.S.C. § 924(e)(1) (providing a 15-year enhanced mandatory penalty for a defendant convicted of 18 U.S.C. § 922(g) who has three prior convictions for either a “violent felony,” a “serious drug offense,” or both that were “committed on occasions different from one another”).

56 A sentencing court can impose a sentence below an otherwise applicable statutory mandatory minimum penalty if: (1) the prosecution files a motion based on the defendant’s “substantial assistance” to authorities in the investigation or prosecution of another person, pursuant to 18 U.S.C. § 3553(e); or (2) in certain drug trafficking cases, the defendant qualifies for the statutory “safety valve” contained in 18 U.S.C. § 3553(f). See USSG §§5C1.2, 5K1.1.

57 A *de facto* life sentence is 470 months or longer. See *supra* note 26 and accompanying text.

58 The Commission determined the life expectancy of each fiscal year 2021 offender based on their gender, race, and ethnicity. A life expectancy sentence was then calculated by adding together the age of the offender at sentencing and the sentence imposed. If the sentence and offender’s current age combined were longer than the offender’s identified life expectancy, the offender was determined to have a sentence that

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exceeded life expectancy. This calculation does not consider decreased life expectancy due to incarceration or the possibility of early parole, based on good time credit.

59 See *supra* note 40.

60 See 2021 RECIDIVISM OVERVIEW REPORT, *supra* note 35.

61 The data used to conduct the analyses in this report includes information obtained pursuant to an interagency agreement with the FBI, which prohibits the Commission from releasing the dataset.

62 This includes any offenders released from the BOP on detainer, which ordinarily indicates transfer of custody to state court or to a state correctional facility following completion of their federal sentence.

63 For a discussion of the offender characteristics of older offenders in this study, see Appendix B.

64 Offenders were excluded from various analyses in this report due to missing information for the variables required for those analyses.

65 See Nat'l Inst. of Just., U.S. Dep't of Just., *Recidivism*, <https://nij.ojp.gov/topics/corrections/recidivism> (last visited Sept. 15, 2021); see also MICHAEL D. MALTZ, *RECIDIVISM* 1, 54 (2001) [hereinafter MALTZ].

66 See, e.g., MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., *UPDATE OF PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014)* (2018); Admin. Off. of the U.S. Cts., *Just the Facts: Post-Conviction Supervision and Recidivism* (Oct. 22, 2018), <https://www.uscourts.gov/news/2018/10/22/just-facts-post-conviction-supervision-and-recidivism#chart1>; WILLIAM RHODES, CHRISTINA DYOUS, RYAN KLING, DANA HUNT & JEREMY LUALLEN, ABT ASSOC., *RECIDIVISM OF OFFENDERS ON FEDERAL COMMUNITY SUPERVISION* (2012).

67 See MALTZ, *supra* note 65, at 55–60.

68 Recidivism rates were also low for offenders who were released after the age of 50. See *infra* Appendix C.

69 2021 RECIDIVISM OVERVIEW REPORT, *supra* note 35, at 25–29.

70 See TRACEY KYCKELHAHN, KRISTEN SHARPE & AMANDA KERBEL, U.S. SENT'G COMM'N, *RECIDIVISM OF FEDERAL FIREARMS OFFENDERS RELEASED IN 2010*, at 23 (2021).



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THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002

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