PREPARED TESTIMONY
of
Judge Patti B. Saris
Chair, United States Sentencing Commission
Before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

October 12, 2011

Chairman Sensenbrenner, Ranking Member Scott, and Distinguished Members of the Subcommittee, thank you for inviting me to testify today on behalf of the United States Sentencing Commission regarding the state of federal sentencing since the Supreme Court's 2005 decision in *United States v. Booker*,[1] and the role of the Commission in federal sentencing after *Booker*.

Since 2005, the Court has issued seven opinions dramatically changing the state of federal sentencing. The federal sentencing guidelines continue to play a central role in federal sentencing. In the more than 83,000 federal felony and Class A misdemeanor cases sentenced annually, over 80 percent of federal offenders continue to be sentenced within the applicable advisory guideline range or pursuant to a request from the government for a sentence below the otherwise applicable advisory guideline range.[2]

While sentencing data and case law demonstrate that the federal sentencing guidelines continue to provide gravitational pull in federal sentencing, the Commission has observed an increase in the numbers of variances from the guidelines in the wake of the Supreme Court's recent jurisprudence. There are troubling trends in sentencing, including growing disparities among circuits and districts and demographic disparities which the Commission has been evaluating.

The Commission believes that a strong and effective guidelines system is an essential component of the flexible, certain, and fair sentencing scheme envisioned by Congress when it passed the SRA.

To improve sentencing in light of *Booker* and its progeny, the Commission has the following statutory suggestions: First, Congress should enact a more robust appellate review standard that requires appellate courts to apply a presumption of reasonableness to sentences within the properly calculated guidelines range. The Commission also believes that Congress should require that the greater the variance from a guideline, the greater should be the sentencing court's justification for the variance. Congress also should create a heightened standard of review for sentences imposed as a result of a "policy disagreement" with the guidelines. Second, the Commission recommends that Congress clarify statutory directives to the sentencing courts

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[1] 543 U.S. 220 (2005).
[2] The Commission refers to a sentence that results from a government request for a sentence below the otherwise applicable advisory guideline range as "government-sponsored."

and Commission that are currently in tension. Section 994 of title 28, United States Code, instructs *the Commission* to assure the guidelines reflect the general inappropriateness of considering certain offender characteristics (for example "family ties and responsibilities") in the guidelines, but 18 U.S.C. § 3553(a) can be read to direct the *sentencing courts* to consider those same characteristics. Accordingly, judges often determine that the guidelines have not sufficiently addressed offender characteristics and impose a sentence outside the guidelines. Third, as the Commission testified in 2005 and 2006, Congress should require that sentencing courts give substantial weight to the guidelines at sentencing, and codify the three-part sentencing process.

Congress created the bipartisan Commission to fulfill the unique role of standing at the crossroads of all three branches of government, and acting as a steward for the purposes of sentencing as set forth in the Sentencing Reform Act of 1984 (SRA), a bipartisan piece of legislation.[3] Congress specifically charged the Commission with ensuring that the federal sentencing guidelines meet these purposes, provide certainty and fairness, avoid unwarranted disparities while maintaining sufficient flexibility to permit individualized sentences when warranted, reflect advances in the knowledge of human behavior as it relates to sentencing, and assessing whether sentencing, penal, and correctional practices are meeting the purposes of sentencing.[4]

Today, the Commission remains extraordinarily busy carrying out its statutory mandates.[5] The Commission promulgated amendments specifically implementing five congressional directives in the areas of fraud and drugs during the last amendment cycle, for which amendments are currently pending before Congress. It also promulgated an amendment addressing straw purchases of firearms, illegal reentry offenses, and supervised release. In the coming months, the Commission will release comprehensive reports on mandatory minimums and their role in the current federal sentencing system; child pornography offenses; and the state of federal sentencing since *Booker*. The Commission recently published its priorities for the upcoming amendment cycle,[6] and it continues to process sentencing information from over 80,000 cases annually, answer numerous requests from all three branches of government and follow an important research agenda.

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[3] 18 U.S.C. § 3553(a)(2). These purposes include the need for a sentence imposed to: (A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) afford adequate deterrence to criminal conduct; (C) protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

[4] 28 U.S.C. § 991.

[5] The specific statutory duties of the Commission include, but are not limited to: (1) promulgating sentencing guidelines to be determined, calculated, and considered in all federal criminal cases; (2) collecting, analyzing, and reporting sentencing data systematically to detect new criminal trends, to determine if federal crime policies are achieving their goals, and to serve as a clearinghouse for federal sentencing statistics; (3) conducting research on sentencing issues and serving as an information center for the collection, preparation, and dissemination of information on federal sentencing practices; and (4) providing specialized training to judges, probation officers, staff attorneys, law clerks, prosecutors, defense attorneys, and other members of the federal criminal justice community on federal sentencing issues, including application of the guidelines. *See* 28 U.S.C. §§ 991, *et seq.*

[6] *See* 76 Fed. Reg. 58564-58565 (Sept. 21, 2011).

My testimony today comprises two parts. Part I of my testimony focuses on the state of federal sentencing after *Booker*. Section I of this part provides a brief overview of the federal sentencing system prior to enactment of the SRA through the PROTECT Act and pre-*Booker* era, as well as the state of the federal sentencing system at the time the Commission testified before this subcommittee in 2005 and 2006; Section II discusses the significant Supreme Court case law that has developed since the 2005 *Booker* decision as well the state of appellate review since *Booker*; Section III provides an overview of key federal sentencing practices and trends across time; and Section IV suggests ways in which the current federal sentencing system may be improved to ensure that it meets the purposes of sentencing set forth in the SRA in a manner consistent with the constitutional holdings of *Booker* and its progeny. With several years of experience under the advisory guidelines system, the Commission believes that adjustments to the current federal sentencing system are ripe for consideration by Congress.

Part II of my testimony provides an overview of the Commission's statutory duties and provides examples of its continued importance in the federal sentencing system. The Commission after *Booker* remains vested with "extraordinary powers and responsibilities" and promotes the "fairness and effectiveness of Federal criminal justice as a whole."[7] The policies and practices that it employs remain consistent with the purposes of sentencing and demonstrate the Commission's unique position as a clearinghouse and expert on federal sentencing practices. After *Booker*, the Commission remains uniquely situated to provide Congress, and the entire criminal justice system, with thoughtful, necessary federal sentencing guidelines and the most up to date information on federal sentencing practices in the form of regular data analyses and comprehensive research.

PART I: Booker and Federal Sentencing

Section I: An Overview of Federal Sentencing

The SRA brought a new era of sentencing to the courts. Prior to implementation of the SRA, federal crimes carried very broad ranges of penalties, and federal judges had the discretion to choose the sentence they believed most appropriate.[8] Every judge was "left to apply his own notions of the purposes of sentencing."[9] Judges were not required to explain the reasons for the sentence imposed, and defendants had very limited rights to appeal. The time actually served by most offenders was determined by the Parole Commission, and on average, offenders served just 58 percent of the sentences that had been imposed.[10] In 1984, Congress enacted the SRA in response to widespread sentencing disparity that existed in the federal sentencing system.[11] Promulgation of the SRA ushered in a new era of sentencing in federal courts through the creation of the Commission and the promulgation of mandatory sentencing guidelines. For nearly 20 years, the mandatory sentencing guideline system required federal judges to impose

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[7] S. REP. NO. 98–225, at 3343.
[8] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM iv (2004) [hereinafter Fifteen Year Report].
[9] SEN. REP. NO. 98-225, at 3221.
[10] FIFTEEN YEAR REPORT, supra note 8, at iv.
[11] Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1837 (1984).

sentences within the applicable guideline range, unless the court found the existence of an aggravating or mitigating circumstance not adequately taken into consideration by the Commission in formulating the sentencing guidelines.[12]

The system that resulted, while by no means perfect, injected the federal sentencing process with greater transparency, consistency, and fairness.[13] The system also provided flexibility "in providing the sentencing judge with a range of options from which to fashion an appropriate sentence."[14] Importantly, however, Congress noted that the post-SRA system did not "remove all of the judge's sentencing discretion."[15] While Congress envisioned "that most cases will result in sentences within the guideline range," there would be "appropriate" instances when sentences fell outside the applicable guidelines range.[16]

Over the intervening years, Congress and the Supreme Court examined and refined the federal sentencing system.[17] Two cases in particular are worth noting in this testimony.

The Supreme Court's 1996 decision in *Koon v. United States*[18] was a significant decision in guidelines jurisprudence.[19] In *Koon*, the Supreme Court held that departure decisions by district courts were due deference and that appellate courts should use an abuse of discretion standard in reviewing trial courts' application of the guidelines to the facts.[20] In reaching its conclusion, the Court suggested that Congress "did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."[21] It pointed to 18 U.S.C. § 3742(e)(4), as enacted by the SRA, which provided that "[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous."[22] It further noted that the statute was amended in 1988 to require courts of appeals to "give due deference to the district court's application of the guidelines to the facts."[23] The Court also commented on the "institutional advantage" district courts hold over appellate courts in making the factual findings necessary to determining whether a particular case warrants departure, particularly because the district courts "see so many more Guidelines cases than appellate courts do."[24]

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[12] 18 U.S.C. § 3553 (b)(1), excised by *Booker*.
[13] FIFTEEN YEAR REPORT, supra note 8, at iv.
[14] S. REP. NO. 98–225, at 3233.
[15] *Id*.
[16] *Id*. at 3235. Congress specifically noted that it believed a sentencing judge "has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." *Id*.
[17] For an examination of the key cases impacting the development of the federal sentencing guidelines, see U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 1-8 (2006) [hereinafter Booker Report].
[18] 518 U.S. 81 (1996).
[19] For a more detailed examination of the *Koon* decision, see the U.S. SENTENCING COMM'N, REPORT TO CONGRESS DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (IN RESPONSE TO SECTION 401(M) OF PUB. LAW 108–21) 5-7 (2003) hereinafter Departures Report].
[20] *Koon*, 518 U.S. at 91.
[21] *Id*. at 97.
[22] *Id*.
[23] *Id*. (quoting 18 U.S.C. § 3742(e)).
[24] *Id*. at 98.

The Supreme Court heard a series of cases challenging judicial fact finding under the Sixth Amendment beginning in 2000 with *Apprendi v. New Jersey*.[25] *Apprendi* involved a challenge to a sentence imposed in state court. The defendant was convicted of a firearms violation, which carried a prison term of five to 10 years. After he pleaded guilty to the crime, the State of New Jersey filed a motion to enhance the sentence under the State's hate crime statute, alleging that the defendant committed the crime of conviction to intimidate a person or group because of racial animus. After finding by a preponderance of the evidence that the crime was racially motivated, the trial court imposed a 12-year sentence. The Supreme Court reversed, holding that the Sixth Amendment requires that "[o]ther than the fact of a prior conviction,[26] any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[27]

In 2003, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003.[28] The PROTECT Act set forth some of the most significant legislation since the SRA in the area of sentencing court departure and appellate review of departure decisions. As discussed in more detail, *infra*, the PROTECT Act fundamentally changed the appellate review standard established in *Koon*. The PROTECT Act, among other things, also formally established a new type of departure for "Early Disposition" or "fast track" programs. These new provisions are discussed in Part I, Section III, *infra*. The legislative history of the PROTECT Act, which is more fully set forth in the Commission's Departures Report, expresses congressional concern that the increasing rate of downward departures from the sentencing guidelines at the time was undermining the goals of the SRA, particularly the goals of certainty and uniformity in sentencing and of avoiding unwarranted disparity.

The Supreme Court issued its landmark decision rendering the federal sentencing guidelines "effectively advisory" on January 12, 2005. In *Booker*, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment.[29] To remedy the Sixth Amendment problem, the Court, therefore, struck two provisions of the SRA and effectively rendered the federal sentencing guidelines advisory.[30]

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[25] 530 U.S. 466 (2000).
[26] The exception for prior convictions is derived from the Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Justice Breyer delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas joined. The Court held that Congress' decision to treat recidivism as a sentencing factor upon an alien's subsequent conviction of an illegal reentry offense, rather than as an element of that offense, did not exceed due process or other constitutional limits on Congress' power to define elements of crime.
[27] *Apprendi*, 530 U.S. at 490. For a more detailed examination of *Apprendi* and the Sixth Amendment case law that developed between *Apprendi* and *Booker*, including a discussion of the *Harris* challenge to statutory mandatory minimum penalties, see the Commission's BOOKER REPORT, supra note 17, at 9-13.
[28] Pub. L. No. 108–21, 117 Stat. 650 (2003) (PROTECT Act).
[29] *Booker*, 543 U.S. at 244.
[30] *Id*. at 245.

A. February 2005 Testimony

The Commission testified before this subcommittee on February 10, 2005, and discussed the possible ramifications on the federal sentencing system. The Commission concluded that the system appeared relatively stable, but it identified key components of the system that required monitoring. First, the Commission noted that *Booker* still required that the guidelines be calculated and considered because they remained an important and essential consideration in the imposition of federal sentences. Second, the Commission recommended that the guidelines be given substantial weight in determining the appropriate sentence because the guidelines take into consideration all of the sentencing factors set forth in 18 U.S.C. § 3553(a). Third, the Commission noted that a post-*Booker* system could operate effectively only if the courts continued to provide sentencing documentation required by 18 U.S.C. § 3553(c) and 28 U.S.C. § 994(w), because without those documents, the Commission would not be able to generate the sentencing data needed by Congress and other stakeholders to evaluate the federal sentencing system.

The Commission identified six possible responses to the *Booker* decision. These responses included: (1) a "wait and see" approach; (2) statutory implementation in some form of the *Booker* sentencing scheme; (3) providing a jury trial mechanism for sentencing guideline enhancements; (4) "simplification" of the guidelines either by reducing the number of guideline adjustments and/or by expanding the sentencing guideline ranges; (5) equating the maximum of the guideline sentencing ranges with the statutory maximum for the offense of conviction, and (6) broader reliance on statutory mandatory minimum penalties.

B. March 2006 Testimony

When the Commission testified before this subcommittee in March 2006, the federal sentencing system appeared relatively stable. The Commission closely monitored federal sentencing during the year after *Booker* and compared it to federal sentencing trends across time.[31] It also released a comprehensive report on the state of federal sentencing in the year after *Booker*, comparing it to key time periods throughout the history of the sentencing guidelines system. In March 2006, the majority of defendants (62.2 %) continued to be sentenced in conformance with the federal sentencing guidelines.[32] Government-sponsored below range sentences also remained stable at 23.7 percent, for a combined conformance rate of 85.9 percent.[33] The Commission's examination of the four major offense categories – drug trafficking, immigration, firearms, and fraud – demonstrated similar patterns of stability. The

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[31] The Commission established various time periods for analysis during its 2006 testimony and accompanying 2006 report to Congress on the impact of *Booker*. For those purposes, the Commission examined cases sentenced from October 1, 2002, through April 30, 2003, the date of the enactment of the PROTECT Act (the pre-PROTECT Act period). The second timeframe examined by the Commission included cases sentenced between May 1, 2003, and June 24, 2004, the date of the decision in *Blakely v. Washington*, 542 U.S. 296 (2004) (the PROTECT Act period). The third timeframe examined by the Commission included cases sentenced during the period January 12, 2005, and January 12, 2006 (the *Booker* period).

[32] BOOKER REPORT at 62, supra note 17, at 62, Table 1.

[33] This compared to a conformance rate of 90.6% in the pre-PROTECT Act period (October 1, 2002, through April 30, 2003), and 93.7% in the post-PROTECT Act period (May 1, 2003, and June 24, 2004). BOOKER REPORT, supra note 17, at 46.

Commission's review also indicated that the severity of sentences and average sentence length remained consistent with pre-*Booker* trends.

The Commission did detect, however, an increase in non-government sponsored below range sentences following *Booker*. The Commission determined that, a year after *Booker*, nationally about 12.5 percent of cases had nongovernment sponsored, below-range sentences attributable either to guideline departures or *Booker*.[34] By comparison, the non-government sponsored, below-range sentence rate estimated by the Commission during the pre-PROTECT period was 8.6 percent and during the post-PROTECT Act period was 5.5 percent.[35]

Based on the information available at the time, the Commission recommended that Congress consider the following: (1) codify the three-step process for imposing a sentence;[36] (2) address the standard of review and appellate process as articulated by *Booker*; (3) ensure the timely and uniform use of sentencing documentation; and (4) clarify that a sentence reduction for cooperation or substantial assistance is impermissible absent a motion from the government. In addition, the Commission continued to improve its real-time data collection, analysis and reporting to keep stakeholders informed of the developments in federal sentencing.

Section II: Case Law Development

There have been significant developments in the case law since *Booker* was decided in 2005. The Supreme Court has issued seven decisions directly related to the operation of the federal sentencing guidelines. These cases have not only directly impacted the sentencing practices of district courts but also re-instated a deferential appellate review standard. This section provides brief summaries of these key cases and their holdings, and provides an overview of the current appellate review system.

In the SRA, Congress created meaningful appellate review of federal sentences for the first time. The right of appeal went hand-in-hand with a guideline system: "The Committee believes that section 3742 creates for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for the correction of erroneous and clearly unreasonable sentences."[37] Section 1291, of title 28, United States Code, provides appellate courts with "jurisdiction of appeals from all final

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[34] *Id*. at 47.
[35] *See id*. at 63; *United States v. Booker: One Year Later—Chaos or Status Quo?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. 7 (2006) (statement of Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n).
[36] The "three-step process" as articulated in *Booker* and *Rita v. United States*, 551 U.S. 338 (2007), requires the courts to: (1) calculate the appropriate guideline sentence; (2) consider any available departure provisions set forth in the *Guidelines Manual*; then (3) consider whether the sentence reached after steps one and two result in a sentence that is sufficient but not greater than necessary as mandated by 18 U.S.C. § 3553 (a)(2). Variances are cases in which the sentence imposed was below the applicable guideline range and where the court did not cite as a reason a provision listed in *Guidelines Manual* as a basis for imposing a sentence below the applicable guideline range.
[37] S. REP. NO. 98–225, at 3338.

decisions of the district courts of the United States," and section 3742, of title 18, United States Code, sets the parameters for appeals in criminal cases.

A. Evolution of the Appellate Standard of Review

During the first decade of the mandatory guidelines system, review of departure decisions and arguments about the proper interpretation of guidelines provisions dominated federal sentencing appeals. In *Koon v. United States*, the Supreme Court held that departure decisions by the district courts were due deference and that appellate courts should use an abuse of discretion standard in reviewing trial courts' application of the guidelines to the facts.[38] The Court noted that "[d] istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do."[39]

In 2003, as part of the PROTECT Act, Congress included significant changes to the appellate review standard, as well as limitations on district courts with respect to departures from the federal sentencing guidelines. Specifically, the PROTECT Act amended 18 U.S.C. § 3742(e) to provide for a de novo standard of review. The PROTECT Act also established factors that Courts of Appeals had to consider when reviewing a sentence including whether the sentence: (1) was imposed in violation of the law; (2) resulted from the incorrect application of the guidelines; (3) was outside the guideline range, and the sentencing court did not provide an adequate statement of reasons; (4) departed from the guideline range based on a factor that does not advance the objectives in § 3553(a)(2), was not authorized under § 3553(b)(1), or is not justified by the facts in the case; (5) departed to an unreasonable degree, in view of the factors set forth in § 3553(b); or (6) was imposed for an offense for which there was no applicable guideline and was plainly unreasonable.[40] The PROTECT Act also required district courts to state with specificity the reasons for a sentence outside the otherwise applicable guideline range.[41]

In its 2005 *Booker* decision, the Court excised 18 U.S.C. § 3742(e), holding that the provision "depends upon the Guidelines' mandatory nature."[42] The Court devised a reasonableness standard of review based on "the past two decades of appellate practice in cases involving departures," the "related statutory language," and the "sound administration of justice."[43] Notably, the Court did not excise the jurisdictional provisions of 18 U.S.C. § 3742 that prohibit appellate review of a properly calculated within range sentence.[44] The Courts of Appeals quickly settled this ambiguity, however, by permitting review of a within range sentence under the rationale that such a sentence may still be "unreasonable" and thus "in violation of the law."[45]

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[38] Koon v, United States, 518 U.S. 81, 91 (1996).
[39] *Id*. at 98.
[40] 18 U.S.C. § 3742(e).
[41] 18 U.S.C. § 3582(c).
[42] *Booker*, 543 U.S. at 245.
[43] *Id*. at 260-61.
[44] *See* 18 U.S.C. §§ 3742(a), 3742(b).
[45] *See, e.g.*, United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006); United States v. Martinez, 434 F.3d 1318 (11th Cir. 2006) ("[A] post-*Booker* appeal based on the 'unreasonableness' of a sentence, whether within or outside

In 2007, the Supreme Court issued three decisions directly related to federal sentencing in the wake of *Booker*. In *Rita v. United States*,[46] the Supreme Court upheld a federal appellate court's reliance on a rebuttable presumption of reasonableness for a sentence that was imposed within the applicable guideline range, concluding that courts of appeals may but need not apply such a presumption when reviewing a within guideline range sentence. The Court further clarified the reasonableness review called for in *Booker* and emphasized the close relationship between the guidelines and § 3553(a) factors. The Court held that a rebuttable presumption of reasonableness on appeal "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable."[47] The Court also made clear such a presumption of reasonableness was not available to the district courts.[48]

In *Gall v. United States*,[49] the Court considered the question whether the standard of review differs for sentences within the applicable guidelines range and those outside the guidelines range. The Court concluded that the abuse of discretion standard applies equally to all sentences "whether inside, outside, or significantly outside the Guidelines range."[50] The Court rejected any "appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range" or "the use of a rigid mathematical formula that uses the percentage of departure as the standard for determining the strength of the justifications required for a specific sentence."[51]

The Court in *Gall* articulated the process by which appellate courts should assess the reasonableness of a sentence. The first step of such review is "to ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." Only if there are no procedural defects should the court move to a "substantive" reasonableness analysis using an "abuse of discretion standard."[52]

> When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. . . . But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the

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the advisory guidelines range, is an appeal asserting that the sentence was imposed in violation of law pursuant to § 3742(a)(1)."); United States v. Mickelson, 433 F.3d 1050, 1052 (8th Cir. 2006) ("[A]n unreasonable sentence would be 'in violation of law' and subject to review under 18 U.S.C. § 3742(a)(1) regardless of whether it was within the guideline range.").

[46] 551 U.S. 338 (2007).

[47] *Rita*, 551 U.S. at 350-51.

[48] *Id*.

[49] 552 U.S. 38 (2007).

[50] *Gall*, 552 U.S. at 41.

[51] *Id*. at 46-47.

[52] *Id*. at 51.

extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.[53]

In *Kimbrough v. United States*, the Court held that a sentencing judge may consider the disparity between the guidelines' treatment of crack and powder cocaine when determining an applicable sentencing range.[54] The Court observed that, in creating the crack cocaine guidelines, the Commission varied from its usual practice of employing an "empirical approach based on the data about past sentencing practices," instead adopting the "weight-driven scheme" used in the 1986 Anti-Drug Abuse Act that created the 100-to-1 disparity between the two drugs and maintaining that ratio throughout the drug quantity table.[55] The Court determined upon review of the history of the Commission's actions with respect to crack and powder cocaine that the drug trafficking guidelines for crack cocaine offenses did not exemplify what the Court perceived to be "the Commission's exercise of its characteristic institutional role" and resulted in sentences for crack cocaine offenses "'greater than necessary' in light of the purposes of sentencing set forth in § 3553(a)."[56] The Court concluded that "[g]iven all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve §3553(a)'s purposes, even in a mine-run case."[57]

In 2008, the Supreme Court again weighed in on post-*Booker* sentencing. In *Irizarry v. United States*,[58] the Court considered the question whether the notice requirement of Federal Rule of Criminal Procedure 32(h) applied to sentences that "varied" from the applicable guideline range under *Booker* as well as typical guideline "departures." The Court held that Rule 32(h)[59] and its previous holding in *Burns v. United States*[60] did not apply to a variance from a recommended guidelines range.[61] In reaching this decision, the Court concluded that:

> Any expectation subject to due process protection at the time we decided *Burns* that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive our decision in *United States* v. *Booker,* (2005), which invalidated the mandatory features of the Guidelines. Now faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of "expectancy" that gave rise to a special need for notice in *Burns*. Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness.[62]

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[53] *Id*.
[54] 552 U.S. 85, 91 (2007).
[55] *Id.* at 95-97.
[56] *Id*. at 109-10.
[57] *Id*. at 110.
[58] 553 U.S. 708 (2008). In response to *Burns v. United States*, 501 U.S. 129 (1991), Rule 32(h) states that "[b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure."
[59] Federal Rule of Criminal Procedure 32(h) states that "[b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure."
[60] 501 U.S. 129 (1991).
[61] *Irizarry* 553 U.S. at 714-15.
[62] *Id*. at 713-14(citations omitted).

The Court held that Rule 32 “does not apply to § 3553 variances by its terms. ‘Departure’ is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.”[63]

In 2009, the Supreme Court issued two per curiam opinions that further weakened the effectiveness of the guidelines. In *Spears v. United States*,[64] the Court (in a 5-4 *per curiam* opinion) held that district courts may categorically disagree with the guidelines, at least with respect to the drug guidelines for crack cocaine offenses. Further explaining its holding in *Kimbrough*, the Court stated “[t]hat was indeed the point of *Kimbrough:* a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”[65] Thus, *Spears* clarified “that district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.”[66]

Similarly in *Nelson v. United States*, the Court (in another per curiam decision) reaffirmed its decisions in *Rita* and *Gall* that a presumption of reasonableness is improper at the district court level. The Court reiterated that “the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.”[67] “Instead, the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, , explaining any variance from the former with reference to the latter.”[68] The Court concluded “[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”[69]

Again in 2011, the Supreme Court addressed the authority of district courts to impose sentences based on policy disagreements with the Commission. In *Pepper v. United States*,[70] the Court held that, when a district court resentences a defendant whose original sentence was overturned on appeal, the district court may consider evidence of the defendant’s rehabilitation since the original sentence was imposed, and may impose a sentence below the guideline range on the basis of this information. The guidelines explicitly prohibit departures on the basis of post-sentencing rehabilitation, but the Court emphasized that its “post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views,” and that this was such a case.[71]

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[63] *Id*. at 714.
[64] 555 U.S. 261 (2009) (per curiam).
[65] *Id*. at 264.
[66] *Id*. at 265
[67] *Id*. (citations omitted).
[68] *Id*.
[69] *Id*.
[70] __ U.S. __, 131 S. Ct. 1229 (2011).
[71] *Id*. at 1247.

B. The State of Federal Appellate Review

Based on hearings, statistics, and case law, the Commission has concluded that the Court after *Booker* has taken some of the "teeth" from appellate review of federal sentencing decisions. The vast majority of sentencing appeals today are based on guideline application or other procedural issues. Appellate courts rarely address the substantive reasonableness of a sentence.

Several factors limit the effectiveness of appeals in alleviating sentencing differences as envisioned by the Court in *Booker*. First, only a small portion of sentences are appealed each year. Immediately following *Booker*, there was an increase in the number of sentences appealed, but in recent years the numbers have leveled off and are more similar to pre-*Booker* levels. In fiscal year 2006, the first full year after *Booker*, 8,283 appeals were filed challenging criminal sentences.[72] This represents over 11 percent of the 72,510 criminal sentences imposed in that year.[73] In contrast, in fiscal year 2010, 5,269, or roughly six percent of the 83,946 felony and Class A misdemeanor sentences imposed were appealed by either the government or defendant.[74] In the years immediately prior to *Booker*, sentencing issues were raised in the cases of approximately 4,200-4,600 defendants each year.[75]

Second, the Government initiates only a small portion of these appeals. In fiscal year 2010, the government only raised sentencing issues in 86 cases, while defendants raised such issues in 5,215 cases.[76] As noted by some circuit judges and evidenced by the low number of government-initiated sentencing appeals, sentences below the applicable guidelines range are not frequently appealed.[77] Second, the Government initiates only a small portion of these appeals.

There are a number of reasons why appeals by defendants predominate. First, after *Booker* defendants may appeal even those sentences that are within a properly calculated guideline range, as well as those above and even those below the range, arguing that the district court did not go low enough or failed adequately to consider relevant evidence.[78] Unless a defendant is bound by a plea agreement, there is little reason not to appeal.[79] Whereas a defendant's attorney is ethically bound to appeal as long as the defendant requests it,[80] an appeal

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[72] U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 55.
[73] *Id*. at Table 10.
[74] U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tables 10 and 55.
[75] *See* U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 55 (4,601 appeals); U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 55 (4,383 appeals); U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS ,Table 55 (4,492 appeals); U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 55 (4,226 appeals).
[76] U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Tables 56 and 56A.
[77] *See USSC 2010 National Training Seminar*, New Orleans, LA (June 17, 2010) (Remarks of Honorable Gerald Lynch, U.S. Court of Appeals for the Second Circuit) [hereinafter Lynch 2010 National Training Remarks].
[78] *See, e.g.*, United States v. Olhovsky, 562 F.3d 530, 546-50 (3d Cir. 2009).
[79] Some circumstances in which the defendant might be precluded from appealing include cases in which the defendant signs an appeal waiver in exchange for a benefit at sentencing, and cases in which the government and the defendant agree to a binding sentence recommendation under Rule 11(e)(1)(C).
[80] *See, e.g.*, Roe v. Flores-Ortega, 528 U.S. 470, 479, 484 (2000) (noting that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal," and holding that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.").

on the part of the government is discretionary and requires specific approval from the Solicitor General.[81] *Booker* did not cause this imbalance in the types of appeals being brought; this disparity has always existed.[82]

Second, only a small percentage of sentences are challenged as being too low, while thousands are appealed as being too high.[83] This is true even though the majority of sentences imposed that are outside the guideline range are below, rather than above the range. For example, in fiscal year 2010, sentencing courts elected to impose 14,565 below-range sentences.[84] This represents close to eighteen percent of the 81,859 sentences imposed that year.[85] In contrast, sentencing courts imposed 1,512 above-range sentences.[86] This represents less than two percent of all sentences.[87]

Finally, the circuits are divided on whether a sentence within a properly calculated guideline range is entitled to a presumption of reasonableness. In the case of certain guidelines some circuits have even suggested that a within guideline sentence will often be unreasonable.[88] Other circuits have examined the same guideline and explicitly affirmed that it should be presumed reasonable.[89]

Feedback the Commission has received suggests that district court judges generally view the appeals process as functioning well, whereas some appeals court judges view the appeals process as broken. District court judges generally consider proper the discretion afforded to them under the *Booker* standard of review.[90] Indeed, 75 percent of federal district judges believe

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[81] See U.S. ATTORNEY MANUAL, § 2-2.121 (Necessity of Authorization by Solicitor General – Appeals or Petitions on Behalf of the United States), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title2/2mapp.htm#2-2.121.

[82] *See* U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tables 56 and 56A (Sentencing issues raised by the defendant in 4500 cases and the government in 133 cases); U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at Tables 56 and 56A (Sentencing issues raised by the defendant in 4,313 cases and the government in 112 cases).

[83] *See* U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tables 56 and 56A.

[84] *Id*. at Table N.

[85] *Id.*

[86] *Id*.

[87] *Id*.

[88] *See*, *e.g.*, United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010) (encouraging district judges "to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2-ones that can range from non-custodial sentences to the statutory maximum-bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.")

[89] United States v. Mantanes, 632 F.3d 372 (7th Cir. 2011); United States v. Gray, 405 F. App'x. 436 (11th Cir. 2010). *See also* United States v. Irey, 612 F.3d 1160, 1203 (11th Cir. 2010) (en banc) (rejecting "as unreasonable and a clear error in judgment the view that the guidelines involving sex crimes against children are too harsh in a mine-run case because pedophiles have impaired volition").

[90] *See, e.g.*, *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Chicago, IL* (Sept. 9-10, 2009) (Testimony of Honorable Philip Simon, Northern District of Indiana, transcript at 102-03) [hereinafter *Simon 25th Anniversary Testimony*], http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090909-10/Public_Hearing_Transcript.pdf; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Austin, TX* (Nov. 19, 2009) (Statement of Honorable Robin J. Cauthron, Western District of Oklahoma, written statement at 3) [hereinafter *Cauthron 25th Anniversary Statement*], http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Cauthron.pdf.

that the current advisory guidelines system best achieves the purposes of sentencing.[91] The defense bar generally views the post-*Booker* review for reasonableness as "strik[ing] the appropriate balance between the district and appellate courts."[92] Some defense attorneys describe appellate review after *Booker* as a return of discretion to the district courts and a correction of the appellate courts' previous "overly strict enforcement of the guidelines [which] created unwarranted uniformity."[93] In contrast, some prosecutors believe that there is little meaningful appellate review of sentences,[94] which has led to a decrease in the number of cases appealed by the government on sentencing grounds.[95] They note, however, that the number of sentencing appeals by defendants has increased because all sentences are subject to review for both procedural and substantive reasonableness and any defendant who is dissatisfied with his sentence now has a right of appeal.[96]

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[91] U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (2010) (response to Question 19).

[92] *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Austin, TX* (Nov. 19, 2009) (Statement of Jason D. Hawkins, First Assistant Federal Public Defender for the Northern District of Texas, written statement at 23) [hereinafter *Hawkins 25th Anniversary Statement*].

[93] *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 at Chicago, IL* (Sept. 9-10 2009) (Statement of Jacqueline A. Johnson, First Assistant Federal Public Defender for the Northern District of Ohio, written statement at 4) [hereinafter *Johnson 25th Anniversary Statement*].

[94] *See, e.g., USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 at Stanford, CA* (May 27-28, 2009) (Testimony of Karin J. Immergut, then- U.S. Attorney for the District of Oregon, transcript at 244) [hereinafter *Immergut 25th Anniversary Testimony*], http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090527-28/Agenda.htm ; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 at New York, NY* (July 9-10, 2009) (Testimony of Honorable Benton J. Campbell, Eastern District of New York, transcript at 301-304) [hereinafter *Campbell 25th Anniversary Testimony*], http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Public_Hearing_Transcript.pdf; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 at Chicago, IL* (Sept. 9-10, 2009) (Statement of Honorable Edward M. Yarbrough, Middle District of Tennessee, statement at 4) [hereinafter *Yarbrough 25th Anniversary Statement*]], http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Gaoette_testimony.pdf ; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 at Phoenix, AZ* (Jan. 20-21, 2010) (Statement of Dennis Burke, then- U.S. Attorney, District of Arizona, statement at 8-10), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100120-21/Burke_Testimony.pdf; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 at Austin, TX* (Nov. 19-20, 2009) (Testimony of Joyce W. Vance, U.S. Attorney, Northern District of Alabama, transcript at 317-319), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Austin_Transcript.pdf.

[95] *See See, Campbell 25th Anniversary Testimony*, *supra* note 95, transcript at 318; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 at Chicago, IL* (Sept. 9-10, 2009), (Testimony of Edward M. Yarbrough, U.S. Attorney, Middle District of Tennessee, transcript at 247), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090909-10/Public_Hearing_Transcript.pdf; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 at Denver, CO* (Oct. 20-21, 2009) (Testimony of B. Todd Jones, U.S. Attorney, District of Minnesota, transcript at 156), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Public_Hearing_Transcript.pdf.

[96] *See,* Immergut 25th Anniversary Testimony, supra note 95, transcript at 244-45; Yarbrough 25th Anniversary Statement, at 4.

In contrast, some circuit judges have expressed concern about the lack of clarity in the Supreme Court's directives in *Booker*, particularly with respect to substantive reasonableness.[97] Even those judges who describe the post-*Booker* advisory guideline system as "working well" seek additional guidance regarding the standard for substantive reasonableness.[98] Perhaps most telling is that judges in two circuits with robust appellate dockets, the Fifth Circuit and the Ninth Circuit, expressed significant concern over both the lack of clarity regarding the standard to be applied when reviewing a sentence for substantive reasonableness and the resulting deference to the district court's discretion.[99] Moreover, some judges in circuits with a high volume of sentencing appeals view the development of a reasonableness standard based on a review of past cases as "unrealistic."[100]

In dissenting opinions circuit judges have voiced concerns regarding the courts' inability to apply a consistent standard of reasonableness review that gives the proper deference to the district court without abdicating the appellate court's role. For example, in one case, a Ninth Circuit judge dissented from the denial of rehearing en banc, criticizing the panel opinion for "[e]mploying what amounts to a de novo standard of review" in reversing a within-guideline

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[97] *See, e.g.*, *USSC 2010 National Training Seminar, New Orleans, LA* (June 17, 2010) (Remarks of Honorable Andre Davis, U.S Court of Appeals for the Fourth Circuit) [hereinafter *Davis 2010 National Training Remarks*] (stating that judges have "no idea what substantive reasonableness looks like"); *see also USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Chicago, IL* (Sept. 10, 2009) (Testimony of Danny Boggs, 6th Cir., transcript at 214) [hereinafter *Boggs 25th Anniversary Testimony*], (noting the lack of guidance from Congress, the Supreme Court or the Sentencing Commission regarding the "task of trying to sort the unwarranted disparities from the warranted disparities"), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090909-10/Public_Hearing_Transcript.pdf.

[98] *See, e.g.*, *See, e.g.*, *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Austin, TX* (Nov. 20, 2009) (Testimony of Honorable Edith Jones, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, transcript at 212, 219) [hereinafter *Jones 25th Anniversary Testimony*], (stating "the guidelines, as a practical matter, after *Booker*, are working well" but "it is very difficult to find a principle[d] basis. . . for saying that a sentence is unreasonable"), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Austin_Transcript.pdf; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentence Reform Act of 1984 at Chicago, IL* (Sept. 9, 2009) (Testimony of Jeffrey Sutton, U.S. Court of Appeals for the Sixth Circuit, transcript at 207) [hereinafter *Sutton 25th Anniversary Testimony*], http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090909-10/Public_Hearing_Transcript.pdf; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Denver, CO* (Oct. 20, 2009), (Testimony of Honorable James Loken, Chief Judge, U.S. Court of Appeals for the Eighth Circuit, transcript at 57) [hereinafter *Loken 25th Anniversary Testimony*], http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Public_Hearing_Transcript.pdf.

[99] *See, e.g.*, *Jones 25th Anniversary Testimony, supra* note 99, transcript at 219, 249 (describing "the sense of futility" in remanding cases for procedural unreasonableness); *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984, Palo Alto, CA* (May 27, 2009) (Testimony of Honorable Alex Kozinski, Chief Judge 9th Cir., transcript at 43-49) [hereinafter *Kozinski 25th Anniversary Testimony*] (stating "there's nothing that I have figured out on appeal that we can really do to constrain the outlier judges"), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090527-28/Transcript_20090527-28.pdf.

[100] *Jones 25th Anniversary Testimony supra* note 99, transcript at 219; *see also Sutton 25th Anniversary Testimony, supra* note 99, transcript at 209 (describing reasoning on substantive reasonableness as "good for one train and one train only"). The individualized nature of the substantive reasonableness analysis has also been expressed in circuit opinions. *See, e.g.*, United States v. Dixon, 449 F.3d 194, 205 (1st Cir. 2006) ("sentencing determinations hinge primarily on case-specific and defendant-specific considerations").

sentence as unreasonable.[101] In another case from the same circuit, a judge dissented from the denial of rehearing en banc, noting that "the desirable principle of deference to the sentencing judge, if taken too far, is transformed into an undesirable principle of no review in effect for substantive reasonableness of a sentence," and concluded, "[t]he scope of our duty to review a district court's sentencing decision for substantive reasonableness under an abuse of discretion standard goes beyond what our court did here, and we would all benefit if we had a better standard for such circumstances."[102] In reaching that conclusion, the judge opined that the case "puts the Ninth Circuit in what I consider to be a conflict with several of our sister circuits who have adopted a more vigorous approach to reviewing sentences for reasonableness."[103] Similarly, a judge in the Eighth Circuit described the affirmance of a sentence as "establish[ing], effectively, a standard of no appellate review at all."[104] The judge went on to state that his circuit "adopt[ed] a posture today that is so deferential that, so long as the district court gives lip service and a bit of discussion to the relevant 18 U.S.C. § 3553(a) factors, a sentence will almost never be reversed, procedurally or otherwise."[105]

At the same time, circuit judges express frustration with remanding cases for resentencing based on procedural issues because on remand the sentencing judge is likely to provide a more detailed explanation for the same sentence, which will satisfy the standard for procedural reasonableness.[106] This frustration has led some appellate judges to describe the appellate role as "a waste of time"[107] or "make work."[108] Moreover, appellate judges describe a system in which procedural issues are fruitlessly over-litigated because those are the issues addressed by the appellate courts.[109] As one judge described it, courts of appeals will usually

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[101] United States v. Amezcua-Vasquez, 586 F.3d 1176, 1179-80 (9th Cir. 2009) (O'Scannlain, dissenting from denial of rehearing en banc).

[102] United States v. Whitehead, 559 F.3d 918 (9th Cir. 2009) (Gould, J., dissenting from denial of rehearing en banc).

[103] *Whitehead*, 559 F.3d at 920.

[104] United States v. Feemster, 572 F.3d 455, 471 (8th Cir. 2009) (Beam, J., dissenting from denial of rehearing en banc).

[105] *Feemster*, 572 F.3d at 571.

[106] *See, e.g.*, *Jones 25th Anniversary Testimony, supra* note 99, transcript at 249 (describing reversal on procedural grounds as futile); *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Chicago, IL* (Sept. 10, 2009) (Testimony of Honorable Frank Easterbrook, Chief Judge U.S. Court of Appeals for the Seventh Circuit, transcript at 193) [hereinafter *Easterbrook 25th Anniversary Testimony*] (describing remand on procedural reasonableness as "an exercise that has a limited, if any, effect on the sentence" and "a make work prescription"), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090909-10/Public_Hearing_Transcript.pdf; *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Denver, CO* (Oct. 20, 2009) (Testimony of Honorable Harris Hartz, 10th Cir., transcript at 45-46) [hereinafter Hartz 25th Anniversary Testimony], http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Public_Hearing_Transcript.pdf.

[107] *USSC 2010 National Training Seminar, New Orleans, LA* (June 17, 2010) (Remarks of Honorable William Riley, Chief Judge 8th Cir.) [hereinafter *Riley 2010 National Training Remarks*] (stating that the appellate role has been diminished to the point of being "a waste of time").

[108] *Easterbrook 25th Anniversary Testimony, supra* note 107, transcript at 193 (describing remand on procedural reasonableness as "a make-work prescription").

[109] *See, e.g.*, Loken 25th Anniversary Testimony transcript at 35, Sutton 25th Anniversary Testimony transcript at 205; *but see* Hartz 25th Anniversary Testimony transcript at 46-47 (describing practice of "try[ing] not to write more

look for any "procedural hook" to justify vacating a sentence that the court of appeals believes to be too high or too low rather than holding that the sentence is substantively unreasonable.[110] The same judge described this practice as "intellectually dishonest."[111]

An issue related to appellate review has arisen from the Court's *Booker* jurisprudence. Beginning with the *Kimbrough* opinion holding that the lower courts could vary from the federal sentencing guidelines because of a policy disagreement, the Court has increasingly encouraged the lower courts to examine federal sentencing guidelines developed as a result of "congressional directives"[112] and impose a sentence other than the otherwise applicable advisory guideline range sentence because of a policy disagreement with the underlying rationale for the guideline. The Court suggests this "policy disagreement" analysis is appropriate because guidelines that result from congressional directive, particularly specific directives[113] "do not exemplify the Commission's exercise of its characteristic institutional role."[114]

The argument has been made increasingly that a guideline is not an appropriate benchmark or starting point if the guideline is based on a congressional directive rather than on the Commission's review of empirical data and national experience.[115] Litigants have successfully argued that when Congress directs the amendment process for a particular guideline, the Commission is not playing its characteristic role in promulgating guidelines based on empirical data and national experience.[116] To support this argument, litigants rely on the Supreme Court's holding in *Kimbrough* in part on the assertion that in setting the crack cocaine guidelines, the Commission abandoned its characteristic institutional role.

Some courts have read *Kimbrough* and *Spears* to have established a "new paradigm" in which district courts are permitted "to disagree categorically with [congressional] directives in providing an individual sentence."[117] They read *Kimbrough* to instruct "sentencing courts to give *less* deference to guidelines that are not the product of the Commission acting in 'its characteristic institutional role,' in which it typically implements guidelines only after taking into

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than a paragraph" about substantive reasonableness as an attempt to "send a signal to counsel on both sides [not to] bring these appeals on substantive reasonableness").

[110] *Lynch 2010 National Training Remarks, supra* note 77.
[111] *Lynch 2010 National Training Remarks, supra* note 77.
[112] The SRA contained a number of congressional directives to the Commission about how it should formulate and structure the federal sentencing guidelines. Since 1984, Congress has directed the Commission to act in the areas of sentencing well over 100 times.
[113] The Commission considers a congressional directive to the Commission to be "specific" in nature if it "states the congressional will in terms of a designated, resulting guideline offense level that [] Commission amendments are to achieve." U.S. SENTENCING COMM'N., SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (as directed by section 1703 of Pub. L. 101–647) at 120 (1991).
[114] *Kimbrough*, 552 U.S. at 89.
[115] *See e.g.*, United States v. Mondragon-Santiago, 564 F.3d 357 (5th Cir. 2009) (rejecting argument a guideline not based on empirical data is entitled to less deference, and holding that any lack of empirical basis underlying the illegal reentry guideline renders the sentence substantively unreasonable).
[116] *See Kimbrough*, 552 U.S. at 109 (2007) (noting that the crack cocaine guidelines "do no exemplify the Commission's exercise of its characteristic institutional role" because "[i]n formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of 'empirical data and national experience.'") (citation omitted).
[117] United States v. Reyes-Hernandez, 624 F.3d 405, 417-418 (7th Cir. 2010) ("Congressional 'directives' to the Sentencing Commission are unlike statutes in that they are not equally binding on sentencing courts").

account ‘empirical data and national experience.’”[118] Other circuits disagree.[119] Thus the circuits are divided on the question whether guidelines promulgated in response to a congressional directive to the Commission are entitled to less deference than guidelines promulgated pursuant to the Commission’s “characteristic institutional role.” As a result, the Commission notes a growing body of case law disavowing the federal sentencing guidelines for child pornography, immigration, crack cocaine, and fraud offenses based on this rationale.[120]

Section III: Federal Sentencing Practices and Trends Across Time

For many years, the Commission has been collecting, analyzing, and reporting on sentencing practices and trends, and in near real-time since 2004. This section of the testimony provides an overview of key federal sentencing practices during fiscal year 2010, as well as detailed analyses of federal sentencing practices across time.

A. Federal Sentencing in Fiscal Year 2010

1. Caseload Composition and Plea Rate

The federal caseload[121] has more than doubled in the last 15 years.[122] In fiscal year 2010, the Commission received information for 83,946 individual felony or Class A misdemeanor cases,[123] compared to 42,436 cases in fiscal year 1996. In fiscal year 2010, 96.8 percent of offenders pleaded guilty.

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[118] *Reyes-Hernandez,* 624 F.3d at 418 (7th Cir. 2010). *See also* United States v. Rodriguez, 527 F.3d 221, 227 (1st Cir. 2008) (“[T]he fast-track departure scheme does not ‘exemplify the [Sentencing] Commission's exercise of its characteristic institutional role.’[] In other words, the Commission has ‘not take [n] account of empirical data and national experience’ in formulating them. [] Thus, guidelines and policy statements embodying these judgments deserve less deference than the sentencing guidelines normally attract.”) (citations omitted).

[119] United States v. Arrelucea-Zamudio, 581 F.3d 142, 149-150 (3d Cir. 2009) (collecting cases and rejecting the approach of the Fifth, Ninth, and Eleventh Circuits, which have concluded that district courts may not disagree with congressional policy, specifically with respect to varying due to perceived fast-track disparity, and stating that “the attempt to distinguish fast-track programs from the sentencing guidance provided in *Kimbrough,* and constrain a district court's sentencing discretion solely on the basis of a congressional policy argument, is unpersuasive.”).

[120] The Federal Defender Service has a series of white papers available to practitioners that “deconstruct” the federal sentencing guidelines and provide arguments for why guidelines covering certain categories of offenses do not reflect the Commission’s expertise.

[121] The Commission receives a report of the sentence imposed in all cases to which the sentencing guidelines apply, which are all felony offenses and all Class A misdemeanors in the United States courts. *See generally* 28 U.S.C. § 994(w); USSG §1B1.9.

[122] The Commission notes that as of September 1, 2011, there were 217,839 total federal inmates. *See* www.bop.gov/locations/weekly_report.jsp (last visited on September 5, 2011). Between fiscal years 2006 and 2010, the Bureau of Prisons estimates that the average net increase in the federal prison population was 4,500 offenders per year. *See* BOP, Buildings and Facilities (B&F) Appropriation for FY2012, available at http://www.bop.gov/news/budget.jsp (last visited September 5, 2011).

[123] In fiscal year 2010 the Commission also received documents in 149 cases in which an organization was sentenced. Additionally, the Commission received documents in 4,120 cases in which a resentencing or other modification of sentence occurred.

In fiscal year 2010, four offense types together accounted for more than 82 percent of the federal caseload: immigration[124] (34.4%), drugs[125] (28.9%), fraud[126] (9.7%), and firearms[127] (9.6%). In addition, non-fraud white collar offenses,[128] child pornography offenses,[129] and larceny offenses[130] accounted for 3.6 percent, 2.3 percent, and 2.0 percent of the caseload, respectively, in fiscal year 2010. Other offenses accounted for 9.5 percent of the caseload.

2. Demographics

Non-citizen offenders accounted for 47.5 percent of federal offenders in fiscal year 2010. The average age of federal offenders sentenced in fiscal year 2010 was 35.3 years with a median of 33.0 years. More than half (51.4%) of federal offenders sentenced did not graduate from high school, and 5.4 percent graduated from college. The overwhelming majority (86.8%) of offenders were men. In fiscal year 2010, 48.1 percent of all offenders were Hispanic, 27.6 percent were White, and 20.7 percent were Black.

3. Criminal History

More than half of all offenders sentenced in fiscal year 2010 had a prior criminal history serious enough to result in a more severe sentencing guideline range than would have been the case if the offender had no prior criminal history. In fiscal year 2010, 56.1 percent of all offenders had a prior criminal history that assigned them to Criminal History Category (CHC) II or higher under the guidelines. Just over three percent of offenders were found to be Career Criminals, and 0.8 percent were found to be Armed Career Criminals, designations that significantly increase the otherwise applicable guideline range.[131]

4. Type of Sentence Imposed

In fiscal year 2010, over 87 percent of federal offenders were sentenced to serve a term of incarceration with no type of alternative to incarceration imposed as part of the sentence.[132] The average sentence length was 44.3 months, and the median sentence was 21.0 months.

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[124] Immigration offenses includes trafficking in United States passports, trafficking in entry documents, failure to surrender naturalization certificate, fraudulently acquiring United States passports, smuggling of an unlawful alien, fraudulently acquiring entry documents, and unlawfully entering the United States.
[125] Drug offenses include drug trafficking, use of a communication facility, and simple possession.
[126] Fraud offenses include odometer laws and regulations, insider trading, and fraud and deceit.
[127] Firearms offenses include unlawful possession/transportation of firearms or ammunition; possession of guns/explosives on aircraft; unlawful trafficking in explosives, possession of guns or explosives in a federal facility or school, use of fire or explosives to commit a felony, and use of firearms or ammunition during a crime.
[128] Non-fraud white collar offenses include embezzlement, forgery/counterfeiting, bribery, money laundering, and tax offenses.
[129] Child pornography offenses include the sale, distribution, transportation, shipment, receipt, or possession of materials involving the sexual exploitation of minors.
[130] Larceny includes bank larceny, theft from benefit plans, theft of mail, receipt or possession of stolen property, and theft from a labor union.
[131] For information on criminal history, see U.S. Sentencing Comm'n Fiscal Year 2010 Sourcebook of Federal Sentencing Statistics, Table 20.
[132] The Commission notes an important aspect of the federal criminal caseload and the number represented here: "The federal sentencing caseload is composed of a substantial proportion of non-United States citizens." U.S. SENTENCING COMM'N, ALTERNATIVES TO INCARCERATION, at 4 (January 2009) [hereinafter ALTERNATIVES

Slightly more than seven percent receive a sentence of probation only. The remaining offenders are sentenced to a mix of probation and some form of confinement (e.g., home detention or other confinement) or to a mix of incarceration and community confinement. Among U.S. citizen offenders, 81.0 percent receive a sentence of imprisonment. Straight probation is imposed in 9.7 percent of cases involving a United States citizen.

In fiscal year 2010, Hispanics received a sentence of imprisonment in 94.6 percent of the cases in which they were the offender, followed by Blacks (86.4%), Whites (79.6%), and Other races (77.4%). The rate at which Hispanic offenders were imprisoned was affected, in part, by the fact that many Hispanic offenders are non-citizens and due to that status are often not eligible for pretrial release or alternatives to incarceration.

5. Sentencing Relative to the Guidelines Range

The rate at which courts impose sentences within the applicable guideline range has varied over time and by offense types. These trends will be discussed in detail in the next section, while this section will provide information relating to sentencing practices in fiscal year 2010.

In fiscal year 2010, the courts imposed sentences within the applicable advisory guideline range or below the range at the request of the government in 80.4 percent of all cases: 55.0 percent of all cases were sentenced within the applicable guideline range, 25.4 percent received a government sponsored below range sentence. In fiscal year 2010, the non-government sponsored below-range rate was 17.8 percent, and the rate of sentences imposed above the guidelines range was 1.8 percent.[133]

The position of the sentence relative to the guideline range varies significantly depending on the type of offense. In fiscal year 2010, sentences within the guideline range were most common in cases involving drug possession (94.9%), prison offenses (73.7%), larceny (71.2%), embezzlement (69.7%), and environmental offenses (66.3%).[134]

The rate at which the sentences imposed are within the applicable guideline range also varies among the circuits. In fiscal year 2010, district courts in the Fifth Circuit imposed a sentence within the guideline range most often (71.3%) while district court judges in the D.C. Circuit imposed within range sentences least often (33.4%).

Non-government sponsored below range rates also vary among the circuits. In fiscal year 2010, the circuit in which district courts imposed non-government sponsored below range sentences most often was the Second Circuit (37.3%), while district courts in the Tenth Circuit imposed such sentences least often (12.0%).

REPORT]. In fiscal year 2010, 47.5% of the federal offenders (n=38,619) for whom the Commission collects data were non-U.S. citizens. Because the majority of these offenders are illegal aliens, they are not eligible for alternatives to incarceration. *See* Alternatives Report at 4-5.

[133] U.S. SENTENCING COMM'N FISCAL YEAR 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table N.

[134] U. S. SENTENCING COMM'N FISCAL YEAR 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 27.

An analysis of these data show that, for many circuits, the rate attributed to that circuit is often heavily influenced by the presence of one or two districts within that circuit that account for a majority of the circuit's criminal caseload. (*E.g.*, in the Fifth Circuit where the Southern District of Texas and the Western District of Texas account for 84.0% of all cases, and the Eleventh Circuit where the three Florida districts account for 61.1% of all cases). For that reason, the remainder of this testimony will present data at the district court level.

B. Sentencing Trends Across Time

This part of the Commission's testimony presents information on sentencing trends across time and broken down into four time periods:

- The post-*Koon* period (June 13, 1996 through April 30, 2003);
- The post-PROTECT Act period (May 1, 2003 through June 24, 2004);
- The post-*Booker* period (January 12, 2005 through December 10, 2007); and
- The post-*Gall* period (December 11, 2007 through September 30, 2010).

This part of the testimony, in addition to presenting information on broad, national sentencing trends, presents information on six different offense types:

- Illegal entry;
- Alien smuggling;
- Drug trafficking (broken down further by major drug type);[135]
- Firearms;
- Fraud; and
- Child pornography (production and possession).

For each type of offense, the following information is provided by time period:

- Percentage of the federal docket;
- Demographics of offenders;
- Average sentence length; and
- Imposition of sentences relative to the applicable guideline range.

For the analysis of the relationship between the sentence imposed and the sentencing guideline that applied in the cases, the Commission presents the average sentence imposed and the average minimum sentence under the applicable guidelines.[136] Data also are presented as to the rate at which the sentences imposed were outside the applicable guideline range and, for those cases that were below the range, the average extent to which the sentence imposed was below the bottom of the guideline range. The Commission also groups these cases into two categories, those where the government sought the reduced sentence (government sponsored

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[135] The drug types are: powder cocaine; crack cocaine; marijuana; methamphetamine; and heroin.
[136] *See* Appendix A of this testimony. Appendix A provides the average sentence length and average guideline minimum for the six offense types listed above by fiscal year from 1996 through 2010.

below range) and those where it did not seek the reduced sentence (non-government sponsored below range).

1. National Sentencing Trends Across Time

Average sentences lengths have remained relatively stable over the past 15 years. Over the last three years, however, average sentence lengths have decreased. This can be attributed to a reduction in the overall severity of the aggregate offenses in the federal caseload (*i.e.*, due to the increasing portion of the federal caseload involving immigration cases, which carry lower sentences, on average, than other offenses) and to a decrease in the rate at which courts are imposing sentences within the applicable guideline range.[137] However, sentencing practices and trends among the districts vary depending on the offense type involved.[138]

The guidelines continue to have a significant impact on the sentences courts impose. As reflected on the figures at Appendix A, the sentences imposed for almost every offense parallel the minimum of the guideline ranges that apply to that offense. When the minimum of the applicable guideline range increases, either due to increases in offense seriousness or due to increases in the criminal history of the offenders committing that offense, or both, the average sentence imposed for the offense also increases, usually in like proportion. Although the minimum of the guideline ranges for individual offenses vary, and the nature of offending and the criminal history of offenders convicted of those offenses also change, the fluctuation in the minimum of the applicable guideline ranges are clearly reflected in the sentences imposed. The clear linkage of the sentencing guidelines and the sentences imposed demonstrates that the guidelines have guided and continue to work to guide the sentencing decisions of federal judges.

Although the guidelines influence the sentences judges impose, the rate at which the sentences imposed are within the applicable guidelines has decreased significantly over the last five years. In fiscal year 2010, the rate at which courts imposed sentences that were within the applicable guideline range was 55.0 percent, the lowest rate in the last 15 years.[139] This rate has decreased from 72.1 percent in fiscal year 2004, the year immediately preceding *Booker*. In fiscal year 1996, the within range rate was 69.6 percent.[140]

A sentence above the guideline range was imposed in 1.8 percent of all cases in fiscal year 2010. Historically, above range cases historically are infrequent. In fiscal year 2004, the above range rate was 0.7 percent. In fiscal year 1996, the above range rate was 0.9 percent.

Approximately one quarter (25.4%) of the sentences in fiscal year 2010 were imposed pursuant to a government sponsored below range sentence. In about 45 percent of these cases (11.5% of all cases) the government filed a motion seeking a reduction in sentence because the defendant provided substantial assistance to the government in the investigation or prosecution

[137] *See* Appendix B of this testimony. Appendix B presents the national average sentence length and average guideline minimum by quarter for fiscal years 1996 through 2010.
[138] *See* Appendix A.
[139] The position of the sentence relative to the guideline range varies significantly depending on the guideline involved. In fiscal year 2010, sentences within the guideline range were most common in cases involving drug possession, prison offenses, larceny, embezzlement, and environmental offenses.
[140] *See* Appendix C.

of another person who had committed an offense.[141] In 9.9 percent of all government sponsored cases, the government sought a below range sentence because the offender had entered an early guilty plea pursuant to an Early Disposition Program (also known as "fast track programs" in immigration cases).[142] Sentences below the applicable guideline range for this reason occur almost exclusively in immigration and drug trafficking cases.

The rate of government sponsored below range sentences has remained relatively stable. For example, in fiscal year 2004, the year immediately preceding *Booker*, the rate of government sponsored below range sentences was 22.2 percent. A direct comparison of government sponsored below range sentences in earlier years is difficult, due to changes in the way the Commission recorded sentencing information in earlier fiscal years and because Congress specifically authorized a new type of government departure (the Early Disposition Program departure) in the PROTECT Act, which passed in fiscal year 2003. However, a comparison on the most common type of government sponsored below range sentence, one based on an offender's substantial assistance to the government, can be made. In fiscal year 2010, the rate of government sponsored below range sentences for this reason was 11.5 percent of all cases. In fiscal year 2004 the rate was 15.2 percent and in fiscal year 1996 the rate was 19.2 percent.

The most notable change in federal sentencing over time involves the rate of non-government sponsored below range sentences. The courts imposed non-government sponsored below range sentences in 17.8 percent of all cases in fiscal year 2010.[143]

Non-government sponsored below range sentences accounted for approximately 12.5 percent of all cases in the year after *Booker*,[144] and about 5.5 percent during the post-PROTECT Act period.[145] A direct comparison of non-government sponsored below range sentences in earlier years cannot be made as the Commission did not distinguish between these sentences and government sponsored sentences (other than for substantial assistance) in those earlier years. After the Supreme Court decision in *Gall*, however, this rate has begun to increase further.

The extent[146] of non-government sponsored below range sentences is greatest in cases involving gambling/lottery offenses, burglary, larceny, and environmental offenses (where these sentences average more than an 80 percent reduction from the bottom of the applicable guideline range). The most common reason courts cite for departures[147] from the sentencing guideline

[141] These sentences were most common in cases involving antitrust, bribery, national defense offenses, drug trafficking, and money laundering.
[142] Congress formally authorized departures for Early Disposition or "fast track" programs in 2003 as part of the PROTECT Act.
[143] These non-government sponsored below range sentences were most common in cases involving child pornography crimes other than the production of such materials (e.g., distribution, receipt, possession), tax offenses, use of a communication facility, and antitrust offenses.
[144] *See* BOOKER REPORT, *supra* note 17, at 47.
[145] *Id*.
[146] The extent of the reduction in below range sentences is the difference between the sentence imposed and the bottom of the applicable guideline range. This is also used to determine the percent the sentence imposed is below the applicable guideline range.
[147] Departures are cases in which the court imposed a sentence below the applicable guideline range and citied one or more provisions in the *Guidelines Manual* as a basis for imposing a sentence below the applicable guideline range.

involved criminal history issues, and most commonly that the offender's criminal history score overrepresented the seriousness of his or her criminal record. When the court classified the sentence as a variance from the guidelines,[148] courts most often cited the nature and circumstances of the offense as a reason for the sentence.

Half of all districts have a rate of non-government sponsored below range sentences between 13.6 percent and 25.0 percent. However, one-fourth (23 districts) have a rate above 26.0 percent.[149] As discussed below, however, the rate at which non-government sponsored below range sentences are imposed varies significantly with the type of offense involved.

2. Sentencing Trends Across Time by Offense Type

As discussed above, sentencing practices and trends among the districts vary greatly depending on the offense type involved. This section of the Commission's testimony presents sentencing information across the four time periods by offense type. The data presented in this section may not equal 100 percent due to rounding.

a. Illegal Entry[150]

Illegal entry offenses involve unlawfully entering or remaining in the United States.

Docket Composition

The portion of the federal caseload attributable to illegal entry offenses has increased since the Post-*Koon* Period. The percentages of the federal caseload comprised of illegal entry offenses across the four time periods are as follows:

- The Post-*Koon* Period – 10.9 percent;
- The Post-PROTECT Act Period – 15.2 percent;
- The Post-*Booker* Period – 16.5 percent; and
- The Post-*Gall* Period – 23.6 percent.

Demographics

Across the four time periods, the majority of offenders convicted of illegal entry offenses are Hispanic, and are non-United States citizens.

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[148] Variances are cases in which the sentence imposed was below the applicable guideline range and where the court did not cite as a reason a provision listed in *Guidelines Manual* as a basis for imposing a sentence below the applicable guideline range.
[149] *See* Appendix D.
[150] "Illegal Entry" cases are those for which the court imposing sentence applied USSG §2L1.2 (Unlawfully Entering or Remaining in the United States) as the primary sentencing guideline in the case.

Race of Illegal Entry Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	1.9%	2.7%	95.3%	0.2%
Post-PROTECT Act Period	2.5%	2.2%	95.2%	0.1%
Post-*Booker* Period	2.7%	1.7%	95.5%	0.2%
Post-*Gall* Period	6.6%	1.1%	92.2%	0.1%

Citizenship of Illegal Entry Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	2.0%	98.0%
Post-PROTECT Act Period	2.7%	97.3%
Post-*Booker* Period	0.6%	99.4%
Post-*Gall* Period	0.1%	99.9%

Average Sentence Length

The average length of sentence imposed for illegal entry offenses has decreased after the Post-*Koon* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 21 months. This compares to an average sentence of 26 months in the Post-*Booker* Period, 29 months in the Post-PROTECT Act Period, and 32 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for illegal entry offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Illegal Entry Offenses Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Within Range	60.3%	69.6%	58.5%	58.3%
Above Range	0.4%	0.3%	1.3%	1.6%
Government Sponsored Below Range	5.1%	23.7%	30.9%	29.4%
Non-Government Sponsored Below Range	34.2%	6.5%	9.3%	10.7%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range For Illegal Entry Offenses (Percentage/Months)

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Government Sponsored Below Range	28.7%--13 mos	24.1%--10 mos	26.4%--9 mos	29.7%--10 mos
Non-Government Sponsored Below Range	33.1%--16 mos	28.1%--12 mos	31.5%--12 mos	35.0%--12 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 66.7 percent in the district with the highest rate of non-government sponsored below range sentences to a low of 1.1 percent in the district with the lowest rate, representing a range of 65.6 percentage points.

b. Alien Smuggling[151]

Alien smuggling offenses involve smuggling, transporting or harboring an unlawful alien.

[151] "Alien Smuggling" cases are those for which the court imposing sentence applied USSG §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) as the primary sentencing guideline in the case.

Docket Composition

The portion of the federal caseload attributable to alien smuggling increased after the Post-*Koon* Period but then decreased during the Post-*Gall* Period. The percentages of the federal caseload comprised of alien smuggling offenses across the four time periods are as follows:

- The Post-*Koon* Period – 3.2 percent;
- The Post-PROTECT Act Period – 3.5 percent;
- The Post-*Booker* Period – 5.1 percent; and
- The Post-*Gall* Period – 4.2 percent.

Demographics

Across the four time periods, the majority of offenders convicted of alien smuggling offenses are Hispanic, and the majority are non-United States citizens.

Race of Alien Smuggling Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	12.0%	2.2%	79.9%	5.9%
Post-PROTECT Act Period	17.4%	4.0%	73.6%	4.9%
Post-*Booker* Period	15.3%	3.0%	78.5%	3.3%
Post-*Gall* Period	29.1%	3.0%	65.4%	2.5%

Citizenship of Alien Smuggling Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	33.2%	66.8%
Post-PROTECT Act Period	48.1%	51.9%
Post-*Booker* Period	46.3%	53.8%
Post-*Gall* Period	47.0%	53.0%

Average Sentence Length

The average length of sentence imposed for alien smuggling offenses has increased since the Post-*Koon* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 17 months. This compares to an average sentence of 16 months in the Post-*Booker* Period, 16 months in the Post-PROTECT Act Period, and 13 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for alien smuggling offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Alien Smuggling Offenses Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Within Range	56.1%	60.5%	55.4%	49.3%
Above Range	1.1%	0.7%	2.2%	1.7%
Government Sponsored Below Range	10.6%	32.2%	35.7%	40.8%
Non-Government Sponsored Below Range	32.3%	6.7%	6.7%	8.2%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range For Alien Smuggling Offenses (Percentage/Months)

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Government Sponsored Below Range	54.2%--9 mos	44.6%--8 mos	40.2%--7 mos	40.9%--7 mos
Non-Government Sponsored Below Range	47.6%--7 mos	43.6%--7 mos	52.2%--8 mos	52.8%--8 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 100.0 percent in the district with the highest rate to a low of 2.6 percent in the district with the lowest rate, representing a range of 97.4 percentage points.

c. Drug Trafficking[152]

Drug trafficking offenses generally involve the unlawful manufacturing, importing, exporting, or trafficking of drugs, including possession of drugs with intent to commit these offenses.

Docket Composition

The portion of the federal caseload attributable to drug trafficking offenses has decreased after the Post-*Koon* Period. The percentages of the federal caseload comprised of drug trafficking offenses across the four time periods are as follows:

- The Post-*Koon* Period – 41.5 percent;
- The Post-PROTECT Act Period – 38.0 percent;
- The Post-*Booker* Period – 37.3 percent; and
- The Post-*Gall* Period – 33.4 percent.

Demographics

Across the four time periods, Hispanics are the largest group of offenders convicted of drug trafficking offenses, and the majority of drug trafficking offenders are United States citizens.

Race of Drug Trafficking Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	25.4%	30.4%	42.3%	2.0%
Post-PROTECT Act Period	27.4%	27.3%	42.3%	3.0%
Post-*Booker* Period	24.8%	30.0%	41.6%	3.6%
Post-*Gall* Period	25.3%	29.8%	41.7%	3.2%

[152] "Drug Trafficking" cases are those for which the court imposing sentence applied USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) or USSG §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) as the primary sentencing guideline in the case.

Citizenship of Drug Trafficking Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	70.1%	29.9%
Post-PROTECT Act Period	71.9%	28.1%
Post-*Booker* Period	71.7%	28.3%
Post-*Gall* Period	71.1%	28.9%

Average Sentence Length

The average length of sentence imposed for drug trafficking offenses increased after the Post-*Koon* Period but decreased in the Post-*Gall* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 77 months. This compares to an average sentence of 83 months in the Post-*Booker* Period, 81 months in the Post-PROTECT Act Period, and 72 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for drug trafficking offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Drug Trafficking Offenses Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Within Range	55.8%	63.3%	53.7%	48.0%
Above Range	0.2%	0.2%	0.5%	0.8%
Government Sponsored Below Range	29.8%	31.7%	34.1%	34.0%
Non-Government Sponsored Below Range	14.2%	4.7%	11.7%	17.3%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range For Drug Trafficking Offenses (Percentage/Months)

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Government Sponsored Below Range	50.6%--51 mos	46.5%--47 mos	45.3%--46 mos	46.5%--46 mos
Non-Government Sponsored Below Range	42.3%--22 mos	38.2%--26 mos	32.8%--30 mos	35.8%--29 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 49.6 percent in the district with the highest rate to a low of 4.8 percent in the district with the lowest rate, representing a range of 44.8 percentage points.

1. *Powder Cocaine Drug Trafficking*[153]

Docket Composition

The portion of the federal drug trafficking caseload attributable to powder cocaine drug trafficking offenses has remained relatively stable after the Post-*Koon* Period. The percentages of the federal caseload comprised of powder cocaine drug trafficking offenses across the four time periods are as follows:

- The Post-*Koon* Period – 23.5 percent;
- The Post-PROTECT Act Period – 22.8 percent;
- The Post-*Booker* Period – 23.5 percent; and
- The Post-*Gall* Period – 23.9 percent.

Demographics

Across the four time periods, Hispanics are the largest group of offenders convicted of powder cocaine drug trafficking offenses, and the majority of offenders are United States citizens.

[153] "Powder Cocaine Drug Trafficking" cases are those for which the court imposing sentence applied USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) or USSG §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) as the primary sentencing guideline in the case with a primary drug type of powder cocaine.

Race of Powder Cocaine Drug Trafficking Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	18.7%	30.3%	49.8%	1.3%
Post-PROTECT Act Period	17.3%	25.3%	56.0%	1.4%
Post-*Booker* Period	15.1%	27.9%	55.7%	1.3%
Post-*Gall* Period	16.5%	28.0%	54.0%	1.5%

Citizenship of Powder Cocaine Drug Trafficking Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	64.6%	35.5%
Post-PROTECT Act Period	62.7%	37.3%
Post-*Booker* Period	62.2%	37.9%
Post-*Gall* Period	63.2%	36.8%

Average Sentence Length

The average length of sentence imposed for powder cocaine drug trafficking offenses has increased after the Post-*Koon* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 84 months. This compares to an average sentence of 84 months in the Post-*Booker* Period, 81 months in the Post-PROTECT Act Period, and 76 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for powder cocaine drug trafficking offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Powder Cocaine Drug Trafficking Offenses
Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Within Range	58.0%	63.8%	54.4%	47.5%
Above Range	0.2%	0.4%	0.5%	0.7%
Government Sponsored Below Range	32.1%	31.8%	34.6%	34.8%
Non-Government Sponsored Below Range	9.7%	4.1%	10.5%	17.0%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range
For Powder Cocaine Drug Trafficking Offenses
(Percentage/Months)

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Government Sponsored Below Range	50.6%--49 mos	47.1%--49 mos	43.3%--46 mos	45.3%--51 mos
Non-Government Sponsored Below Range	39.2%--31 mos	39.8%--26 mos	31.1%--27 mos	33.7%--27 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 41.0 percent in the district with the highest rate to a low of 2.0 percent in the district with the lowest rate, representing a range of 39.0 percentage points.

2. *Crack Cocaine Drug Trafficking*[154]

Docket Composition

The portion of the federal drug trafficking caseload attributable to crack cocaine drug trafficking offenses has remained relatively stable after the Post-*Koon* Period. The percentages of the federal caseload comprised of crack cocaine drug trafficking offenses across the four time periods are as follows:

- The Post-*Koon* Period – 22.4 percent;
- The Post-PROTECT Act Period – 20.7 percent;
- The Post-*Booker* Period – 22.1 percent: and
- The Post-*Gall* Period – 22.3 percent.

Demographics

Across the four time periods, the majority of offenders convicted of crack cocaine drug trafficking offenses are Black, and the majority are United States citizens.

Race of Crack Cocaine Drug Trafficking Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	6.1%	83.8%	9.1%	0.9%
Post-PROTECT Act Period	7.5%	81.9%	9.6%	1.0%
Post-*Booker* Period	8.7%	82.4%	7.9%	1.0%
Post-*Gall* Period	9.1%	79.2%	10.7%	1.0%

Citizenship of Crack Cocaine Drug Trafficking Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	93.3%	6.7%
Post-PROTECT Act Period	94.7%	5.3%
Post-*Booker* Period	96.4%	3.6%
Post-*Gall* Period	97.0%	3.0%

[154] "Crack Cocaine Drug Trafficking" cases are those for which the court imposing sentence applied USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) or USSG §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) as the primary sentencing guideline in the case with a primary drug type of crack cocaine.

Average Sentence Length

The average length of sentence imposed for crack cocaine drug trafficking offenses increased after the Post-*Koon* Period and then decreased after the Post-PROTECT Act Period. The average sentence imposed in these cases in the Post-*Gall* Period was 112 months. This compares to an average sentence of 124 months in the Post-*Booker* Period, 126 months in the Post-PROTECT Period Act, and 119 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for crack cocaine drug trafficking offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Crack Cocaine Drug Trafficking Offenses Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Within Range	58.4%	63.3%	55.7%	48.4%
Above Range	0.2%	0.2%	0.5%	0.9%
Government-Sponsored Below Range	34.3%	32.1%	30.5%	29.5%
Non Government-Sponsored Below Range	7.2%	4.5%	13.3%	21.2%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range For Crack Cocaine Drug Trafficking Offenses (Percentage/Months)

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Government Sponsored Below Range	46.4%--70 mos	44.3%--72 mos	44.2%--69 mos	45.3%--67 mos
Non-Government Sponsored Below Range	34.3%--44 mos	27.3%--39 mos	27.7%--41 mos	32.7%--39 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 100.0 percent to a low of 3.8 percent, representing a range of 96.2 percentage points.

3. *Marijuana Drug Trafficking*[155]

Docket Composition

The portion of the federal caseload attributable to marijuana drug trafficking offenses has decreased after the Post-*Koon* Period and then remained relatively stable. The percentages of the federal caseload comprised of marijuana drug trafficking offenses across the four time periods are as follows:

- The Post-*Koon* Period – 29.2 percent;
- The Post-PROTECT Act Period – 25.8 percent;
- The Post-*Booker* Period – 24.2 percent; and
- The Post-*Gall* Period – 25.1 percent.

Demographics

Across the four major time periods, the majority of offenders convicted of marijuana drug trafficking offenses are Hispanic, and the slight majority are United States citizens.

[155] "Marijuana Drug Trafficking" cases are those for which the court imposing sentence applied USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) or USSG §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) as the primary sentencing guideline in the case with a primary drug type of marijuana.

Race of Marijuana Drug Trafficking Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	27.6%	7.4%	63.5%	1.5%
Post-PROTECT Act Period	25.6%	8.4%	63.2%	2.8%
Post-*Booker* Period	24.3%	10.2%	61.8%	3.7%
Post-*Gall* Period	26.4%	8.0%	61.8%	3.8%

Citizenship of Marijuana Drug Trafficking Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	58.6%	41.4%
Post-PROTECT Act Period	62.0%	38.0%
Post-*Booker* Period	59.0%	41.0%
Post-*Gall* Period	55.1%	44.9%

Average Sentence Length

The average length of sentence imposed for marijuana drug trafficking offenses increased after the Post- *Koon* Period and then decreased in the Post-*Gall* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 35 months. This compares to an average sentence of 40 months in the Post-*Booker* Period, 39 months in the Post-PROTECT Act Period, and 34 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for marijuana drug trafficking offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Marijuana Drug Trafficking Offenses
Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Within Range	52.9%	65.4%	55.5%	54.9%
Above Range	0.2%	0.2%	0.6%	0.8%
Government-Sponsored Below Range	21.6%	30.3%	36.0%	32.7%
Non Government-Sponsored Below Range	25.3%	4.2%	7.9%	11.7%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range
For Marijuana Drug Trafficking Offenses
(Percentage/Months)

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Government Sponsored Below Range	54.9%--32 mos	46.5%--22 mos	47.5%--23mos	48.2%--21 mos
Non-Government Sponsored Below Range	46.5%--13 mos	46.6%--15 mos	43.6%--17 mos	45.9%--15 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 42.9 percent to a low of 1.6 percent, representing a range of 41.3 percentage points.

4. *Methamphetamine Drug Trafficking*[156]

Docket Composition

The portion of the federal drug trafficking caseload attributable to methamphetamine drug trafficking offenses has increased after the Post-*Koon* Period and then decreased in the Post-*Gall* Period. The percentages of the federal caseload comprised of methamphetamine drug trafficking offenses across the four time periods are as follows:

- The Post-*Koon* Period – 13.6 percent;
- The Post-PROTECT Act Period – 19.1 percent;
- The Post-*Booker* Period – 20.3 percent; and
- The Post-*Gall* Period – 17.1 percent.

Demographics

The Across the four time periods, the majority of offenders convicted of methamphetamine drug trafficking offenses are White, and the majority are United States citizens.

Race of Methamphetamine Drug Trafficking Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	61.5%	1.4%	32.2%	5.0%
Post-PROTECT Act Period	60.4%	1.6%	31.8%	6.2%
Post-*Booker* Period	53.5%	2.1%	37.7%	6.8%
Post-*Gall* Period	52.3%	2.8%	39.8%	5.2%

Citizenship of Methamphetamine Drug Trafficking Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	77.1%	22.9%
Post-PROTECT Act Period	77.5%	22.5%
Post-*Booker* Period	73.7%	26.3%
Post-*Gall* Period	70.6%	29.4%

[156] "Methamphetamine Drug Trafficking" cases are those for which the court imposing sentence applied USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) or USSG §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) as the primary sentencing guideline in the case with a primary drug type of methamphetamine.

Average Sentence Length

The average length of sentence imposed for methamphetamine drug trafficking offenses increased after the Post-*Koon* Period and then decreased after the Post-PROTECT Period. The average sentence imposed in these cases in the Post-*Gall* Period was 96 months. This compares to an average sentence of 99 months in the Post-*Booker* Period, 100 months in the Post-PROTECT Period, and 89 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for methamphetamine drug trafficking offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Methamphetamine Drug Trafficking Offenses Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Within Range	51.6%	60.6%	51.0%	42.5%
Above Range	0.2%	0.1%	0.4%	0.6%
Government Sponsored Below Range	39.0%	34.8%	36.1%	39.9%
Non-Government Sponsored Below Range	9.3%	4.5%	12.5%	17.0%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range For Methamphetamine Drug Trafficking Offenses (Percentage/Months)

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Government Sponsored Below Range	48.2%--54 mos	44.7%--53 mos	42.6%--52 mos	42.6%--51 mos
Non-Government Sponsored Below Range	33.8%--35 mos	28.6%--27 mos	27.7%--32 mos	29.0%--30 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 100.0 percent to a low of 2.1 percent, representing a range of 97.9 percentage points.

5. *Heroin Drug Trafficking*[157]

Docket Composition

The portion of the federal drug trafficking caseload attributable to heroin drug trafficking offenses has decreased after the Post-*Koon* Period. The percentages of the federal caseload comprised of heroin drug trafficking offenses across the four time periods are as follows:

- The Post-*Koon* Period – 8.1 percent;
- The Post-PROTECT Act Period – 7.1 percent;
- The Post-*Booker* Period – 6.1 percent; and
- The Post-*Gall* Period – 6.4 percent.

Demographics

Across the four time periods, the majority of offenders convicted of heroin drug trafficking offenses are Hispanic, and the majority are United States citizens.

[157] "Heroin Drug Trafficking" cases are those for which the court imposing sentence applied USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) or USSG §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy) as the primary sentencing guideline in the case with a primary drug type of heroin.

Race of Heroin Drug Trafficking Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	11.6%	22.7%	63.0%	2.8%
Post-PROTECT Act Period	13.3%	20.7%	64.6%	1.4%
Post-*Booker* Period	12.2%	26.4%	60.4%	1.0%
Post-*Gall* Period	16.1%	26.9%	56.0%	1.0%

Citizenship of Heroin Drug Trafficking Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	46.8%	53.2%
Post-PROTECT Act Period	49.9%	50.1%
Post-*Booker* Period	57.6%	42.4%
Post-*Gall* Period	62.8%	37.2%

Average Sentence Length

The average length of sentence imposed in heroin drug trafficking offenses has increased after the Post-*Koon* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 71 months. This compares to an average sentence of 67 months in the Post-*Booker* Period, 65 months in the Post-PROTECT Act Period, and 60 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for heroin drug trafficking offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Heroin Drug Trafficking Offenses
Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Within Range	60.4%	66.2%	51.5%	44.8%
Above Range	0.3%	0.4%	0.7%	1.4%
Government Sponsored Below Range	24.1%	23.9%	29.1%	31.0%
Non-Government Sponsored Below Range	15.2%	9.5%	18.8%	22.9%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range
For Heroin Drug Trafficking Offenses
(Percentage/Months)

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Government Sponsored Below Range	54.3%--50 mos	48.6%--47 mos	50.4%--51 mos	49.6%--52 mos
Non-Government Sponsored Below Range	37.7%--23 mos	46.7%--22 mos	36.9%--28 mos	37.2%--27 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 100.0 percent to a low of 2.3 percent, representing a range of 97.7 percentage points.

d. Firearms[158]

Docket Composition

The portion of the federal caseload attributable to firearms offenses increased since the Post-*Koon* Period and then decreased after the Post-PROTECT Period. The percentages of the federal caseload comprised of firearms offenses across the four time periods are as follows:

- The Post-*Koon* Period – 6.1 percent;
- The Post-PROTECT Act Period – 10.1 percent;
- The Post-*Booker* Period – 9.9 percent; and
- The Post-*Gall* Period – 8.6 percent.

Demographics

Across the four time periods, Blacks are the largest group of offenders convicted of firearms offenses, and the overwhelming majority of firearms offenders are United States citizens.

Race of Firearms Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	39.5%	45.7%	12.0%	2.8%
Post-PROTECT Act Period	39.1%	45.4%	12.8%	2.7%
Post-*Booker* Period	35.6%	46.8%	14.7%	3.0%
Post-*Gall* Period	32.2%	48.8%	16.6%	2.4%

Citizenship of Firearms Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	93.6%	6.4%
Post-PROTECT Act Period	94.4%	5.6%
Post-*Booker* Period	93.1%	6.9%
Post-*Gall* Period	92.5%	7.5%

[158] "Firearms" cases are those for which the court imposing sentence applied USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) as the primary sentencing guideline in the case.

Average Sentence Length

The average length of sentence imposed for firearms offenses increased after the Post-*Koon* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 59 months. This compares to an average sentence of 58 months in the Post-*Booker* Period, 57 months in the Post-PROTECT Act Period, and 56 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for firearms offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Firearms Offenses Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Within Range	75.1%	79.7%	70.6%	63.6%
Above Range	1.1%	1.2%	2.4%	2.6%
Government-Sponsored Below Range	12.0%	12.6%	12.5%	13.0%
Non Government-Sponsored Below Range	11.9%	6.5%	14.6%	20.8%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range For Firearms Offenses (Percentage/Months)

	Post-*Koon* Period	**Post-PROTECT Act Period**	**Post-*Booker* Period**	**Post-*Gall* Period**
Government-Sponsored Below Range	56.3%--27 mos	55.9%--25 mos	51.5%--26 mos	48.3%--28 mos
Non Government-Sponsored Below Range	48.3%--19 mos	50.8%--18 mos	44.5%--17 mos	44.4%--17 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 48.1 percent to a low of 3.0 percent, representing a range of 45.1 percentage points.

f. Fraud[159]

Fraud offenses involve larceny, embezzlement, and other forms of theft as well as offenses involving stolen property, property damage, fraud and deceit, forgery and offenses involving altered of counterfeit instruments other than counterfeit bearer obligations of the United States.

Docket Composition

The portion of the federal caseload attributable to fraud offenses has decreased since the Post-*Koon* Period. The percentages of the federal caseload comprised of fraud offenses across the four time periods are as follows:

- The Post-*Koon* Period – 11.7 percent;
- The Post-PROTECT Act Period – 9.6 percent;
- The Post-*Booker* Period – 8.4 percent; and
- The Post-*Gall* Period – 7.7 percent.

Demographics

Across the four time periods, Whites are the largest group of offenders convicted of fraud offenses, and the majority of fraud offenders are United States citizens.

Race of Fraud Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	53.3%	32.6%	8.9%	5.2%
Post-PROTECT Act Period	50.9%	32.4%	11.5%	5.2%
Post-*Booker* Period	49.7%	33.3%	12.2%	4.7%
Post-*Gall* Period	47.4%	32.4%	14.9%	5.4%

[159] "Fraud" cases are those for which the court imposing sentence applied 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) with a primary offense type of fraud (based on statute(s) of conviction) sentenced under a *Guidelines Manual* effective November 1, 2001 or later, or USSG §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) as the primary sentencing guideline in the case.

Citizenship of Fraud Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	88.4%	11.6%
Post-PROTECT Act Period	85.4%	14.6%
Post-*Booker* Period	87.8%	12.2%
Post-*Gall* Period	84.8%	15.2%

Average Sentence Length

The average length of sentence imposed for fraud offenses increased after the Post-*Koon* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 24 months. This compares to an average sentence of 19 months in the Post-*Booker* Period, 16 months in the Post-PROTECT Act Period, and 13 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for fraud offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Fraud Offenses Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Within Range	71.1%	73.8%	62.9%	55.0%
Above Range	1.2%	1.2%	2.4%	2.4%
Government Sponsored Below Range	18.1%	18.8%	18.3%	20.3%
Non-Government Sponsored Below Range	9.6%	6.2%	16.4%	22.3%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range For Fraud Offenses (Percentage/Months)

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Government Sponsored Below Range	75.5%--13 mos	72.1%--14 mos	70.3%--18 mos	65.5%--21 mos
Non-Government Sponsored Below Range	74.5%--11 mos	74.4%--12 mos	67.2%--12 mos	59.7%--14 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 46.8 percent in the district with the highest rate to a low of 1.4 percent in the district with the lowest rate, representing a range of 45.4 percentage points.

g. Child Pornography

There has been significant increase in sentence lengths for child pornography offenses due to the enactment of mandatory minimum penalties for many of these crimes in the PROTECT Act of 2003 and the Adam Walsh Act of 2006. The increases are very significant, with average sentences increasing by 69.7 percent since fiscal year 2004.

1. *Child Pornography Production*[160]

Child pornography production offenses involve sexually exploiting a minor by production of sexually explicit visual or printed material or a custodian permitting a minor to engage in sexually explicit conduct. This offense also includes the advertisement for minors to engage in production.

Docket Composition

The portion of the federal caseload attributable to child pornography production offenses has increased since the Post-*Koon* Period. The percentages of the federal caseload comprised of child pornography production offenses across the four time periods are as follows:

- The Post-*Koon* Period – 0.1 percent;
- The Post-PROTECT Act Period – 0.2 percent;

[160] "Child pornography production" cases are those for which the court imposing sentence applied USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) as the primary sentencing guideline in the case.

- The Post-*Booker* Period – 0.2 percent; and
- The Post-*Gall* Period – 0.3 percent.

Demographics

The majority of offenders convicted of child pornography production offenses are White, and are United States citizens.

Race of Child Pornography Production Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	89.8%	3.8%	5.1%	1.3%
Post-PROTECT Act Period	89.9%	4.6%	3.7%	1.8%
Post-*Booker* Period	85.4%	5.7%	6.3%	2.6%
Post-*Gall* Period	85.7%	6.7%	6.3%	1.4%

Citizenship of Child Pornography Production Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	99.0%	1.0%
Post-PROTECT Act Period	98.2%	1.8%
Post-*Booker* Period	96.9%	3.2%
Post-*Gall* Period	97.5%	2.5%

Average Sentence Length

The average length of sentence imposed in child pornography production offenses has increased significantly after the Post-*Koon* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 271 months. This compares to an average sentence of 244 months in the Post-*Booker* Period, 164 months in the Post-PROTECT Act Period, and 133 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for child pornography production offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Child Pornography Production Offenses
Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Within Range	72.5%	84.0%	64.5%	61.3%
Above Range	10.2%	6.6%	11.2%	5.7%
Government Sponsored Below Range	7.4%	7.6%	13.2%	14.1%
Non-Government Sponsored Below Range	9.9%	1.9%	11.2%	19.0%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range
For Child Pornography Production Offenses
(Percentage/Months)

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Government Sponsored Below Range	39.8%--42 mos	22.9%--30 mos	29.0%--70 mos	27.1%--72 mos
Non-Government Sponsored Below Range	38.9%--35 mos	40.9%--42 mos	27.2%--49 mos	29.4%--67 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 100.0 percent in the district with the highest rate to a low of 7.1 percent in the district with the lowest rate, representing a range of 92.9 percentage points.

2. *Child Pornography Possession Cases*[161]

Child pornography possession offenses involve trafficking in material involving the sexual exploitation of a minor, receiving, transporting, shipping, soliciting, or advertising material involving the sexual exploitation of a minor as well as, possessing material involving the sexual exploitation of a minor with intent to traffic and possessing material involving the sexual exploitation of a minor. Also included is possession of materials depicting a minor engaged in sexually explicit conduct.

Docket Composition

The portion of the federal caseload attributable to child pornography possession offenses has increased since the Post-*Koon* Period. The percentages of the federal caseload comprised of child pornography possession offenses across the four time periods are as follows:

- The Post-*Koon* Period – 0.7 percent;
- The Post-PROTECT Act Period – 0.9 percent;
- The Post-*Booker* Period – 1.6 percent; and
- The Post-*Gall* Period – 2.2 percent.

Demographics

The majority of offenders convicted of child pornography possession offenses are White, and are United States citizens.

Race of Child Pornography Possession Offenders

	White	Black	Hispanic	Other
Post-*Koon* Period	92.3%	2.0%	3.6%	2.2%
Post-PROTECT Act Period	91.1%	1.7%	5.2%	2.0%
Post-*Booker* Period	91.2%	1.6%	5.3%	1.8%
Post-*Gall* Period	89.1%	2.9%	6.0%	2.0%

[161] "Child pornography possession" cases are those for which the court imposing sentence applied USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) or USSG §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct) as the primary sentencing guideline in the case.

Citizenship of Child Pornography Possession Offenders

	United States Citizens	Non-United States Citizens
Post-*Koon* Period	97.5%	2.5%
Post-PROTECT Act Period	98.1%	1.9%
Post-*Booker* Period	97.6%	2.4%
Post-*Gall* Period	97.5%	2.5%

Average Sentence Length

The average length of sentence imposed for child pornography possession offenses has increased significantly after the Post-*Koon* Period. The average sentence imposed in these cases in the Post-*Gall* Period was 92 months. This compares to an average sentence of 82 months in the Post-*Booker* Period, 47 months in the Post-PROTECT Act Period, and 34 months in the Post-*Koon* Period.

Imposition of Sentences Relative to the Applicable Guideline Range

The first table in this section presents the rate in which courts impose sentences for child pornography possession offenses relative to the applicable guideline range across the four time periods. The second table in this section presents, for cases in which the court imposed below range sentences, the average extent of the reduction below the bottom of the applicable guideline range across the four time periods.

Rate of Child Pornography Possession Offenses Sentenced Relative to the Applicable Guideline Range

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Within Range	67.5%	79.6%	64.3%	44.2%
Above Range	2.1%	3.9%	2.8%	2.0%
Government Sponsored Below Range	7.2%	3.8%	7.5%	11.4%
Non-Government Sponsored Below Range	23.3%	12.7%	25.4%	42.4%

Average Extent of Reduction Below the Bottom of the Applicable Guideline Range For Child Pornography Possession Offenses (Percentage/Months)

	Post-*Koon* Period	Post-PROTECT Act Period	Post-*Booker* Period	Post-*Gall* Period
Government Sponsored Below Range	67.2%--18 mos	48.1%--22 mos	40.2%--36 mos	42.8%--47 mos
Non-Government Sponsored Below Range	67.8%--17 mos	55.9%--19 mos	41.8%--29 mos	40.7%--43 mos

In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 82.1 percent to a low of 6.0 percent, representing a range of 76.1 percentage points.

C. Demographic Differences in Sentencing

The Commission's 2006 *Booker* Report presented findings based on a multivariate regression analysis, a tool commonly used by social scientists and in many other fields.[162] The principal benefit of this tool is that it accounts, or controls, for the effect of each factor in the analysis. Each factor is separately assessed and the extent to which each factor influences the outcome is measured. Using this tool, the Commission examined whether several demographic factors, including race, gender, citizenship, education, or age, were associated with the length of sentences imposed after *Booker*.

In March 2010, the Commission, using data through the end of fiscal year 2009, published a report that updated the analysis of the association between sentence length and demographic factors originally presented in the *Booker* Report.[163] The Commission has now updated this analysis with data through the end of fiscal year 2010, and also expanded it to include an earlier period of time not discussed in the prior two reports.[164]

The results of the Commission's updated and expanded analysis are set forth in Appendix E of this testimony. The Commission continues to find that sentence length is associated with

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[162] *See* U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 4-10 (2010).

[163] *Id*.

[164] The March 2010 report presented data for three time periods: the Post-PROTECT Act period (May 1, 2003 – June 24, 2004); the Post-*Booker* Period (January 12, 2005 – December 10, 2007); and the Post-*Gall* Period (December 11, 2007 – September 30, 2009). In this testimony, the Commission has expanded the Post-*Gall* Period through September 30, 2010, and has added a new time period, the Post-*Koon* Period (June 19, 1996 – April 2003). In this portion of the testimony, the Post-*Koon* Period encompasses cases in which sentences were imposed between October 1, 1999, and April 30, 2003.

some demographic factors. Based on this analysis, and after controlling for a wide variety of factors relevant to sentencing, the data reflect that:

- o Black male offenders received longer sentences than White male offenders. The differences in sentence length have increased steadily since *Booker*.
- o Female offenders of all races received shorter sentences than White male offenders. The differences in sentence length fluctuated at different rates in the time periods studied for white females, black females, Hispanic females, and "other" female offenders (such as those of Native American, Alaskan Native, and Asian or Pacific Islander origin.
- o Non-citizen offenders received longer sentences than offenders who were U.S. citizens. These differences have increased steadily since *Booker*.
- o Offenders with some college education received shorter sentences than offenders with no college education. These differences have remained relatively stable across the time periods studied.
- o Offenders over the age of 25 received longer sentences than offenders who were 25 or younger (at the time of sentence).

The Commission's analysis found that the differences in sentence length for Black male offenders compared to White male offenders has increased over time. In the Post-*Koon* Period, Black male offenders received sentences that were 11.2 percent longer than those imposed on White male offenders. In the Post-PROTECT Act Period, this difference decreased to 5.5 percent longer sentences. The difference between these two groups increased to 15.2 percent in the Post-*Booker* Period, and was 20.0 percent in the Post-*Gall* Period.

Sentences for Hispanic male offenders were 3.6 percent lower than those imposed on White male offenders during the Post-*Koon* Period and 4.4 percent lower than sentences for White male offenders during the Post-PROTECT Act period. No statistically significant difference in sentence length between these two groups was found in either the Post-*Booker* Period or the Post-*Gall* Period.

Sentences for female offenders of all races were consistently shorter than those for White male offenders, and these differences were apparent in each of the time periods studied. In three of the time periods studied "Other" race female offenders received the shortest sentences when compared to White male offender's vis-à-vis other females. In all four time periods, Black female offenders received shorter sentences (between 17 and 34 percent) when compared to White male offenders than did White female (19 to 30 percent) or Hispanic female offenders (13 to 29 percent) when compared to White male offenders.

In the Post-*Koon* Period, non-citizen offenders received 7.4 percent longer sentences than those imposed on citizen offenders. However, there was no statistically significant difference in sentence between these two groups in the Post-PROTECT Act Period. In the Post-*Booker*

Period, non-citizens received sentences that were 8.5 percent longer than sentences for citizen offenders, and in the Post-*Gall* Period received sentences that were 11.2 percent longer sentences than those imposed on citizen offenders.

In the Post-*Koon* Period, offenders over the age of 25 had 3.6 percent longer sentences than offenders who were 25 or younger. However, there was no statistically significant difference in sentences between these two groups in the Post-PROTECT Act Period. In the Post-*Booker* Period offenders over 25 had sentences that were 3.1 percent longer than those for younger offenders, and in the Post-*Gall* Period had sentences that were 2.7 percent longer than those imposed on younger offenders.

Section IV: Recommendations

The Commission believes there are steps that Congress can take now to strengthen the guidelines system, provide more effective substantive appellate review, and generally ensure that the post-*Booker* federal sentencing system more effectively continues to reflect the purposes and goals of sentencing set forth in the SRA. As the Supreme Court anticipated when it decided *Booker*—

> Ours of course is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution that Congress judges best for the federal system of justice.[165]

The Commission believes that the statutory changes outlined below would result in a system consistent with that originally envisioned by Congress and the Constitution.

A. Develop More Robust Substantive Appellate Review

The Commission believes that Congress should address the reasonableness standard of review and appellate process articulated in *Booker* and subsequent case law. Appellate review was a key component of sentencing reform in the SRA. Congress envisioned appellate review of sentences imposed to provide the Commission valuable information on federal sentencing and ensure fair, transparent, more uniform sentences. Since *Booker*, the role of appellate review is unclear.

The Commission recommends that Congress revitalize appellate review in three ways. First, *Rita* merely permits, but does not require, appellate courts to adopt a presumption of reasonableness for within range sentences and several circuits do not apply such a presumption.[166] Requiring a presumption of reasonableness at the appellate level would promote

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[165] *Booker*, 543 U.S. at 265.

[166] The First, Second, Third, Ninth, and Eleventh circuits have declined to adopt the presumption. *See* United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006); United States v. Cooper, 437 F.3d 324, 331-32 (3d Cir. 2006), *abrogated on other grounds as recognized in United States v. Wells,* 279 F. App'x 100 (3d Cir. 2008); United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008) (en banc); United States v. Hunt, 459 F.3d 1180, 1184-85 (11th Cir. 2006).

more consistent sentencing outcomes and practices throughout the system. It would also assist in ensuring that the federal sentencing guidelines be given substantial weight during sentencing.

Second, the Commission believes that Congress should direct sentencing courts to provide greater justification for sentences imposed the further the sentence is from the otherwise applicable advisory guidelines sentence.[167] Such explanation would ensure that the vision of a transparent system remains intact, and would continue to ensure that appellate review remains robust.[168] As the Court noted in *Rita*, "The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."[169]

> The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. That being so, his reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through §3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge's explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.[170]

Thus, the Commission recommends that any legislative proposal to address federal sentencing include strengthening the justification for non-guidelines (variance) sentences.

Third, Congress should create a heightened standard of review for sentences imposed as a result of a "policy disagreement" with the guidelines. In *Kimbrough*[171] and *Spears*,[172] the Supreme Court held that district courts are free to categorically disagree with the Commission's policy decisions, as expressed in the *Guidelines Manual*, and to adopt their own policies, although the guidelines are due "respectful consideration."[173]

The Commission believes that the current lack of rigorous appellate review of policy disagreements undermines the role of the guidelines system and risks increasing unwarranted sentencing disparity as individual judges substitute their own policy judgments for the collective policy judgments of Congress and the Commission. Furthermore, subjecting such policy disagreements to heightened appellate review would be consistent with previous Supreme Court decisions stating that "while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case."[174]

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[167] *See Gall*, 552 U.S. at 50.
[168] *See Rita*, 551 U.S. at 357.
[169] *Id*. at 356.
[170] *Id*. at 358.
[171] *Kimbrough*, 552 U.S. at 102-111.
[172] *Spears*, 555 U.S. at 264-265.
[173] *Kimbrough*, 552 U.S. at 101 (internal citations omitted).
[174] *Id*. at 109 (citations omitted).

B. Resolve the Tension between 18 U.S.C. § 3553(a) and 28 U.S.C. §§ 991, et seq.

The Commission recommends that Congress address the tension between directives to the Commission set forth at 28 U.S.C. §§ 991, *et seq*., and directives to the district courts at 18 U.S.C. § 3553(a), particularly as they relate to certain offender characteristics. In *Rita*, the Court noted that the SRA statutory directives to the courts and to the Commission work in tandem and that Congress charged both with carrying out the purposes of sentencing set forth in the SRA.[175] As the Court noted, "The upshot [of the SRA] is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one at retail, the other at wholesale."[176]

The Commission recommends that Congress clarify the relationship between these two statutory provisions, specifically as they relate to certain offender characteristics in 28 U.S.C. § 994 and the courts' consideration of those same factors under 18 U.S.C. § 3553(a). For example 28 U.S.C. § 994(e) directs the Commission to "assure" that the guidelines reflect the "general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" in determining the length of imprisonment.[177] Over the course of its history, the Commission has ensured that the departure provisions set forth in the *Guidelines Manual* are consistent with this directive. Yet under the current advisory regime, judges consider those very factors under § 3553(a) and often arrive at sentences below the guidelines range as a result of such consideration in almost 14 percent of all federal felony and Class A misdemeanor cases. Departures are followed in only about 3.4 percent of these cases because judges prefer to vary when they consider offender characteristics like family history, for example. In the Commission's view, Congress should resolve disconnect between the directives to the Commission (§ 994) and the directives to the courts (§ 3553).

C. Codify the "Three-step" Approach

The Commission recommends that Congress codify the sentencing process first articulated in *Booker*. Codification of this "three-step" process ensures that the federal sentencing guidelines are afforded the appropriate consideration, determination, and ultimately the proper weight to which they are due under *Booker* and consistent with the Court's remedial opinion.

The first step in the process requires district courts to properly calculate and consider the guidelines when sentencing.[178] The second step in the process directs the courts, after calculating the appropriate guidelines sentence, to consult the *Guidelines Manual* and consider

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[175] *Rita*, 551 U.S. at 347.
[176] *Id*. at 348.
[177] 18 U.S.C. § 994(e).
[178] *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall*, 552 U.S. at 49 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

whether the case warrants a departure.[179] As articulated in *Irizarry*, *see supra*, "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines."[180] A "variance" – i.e., a sentence outside the guideline range other than as provided for in the *Guidelines Manual* – is considered by the court only after departures have been considered. That is the third step of the process. Most circuits agree on a three-step approach, including the consideration of departure provisions in the *Guidelines Manual*, in determining the sentence to be imposed.[181] In 2010, the Commission promulgated an amendment to USSG § 1B1.1 (Application Instructions) codifying the three-step approach in the guidelines and encourages Congress to consider statutory codification of this process as well.

D. Resolve the Uncertainty About the Weight to Be Given to the Federal Sentencing Guidelines

As the Commission testified in 2005 and 2006, *Booker* does not specify how much weight the guidelines should be afforded by the district courts. The Commission believes that Congress should clarify its statutory intent that courts should give the guidelines substantial weight.[182]

In *Rita*, the Supreme Court states that the SRA reflects Congress' expectation that both the sentencing judge and the Commission would carry out "the same basic § 3553(a) objectives, the one at retail, the other at wholesale."[183] The guidelines may be presumed reasonable because they "seek to embody the § 3553(a) considerations, both in principle and in practice" and they "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."[184] During the process of developing the initial set of guidelines and refining them throughout the ensuing years, the Commission has considered the factors listed in section 3553(a) that were cited with approval in *Booker*.[185]

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[179] *See* 18 U.S.C. § 3553(a)(5).
[180] 553 U.S. at 714.
[181] *See* United States v. Dixon, 449 F.3d 194, 203-04 (1st Cir. 2006) (court must consider "any applicable departures"); United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005) (court must consider "available departure authority"); United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006) (same); United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after Booker"); United States v. Tzep-Mejia, 461 F.3d 522, 525 (5th Cir. 2006) ("Post-Booker case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence." (internal footnote and citation omitted)); United States v. McBride, 434 F.3d 470, 476 (6thCir. 2006) ("Within this Guideline calculation is the determination of whether a . . . departure is appropriate"); United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate", and after that must consider a variance (internal quotation omitted)); United States v. Robertson, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); United States v. Jordi, 418 F.3d 1212, 1215 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). *But see* United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2006) (stating that departures are "obsolete").
[182] *See* United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005).
[183] *Rita*, 551 U.S. at 348.
[184] *Id*. at 350.
[185] *See*, *e.g.*, United States v. Shelton, 400 F.3d 1325 (11th Cir. 2005).

In addition, Congress through its actions has indicated its belief that the guidelines generally achieve the statutory purposes of sentencing. Pursuant to 28 U.S.C. § 994(p), the Commission is required to submit all guideline and guideline amendments for congressional review before they become effective. To date, the initial set of guidelines and over 750 amendments, many of which were promulgated in response to congressional directives, have withstood congressional scrutiny.

E. Review of Federal Incarceration and Sentence Length

As noted in Section III, the federal prison population continues to grow not just in size but also in overall cost. The SRA specifically directed the Commission to look at imprisonment rates in two ways as it implemented and refined federal sentencing guidelines across time. First, 28 U.S.C. § 994(j) directs the Commission to "insure that the guidelines reflect the general appropriateness" of alternatives to incarceration for first-time, non-violent offenders, and imposition of a term of imprisonment for an offender convicted of a crime of violence resulting in serious bodily injury. The Commission implements the full spectrum of this directive with each guideline promulgated. Section 994(q) directs the Commission, working with the Bureau of Prisons, to provide analysis and recommendations "concerning maximum utilization of resources to deal effectively with the federal prison population."[186] Congress further noted, "Some critics have expressed concern that sentences under the guidelines will be either too low to protect the public or so high that they will result in prison overcrowding."[187] The Commission intends to continue its work with the Bureau of Prisons and other key stakeholders on issues of federal incarceration as Congress directed in the SRA. For example, the Commission will continue to work with Congress on prison impact statements for proposed legislation pursuant to 18 U.S.C. § 4047. "By developing complete information on [sentencing] practices, the Sentencing Commission will be able, if necessary, to change those practices with a full awareness of their potential impact on the criminal justice system."[188]

Section 992(b)(2) of the SRA also directs the Commission to "develop means of measuring the degree to which sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in section 3553(a)(2). . . ."[189] The Commission meets this directive through the collection, analysis, and reporting of sentencing information to criminal justice stakeholders. The Commission also uses this information in the formulation of the federal sentencing guidelines and policy statements, including when and to what degree alternatives to incarceration are appropriate as well as when offenses require terms of imprisonment. The Commission will be addressing the impact of statutory mandatory minimum penalties on the federal prison system in its upcoming report.

The Commission notes that this Subcommittee and the full House Judiciary Committee regularly seek prison impact assessments from the Commission and the Congressional Budget Office. The Commission encourages Congress and the Attorney General to employ these assessments as part of legislative consideration. The Commission also encourages Congress to

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[186] 28 U.S.C. § 994(q).
[187] S. REP. NO. 98-225, at 3244 (1984).
[188] *Id.*
[189] 28 U.S.C. § 994(b)(2).

utilize section 4047(c) that requires the Attorney General to prepare and transmit to Congress by March 1 of each year "a prison impact assessment reflecting the cumulative effect of all relevant changes in the law taking effect during the preceding calendar year." Doing so would help the Bureau of Prisons, the Department of Justice, Congress, and others budget, manage, and plan for the federal prison population in an effective manner.

Part II: Statutory Mission of the Commission

The Commission welcomes congressional oversight of its activities and greatly appreciates congressional interest in its work.

The Commission is a bipartisan, independent agency located within the judicial branch of government. Section 992, title 28 of the United States Code, sets forth the terms of office and compensation for members of the Commission. The Commission comprises seven voting members, including a Chair and up to three Vice Chairs, who serve six-year terms.[190] At least three of the voting members must be federal judges.[191] The Chair and Vice Chairs of the Commission are appointed by the President and confirmed by the Senate to hold those positions.[192] The Chair and Vice Chairs hold full-time positions and are compensated during their terms of office at the annual rate at which judges of the United States courts of appeals are compensated.[193] The other voting members of the Commission hold part-time positions and are paid at the daily rate at which judges of the United States courts of appeals are compensated.[194] In accordance with 28 U.S.C. § 992(c), "[a] Federal judge may serve as a member of the Commission without resigning the judge's appointment as a Federal judge."

The Commission remains a critical and vital component of federal sentencing after *Booker*. As noted above, the Commission has four overarching statutory duties with several subcomponents. These duties include, but are not limited to: (1) promulgating sentencing guidelines to be determined, calculated, and considered in all federal criminal cases; (2) collecting, analyzing, and reporting sentencing data systematically to detect new criminal trends, to determine if federal crime policies are achieving their goals, and to serve as a clearinghouse for federal sentencing statistics; (3) conducting research on sentencing issues and serving as an information center for the collection, preparation, and dissemination of information on federal sentencing practices; and (4) providing specialized training to judges, probation officers, staff attorneys, law clerks, prosecutors, defense attorneys, and other members of the federal criminal justice community on federal sentencing issues, including application of the guidelines.[195] The Commission provides enormous returns including near real time data, rapid response to Congress and others both in terms of research and implementation of sentencing policy, and prison impact analyses.

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[190] 28 U.S.C. § 28 U.S.C. §§ 991(a), 992(a). A voting member of the Commission may not serve more than two full terms. 28 U.S.C. § 992(b)(1)(A).
[191] 28 U.S.C. § 991(a).
[192] *Id.*
[193] 28 U.S.C. § 992(c).
[194] *Id.*
[195] *See generally*¸ 28 U.S.C. §§ 991-998.

The work of the Commission has been significant since the *Booker* decision. For example, the federal docket has grown by more than 11,000 cases in the last five fiscal years. Each Supreme Court case has required the Commission to increase its efforts to provide meaningful guidance to the courts and the entire criminal justice system, and to ensure that the guidelines continue to reflect the purposes of sentencing. Moreover, since *Booker*, the Commission has promulgated 79 guideline amendments. Of those 79 amendments, 40 were in response to directives from Congress and other changes in the law. Those changes also have meant more analysis, more training, and more work for the Commission. A more detailed examination of the work of the Commission is set forth below.

Section I: Sentencing Policy Development

The Commission continues to evaluate and refine federal sentencing policy as set forth in the sentencing guidelines. Pursuant to statute, the Commission engages in a sophisticated analysis and review process during its promulgation of guidelines and policy statements. This process begins with the publishing of proposed priorities in the late spring or summer. A final list of priorities is published in the fall, subject to additions or changes that may result from new legislation or case law. Throughout the fall and winter, the Commission conducts empirical research, meets with stakeholders, holds hearings, conducts case law and literature reviews, and begins development of language for guideline amendments.[196] In the spring it holds additional hearings on the proposed amendments and finalizes the amendment package for congressional submission. By May 1, of each year, the Commission must submit its proposed amendments to Congress. Congress has 180 days to review the amendment package and if no action is taken to disapprove or otherwise modify it, the package becomes effective on November 1 of each year.

The Commission recently completed amendments (now pending before Congress) that implemented a number of congressional directives including the Fair Sentencing Act of 2010, Pub. L. 111–220; the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, the Patient Protection and Affordable Care Act, Pub. L. 111–148, and the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111–195;[197] and the Secure and Responsible Drug Disposal Act of 2010, Pub. L. 111–273. In addition, the Commission increased the penalties for straw purchasers of firearms. The Commission also addressed supervised release terms for deportable aliens and issues associated with illegal entry offenses.

Section II: Collecting, Analyzing and Reporting Sentencing Data

In fulfillment of its statutory duties related to collecting, analyzing and reporting federal sentencing statistics and trends, the Commission collects data about criminal cases sentenced

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[196] *See generally*, 28 U.S.C. §§ 994, 995. When promulgating guidelines and policy statements the Commission also must adhere to the congressional directives that the guidelines and policy statements are consistent with all federal statutes (28 U.S.C. § 994(a)) and that the maximum of the sentencing range may not exceed the minimum of the range by more than 25% or six months. 28 U.S.C. § 994(b)(2).
[197] In the coming weeks, the Commission will be releasing a report regarding the penalties associated with offenses identified in this Act.

during the year.[198] During the past year, the Commission received over 386,000 documents from more than 83,000 original sentencings.[199] To put this caseload into perspective, in fiscal year 1990, the Commission received documentation for 33,000 cases sentenced under the guidelines. The importance of the Commission's data collection, analysis, and reporting requirements is highlighted in Part I of this testimony. Without the Commission, the criminal justice system would not have an objective, expert body to which it could turn for information about sentencing trends and practices. If nothing else, the data collected by the Commission since *Booker* indicates the growing complexity of the federal caseload and growing lack of uniformity throughout the system.

The Commission collects and analyzes many pieces of information of interest and importance to the federal criminal justice community from the documents it receives from the courts. The Commission publishes these analyses in a variety of ways, including reporting them in its comprehensive Annual Report and Sourcebook of Federal Sentencing Statistics. It also disseminates key aspects of this data on a quarterly basis and provides trend analyses of the changes in federal sentencing practices over time. The Commission disseminates its information in a variety of ways, including through its modernized website.

At the request of Congress, the Commission also provides specific analyses using real-time data of sentencing trends related to proposed and pending legislation. These assessments often are complex and time-sensitive, and require highly specialized Commission resources. In addition, the Commission responds to a number of more general data requests from Congress and entities such as the Congressional Research Service, the Congressional Budget Office, and the Government Accountability Office, on issues such as healthcare fraud, drugs, immigration, gangs, child sex offenses, and offenses affecting Native Americans. These requests are expected to continue in response to congressional work on crime legislation in the 112th Congress.[200]

The Commission also responds to request for data analyses from federal judges. For example, the Commission provides to each chief district judge and each chief circuit judge a yearly analysis of the cases sentenced in the district or circuit with a comparison of the caseload and sentencing practices in that district or circuit to the nation as a whole. The Commission's ability to provide these analyses on demand and with real-time data provides a unique resource to judges. Collectively, the Commission responded to over 100 requests for specific analyses in fiscal year 2011.

The Commission's data collection, analysis and reporting requirements are impacted by the increasingly high volume of cases sentenced in the federal system annually; however, the Commission's modernization and refinement efforts have kept pace with demands placed on it. Over the past few years, the Commission has greatly automated and updated its business

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[198] *See* 28 U.S.C. § 994(w)(1), which requires the chief judge of each district court, within 30 days of entry of judgment to provide the Commission with: (1) the charging document; (2) the written plea agreement (if any); (3) the Presentence Report; (4) the judgment and commitment order; and (5) the statement of reasons form.

[199] Since March 2008, the Commission also has collected real-time data from the courts on over 24,000 motions filed for retroactive application of its 2007 crack cocaine amendment. The Commission continues to collect and regularly report real-time data on the retroactive application of its 2007 crack cocaine amendment.

[200] In fiscal year 2011, the Commission responded to 102 requests for information from the courts, Congress, and the Executive branch. In fiscal year 2010, the Commission responded to 103 requests.

processes for the receipt, collection and analysis of sentencing documentation from the courts. The resulting efficiencies have resulted in significant cost-savings for not only the Commission but for the courts as well. The Commission also re-launched its website in December 2010 that now provides improved and enhanced access to the Commission's work. Moreover, the Commission is in the process of automating data contained in its annual sourcebooks. Specifically, the Commission is developing an interactive website using information based on the tables from our Annual Sourcebook (for example, Table 13, Average Sentence Length in Each Primary Offense Category). These data could be further refined by the user to provide average sentence length but also by circuit, district, race, gender, citizenship, and age.

Section III: Conducting Research

Research is a critical part of the Commission's overall mission. The Commission's research staff regularly provides short- and long-term guideline and sentencing related research and analyses for the Commission and the criminal justice community. The Commission routinely uses this research when considering proposed changes to the guidelines, and Commission research is routinely provided to other policymakers and members of the criminal justice community as part of their decision-making processes.

In fiscal years 2010 and 2011, for example, the Commission published research reports on the use of supervised release in the federal criminal justice system, the calculation of certain criminal history points under the sentencing guidelines, demographic differences in federal sentencing practices and trends since the *Booker* decision, overviews of federal criminal cases in fiscal years 2008 and 2009, and additional information on data collection by the Commission. The Commission also conducted a comprehensive survey of federal district court judges about the state of federal sentencing. The Commission also completed a recidivism study of crack cocaine offenders for whom courts have granted motions for retroactive application of the Commission's 2007 crack cocaine amendment, and a detailed analysis of the number of crack cocaine offenders potentially impacted by the Commission's decision to give retroactive effect to its proposed permanent amendment implementing the Fair Sentencing Act of 2010.

As noted in the opening of this testimony, in the coming weeks, the Commission will be releasing a comprehensive review of statutory mandatory minimum penalties and their role in federal sentencing. The Commission also is drafting a significant report on child pornography offenses, and it is working on a comprehensive evaluation of the effect of *Booker* and its progeny on the federal sentencing system that will build upon the testimony presented today.

Section IV: Training & Outreach

Congress created the Commission as a body that would "devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field,"[201] and "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process."[202] Congress also tasked the Commission, among other

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[201] 28 U.S.C. § 995(a)(17).
[202] 28 U.S.C. § 995(a)(18)

things, with issuing instructions to probation officers concerning the application of the Commission's guidelines and policy statements.[203]

The Commission fulfills this statutory duty to provide training and specialized technical assistance on federal sentencing issues, including application of the sentencing guidelines, to federal judges (including training of new judges), probation officers, staff attorneys, law clerks, prosecutors, and defense attorneys by providing educational programs around the country throughout the year. The Commission continues to expand its training and outreach efforts, in large part as a result of *Booker* and subsequent Supreme Court cases. In fiscal year 2010, for example, the Commission conducted training programs in all twelve circuits and most of the 94 judicial districts. In fiscal year 2010, the Commission trained approximately 6,000 individuals on the guidelines and other sentencing issues.[204]

Commissioners and Commission staff also participated in other numerous academic programs, symposia, and circuit conferences as part of the ongoing discussion of federal sentencing issues. In the coming months, the Commission plans to continue to provide training to the district and circuit courts on a number of federal sentencing issues, including recently promulgated guidelines and guideline amendments.

Conclusion

The Commission has monitored federal sentencing carefully since the Court issued its *Booker* decision. The guidelines continue to be the anchor for all federal sentences. However, disparities among district and appellate courts have grown. Based on these observations, the Commission believes that adjustments to the current advisory guideline system are ripe for consideration by Congress. The Commission offers these suggestions today to help ensure a strong and effective guidelines system that is consistent with the goals and purposes of sentencing set forth by Congress in the SRA. The Commission remains uniquely positioned to provide Congress and the criminal justice community with advice and information that will help further the goals of sentencing in an effective and thorough manner.

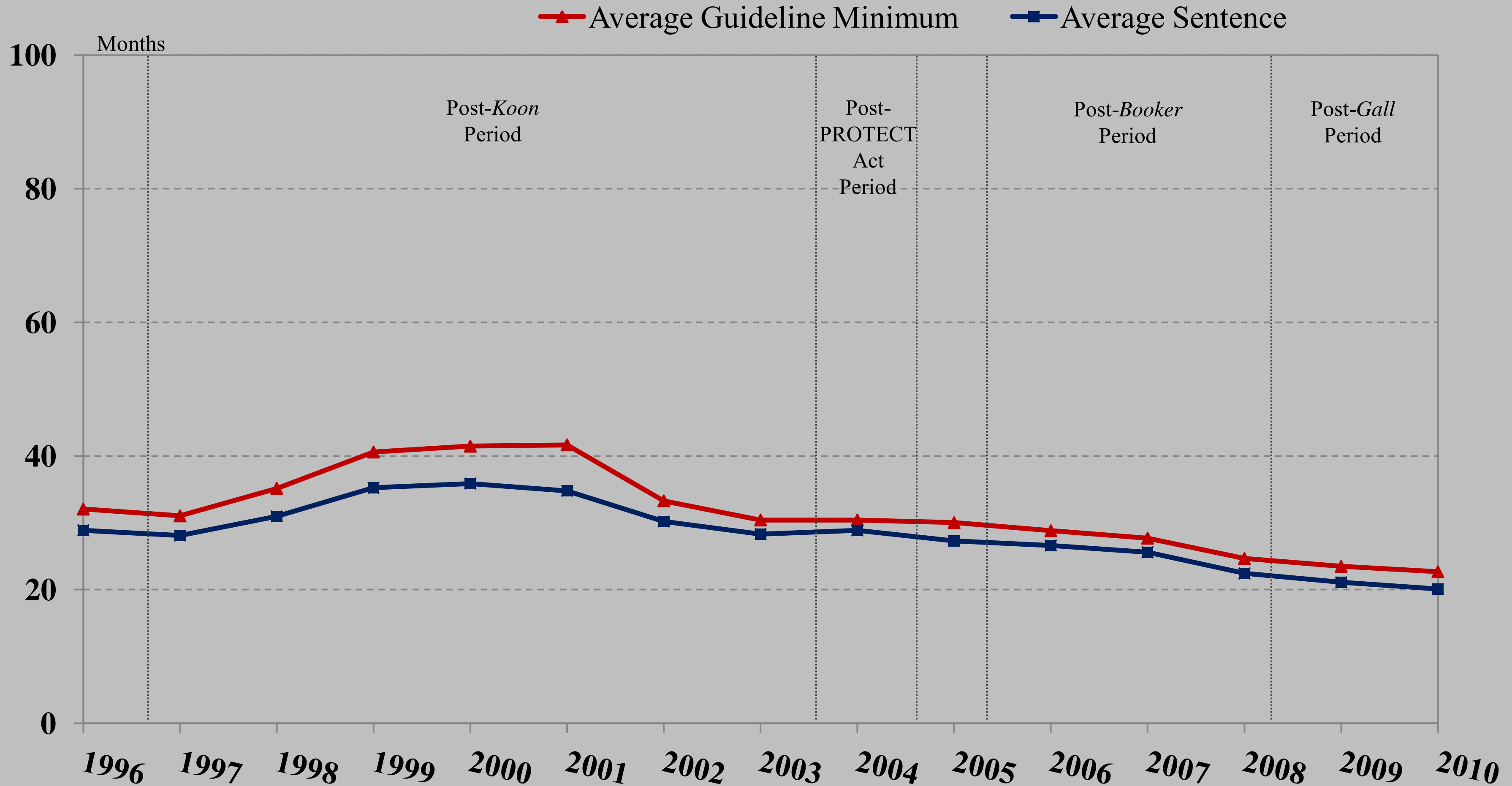
The Commission thanks you for holding this very important hearing and looks forward to answering your questions and working with you in the months ahead.

[203] 28 U.S.C. § 995(a)(10).
[204] In fiscal year 2011, the Commission trained approximately 7,000 people.

Appendix A

Average Sentence Length and Average Guideline Minimum Data for Illegal Entry (USSG §2L1.2) Offenders

Fiscal Years 1996-2010

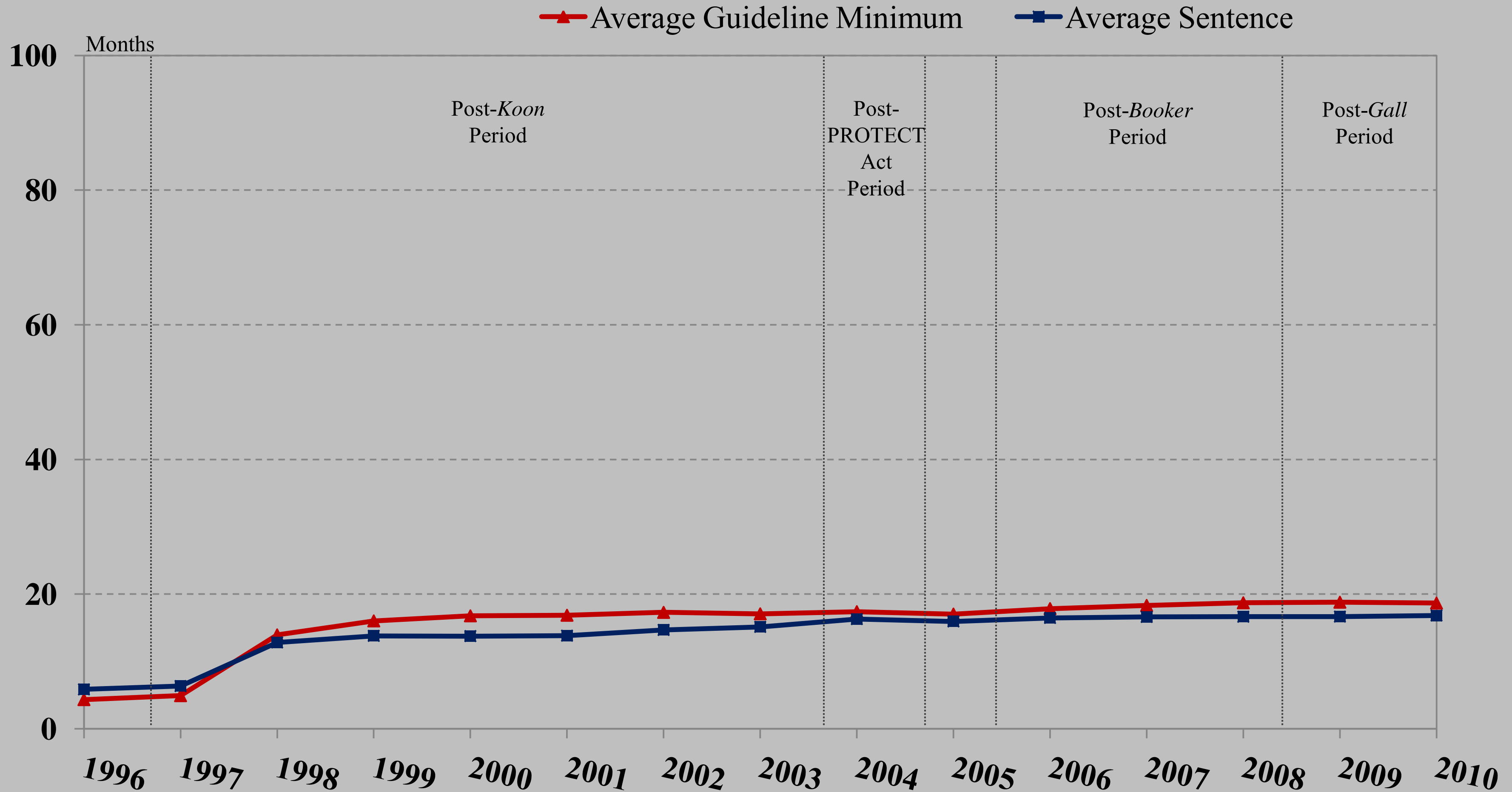


Only cases with complete guideline application information and a primary sentencing guideline of USSG §2L1.2 are included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Alien Smuggling (USSG §2L1.1) Offenders

Fiscal Years 1996-2010

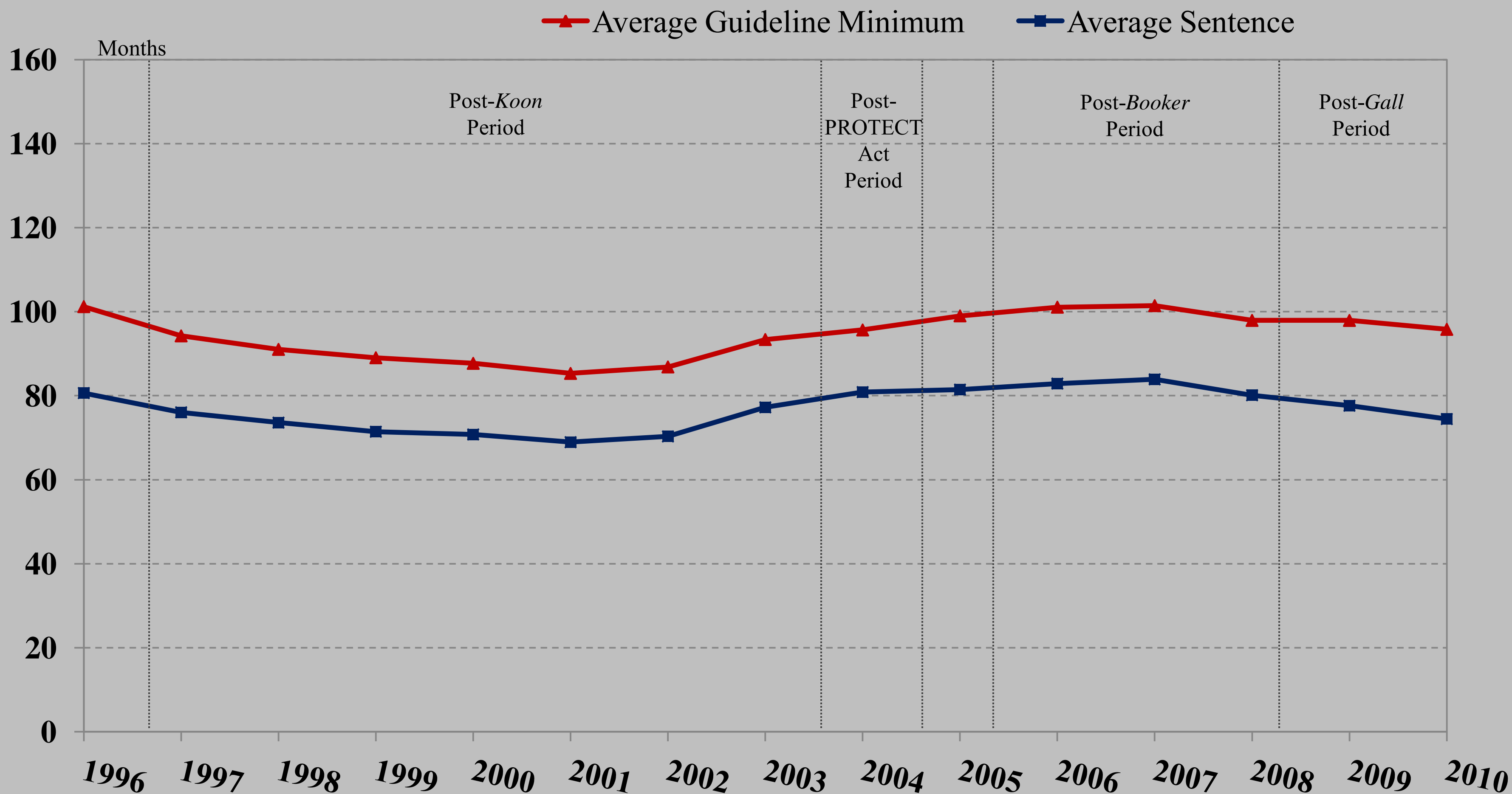


Only cases with complete guideline application information and a primary sentencing guideline of USSG §2L1.1 are included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Drug Trafficking (USSG §§2D1.1 and 2D1.2) Offenders

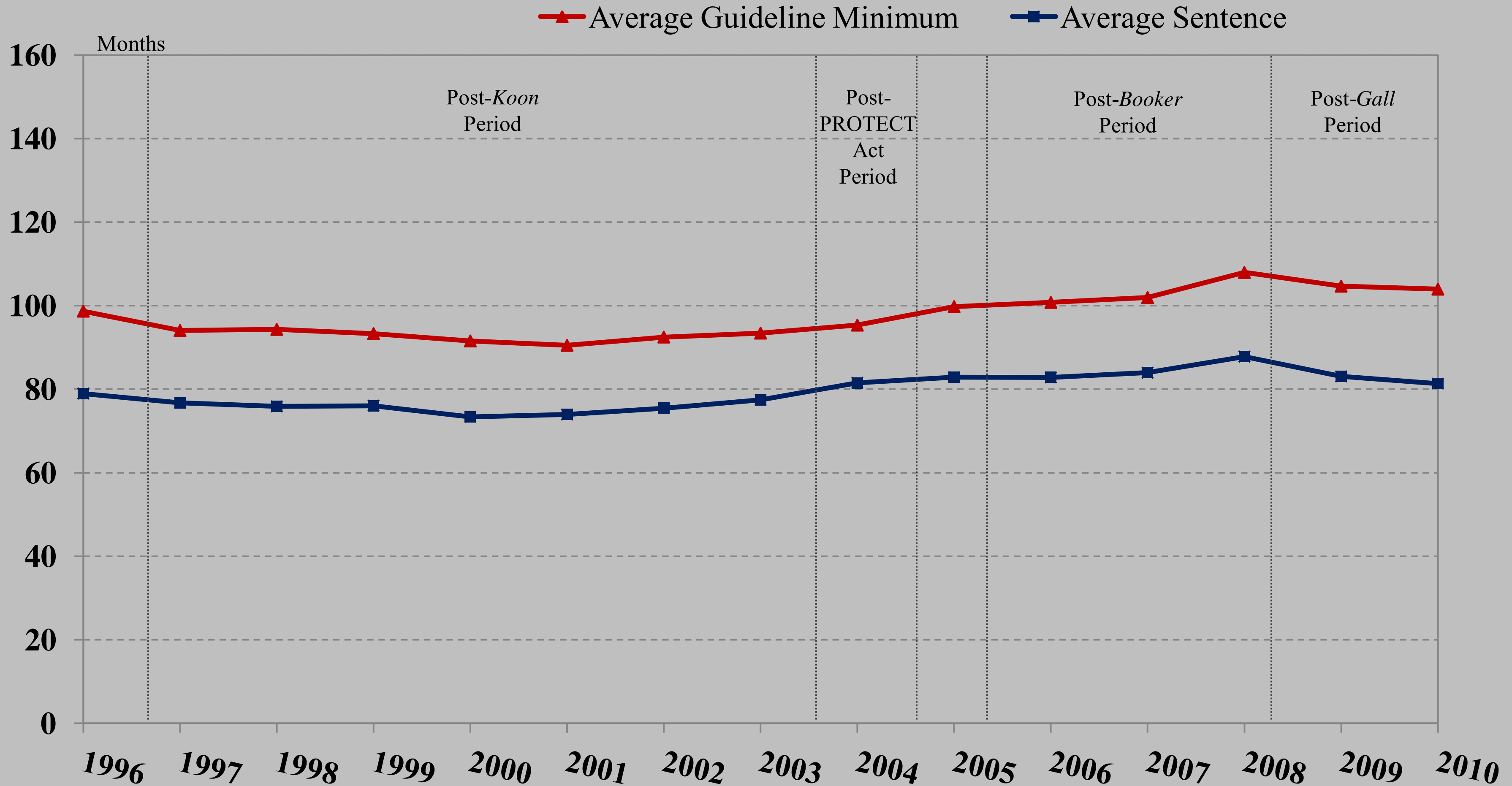
Fiscal Years 1996-2010



Only cases with complete guideline application information with a primary sentencing guideline of USSG §2D1.1 or §2D1.2 were included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.
SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Drug Trafficking (USSG §§2D1.1 and 2D1.2) Offenders (Powder Cocaine Offenses)

Fiscal Years 1996-2010

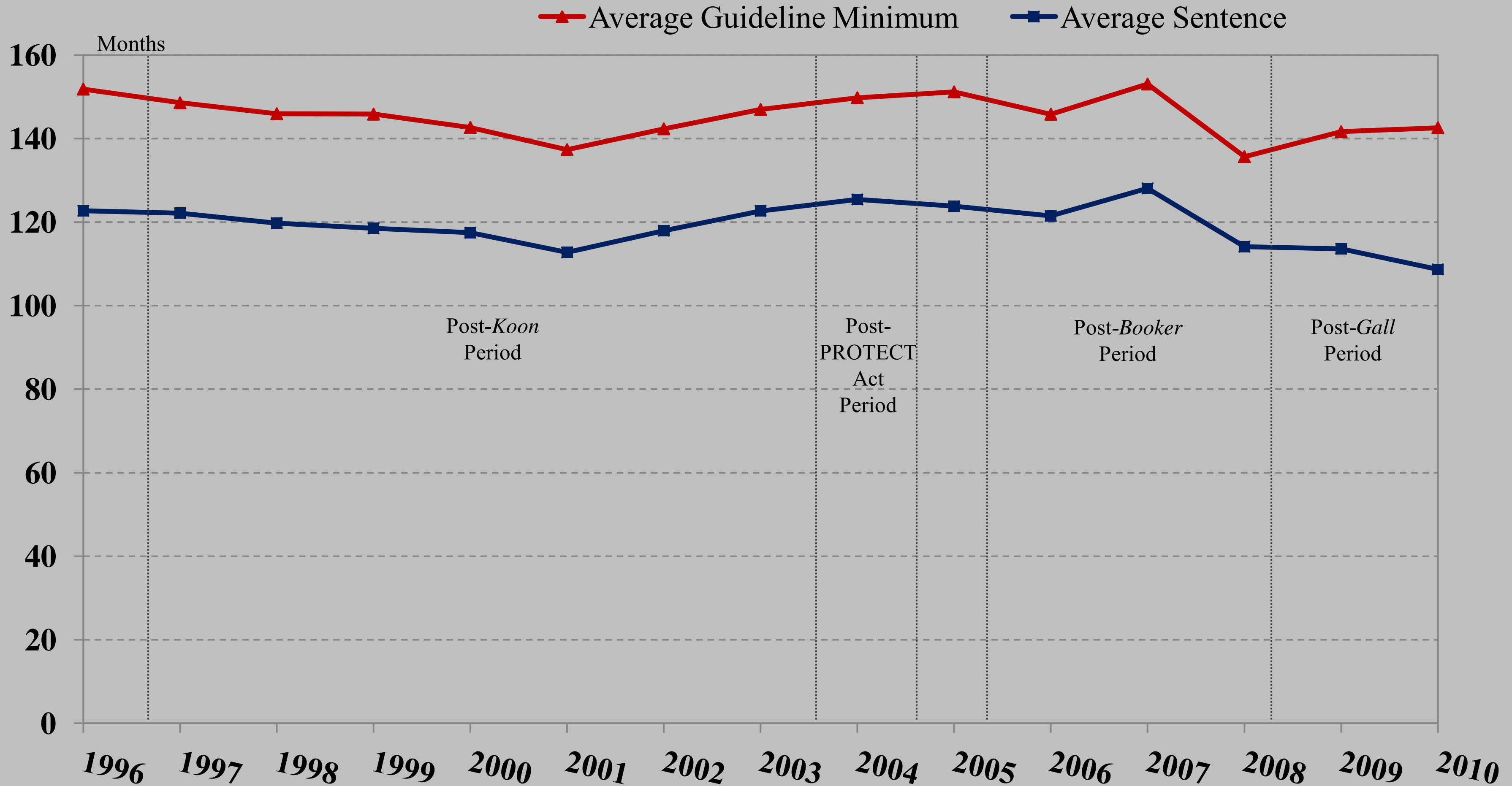


Only cases with complete guideline application information with a primary sentencing guideline of USSG §2D1.1 or §2D1.2 with a primary drug type of powder cocaine were included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Drug Trafficking (USSG §§2D1.1 and 2D1.2) Offenders (Crack Cocaine Offenses)

Fiscal Years 1996-2010

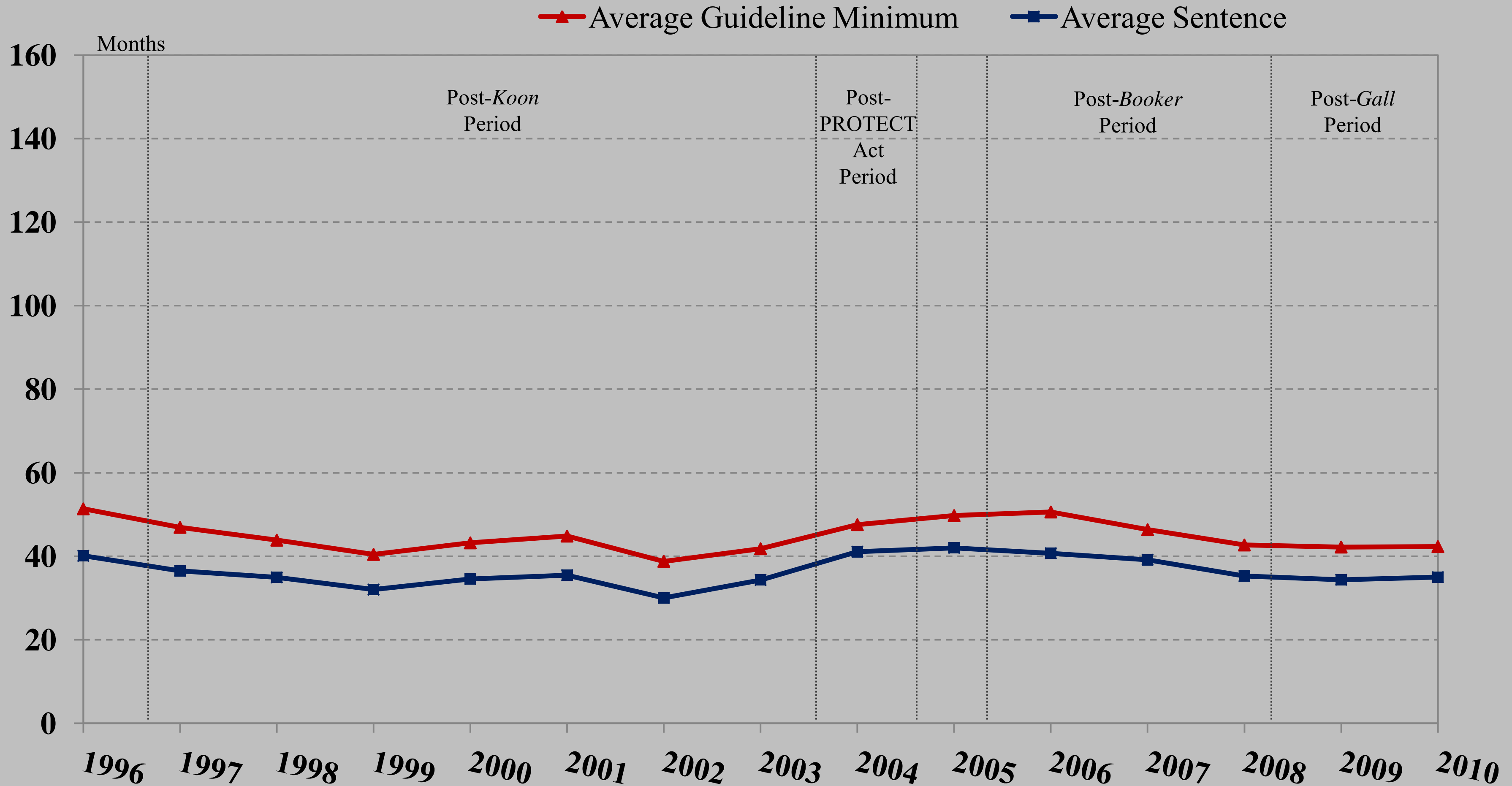


Only cases with complete guideline application information with a primary sentencing guideline of USSG §2D1.1 or §2D1.2 with a primary drug type of crack cocaine were included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Drug Trafficking (USSG §§2D1.1 and 2D1.2) Offenders (Marijuana Offenses)

Fiscal Years 1996-2010

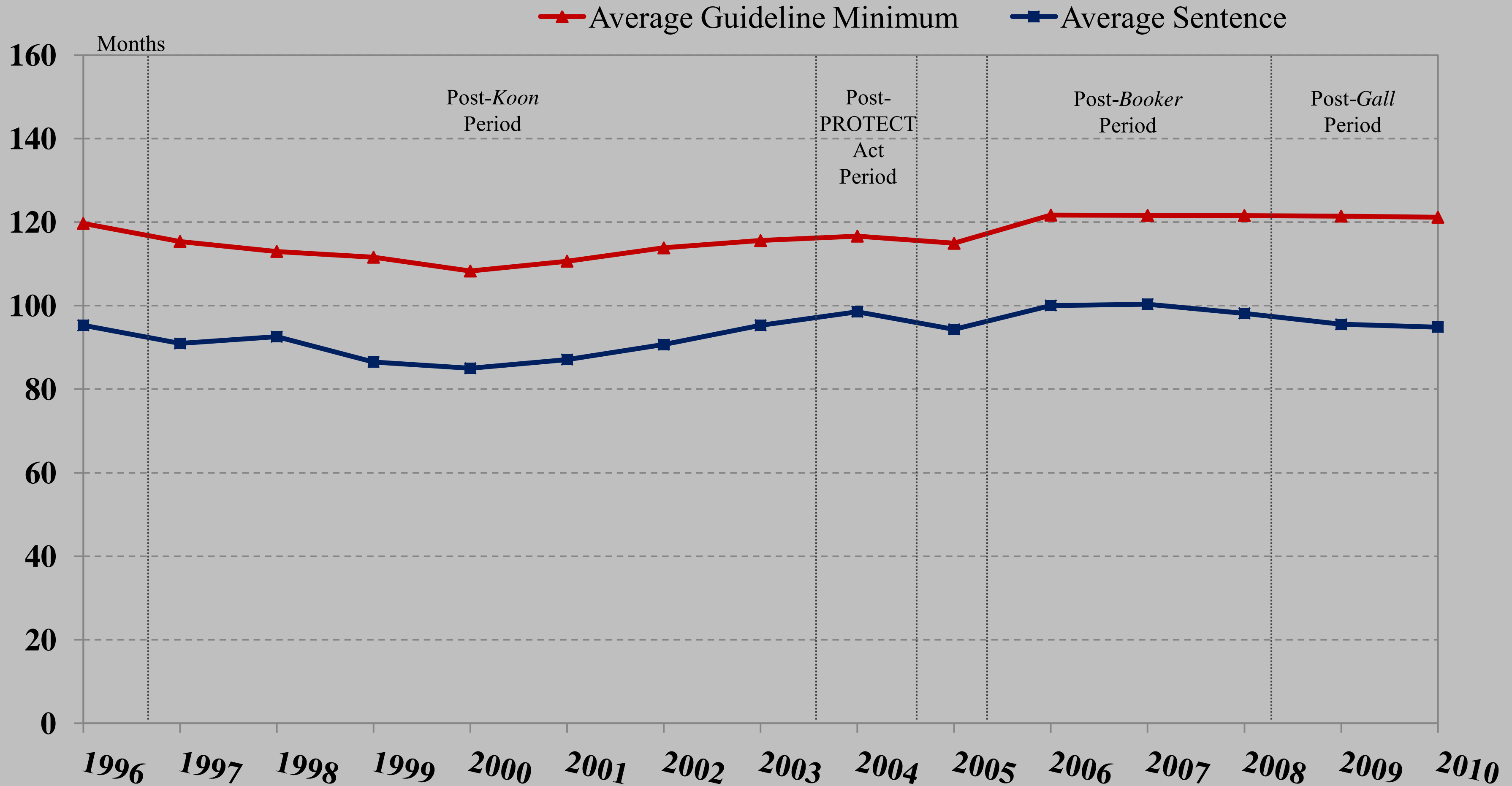


Only cases with complete guideline application information with a primary sentencing guideline of USSG §2D1.1 or §2D1.2 with a primary drug type of marijuana were included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Drug Trafficking (USSG §§2D1.1 and 2D1.2) Offenders (Methamphetamine Offenses)

Fiscal Years 1996-2010

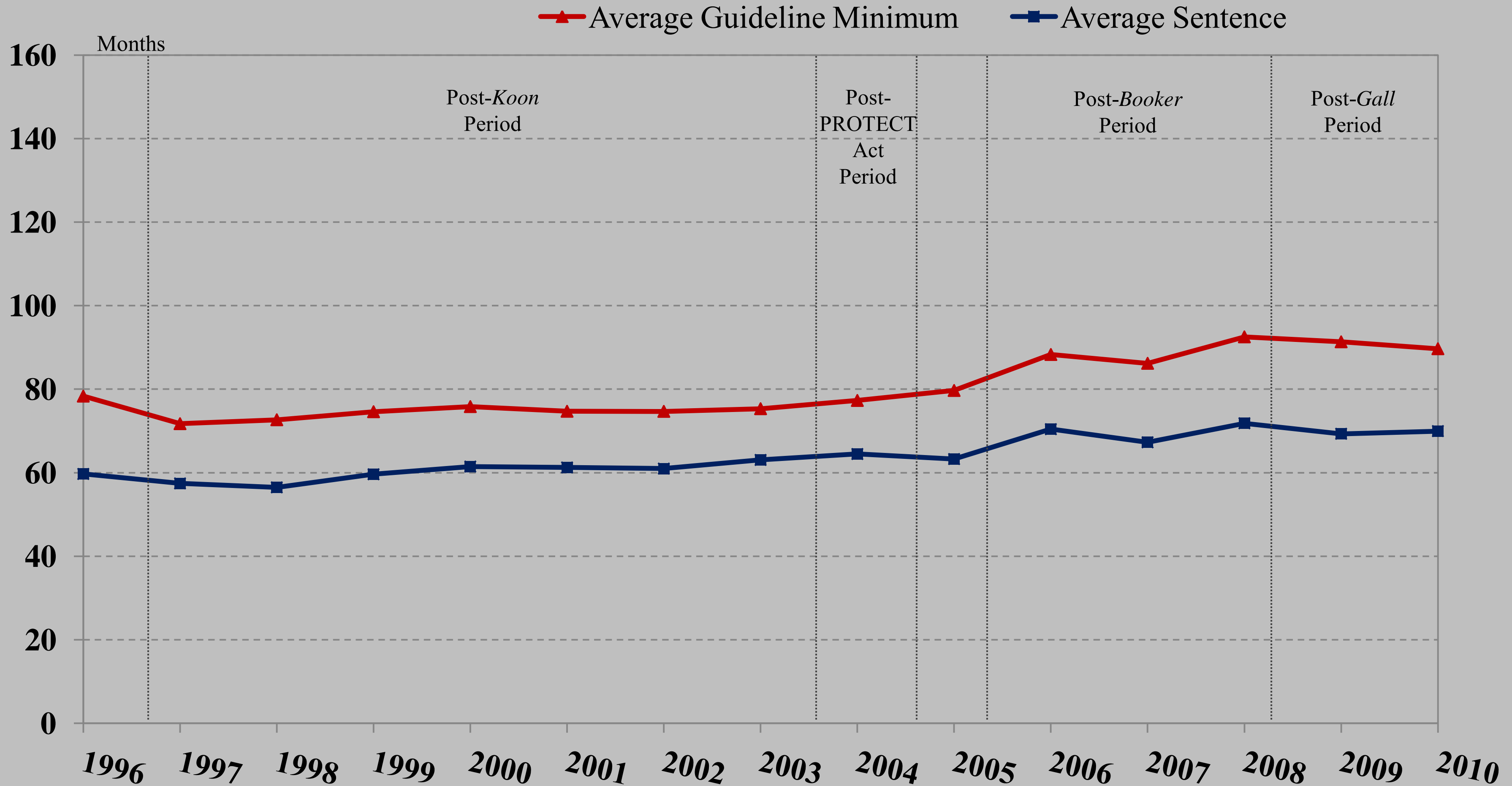


Only cases with complete guideline application information with a primary sentencing guideline of USSG §2D1.1 or §2D1.2 with a primary drug type of methamphetamine were included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Drug Trafficking (USSG §§2D1.1 and 2D1.2) Offenders (Heroin Offenses)

Fiscal Years 1996-2010

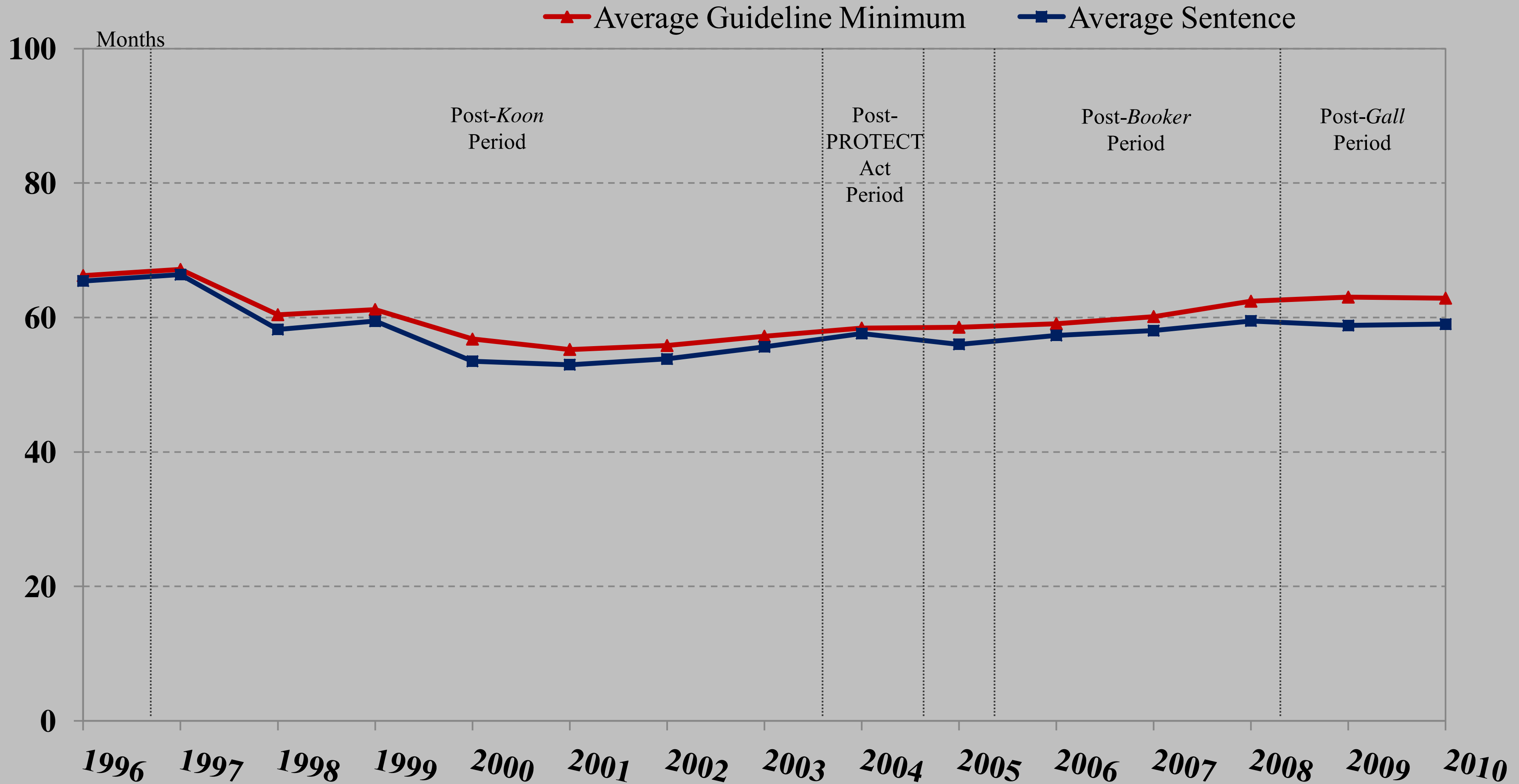


Only cases with complete guideline application information with a primary sentencing guideline of USSG §2D1.1 or §2D1.2 with a primary drug type of heroin were included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Firearms (USSG §2K2.1) Offenders

Fiscal Years 1996-2010

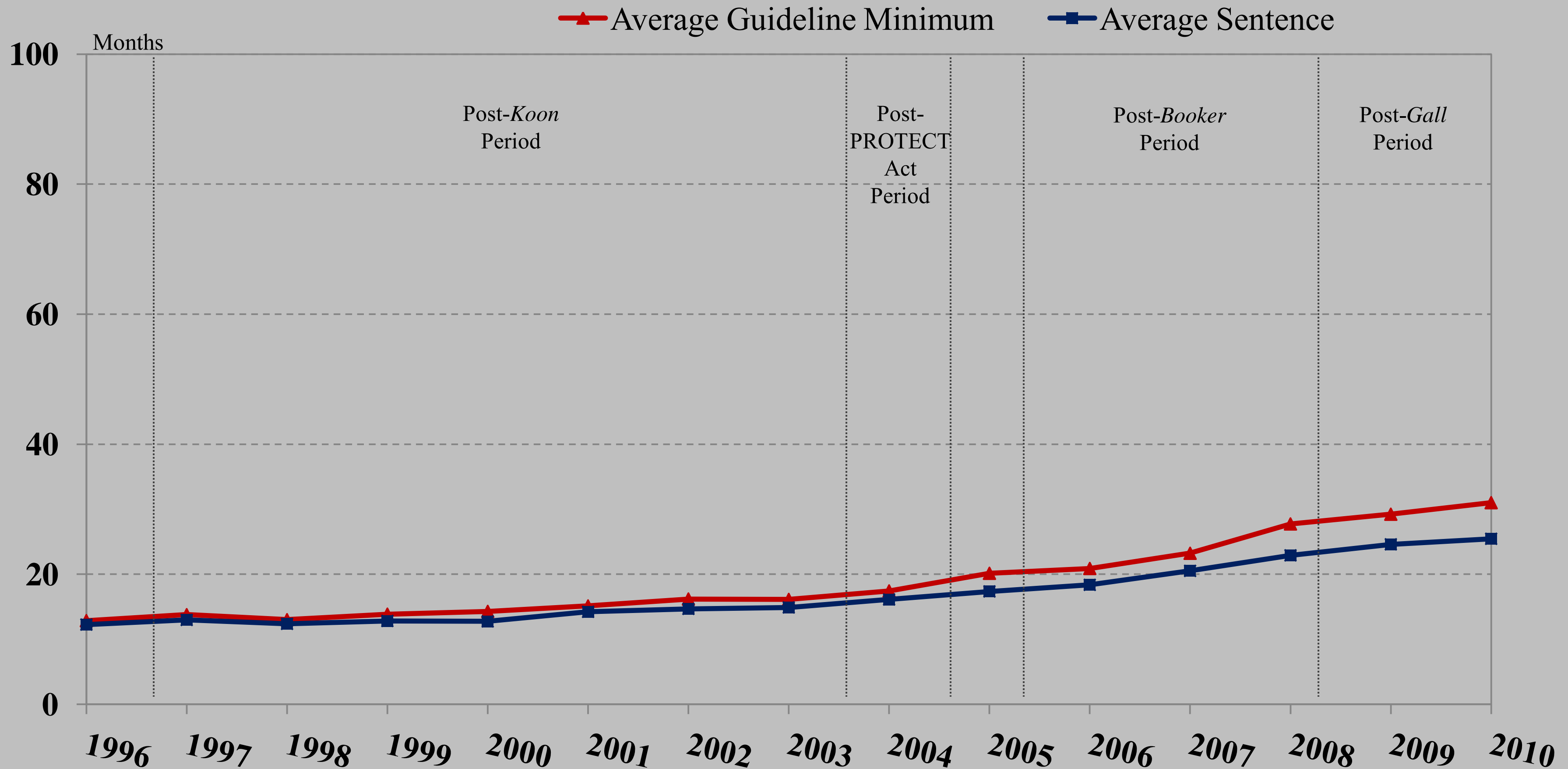


Only cases with complete guideline application information and a primary sentencing guideline of USSG §2K2.1 are included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Fraud (USSG §§2B1.1 and 2F1.1) Offenders

Fiscal Years 1996-2010

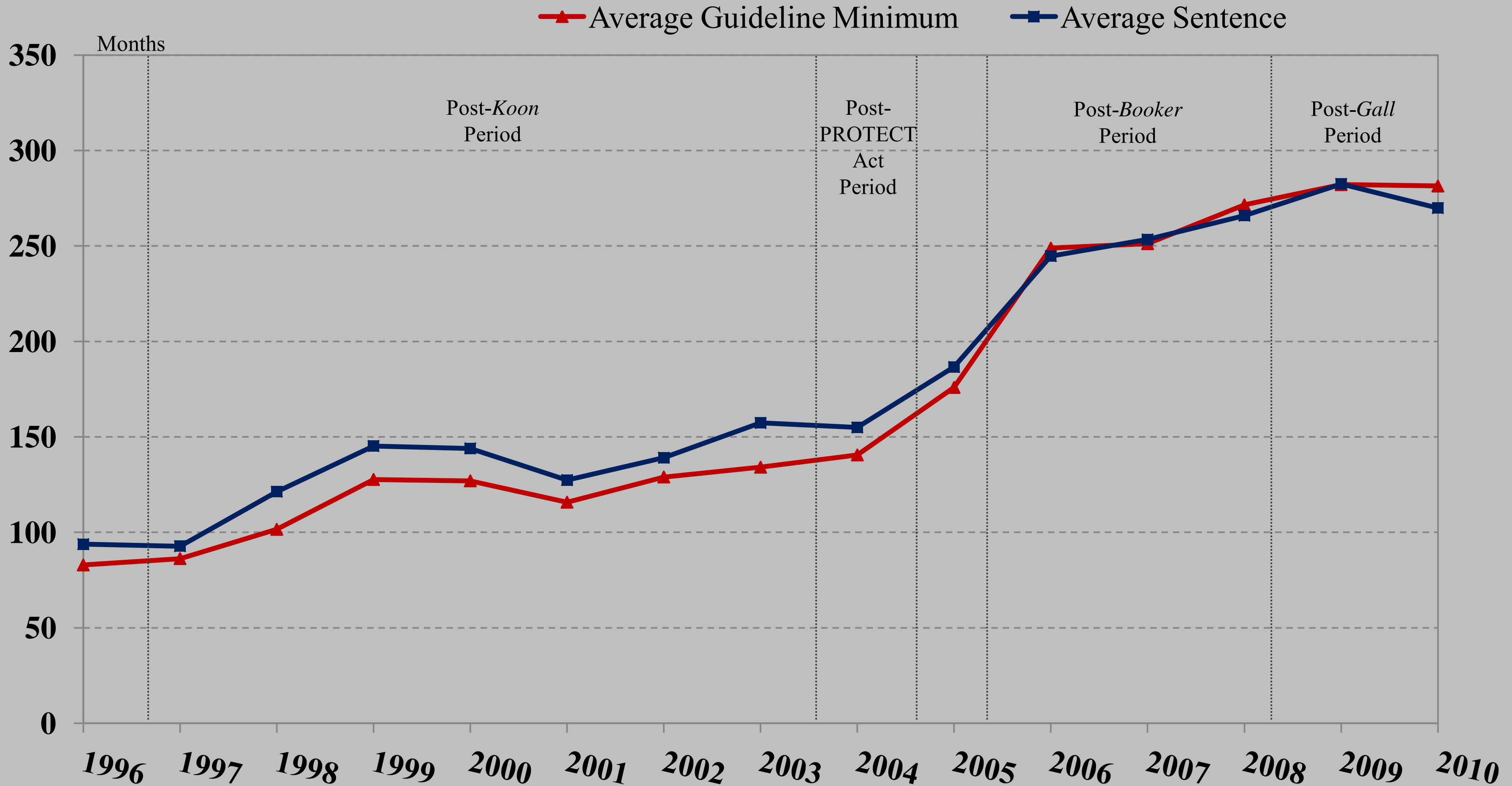


Only cases with complete guideline application information with a primary sentencing guideline of USSG §2B1.1 with a primary offense type of fraud sentenced under a Guidelines Manual effective November 1, 2001 or later or USSG §2F1.1 were included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Child Pornography Production (USSG §2G2.1) Offenders

Fiscal Years 1996-2010

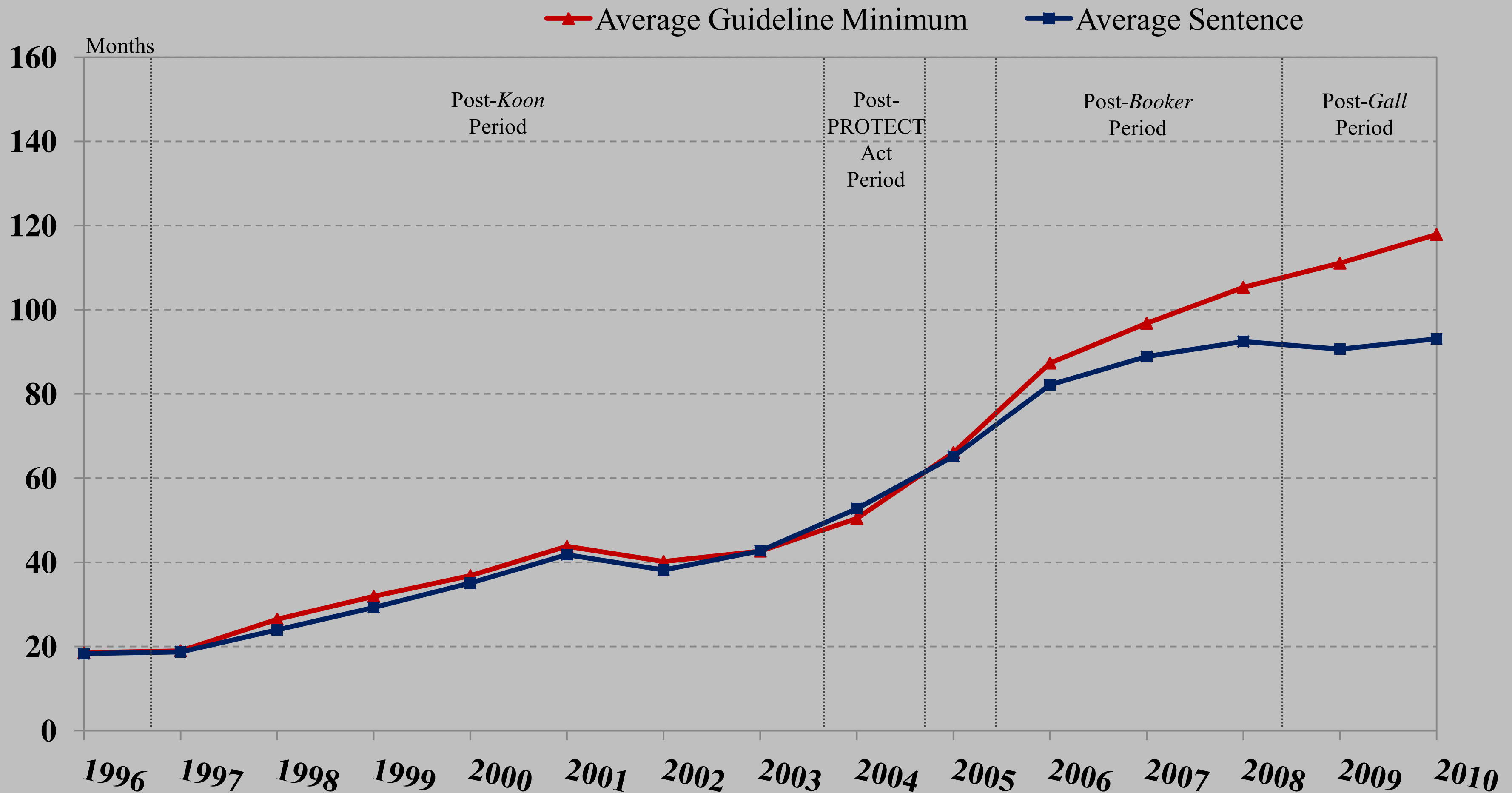


Only cases with complete guideline application information and a primary sentencing guideline of USSG §2G2.1 are included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.

SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Average Sentence Length and Average Guideline Minimum Data for Child Pornography Possession (USSG §§2G2.2 and 2G2.4) Offenders

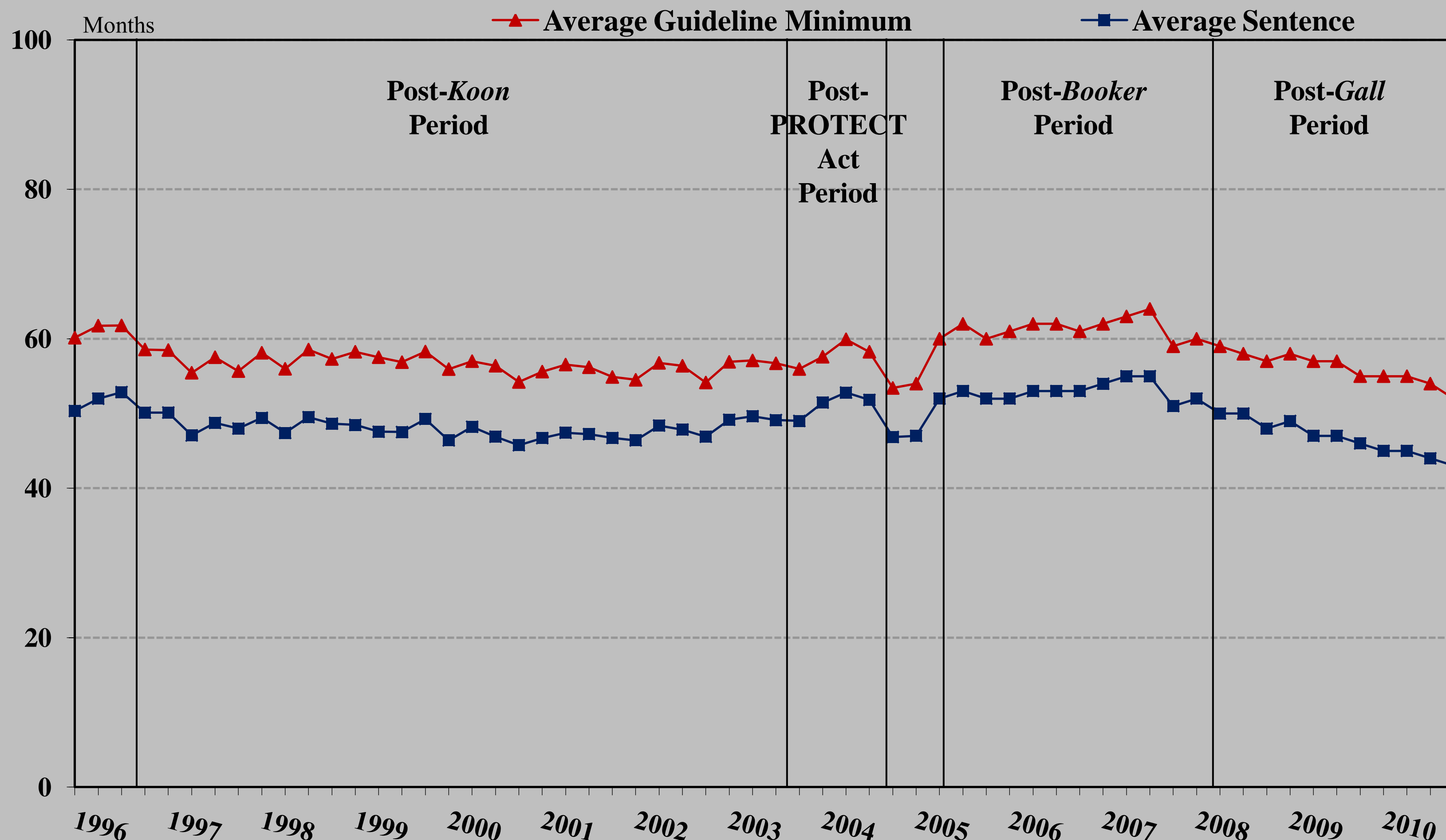
Fiscal Years 1996-2010



Only cases with complete guideline application information with a primary sentencing guideline of USSG §2G2.2 or §2G2.4 were included in this analysis. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties.
SOURCE: U.S. Sentencing Commission, 1996-2010 Datafiles, USSCFY96 – USSCFY10.

Appendix B

Average Sentence Length and Average Guideline Minimum
Quarterly Data for All Cases
Fiscal Years 1996-2010

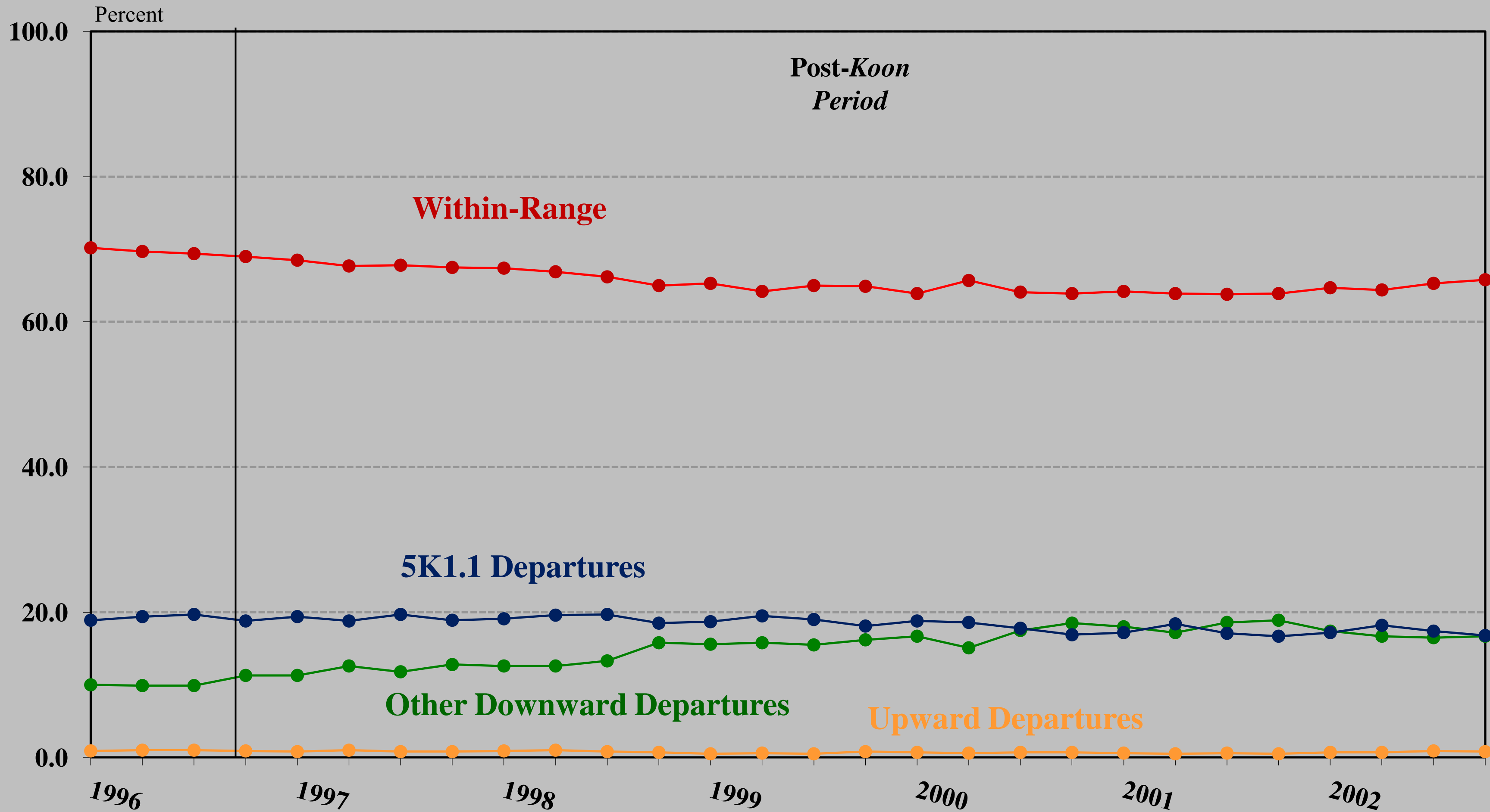


Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 1995-2010 Datafiles, USSCFY1996-USSCFY2010.

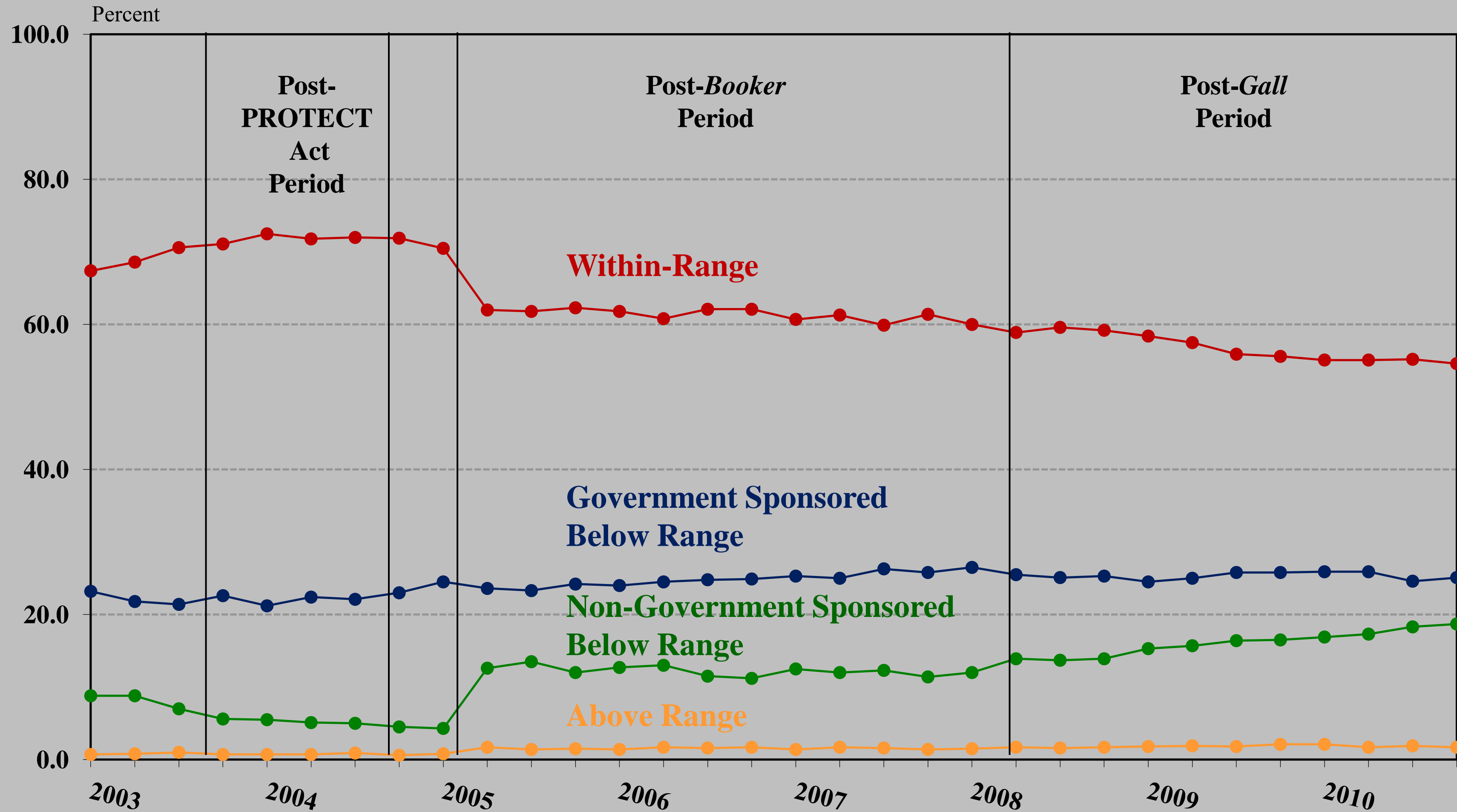
Appendix C

Quarterly Data for Within-Range and Out-of-Range Sentences
Fiscal Years 1996-2002



SOURCE: U.S. Sentencing Commission, 1996-2002 Datafiles, USSCFY1996-USSCFY2002.

Quarterly Data for Within-Range and Out-of-Range Sentences
Fiscal Years 2003-2010



SOURCE: U.S. Sentencing Commission, 2003-2010 Datafiles, USSCFY2003-USSCFY2010.

Appendix D

Rate of Non-Government Below Range Sentences
Fiscal Year 2010

District	Rate of Non-Government Below Range Sentences
Southern District of New York	49.0
District of Delaware	44.3
District of Connecticut	43.1
District of Rhode Island	42.8
District of Minnesota	42.7
Eastern District of New York	42.0
Western District of Wisconsin	40.5
Northern District of Illinois	40.5
District of Vermont	38.4
District of Massachusetts	35.7
Eastern District of Wisconsin	35.7
Southern District of West Virginia	35.1
Northern District of Georgia	31.9
District of Hawaii	29.5
District of Alaska	29.5
Eastern District of Michigan	29.4
Western District of Pennsylvania	28.9
Middle District of Tennessee	28.2
Eastern District of Pennsylvania	27.5
Eastern District of Missouri	27.3
Middle District of Pennsylvania	27.1
Southern District of Iowa	26.3
Western District of Tennessee	26.0
District of Nebraska	25.0
Southern District of Florida	24.9
Middle District of Florida	24.7
Central District of California	24.4
Eastern District of Washington	23.6
Southern District of Ohio	23.4
Northern District of West Virginia	23.3
Northern District of Ohio	23.2
Western District of Virginia	22.9
Western District of Michigan	22.6
Central District of Illinois	22.4
District of Utah	22.1
Southern District of Indiana	21.9

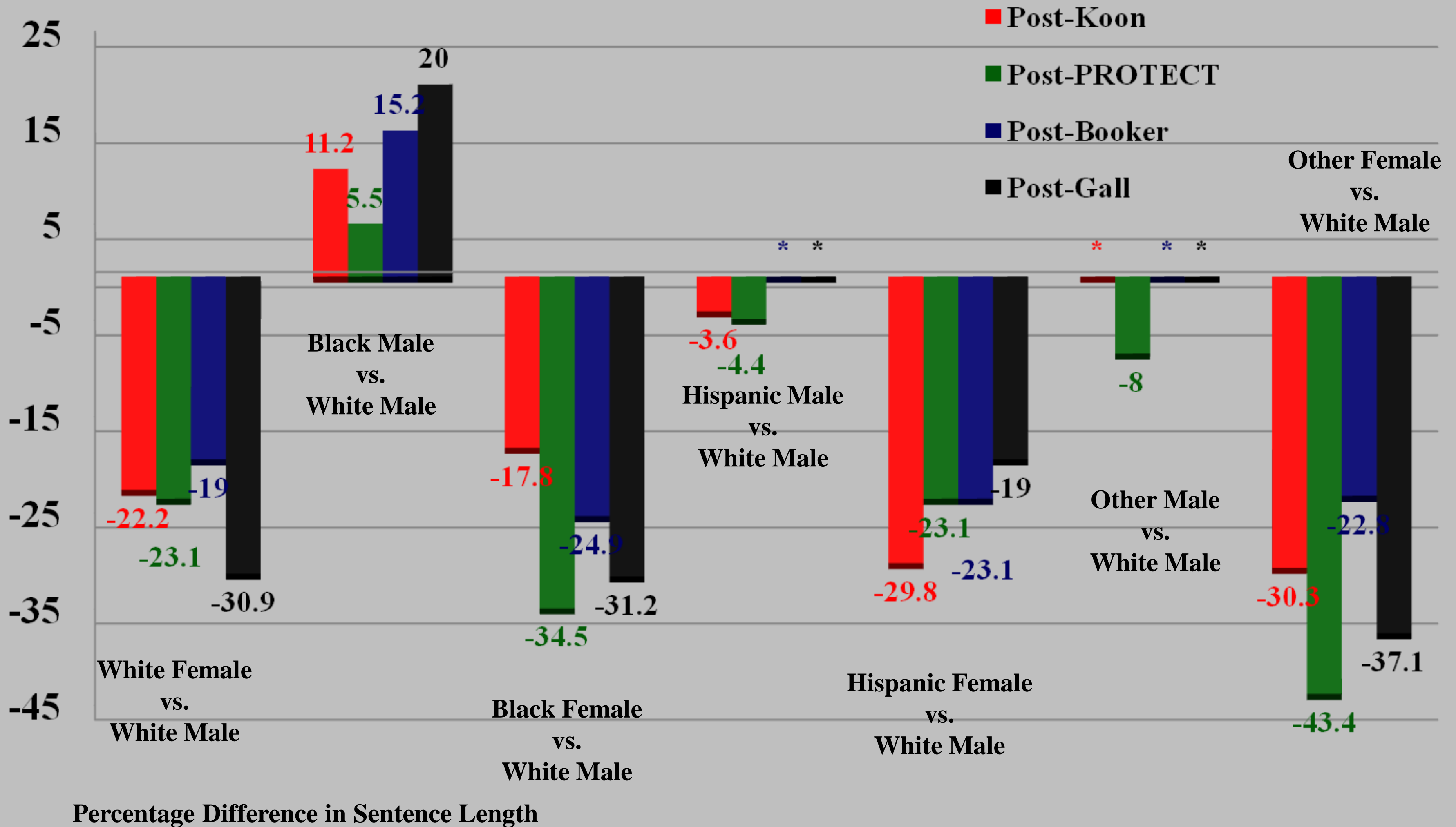
District	Rate of Non-Government Below Range Sentences
District of South Dakota	21.8
District of Columbia	21.6
District of Colorado	21.2
Western District of Missouri	20.9
District of New Jersey	20.9
District of Nevada	20.6
Eastern District of Arkansas	19.9
Middle District of Louisiana	19.8
District of Oregon	19.5
Northern District of California	19.4
District of Idaho	19.3
Southern District of Alabama	19.2
District of New Hampshire	19.0
District of South Carolina	18.8
District of Wyoming	18.7
Western District of Oklahoma	18.6
Eastern District of Virginia	18.3
Northern District of Oklahoma	18.1
District of Maryland	18.0
Southern District of Illinois	17.9
District of the Northern Mariana Islands	17.9
Northern District of Indiana	17.8
Eastern District of Louisiana	17.7
Western District of Washington	17.6
Northern District of New York	17.2
District of Maine	17.2
Eastern District of Tennessee	16.3
District of the Virgin Islands	15.1
Southern District of Texas	14.9
Western District of New York	14.8
Western District of Kentucky	14.7
Western District of Arkansas	14.3
Northern District of Alabama	13.9
Northern District of Florida	13.8
Southern District of Mississippi	13.6
Northern District of Texas	13.4
District of North Dakota	13.0
Middle District of North Carolina	12.9
Northern District of Iowa	12.8

District	Rate of Non-Government Below Range Sentences
Western District of North Carolina	12.5
Western District of Louisiana	12.5
District of Montana	12.5
Eastern District of Oklahoma	12.4
Middle District of Alabama	12.3
Eastern District of Kentucky	12.3
Eastern District of California	12.2
District of Puerto Rico	12.1
Western District of Texas	11.1
District of Kansas	10.9
District of Guam	9.1
Southern District of California	8.7
Eastern District of North Carolina	8.7
Southern District of Georgia	8.5
Northern District of Mississippi	8.3
Eastern District of Texas	8.0
District of Arizona	7.1
District of New Mexico	6.7
Middle District of Georgia	4.7

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Appendix E

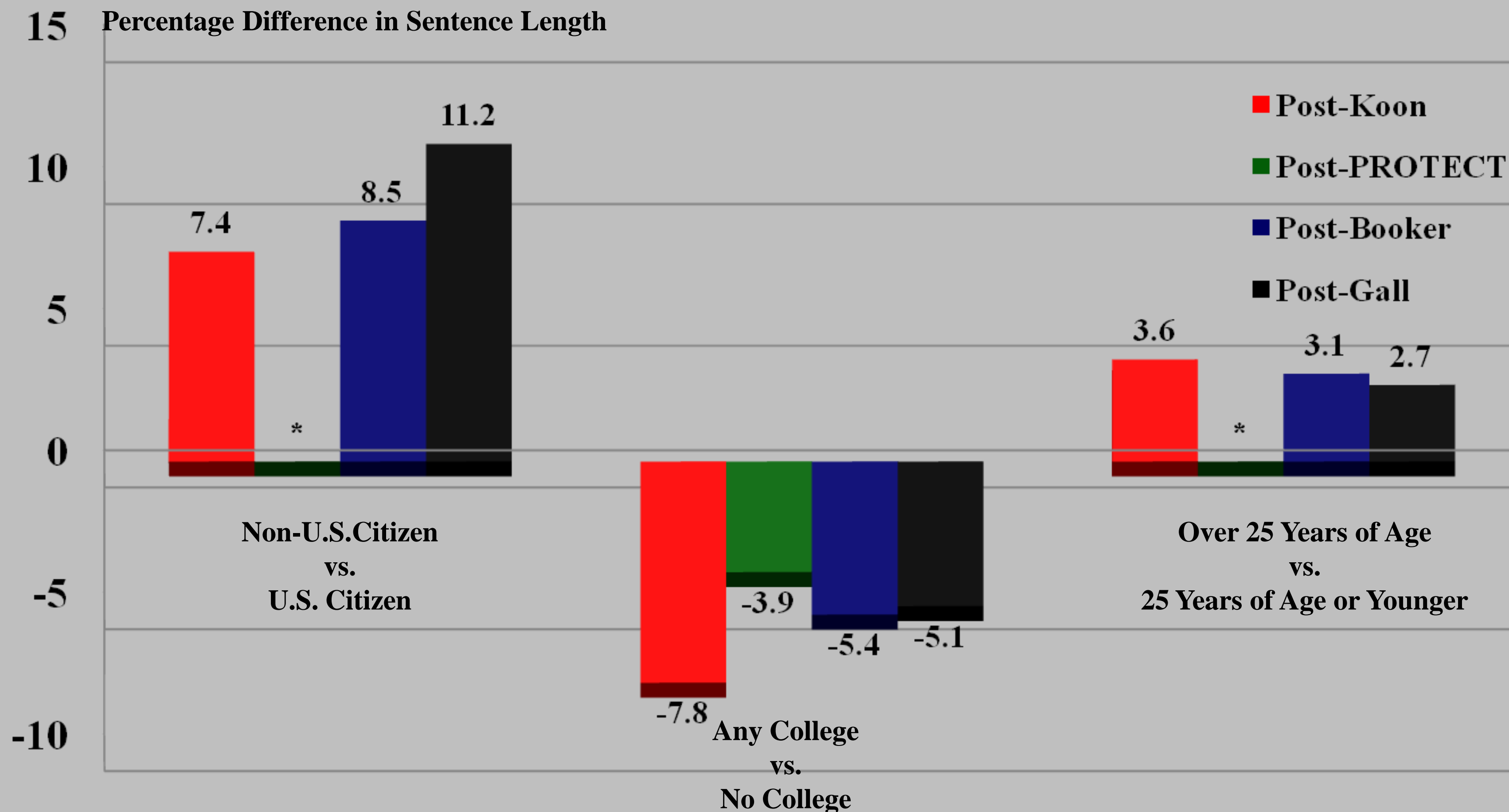
Refined Model



*Indicates that the difference between the two groups was not statistically significant.

SOURCE: U.S. Sentencing Commission, 1999 -2010 Datafiles, USSCFY99-USSCFY10.

Refined Model



*** Indicates that the difference between the two groups was not statistically significant.**

SOURCE: U.S. Sentencing Commission, 1999 -2010 Datafiles, USSCFY99-USSCFY10.