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THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING

Federal Sentencing Outcomes, 2005 - 2017





REPORT OF THE UNITED STATES SENTENCING COMMISSION

THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING

National Sentencing Practices from 2005–2017



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TABLE OF CONTENTS



INTRODUCTION & KEY FINDINGS

- 5 The Influence of the Guidelines on Federal Sentencing Outcomes
- 7 Updated Analysis on the Influence of the Sentencing Guidelines
- 18 Summary of Findings

METHODOLOGY

- 9 The Commission's 2012 Study of the Anchoring Effect of the Guidelines
- 13 Expanding the Methodology of the 2012 Booker Report
- 16 Data Analysis – Measuring the Influence of the Guidelines

FINDINGS

- 20 Results of the Aggregate Analysis
- 21 All Cases Methodology
- 23 Judicial Discretion Methodology
- 25 Impact of Substantial Assistance
- 26 Results of the Guideline-Specific Analyses

Economic Crime | §2B1.1

- 27 Economic Crime Offenders Sentenced Under §2B1.1
- 28 §2B1.1 Analysis All Cases Methodology
- 30 Judicial Discretion Methodology

Drug Trafficking | §2D1.1

- 32 Drug Trafficking Offenders Sentenced Under §2D1.1
- 33 §2D1.1 Analysis All Cases Methodology
- 36 Judicial Discretion Methodology

Firearms | §2K2.1

- 38 Firearms Offenders Sentenced Under §2K2.1
- 39 §2K2.1 Analysis All Cases Methodology
- 41 Judicial Discretion Methodology



TABLE OF CONTENTS



FINDINGS (continued)

Illegal Reentry | §2L1.2

- 43 Illegal Reentry Offenders Sentenced Under §2L1.2
- 44 §2L1.2 Analysis All Cases Methodology
- 46 Judicial Discretion Methodology

Non-Production Child Pornography | §2G2.2

- 48 Non-Production Child Pornography Offenders Sentenced Under §2G2.2
- 50 §2G2.2 Analysis All Cases Methodology
- 52 Judicial Discretion Methodology

Career Offenders | §4B1.1

- 54 Career Offenders Sentenced Under §4B1.1
- 55 §4B1.1 Analysis All Cases Methodology
- 57 Judicial Discretion Methodology

CONCLUSION

- 60 The Influence of the Guidelines on Federal Sentencing Outcomes

TABLE OF CONTENTS

Appendices



APPENDIX A

63	Judicial Discretion Methodology with Substantial Assistance Cases Included
64	Aggregate Analysis
65	Economic Crimes
66	Drug Trafficking
67	Firearms
68	Illegal Reentry
69	Child Pornography
70	Career Offender

APPENDIX B

71	USSG §2D1.1 Analysis by Individual Drug Type
72	Powder Cocaine
74	Crack Cocaine
76	Heroin
78	Marijuana
80	Methamphetamine
82	Other Drug

APPENDIX C

84	Percent Difference Graph of Combined Guideline-Specific Analyses
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ENDNOTES

86	Endnotes
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This report, the fourth in the series, updates the 2012 *Booker Report*'s examination of the influence of the guideline range on the average sentence imposed.



INTRODUCTION

The Influence of the Guidelines on Federal Sentencing Outcomes

National Sentencing Practices from 2005–2017



The United States Sentencing Commission provides timely and objective data, information, and analysis about federal sentencing practices as part of its mission to promote fairness and consistency in sentencing.¹ This report continues the Commission's work analyzing the influence of the sentencing guidelines on sentencing outcomes in the federal courts since the 2005 Supreme Court decision in *United States v. Booker*.²

Specifically, this report builds on the Commission's 2012 report to Congress, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*,³ which examined the influence of the guideline range calculated from the *Guidelines Manual* on sentences imposed from October 1995 to September 2011. The 2012 *Booker* Report compared the average guideline range minimum with the average sentence imposed for five offense types and the career offender enhancement. Given that its time frame began prior to *Booker*, the report tracked this comparison over periods of time when the sentencing guidelines were mandatory as well as advisory. The Commission found that the guidelines "remained the essential starting point in all federal sentences and . . . continued to exert significant influence on federal sentencing trends over time."⁴ However, while the influence of the guidelines

was generally stable for certain guidelines, such as drug trafficking, firearms, and immigration offenses, its influence had diminished for others, such as child pornography and fraud offenses.⁵

Following the 2012 *Booker* Report, the Supreme Court discussed the Commission's findings in *Peugh v. United States*.⁶ In *Peugh*, the Court held that the Ex Post Facto Clause is violated when a defendant is sentenced under current guidelines that yield a higher guideline range than the guidelines in effect at the time of the offense.⁷ Citing to findings in the 2012 *Booker* Report and other Commission data publications, the Court explained that there is "considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing sentences imposed by judges" and that "the Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it."⁸ The Court noted that after *Booker*, sentencing courts must still begin their analysis by correctly calculating the guideline range, which will "anchor" their discretion and the appellate review process.⁹ Thus, the Court concluded that the Guidelines continue to be the "lodestone" of sentencing and a retrospective increase in the guideline range creates a risk of a higher sentence.¹⁰



Since then, the Commission has continued to study whether the degree of influence found in *Peugh* has changed in a series of reports updating the 2012 *Booker* Report's analyses and findings. In 2017, the first update focused on demographic differences in federal sentencing.¹¹ The Commission concluded that increases in demographic differences in sentencing during the first seven years after *Booker*—including a longer average sentence for black male offenders compared to similar white male offenders—persisted in the subsequent five-year period.¹² In 2019, a second update compared judges' individual sentencing practices within the same city and reported that the increasing differences in district-level sentencing practices found in the 2012 *Booker* Report had continued, even within the same courthouse.¹³ In 2020, a third update examined sentencing practices across districts, comparing each district's sentencing practices to the average sentencing practices of all districts in the analysis and similarly found that disparities in sentencing practices persisted.¹⁴

This report, the fourth in the series, updates the 2012 *Booker* Report's examination of the influence of the guideline range on the average sentence imposed. Using sentencing data collected from 2005 to 2017, the same time frame as the 2019 and 2020 reports, this report first replicates the analysis in the 2012 *Booker* Report. This analysis compares, for all cases during the

study period, the average guideline range minimum with the average sentence imposed under all guidelines in the aggregate, and then does the same under six individual guidelines: economic offenses under §2B1.1, drug trafficking offenses under §2D1.1, non-production child pornography offenses under §2G2.2 (and §2G2.4¹⁵), firearms offenses under §2K2.1, illegal reentry offenses under §2L1.2, and the career offender enhancement under §4B1.1.¹⁶ Next, the report limits this analysis to cases in which the Commission could meaningfully assess judicial discretion.

Both sets of analyses show that, while the difference between the average guideline minimum and average sentence imposed has increased for most guidelines since *Booker*, the difference has generally stabilized in the most recent study years following the 2012 *Booker* Report. Notably, however, the difference between the average guideline minimum and the average sentence imposed is consistently narrower when the analysis is limited to cases in which judicial discretion could be meaningfully assessed. While this narrowing is largely due to the impact of excluding substantial assistance departures, this trend nevertheless indicates that the guidelines exert a greater influence on sentences imposed in cases in which judicial discretion could be meaningfully assessed than in cases in which it could not.

KEY FINDINGS

Updated Analysis on the Influence of the Sentencing Guidelines

In this report, the Commission analyzes the difference between average guideline minimums and average sentences imposed. These differences, measured in a raw number of months and average percentage difference, are analyzed for all cases in the aggregate and selected individual guidelines across three time periods between 2005 and 2017: the *Booker*, *Gall*, and Post-Report Periods.¹⁷ While the extent of those differences vary depending on the individual guideline, the Commission found several overarching trends indicating that the guidelines generally continue to have a substantial influence on sentences imposed after *Booker*.

- In the wake of *Booker* and *Gall* and continuing into the Post-Report Period, the difference between the average guideline minimum and average sentence imposed widened for the federal caseload overall, indicating that the influence of the guidelines generally decreased after *Booker* rendered them advisory. However, this trend has not continued in the most recent years of the Post-Report Period, suggesting that the influence of the guidelines may have stabilized.
- The influence of the guidelines continued to vary substantially depending on the type of offense throughout the Post-Report Period. As indicated by the difference between the average guideline minimum and average sentence imposed, the guidelines continued to exert a strong influence on sentences imposed in firearms and illegal reentry offenses, a more moderate influence on sentences imposed in fraud and drug offenses, and a weakening influence in non-production child pornography offenses and career offender cases.
- Major amendments by the Commission to the drug trafficking and illegal reentry guidelines appear to have strengthened their influence during the most recent years of the Post-Report Period. The difference between the average guideline minimum and average sentence imposed for these two guidelines narrowed after the Commission reduced the Drug Quantity Table by two offense levels in 2014 and comprehensively revised the illegal reentry guideline in 2016.
- The guidelines generally exert a greater influence on sentences imposed in cases in which judicial discretion could be meaningfully assessed. Excluding cases in which judicial discretion could not be meaningfully assessed narrowed the difference between the average guideline minimum and the average sentence imposed for the federal caseload overall, and for all but one individual offense type studied, across every time period studied. This narrowing was largely attributable to the exclusion of cases with substantial assistance departures, which resulted in an average sentence reduction of 51.8 percent. Sentence reductions for substantial assistance require a government motion and afford substantial weight to the government's evaluation.



METHODOLOGY

The Commission's 2012 Study of the Anchoring Effect of the Guidelines



This report updates the 2012 *Booker* Report's analysis of the influence of the guideline range on sentencing, both in terms of the time period examined and methodology used. In addition to updating the 2012 findings to analyze a more recent time period, this report incorporates the methodology used in the Commission's more recent Intra-City Report and Inter-District Report.

Congress included three provisions intended to reduce the extent of unwarranted sentencing disparities in the Sentencing Reform Act.¹⁸ As part of those provisions, Congress instructed the Commission to pay "particular attention" to avoiding unwarranted sentencing disparities in creating guidelines.¹⁹ Although the Supreme Court's decision in *Booker* rendered the guidelines advisory – thereby providing courts with more discretion in sentencing than under the pre-*Booker* guidelines – the Court did not invalidate those three provisions. Indeed, the Court specifically stated that it believed the post-*Booker* advisory guideline system would "promote uniformity in the sentencing process" and thus help avoid unwarranted sentencing disparities.²⁰

In furtherance of those directives, the Commission has continued to study sentencing variations from the guidelines. In the 2012 *Booker* Report, the Commission examined the influence of the guideline range on sentences imposed across four time periods:

the Koon period (the Supreme Court's 1996 decision in *Koon v. United States*²¹ until the enactment of the PROTECT Act²² on April 30, 2003);

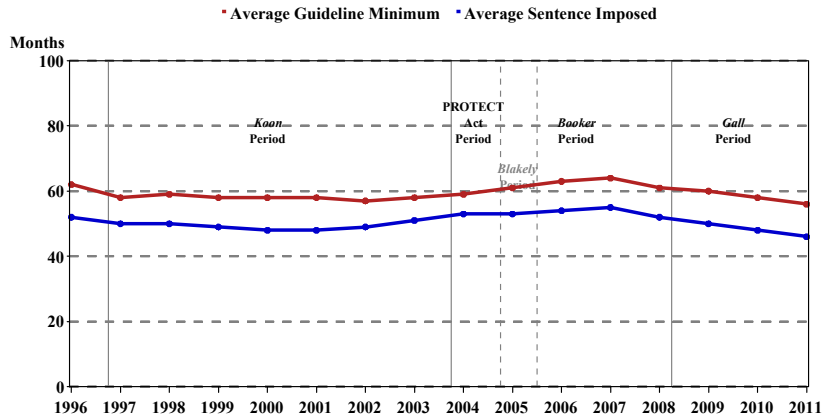
the PROTECT Act period (April 30, 2003 through the Supreme Court's 2004 decision in *Blakely v. Washington*,²³ which foreshadowed the Supreme Court's 2005 decision in *United States v. Booker*²⁴);

the Booker period (January 12, 2005, through December 9, 2007); and

the Gall period (the date of the *Gall* and *Kimbrough* decisions²⁵ through the end of fiscal year 2011).

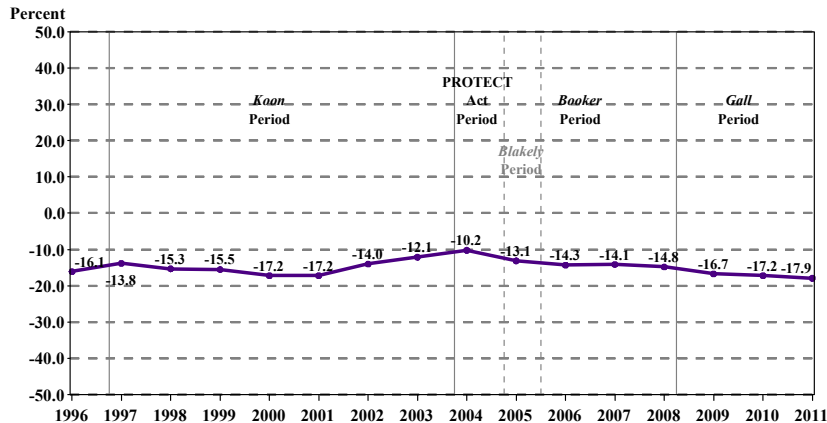


Average Guideline Minimum and Sentence Imposed
All Cases
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Percent Difference Between Average Guideline Minimum and Sentence Imposed
All Offenses
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

To examine the extent to which the guidelines influence sentencing outcomes, the report used two-line graphs to compare the average guideline range minimum and the average sentence imposed.²⁶

The distance between the two lines reflected how closely the sentences were adhering to their corresponding guideline ranges and, therefore, how much the guidelines were generally continuing to anchor the sentences.²⁷ Thus, the farther apart the lines were from each other, the less the average guideline minimum appeared to anchor the average sentence imposed.²⁸ Accompanying each two-line graph was a percentage graph with a single line representing the corresponding percent difference between the average guideline minimum and average sentence imposed over time.²⁹

The report noted, however, that the fact there was a difference between the average guideline minimum and average sentence imposed did not necessarily indicate that the guidelines lacked influence on sentencing because some sentences were lower than the guideline minimum due to departures for substantial assistance or an Early Disposition Program, both of which are based on specific statutory authority and incorporated into the *Guidelines Manual*.³⁰ To the contrary, where the lines were consistently parallel, the influence of the guidelines was relatively stable, even if the difference between the average guideline minimum and the average sentence imposed was substantial.³¹

The 2012 *Booker* Report analyzed data for all offenses in the aggregate, as well as five specific offense types (drug trafficking offenses, firearms offenses, immigration offenses, fraud offenses, and non-production child pornography offenses) and the career offender guideline.³² The Commission found that the guidelines remained the essential starting point for

federal sentences overall and continued to significantly influence sentences over time.³³ Although there was a general widening between the average guideline minimum and average sentence imposed after *Booker* (ranging from 10.2% in 2004 to 17.9% in 2011), the percent difference graph showed a generally flat line, indicating relative stability over time in the difference between those two numbers.³⁴

Though federal sentencing outcomes had shown general stability in the aggregate, the report nevertheless found that the influence of the guidelines had diminished for certain offenses (child pornography and fraud) and not others (drug trafficking, firearms, and immigration).³⁵ The report explained that these differences were driven by factors outside of the guidelines specific to these offense types—for example, the average guideline minimum for non-production child pornography offenses had increased over time due, in part, to statutory changes enacted in the PROTECT Act.³⁶

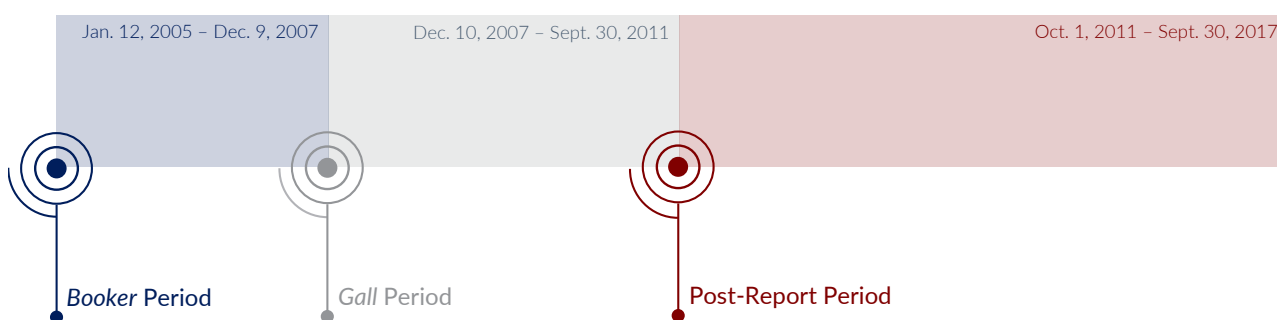
KEY FINDINGS FROM REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2012)

- The guidelines remained the essential starting point for all federal sentences in the aggregate and continued to significantly influence sentences over time.
- Although the gap between the average guideline minimum and the average sentence imposed had widened generally since *Booker*, it remained relatively stable over the time period studied in the report.
- The guidelines' degree of influence on the sentence imposed differed between specific offense types, with drug trafficking, firearms, and immigration offenses showing a more stable relationship between the guideline minimum and sentence than child pornography and fraud offenses.









METHODOLOGY

Expanding the Methodology of the 2012 *Booker* Report



For this report, the Commission first replicates the methodology of the 2012 *Booker* Report to analyze the continuing influence of the guidelines. Similar to the 2012 *Booker* Report, this report provides data for cases sentenced under all guidelines in the aggregate (“Aggregate Analysis”), as well as data for cases sentenced under selected individual guidelines (“Guideline-Specific Analyses”):

-  Drug trafficking offenses under §2D1.1;
-  Economic offenses under §2B1.1;
-  Firearms offenses under §2K2.1;
-  Illegal reentry offenses under §2L1.2;
-  Non-production child pornography offenses under §2G2.2/§2G2.4; and
-  The career offender enhancement under §4B1.1.³⁷

As in the 2012 *Booker* Report, this report uses a similar style of line graphs comparing two lines over time, each representing the average guideline minimum and average sentence imposed in months. Further, the two-line graphs are supplemented by a percentage graph which plots the percentage difference between the average guideline minimum and average sentence imposed in a single line.³⁸

This report, however, expands the 2012 methodology in two ways. First, this report analyzes cases in the time period since the 2012 report was released, spanning the *Booker* Period, the *Gall* Period, and the six-year period following the 2012 *Booker* Report’s publication (the “Post-Report Period” from fiscal years 2012 to 2017).



Additionally, the current report expands on the 2012 study by analyzing the cases using two distinct methodologies. First, the relevant cases are analyzed without any Methodology exclusions (“All Cases Methodology”). Second, in addition to providing the analysis for all cases, the Commission also prepared the same analyses for only those cases in which judicial discretion could be meaningfully assessed (“Judicial Discretion Methodology”).

To identify cases in which judicial discretion could be meaningfully assessed, the Commission applied the same case exclusions adopted in the Intra-City and Inter-District Reports.

By excluding cases in which a mandatory minimum penalty or a government-sponsored departure limited the Commission’s ability to fully assess judicial discretion, this analysis aims to focus on cases where the guidelines, rather than other factors like a statute or government motion, may influence the final sentence. First, a conviction for an offense carrying a mandatory minimum that ends up being greater than the guideline

maximum can set the sentence without regard to the guideline range or the judge’s discretion.

Second, a substantial assistance departure under §5K1.1 can have a notable impact on the sentence imposed that does not solely reflect the exercise of judicial discretion. Section 5K1.1 provides that upon a government motion stating that a defendant has provided substantial assistance, the court may depart from the guidelines and, notably, a mandatory minimum penalty.³⁹ Although the court has discretion in determining the appropriate amount of departure to apply, it has no discretion with regard to whether a government motion seeking such a departure will be filed. It is unlikely that such a motion will be denied if filed, with the commentary stating that substantial weight should be given to the government’s evaluation of the extent of the defendant’s assistance.⁴⁰ Moreover, once granted, the court’s exercise of discretion is necessarily impacted by the government’s recommendation about the amount of departure that should be granted given that the government’s recommended departure must be afforded weight.

The first two exclusions represent cases that do not allow for a meaningful assessment of judicial sentencing discretion:

EXCLUSION 1

Cases in which a statutory mandatory minimum penalty equaled or exceeded the otherwise applicable guideline minimum (“mandatory minimum trumps”);

EXCLUSION 2

Cases in which a court departed downward based on a defendant’s “substantial assistance” to the government under §5K1.1 or as part of an Early Disposition Program (insofar as such departures require the government to file motions requesting them and, when filed, the motions are almost always granted).

To identify cases in which judicial discretion could be meaningfully assessed, the Commission applied the same case exclusions adopted in the Intra-City and Inter-District Reports.

“JUDICIAL DISCRETION” METHODOLOGY



*cases in which
judicial discretion could be assessed*

The Commission also excluded three additional types of cases that present difficulties in accurately measuring the percent difference from the guideline minimum:

EXCLUSION 3

Cases with one or more counts of conviction under a statute requiring a mandatory sentence of imprisonment to run consecutively to any sentence imposed under the guidelines (*e.g.*, 18 U.S.C. §§ 924(c) and 1028A);

EXCLUSION 4

Cases in which the guideline minimum was life imprisonment or cases in which a court varied or departed upwardly from a guideline range of a term of months to a life imprisonment sentence (as there is no meaningful way to measure the extent of a departure or variance below a life term or the extent of an upward departure or variance to a life term, as a life term is not a fixed term of months); and

EXCLUSION 5

Cases in which the guideline minimum was less than ten months (which, after 2010, necessarily fell in Zones A or B of the Sentencing Table).



METHODOLOGY

Data Analysis – Measuring the Influence of the Guidelines



To study the degree of influence exerted by the guidelines after *Booker*, the Commission’s updated analysis examines the relationship between the average guideline minimum and the average sentence imposed for cases sentenced under all guidelines in the aggregate (“Aggregate Analysis”) and selected individual guidelines—economic offenses, drug trafficking offenses, firearms offenses, illegal reentry offenses, non-production child pornography offenses, and the career offender enhancement (“Guideline-Specific Analysis”)—from fiscal years 2005 to 2017. The first four guideline types were selected for their frequency of application,⁴¹ while the last two were selected due to longstanding concerns that appear to impact the extent to which they are followed.⁴²

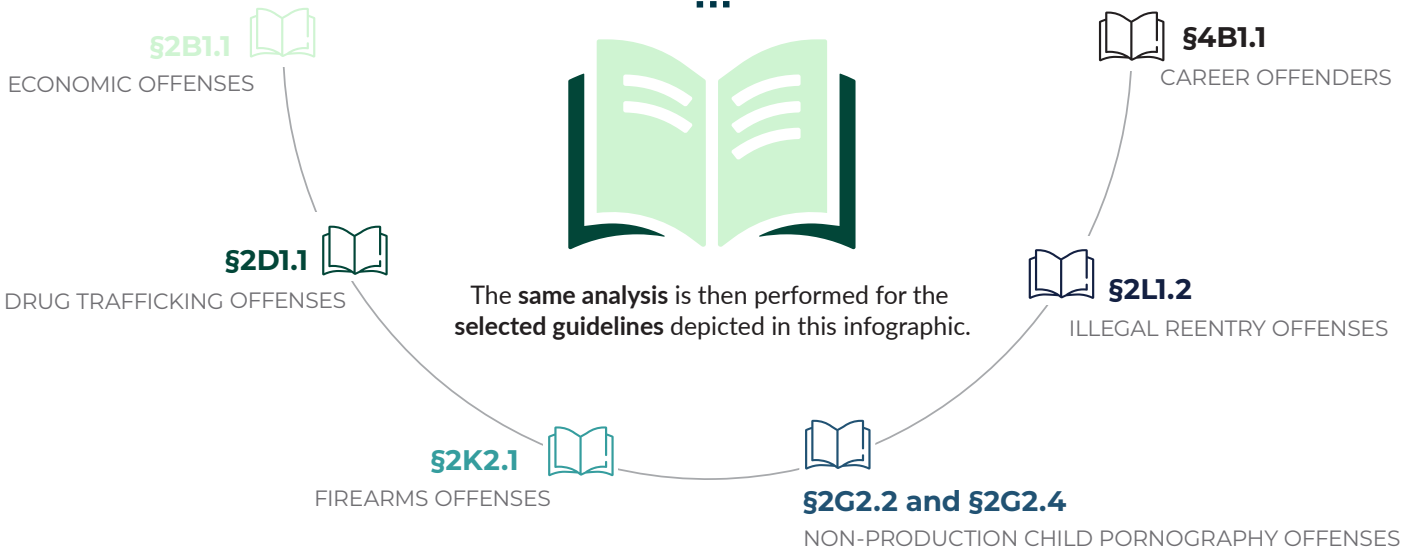
For each section below, the report first analyzes the data for all cases that fall under that section (“All Cases Methodology”) before then analyzing the same cases but limited by the five case exclusions discussed in the Methodology section (“Judicial Discretion Methodology”). As described above, these exclusions represent cases that do not allow for a meaningful assessment of judicial sentencing discretion (because of a statutory mandatory minimum that equals or exceeds the guideline minimum or a government-sponsored departure) and cases that present difficulties in accurately measuring the percent difference from the guideline minimum (because of a mandatory consecutive sentence of imprisonment, a guideline minimum or sentence of life imprisonment, or a guideline minimum of less than ten months).

AGGREGATE GROUP



To study the degree of influence exerted by the guidelines after *Booker*, this analysis examines the relationship between the **guideline minimum** and the **sentence imposed** for **all cases** in the aggregate from **fiscal years 2005 to 2017**.

GUIDELINE-SPECIFIC GROUPS



METHODOLOGY

Each of the study groups above are examined using **two distinct methodologies**:

“ALL CASES”
METHODOLOGY



relevant cases without any methodology exclusions

“JUDICIAL DISCRETION”
METHODOLOGY



cases in which judicial discretion could be assessed



FINDINGS

Summary of Findings

As discussed below, the data under both methodologies show an overall increase in the difference between the average guideline minimum and the average sentence imposed since *Booker*. Although the spread between those two lines is wider in the Post-Report Period than in the *Booker* and *Gall* Periods, the spread generally stabilized in the most recent years of the Post-Report Period. Consistent with the 2012 *Booker* Report, while the graphs depicting the individual guidelines reveal

significant differences among offense guideline types, the general trends remain the same, with a widening spread since *Booker* but a stabilization in the Post-Report Period. Moreover, though the general trends remain the same, the spread between the average guideline minimum and average sentence imposed becomes much smaller when exclusions are applied to focus on the cases in which sentencing discretion could be assessed.

“

Both methodologies show an overall increase in the difference between the average guideline minimum and the average sentence imposed since *Booker*, followed by greater stability in the most recent years studied. A similar trend exists when analyzing individual guidelines.





FINDINGS

Results of the Aggregate Analysis

Building on its previous work, the Commission first updates the year-by-year analysis presented in the Commission's 2012 study to explore whether the influence of the guidelines has increased or decreased

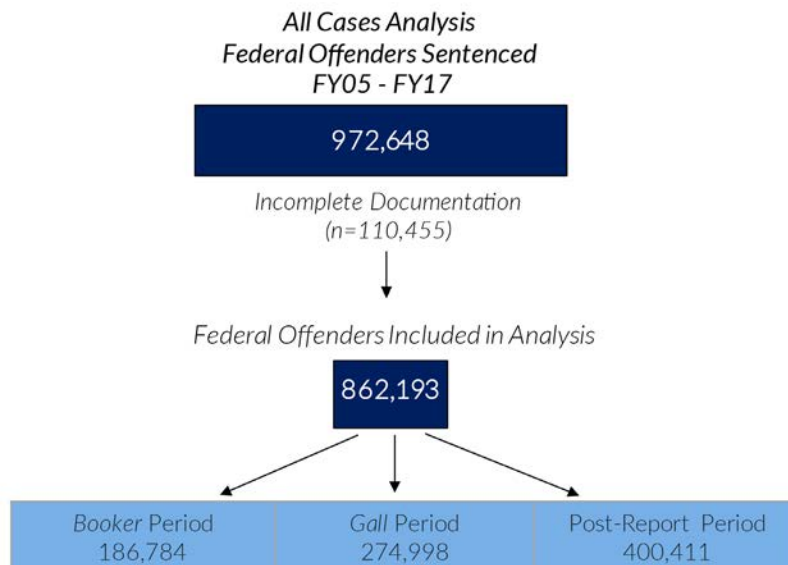
as more time has passed since the *Booker* decision. This section examines data for cases under all guidelines in the aggregate, first with the All Cases Methodology and then with the Judicial Discretion Methodology.

Building on its previous work, the Commission updates the year-by-year analysis presented in its 2012 study regarding the influence of the guidelines since the *Booker* decision.

FINDINGS

All Cases Methodology

In creating the dataset for this, and each of the subsequent analyses, the Commission first identified 972,648 cases across the nation during fiscal years 2005 to 2017. After excluding cases for which incomplete sentencing documentation was submitted to the Commission, the Aggregate Analysis of offenders sentenced from fiscal years 2005 to 2017 includes 862,193 cases. The following graphic breaks down the number of cases across the *Booker*, *Gall*, and Post-Report Periods.

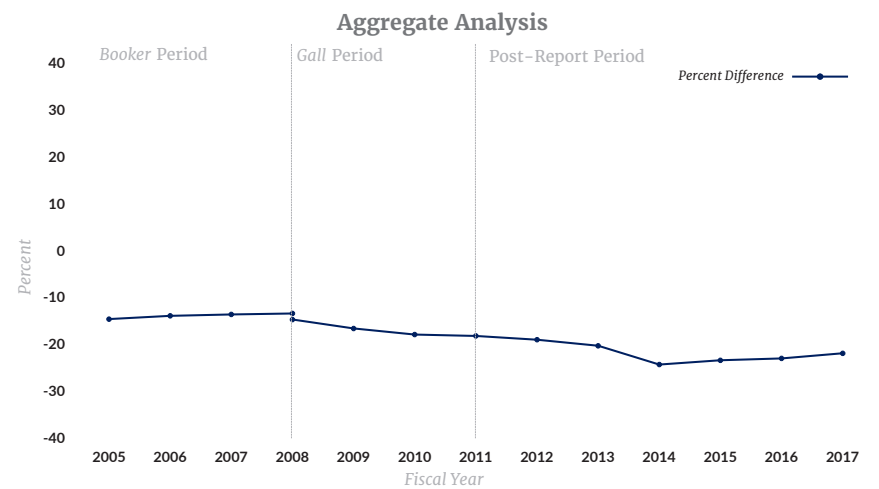
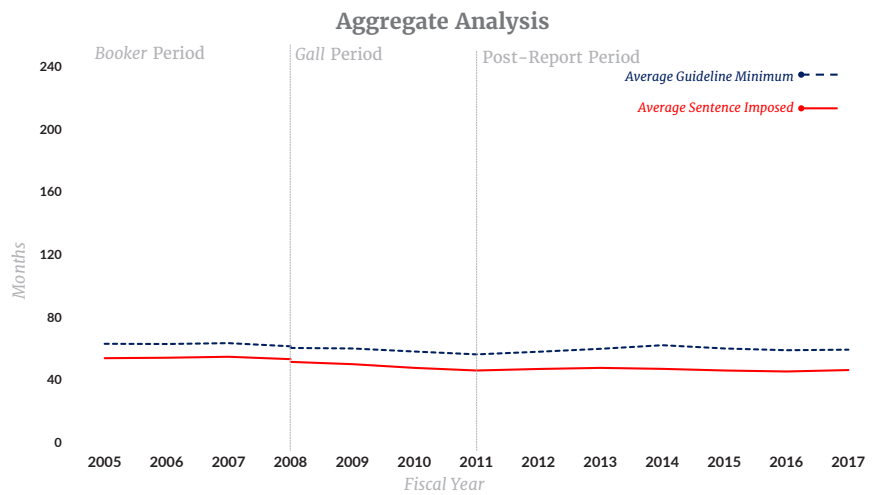




As reflected in these figures, the difference between the average guideline minimum and the average sentence imposed has generally widened since the *Booker* and *Gall* Periods, suggesting an overall decline in the influence of the guidelines over time. Although the difference continued to widen in the Post-Report Period, it appears to have stabilized after peaking in 2014. In fact, the analysis of the years that followed from 2015 through 2017 demonstrated a small gradual decrease in the difference between the average guideline minimum and average sentence imposed in those years.

This trend is first demonstrated in the two-line graph, which shows a gradual widening of the spread between the average guideline minimum and average sentence imposed. In the *Booker* Period, the average sentence imposed was 8.7 months lower than the average guideline minimum. In the *Gall* Period, the average sentence imposed was 9.9 months lower. And in the Post-Report Period, the average sentence imposed was 13.2 months lower. However, in the most recent years of the Post-Report Period, average sentences imposed generally paralleled average guideline minimums—that is, where the average guideline minimum increased or decreased, so did the average sentence imposed—which suggests a stabilization in the influence of the guidelines.

The percentage graph also depicts the influence of the guidelines on sentences over time, as a single line representing the percentage difference between the average guideline minimum and the average sentence imposed. Across all periods, the line has remained below zero, because the average sentence has always been lower than the average guideline minimum. The



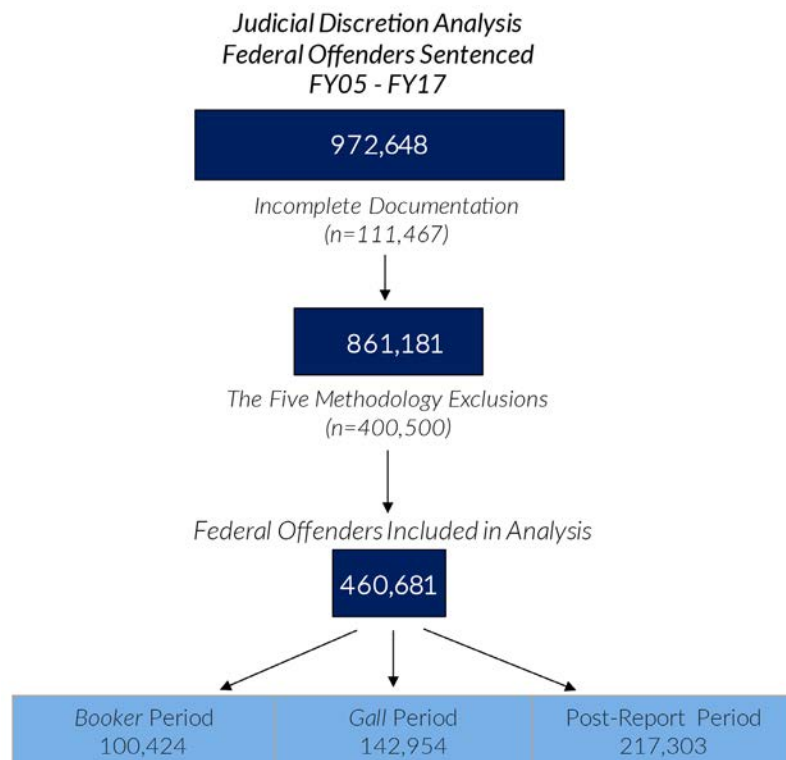
percentage difference has generally increased since the *Booker* Period, varying from a low of 13.4 percent below the guideline minimum at the end of the *Booker* Period in 2008 to a high of 24.3 percent below the guideline minimum during the Post-Report Period in 2014. In the Post-Report Period, the percentage difference varied from a low of 19.0 percent in 2012 to a high of 24.3 percent in 2014, before gradually narrowing to 21.9 percent in 2017. This reflects the trend seen in the two-line graph that the relationship between the average guideline minimum and average sentence imposed for cases in the Aggregate Analysis stabilized in the most recent years of the Post-Report Period.



FINDINGS

Judicial Discretion Methodology

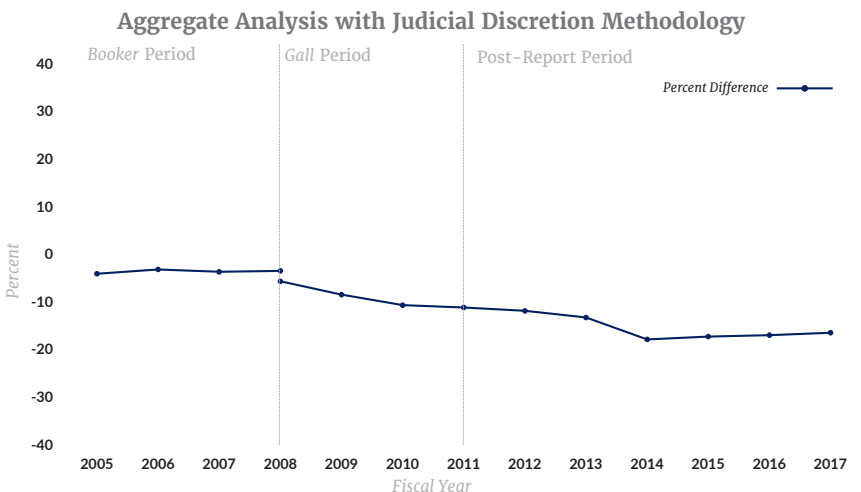
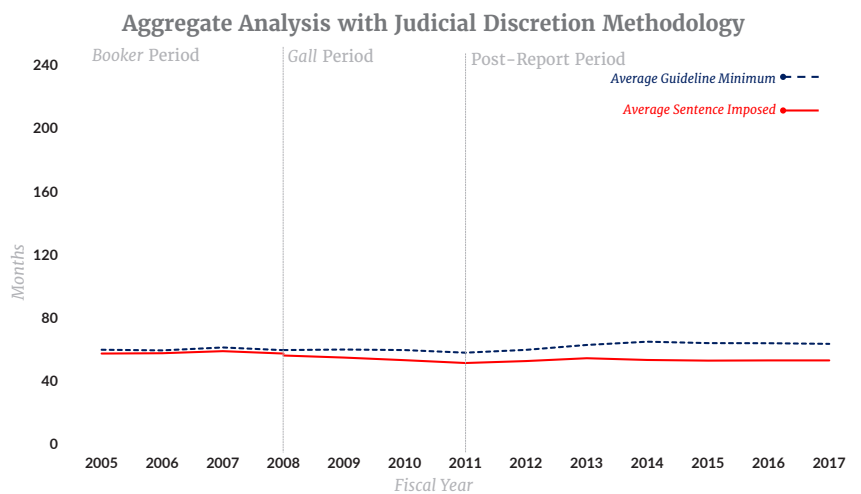
Building on its more recent analyses in the Intra-City and Inter-District Reports, the Commission next explored whether the same trends hold true when focusing solely on cases in which judicial discretion could be meaningfully measured. After exclusions, the number of Aggregate Analysis cases decreases to 460,681 cases (100,424 cases in the *Booker* Period; 142,954 cases in the *Gall* Period; and 217,303 cases in the Post-Report Period).⁴³

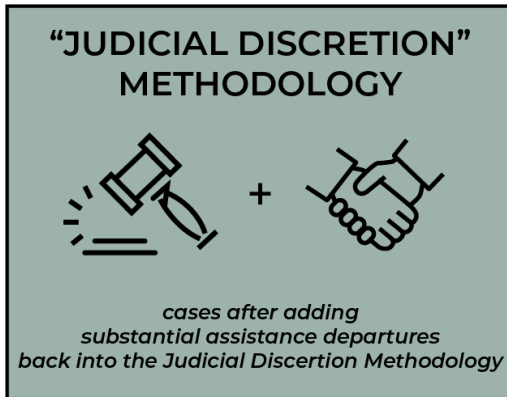




As demonstrated, the Commission continued to observe trends similar to those seen in the broader All Cases Methodology above. That is, the difference between the average guideline minimum and average sentence imposed generally increased in the *Booker* and *Gall* Periods but relatively stabilized in the Post-Report Period. After the difference increased at the start of the Post-Report Period, peaking in 2014, it remained stable in the years that followed from 2015 through 2017.

Although the overall trends across the three time periods remain the same, the more limited analysis focusing solely on cases in which judicial discretion could be meaningfully assessed shows a substantially narrower spread between the average guideline minimum and average sentence imposed than the analysis under the All Cases Methodology. For example, during the most recent year of the Post-Report Period, the difference between the average guideline minimum and average sentence imposed was 16.5 percent in cases in which judicial discretion could be meaningfully assessed compared to 21.9 percent for all cases. Thus, removing cases that do not allow for full assessment of judicial discretion results in a closer relationship between the average guideline minimum and average sentence imposed. This indicates that the guidelines exert a greater influence on sentences imposed in cases in which judicial discretion could be meaningfully assessed.⁴⁴





Analysis shows that the smaller gap is largely due to the impact of substantial assistance departures on sentences imposed in cases that do not solely reflect the exercise of judicial discretion.

FINDINGS

Impact of Substantial Assistance Departures

As noted, the difference between the average guideline minimum and the average sentence imposed narrowed when focusing on cases with measurable judicial discretion. Subsequent analysis shows that the smaller gap is largely due to the impact of removing cases with substantial assistance departures. Substantial assistance departures, which are based on specific statutory authority and require a motion by the government, often lead to substantial decreases from the guideline minimum, consistent with the intent of the departure to encourage cooperation with the government. Indeed, during the years studied in this report, substantial assistance departures yielded an average sentence reduction of 51.8 percent.

To show their impact, the Commission also added the cases with substantial assistance departures back into the Judicial Discretion Methodology. As depicted in the graphs in Appendix A, adding back in the 88,380 substantial assistance departure cases (9.1% of the total data set of 972,648 cases) substantially widens the spread between the average guideline minimum and average sentence imposed. This reflects both the relatively large number of cases with substantial assistance departures and the extent of the departures granted.

The graphs in Appendix A also show the same trend for each of the individual guideline analyses below, with the smaller spread under the Judicial Discretion Methodology being largely attributable to the exclusion of departures granted for substantial assistance.

FINDINGS

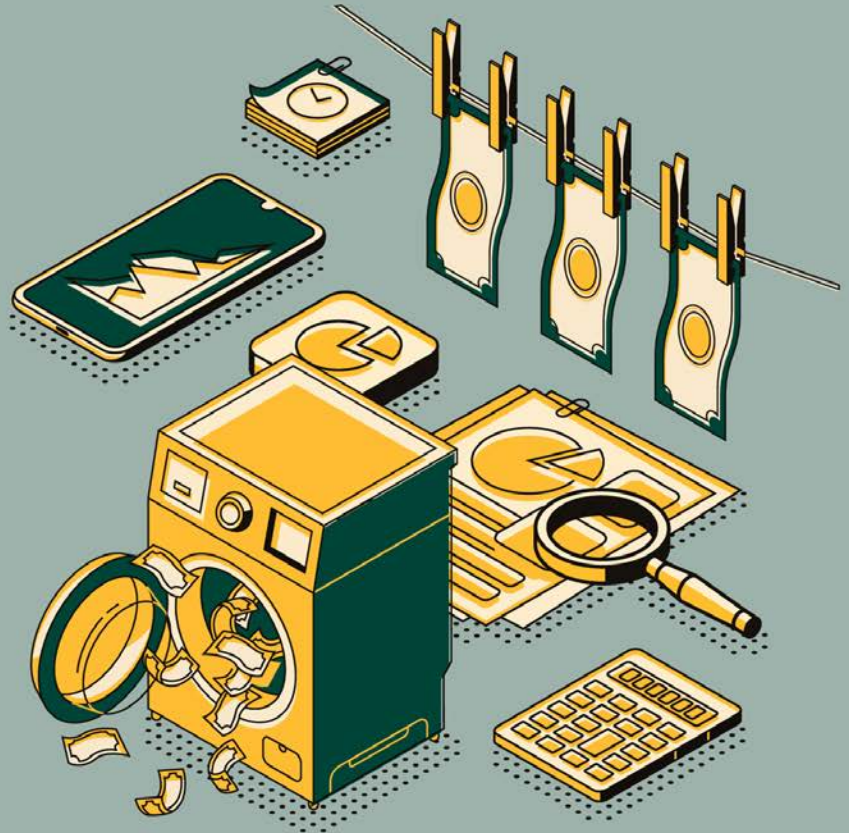
Results of the Guideline-Specific Analyses

While the Aggregate Analysis above is informative, it does not show whether the extent of the influence of the guidelines differs across individual guidelines. As explained above, the Commission’s 2012 *Booker* Report found that although federal sentencing outcomes had shown general stability in the aggregate, the influence of the guidelines varied by major offense type.⁴⁵ To explore whether this trend continues, this report’s Guideline-Specific Analyses analyze the influence of the guidelines individually among each of the four most

commonly applied guidelines — the primary guidelines for economic offenses, drug trafficking offenses, firearms offenses, and illegal reentry offenses.⁴⁶ In addition, this report analyzes the influence of the primary guideline for non-production child pornography offenses and the career offender enhancement, both of which regularly have substantially lower within-guideline rates compared to the within-guideline rate in the Aggregate Analysis.⁴⁷

GUIDELINE-SPECIFIC GROUPS





OVERVIEW

Economic Crime Offenders Sentenced Under §2B1.1

Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

The Commission's §2B1.1 analysis demonstrates that the difference between the average guideline minimum and the average sentence imposed has generally widened since the *Booker* and *Gall* Periods, suggesting an overall decline in the influence of the guideline over time.



FINDINGS

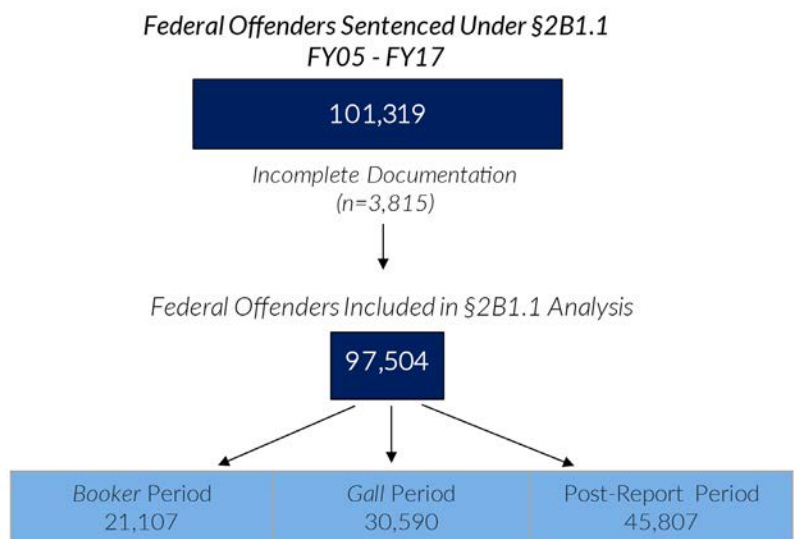
Results of the §2B1.1 Analysis All Cases Methodology

In the 2012 *Booker* Report, the Commission examined economic offenses under both §2B1.1 and §2F1.1.⁴⁸ The 2012 *Booker* Report noted that for such offenses, the average guideline minimum and average sentence imposed had not consistently paralleled each other over time, primarily due to statutory changes, guideline amendments, and the seriousness of the offenses.⁴⁹

For purposes of this updated analysis, the Commission identified 101,319 cases during fiscal years 2005 to 2017 for which §2B1.1 was the primary guideline. After excluding cases for which incomplete sentencing documentation was submitted to the Commission, the Guideline-Specific Analysis of offenders sentenced for

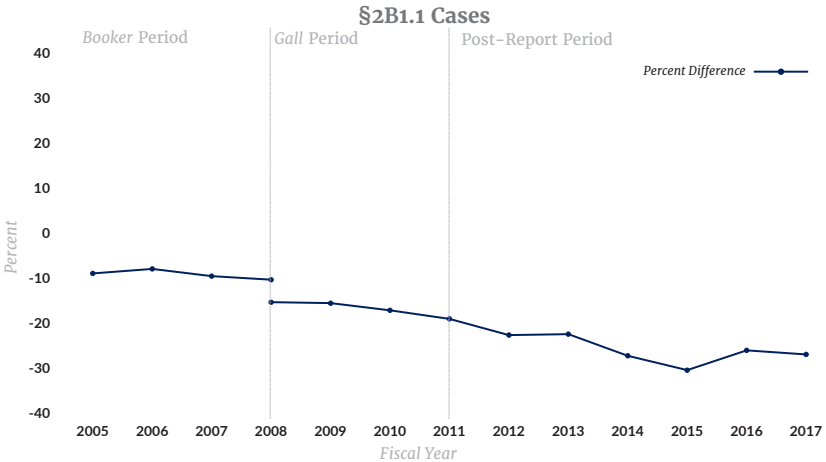
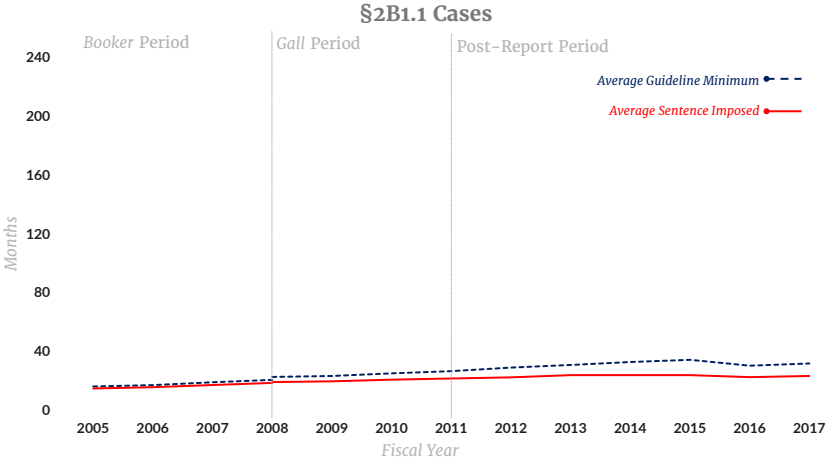
economic offenses under §2B1.1 from fiscal years 2005 to 2017 includes 97,504 cases.⁵⁰

The two-line and percentage graphs below examine economic offenses under §2B1.1 before the application of any Methodology exclusions. As shown in both graphs, the difference between the average guideline minimum and the average sentence imposed has generally widened since the *Booker* and *Gall* Periods, suggesting an overall decline in the influence of the §2B1.1 guideline over time. This is consistent with the findings in the 2012 *Booker* Report, which showed that the influence of the guideline minimum for fraud offenses had increasingly diminished.⁵¹



However, between 2015 and 2016, the average guideline minimum slightly decreased and the difference between the average guideline minimum and sentence imposed slightly narrowed. This likely reflects the Commission’s 2015 amendments of §2B1.1 related to the “victims table,” the “sophisticated means” enhancement, “intended loss” in the fraud table, and “fraud on the market” cases, as well as inflationary adjustments that increased loss amounts triggering enhancements in order to account for inflation since the fraud table was last revised in 2001.⁵² These amendments were enacted to better account for harm to victims, individual culpability, and the offender’s intent and may have resulted in a subsequent decrease in the average guideline minimum.⁵³

The two-line graph shows a steady widening of the spread between the average guideline minimum and average sentence imposed, with a slight narrowing following the 2015 amendment to the economic offenses guideline. In the *Booker* Period, the average sentence was 1.7 months lower than the average guideline minimum. In the *Gall* Period, the average sentence was 4.1 months lower than the average guideline minimum. In the *Post-Report* Period, the average sentence was 8.2 months lower than the average guideline minimum. While the spread between the two lines has widened overall, likely due in part to generally increasing guideline minimums, the average sentence also increased. This suggests some stability in the influence of the guideline over time, particularly in the most recent years of the *Post-Report* Period when the spread between the two lines peaked in fiscal year 2015, then narrowed and stabilized in 2016 and 2017.



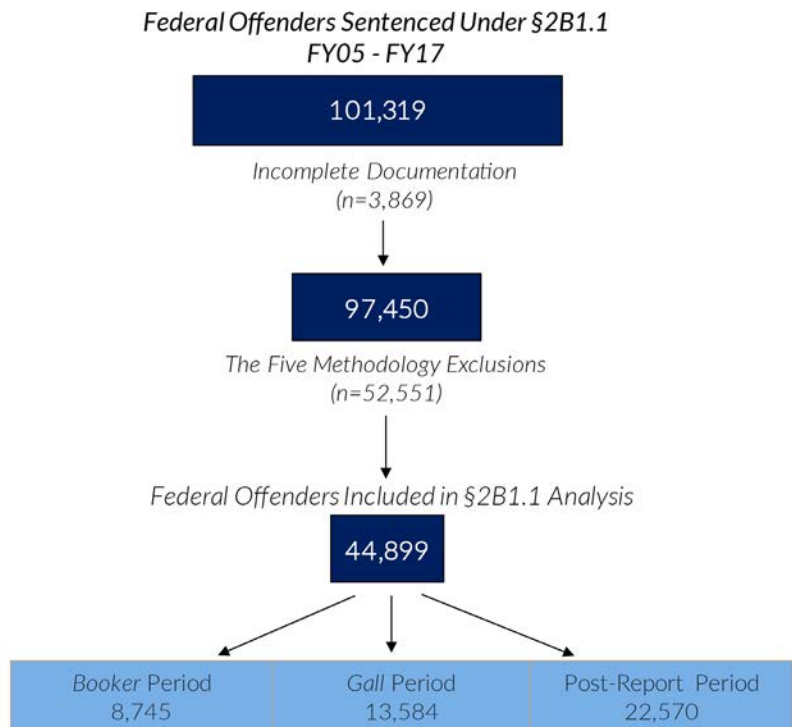
The percentage graph depicts the same trend, showing a steady increase in the percentage difference between the average guideline minimum and average sentence imposed. The percentage difference has varied from 7.9 percent below the average guideline minimum during the *Booker* Period in 2006 to 30.4 percent during the *Post-Report* Period in 2015. Although the percentage difference has generally grown since the *Booker* Period, the growth has remained relatively flat in the last two years of this study, averaging 26.0 and 26.9 percent, respectively. This suggests the relationship between the average guideline minimum and average sentence imposed for economic offenses may be stabilizing.



FINDINGS

Judicial Discretion Methodology

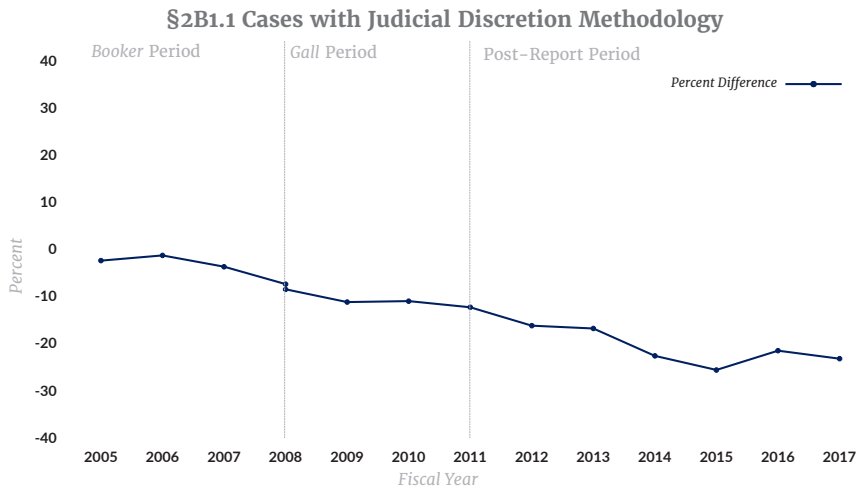
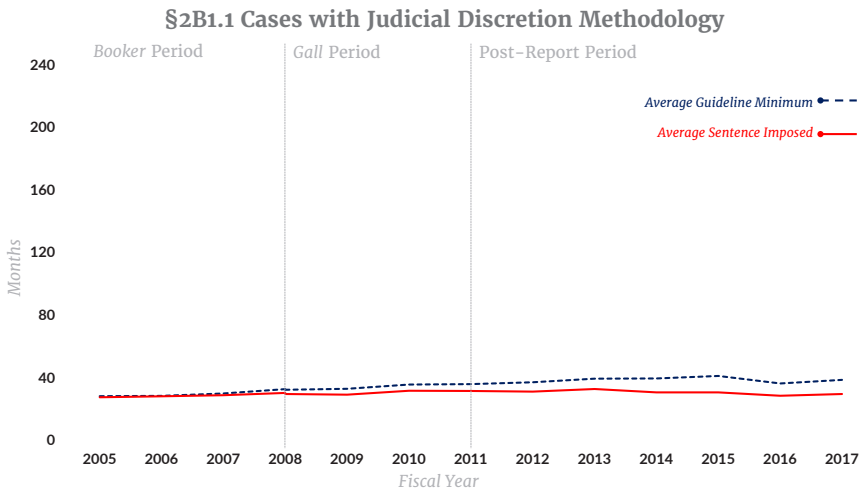
The following graphs apply the five Methodology exclusions to the economic offenses analysis. After exclusions, the number of economic offense cases in the analysis decreases to 44,899 cases (including 8,745 cases in the *Booker* Period; 13,584 cases in the *Gall* Period; and 22,570 cases in the Post-Report Period).⁵⁴



Compared to the All Cases Methodology of economic offenses in the previous section, limiting the analysis to those cases in which judicial discretion could be assessed a moderately smaller difference between the average guideline minimum and average sentence imposed.

Removing cases in which judicial discretion cannot be meaningfully assessed results in a closer relationship between the average guideline minimum and average sentence imposed, though the difference is less pronounced compared to other guidelines discussed below. For example, during the most recent year of the Post-Report Period, the difference between the average guideline minimum and average sentence imposed was 23.2 percent in cases in which judicial discretion could be meaningfully assessed, compared to 26.9 percent for all §2B1.1 cases.

Notably, the overall trends across the three time periods remain the same both with and without the five exclusions applied. Although the percentage difference has generally increased since the *Booker* Period, the line has remained relatively level in the last two years of this study, decreasing from a high of 25.6 in 2015 to 21.5 and 23.2 percent in 2016 and 2017, respectively. Like the All Cases Methodology, this suggests the relationship between the guideline minimum and sentence for economic offenses may be stabilizing despite the widening gap following the *Booker* and *Gall* periods.⁵⁵





OVERVIEW

Drug Trafficking Offenders Sentenced Under §2D1.1

Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

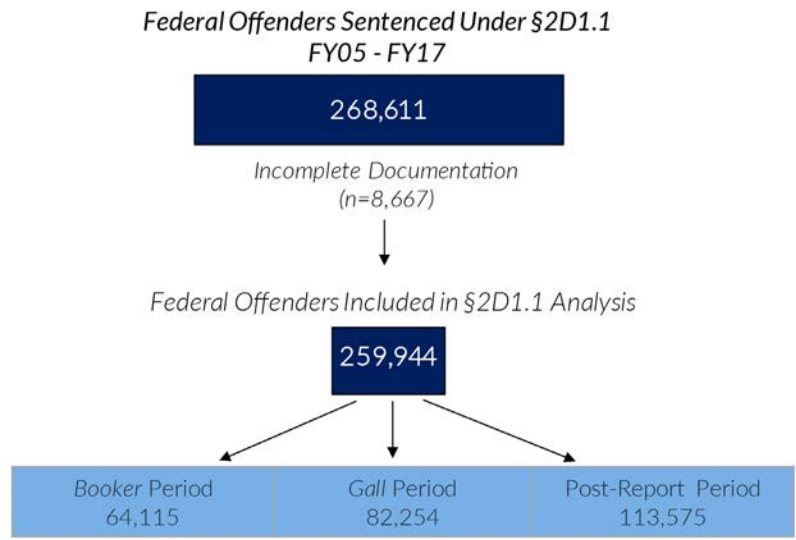
The Commission's §2D1.1 analysis demonstrates that the difference between the average guideline minimum and the average sentence imposed generally widened until a peak in 2014, followed by some narrowing in the years after the Commission's 2014 guideline amendment.

FINDINGS

Results of the §2D1.1 Analysis All Cases Methodology

In the 2012 *Booker* Report, the Commission examined drug trafficking offenses under §§2D1.1 and 2D1.2.⁵⁶ The 2012 *Booker* Report noted that for these offenses, the relationship between the average guideline minimum and average sentence imposed had generally remained stable.⁵⁷

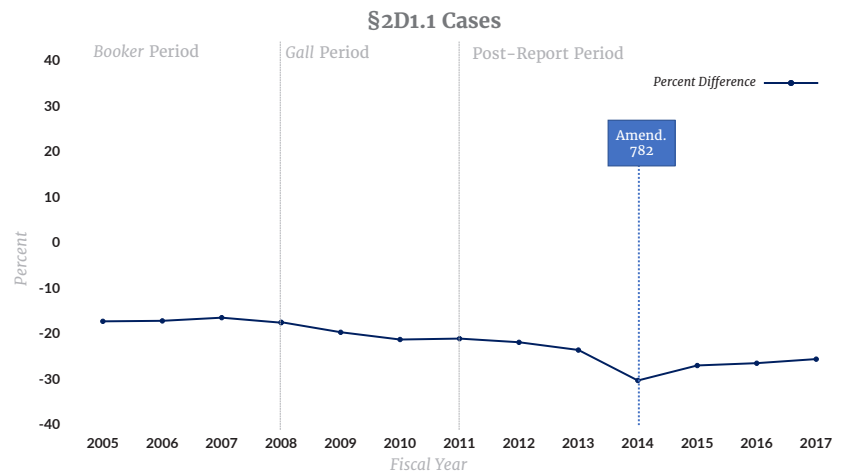
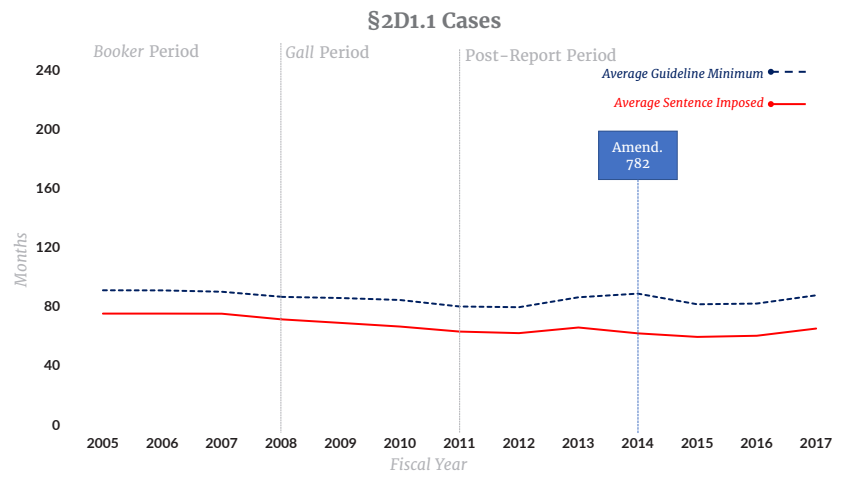
The Commission identified 268,611 cases during fiscal years 2005 to 2017 for which §2D1.1 was the primary guideline. After excluding cases for which incomplete sentencing documentation was submitted to the Commission, the Guideline-Specific Analysis of all offenders sentenced for drug trafficking offenses under §2D1.1 from fiscal years 2005 to 2017 includes 259,944 cases.





These two-line and percentage graphs examine drug trafficking offenses under §2D1.1 before the application of any Methodology exclusions. As shown in both graphs, the difference between the average guideline minimum and the average sentence imposed has generally increased since the *Booker* Period, peaking in 2014. This peak likely reflects anticipation by courts and litigants of the Commission's promulgation of Amendment 782, which reduced the drug quantity guidelines for drugs by two levels and went into effect on November 1, 2014.⁵⁸ In fiscal year 2014, some courts anticipating Amendment 782 used downward variances to account for the expected changes to the drug guidelines for defendants sentenced prior to November 1, 2014.⁵⁹ However, following the amendment, in the most recent years of the Post-Report Period, the difference between the average guideline minimum and the average sentence imposed stabilized.

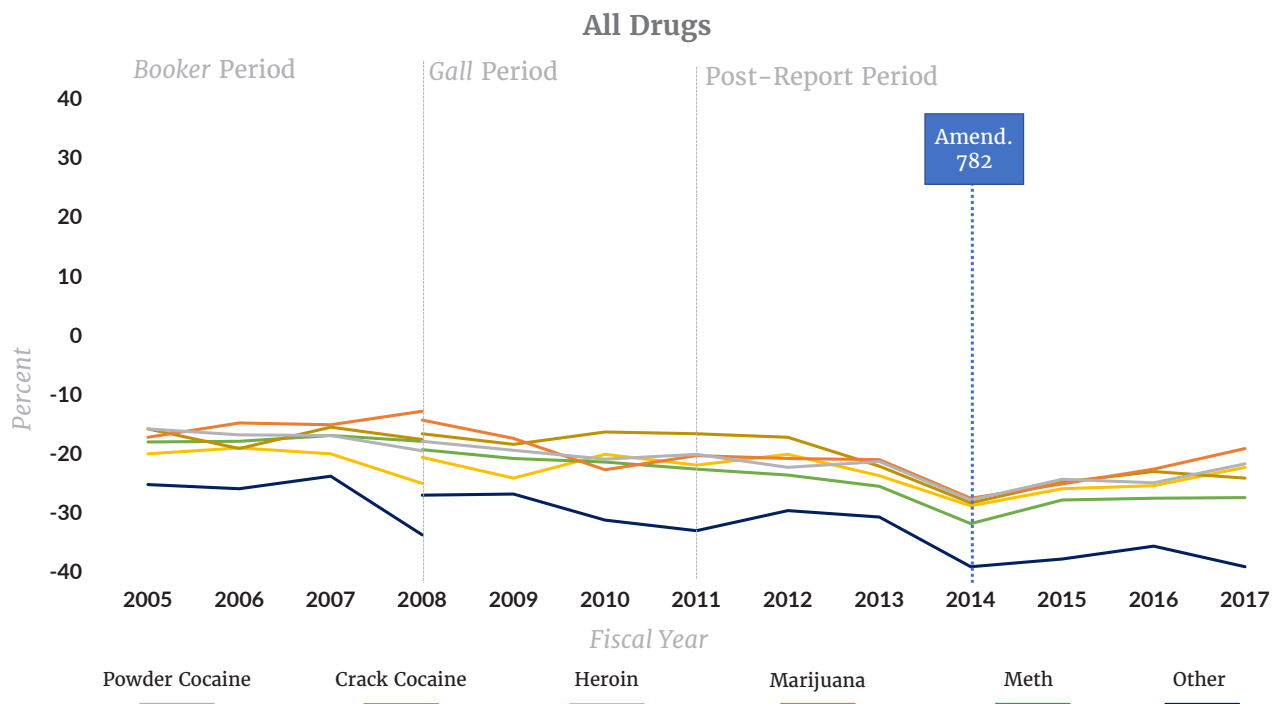
The two-line graph shows an overall widening of the spread between the average guideline minimum and average sentence imposed across the three periods. In the *Booker* Period, the average sentence was 15.4 months lower than the average guideline minimum. In the *Gall* Period, the average sentence was 16.7 months lower than the average guideline minimum. In the Post-Report Period, the average sentence was 21.8 months lower than the average guideline minimum. Not only has the spread widened across all three periods, but the spread for drug trafficking cases has been consistently greater than for all cases generally in the Aggregate Analysis. However, while the spread continued to grow into the Post-Report Period, peaking in 2014 before Amendment 782, the spread narrowed in the years that followed from 2015 through 2017. Thus, in addition to Amendment 782's role in the 2014 peak, the amendment likely contributed to the subsequent stabilization between the lines. Indeed, the Commission stated that one reason for the amendment



was to lower the guideline minimums closer to the average sentences imposed prior to the amendment.⁶⁰

The percentage graph depicts the same trend. The percentage difference has varied from 16.5 percent below the average guideline minimum during the *Booker* Period in 2007 to a peak of 30.3 percent during the Post-Report Period in 2014. Although the difference has generally increased since the *Booker* Period, its stabilization in the most recent years of the Post-Report Period has moved the percentage difference closer to what it was at the beginning of the Post-Report Period. The Post-Report Period began with a difference of 21.9 percent in 2012 and ended with a difference of 25.6 percent in 2017. This reflects the general trend that the relationship between the average guideline minimum and sentence for drug trafficking cases may be stabilizing.

A major amendment by the Commission to the drug trafficking guideline appears to have strengthened the guideline’s influence during the most recent years of the Post-Report Period.



Similar trends are reflected across the individual drug types, depicted in the drug-specific percentage graph below.⁶¹ While the percentage difference between the average guideline minimum and average sentence imposed varies somewhat by drug type, the difference for every drug type has trended higher since *Booker* and stabilized in the most recent years of the Post-Report Period. The average percentage difference continued to increase at the beginning of the Post-Report Period

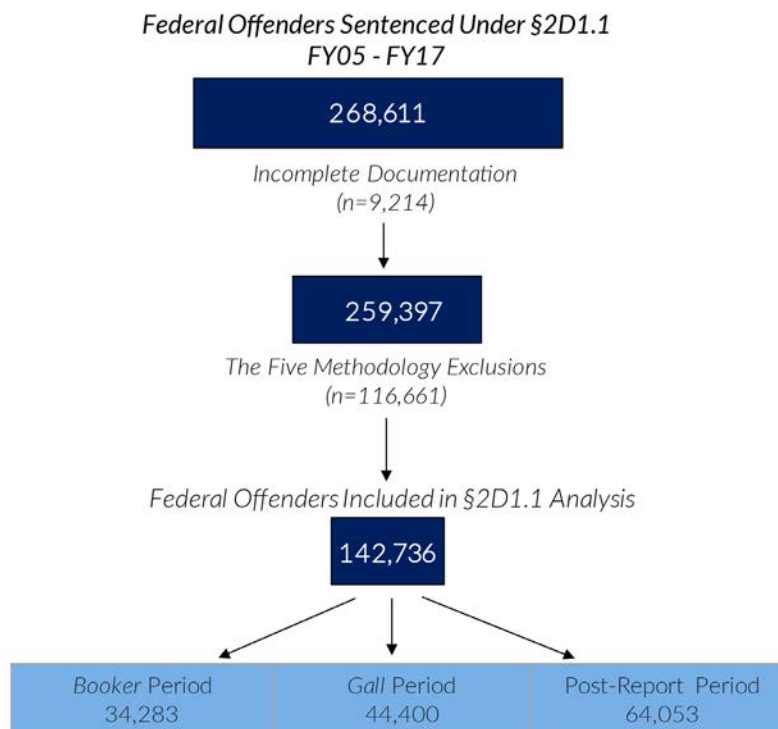
for each individual drug and peaked in 2014, driven in part by Amendment 782.⁶² Similarly, like the overall drug analysis, the individual drug types showed decreases in percentage differences the following year and stabilization during the most recent years of the Post-Report Period.⁶³ As explained in the overall drug analysis, this peak was likely caused by an increase in variances imposed after the amendment’s promulgation but before its effectuation.⁶⁴



FINDINGS

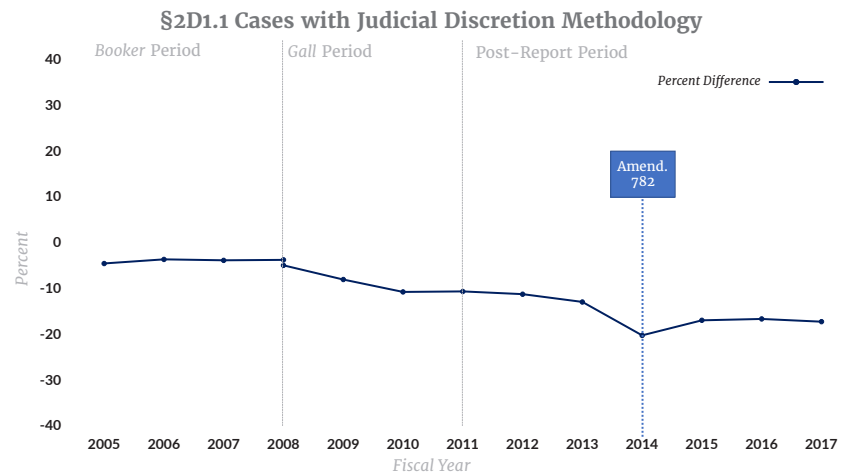
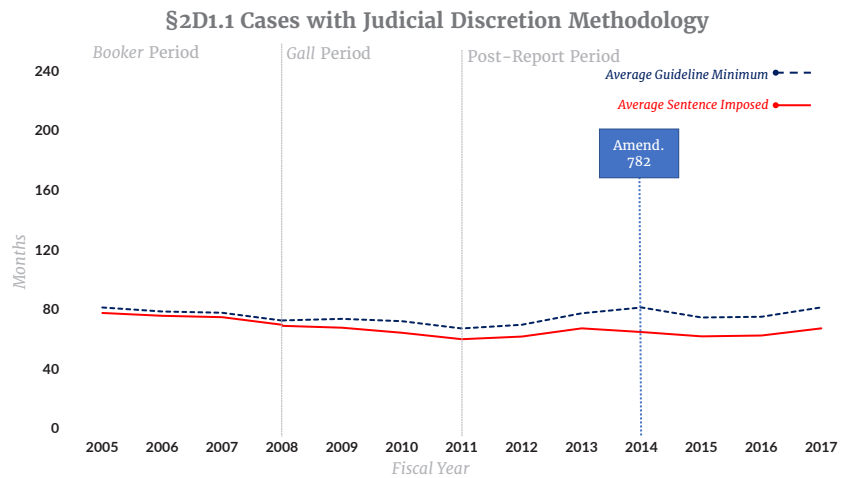
Judicial Discretion Methodology

The following graphs apply the five Methodology analysis decreases to 142,736 cases (including 34,283 exclusions to the drug trafficking analysis. After cases in the *Booker* Period; 44,400 cases in the *Gall* exclusions, the number of drug trafficking cases in the Period; and 64,053 cases in the Post-Report Period).⁶⁵



Compared to the All Cases Methodology, limiting the analysis to those cases in which judicial discretion could be meaningfully assessed demonstrates a narrower spread between the average guideline minimum and average sentence imposed. This suggests that the guidelines exert a greater influence on sentences imposed in cases where courts have more meaningful judicial discretion. For example, in the most recent year of the Post-Report Period, the difference between the average guideline minimum and average sentence imposed in drug trafficking cases in which judicial discretion could be meaningfully assessed was 17.3 percent compared to 25.6 percent for all drug trafficking cases.

Notably, the overall trends across the three time periods remain the same both with and without the five exclusions applied. Although the difference between the average guideline minimum and average sentence imposed is larger now than in the *Booker* and *Gall* Periods, it has remained relatively stable in the most recent years of the Post-Report Period. Further, in both analyses, the difference peaked in 2014, then remained stable in the years that followed from 2015 through 2017.⁶⁶





OVERVIEW

Firearms Offenders Sentenced Under §2K2.1

Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

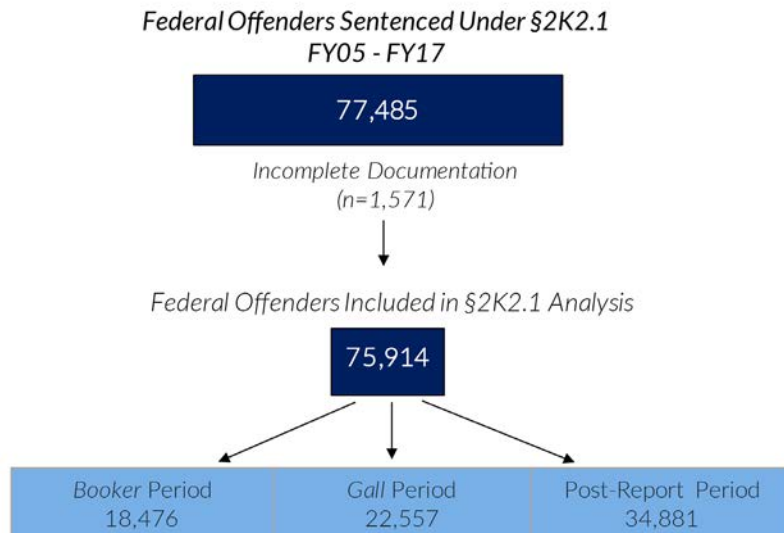
The Commission's §2K2.1 analysis demonstrates that, while the difference between the average guideline minimum and the average sentence imposed has widened slightly since *Booker*, the guidelines continue to exert a strong influence on sentences imposed in firearms offenses.

FINDINGS

Results of the §2K2.1 Analysis All Cases Methodology

In the 2012 *Booker* Report, the Commission examined firearms offenses under §2K2.1.⁶⁷ The 2012 *Booker* Report noted that for these offenses, the influence of the guidelines on the average sentence imposed had generally remained stable, with the average sentence imposed adhering closely to the average guideline minimum.⁶⁸

The Commission identified 77,485 cases during fiscal years 2005 to 2017 for which §2K2.1 was the primary guideline. After excluding cases for which incomplete sentencing documentation was submitted to the Commission, the Guideline-Specific Analysis of offenders sentenced for firearms offenses under §2K2.1 from fiscal years 2005 to 2017 includes 75,914 cases.

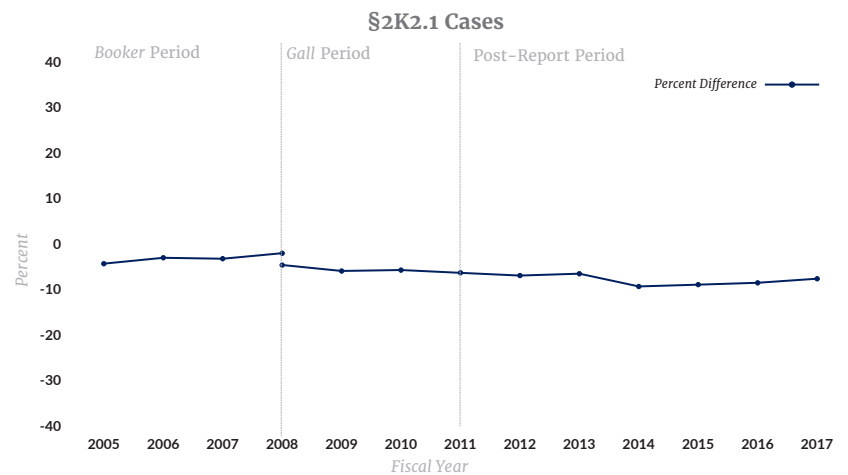
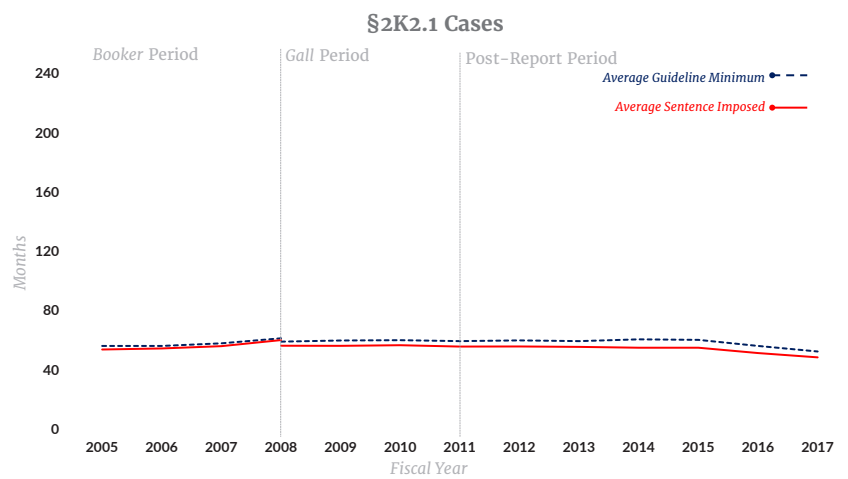




The two-line and percentage graphs below examine firearms offenses under §2K2.1 before the application of any Methodology exclusions. The difference between the average guideline minimum and the average sentence imposed has slightly increased since the *Booker* and *Gall* Periods, suggesting a small decline in the influence of the §2K2.1 guideline over time. However, consistent with the 2012 *Booker* Report's findings, the spread in firearms cases has remained relatively small compared to cases under all guidelines in the aggregate, reflecting a strong influence from the firearm guideline on average sentences imposed across all time periods.

The two-line graph shows a slight widening of the spread between the average guideline minimum and the average sentence imposed for firearms offenses since the *Booker* and *Gall* Periods. In the *Booker* Period, the average sentence was 1.8 months lower than the average guideline minimum. In the *Gall* Period, the average sentence was 3.3 months lower than that average guideline minimum. In the Post-Report Period, the average sentence was 4.6 months lower than the average guideline minimum. However, the spread has remained small and in the most recent years of the Post-Report Period has narrowed slightly. Thus, the firearms guideline has a stable and strong influence on the sentence imposed. This may be explained in part by the relative stability of the average guideline minimum over time, which has not substantially changed during the years of this report.

The percentage graph depicts the same trend, showing a percentage difference between the average guideline minimum and the average sentence imposed that has

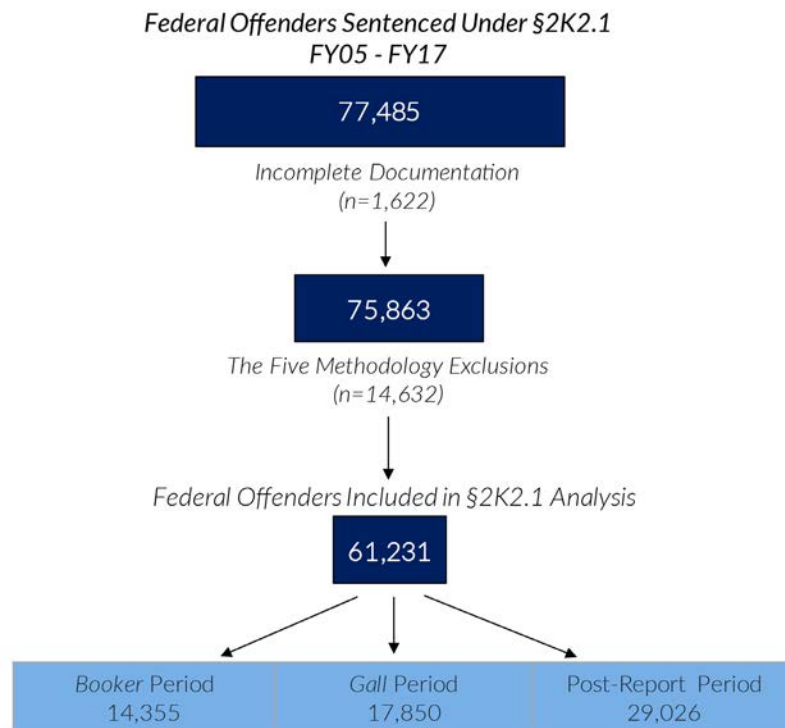


adhered closely to zero across all periods. While the percentage difference has increased since the *Booker* Period, it has not varied over time as much as other individual guidelines or the Aggregate Analysis. The percentage difference has varied from 2.0 percent below the guideline minimum during the *Booker* Period in 2008 to 9.3 percent below the guideline minimum during the Post-Report Period in 2014. The percentage difference has decreased slightly since 2014, changing from 9.3 percent in 2014 to 7.6 percent in 2017. This suggests the relationship between the average guideline minimum and average sentence imposed for firearms cases remains strong and may be stabilizing.

FINDINGS

Judicial Discretion Methodology

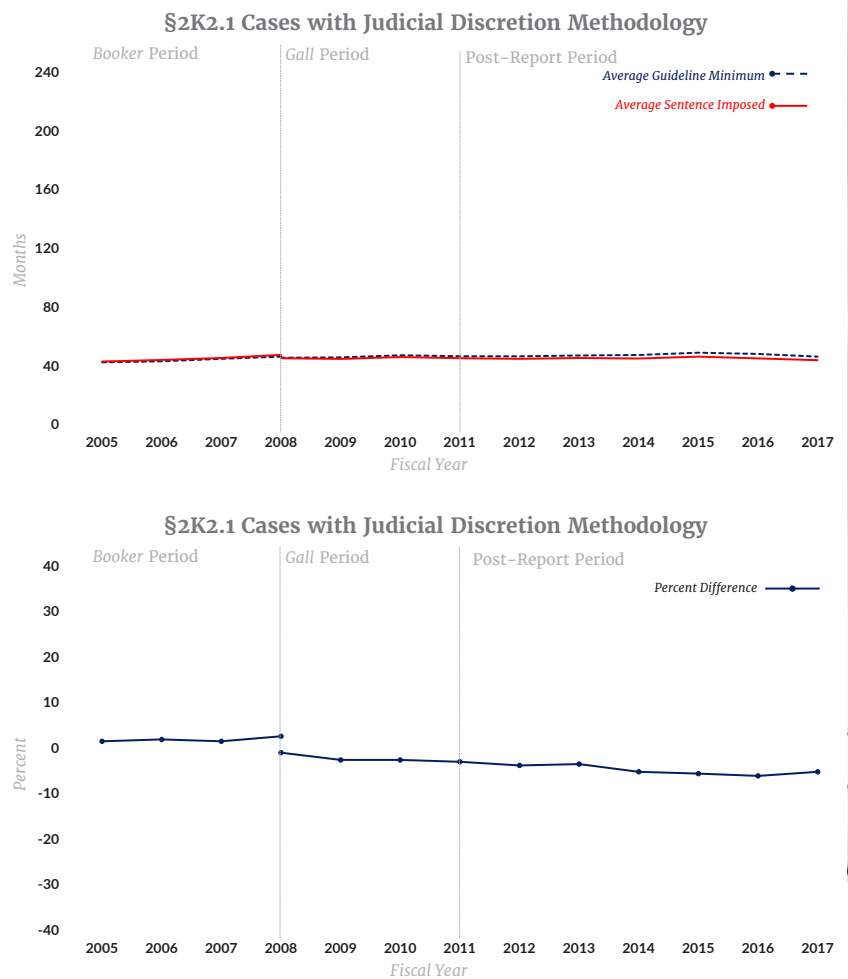
The following graphs apply the five Methodology to 61,231 cases (including 14,355 cases in the *Booker* exclusions to the firearms analysis. After exclusions, the number of firearms cases in the analysis decreased to 61,231 cases (including 14,355 cases in the *Booker* Period; 17,850 cases in the *Gall* Period; and 29,026 cases in the Post-Report Period).⁶⁹





Compared to the All Cases Methodology, limiting the analysis to those cases in which judicial discretion could be meaningfully assessed demonstrates a slightly smaller spread between the average guideline minimum and average sentence imposed. The relatively small change in spread once the exclusions are applied may reflect that, relative to other offenses, the exclusions removed a smaller proportion of the All Cases Methodology. Even so, in the most recent year of the Post-Report Period, the difference between the average guideline minimum and average sentence imposed was 5.2 percent in firearms cases in which judicial discretion could be meaningfully assessed compared to 7.6 percent for all firearms cases, reflecting that applying the exclusions yielded a closer relationship between the average guideline minimum and average sentence imposed.

Like other analyses, the overall trends across the three time periods remain the same both with and without the five exclusions applied. One notable difference here is that with exclusions, the average sentence imposed during the *Booker* Period was actually higher than the guideline minimum. However, as with the All Cases Methodology, while the percentage difference between the guideline minimum and sentence imposed has increased since the *Booker* Period, it has not varied over time as much as all cases in the aggregate. Furthermore, while the percentage difference is greater now than in the *Booker* Period, the line has remained relatively flat since 2014.⁷⁰





OVERVIEW

Illegal Reentry Offenders Sentenced Under §2L1.2

Unlawfully Entering or Remaining in the United States

The Commission's §2L1.2 analysis demonstrates that, unlike the other analyses, the difference between the average guideline minimum and the average sentence imposed for illegal reentry offenses substantially narrowed at the end of the Post-Report Period compared to the *Booker* and *Gall* Periods, showing an overall increase in the influence of the guideline following the Commission's 2016 guideline amendment.



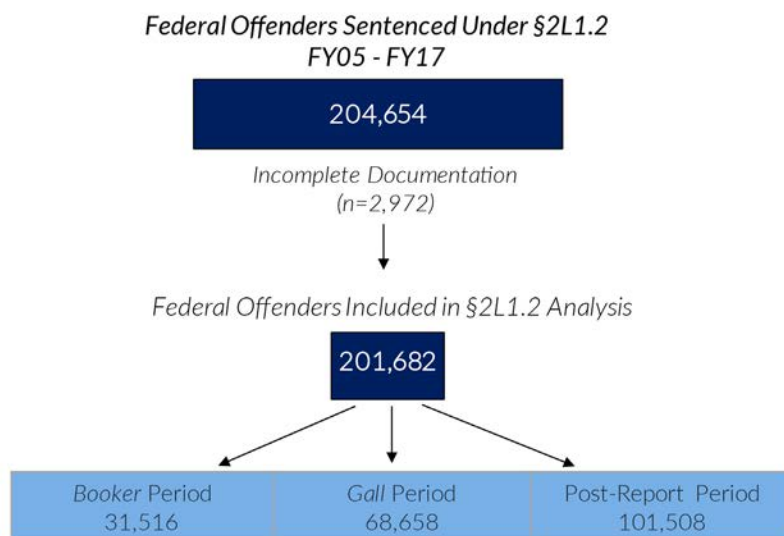
FINDINGS

Results of the §2L1.2 Analysis All Cases Methodology

In the 2012 *Booker* Report, the Commission examined immigration offenses under §§2L1.1 and 2L1.2.⁷¹ The 2012 *Booker* Report noted that for these offenses, the influence of the guidelines on the average sentence imposed had generally remained stable.⁷² The Commission identified 204,654 cases during fiscal years 2005 to 2017 for which §2L1.2 was the primary guideline. After excluding cases for which incomplete sentencing documentation was submitted to the Commission, the Guideline-Specific Analysis of offenders sentenced for illegal reentry offenses under §2L1.2 from fiscal years 2005 to 2017 includes 201,682 cases.

The two-line and percentage graphs examine illegal reentry offenses under §2L1.2 before the application

of any Methodology exclusions. Unlike every other guideline in this report, the difference between the average guideline minimum and the average sentence imposed for illegal reentry offenses was smaller at the end of the Post-Report Period compared to the *Booker* and *Gall* Periods, showing an overall increase in the influence of the guideline over time. Although this trend may be attributed to a variety of factors, one likely influence is the Commission's 2016 comprehensive revision of the illegal reentry guideline to promote uniformity and address judicial concerns about the severity of the guideline.⁷³ Notably, the amendment addressed the guideline's then-existing 16- and 12-level enhancements for certain prior felonies committed before a defendant's deportation



by accounting for prior criminal conduct in a more proportionate manner.⁷⁴ Specifically, the amendment added tiered enhancements based on criminal conduct occurring before and after the defendant’s first order of deportation.⁷⁵ The tiered enhancements thus allow for more incremental punishment to account for the varying levels of culpability and risk of recidivism.

The two-line graph shows that the average guideline minimum has steadily decreased across all three periods, and the average sentence has paralleled that trend by steadily decreasing as well—in particular, in 2017, after the 2016 promulgation of Amendment 802, both the average guideline minimum and difference between the average guideline minimum and average sentence imposed sharply decreased. At the start of the *Booker* Period, the average illegal reentry guideline minimum was 30.2 months and the average sentence 27.3 months, a difference of only 2.9 months. At the start of the *Gall* Period, the average illegal reentry guideline minimum was 24.1 months and the average sentence 21.9 months, a difference of only 2.2 months. By the end of the Post-Report Period, in 2017, the average illegal reentry guideline minimum had decreased to 12.6 months and the average sentence had decreased to 12.0 months, a difference of only 0.6 months. Thus, the data suggests that the illegal reentry guideline has a strong influence on the sentence imposed, which grew even stronger after the 2016 guideline amendment brought the sentences imposed by judges even closer to the average guideline minimum.

Similarly, the percentage graph shows that the percentage difference between the average guideline minimum and average sentence imposed remained



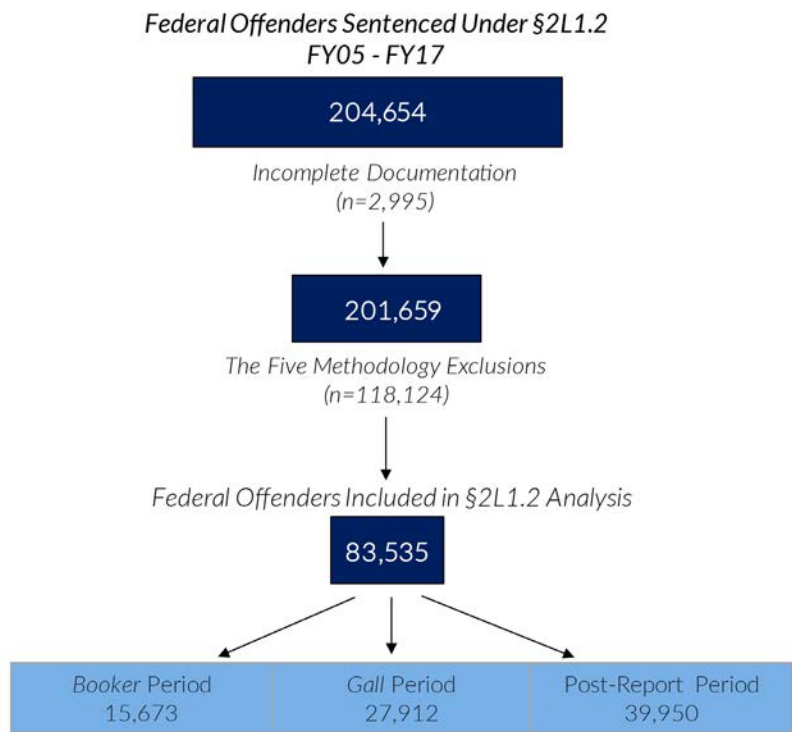
relatively stable throughout the *Booker* and *Gall* Periods, varying from 9.6 percent at the start of the *Booker* Period to 9.1 percent at the start of the *Gall* Period. The percentage difference increased from the end of the *Gall* Period into much of the Post-Report Period, peaking at 18.9 percent in 2016. However, the percentage difference substantially decreased after the 2016 illegal reentry guideline amendment, ending with 4.8 percent in 2017.



FINDINGS

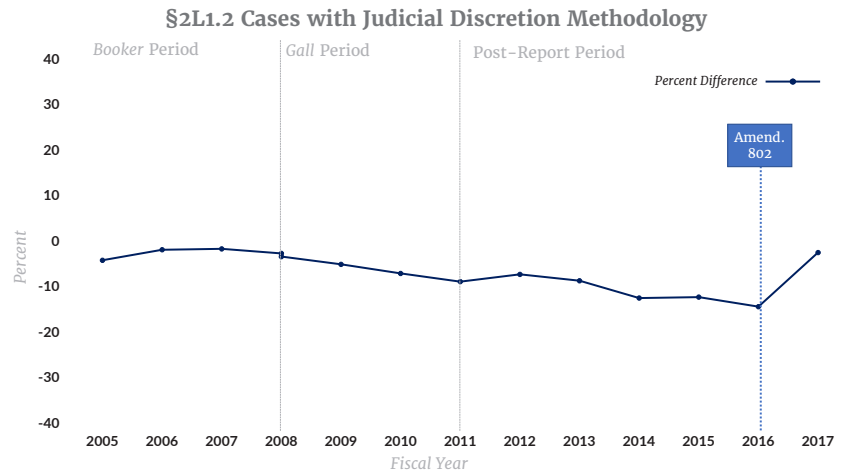
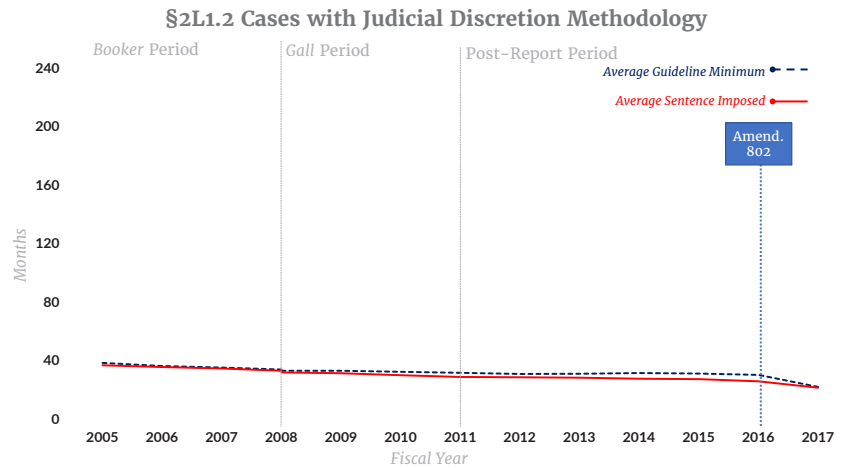
Judicial Discretion Methodology

The following graphs apply the five Methodology analysis decreased to 83,535 cases (including 15,673 exclusions to the illegal reentry analysis. After cases in the *Booker* Period; 27,912 cases in the *Gall* exclusions, the number of illegal reentry cases in the Period; and 39,950 cases in the Post-Report Period).⁷⁶



Compared to the All Cases Methodology, limiting the analysis to those cases in which judicial discretion could be meaningfully assessed revealed a slightly smaller difference between the average guideline minimum and average sentence imposed. Like the firearms guideline, the difference may appear less substantial than for other guidelines given that even without exclusions, the illegal reentry cases already showed a small spread between the average guideline minimum and average sentence imposed. The smaller difference may also reflect the relatively small number of illegal reentry cases that receive substantial assistance departures.⁷⁷ Even so, the results suggest that the guidelines exert a greater influence on sentences imposed in cases in which judicial discretion can be meaningfully assessed. For example, in the most recent year of the Post-Report Period, the difference between the average guideline minimum and average sentence imposed in illegal reentry cases was 2.7 percent under the Judicial Discretion Methodology, compared to 4.8 percent for all illegal reentry cases.

As with previous guidelines, the overall trends across the three time periods remain similar both with and without the five exclusions applied. Similar to the analysis of all illegal reentry cases, limiting the analysis to those cases in which judicial discretion could be assessed shows that the percentage difference increased from the end of the *Gall* Period into much of the Post-Report Period,



peaking at 14.6 percent in 2016. Following the 2016 illegal reentry guideline amendment, the percentage difference substantially decreased to 2.7 percent in 2017. Therefore, the analysis of cases focusing on judicial discretion demonstrates a strong relationship between the guideline minimum and sentence imposed, particularly after the 2016 amendment.⁷⁸



OVERVIEW

Non-Production Child Pornography Offenders Sentenced Under §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.

The Commission's §2G2.2 analysis demonstrates a steady increase in the difference between the average guideline minimum and the average sentence imposed until the most recent years of the Post-Report Period, as the increasing average guideline minimums outpaced the average sentences imposed.

In addition to the most frequently applied individual guidelines above, the Commission also analyzed the guidelines for non-production child pornography offenses. Although these cases represent a small proportion of the overall caseload, the guidelines for these offenses have been subject to longstanding concern from stakeholders and have among the lowest within-guideline sentencing rates each year.⁷⁹

The analysis revealed that the guidelines for non-production child pornography cases have a smaller influence on the average sentence imposed than the other guidelines. As discussed below, this is due in part to congressional directives and statutory changes enacted over time, particularly stemming from the PROTECT Act in 2003.

In the 2012 *Booker* Report, the Commission noted that compared to other guidelines, the non-production child pornography guideline's average guideline minimum and average sentence imposed had not consistently paralleled each other over time and had increasingly diverged since 2005.⁸⁰ The Commission noted that the average guideline minimum had steadily increased over time due to statutory changes implemented from 1997 and 2003 and their corresponding guideline amendments.⁸¹ And as the guideline minimum increased through the *Booker* and *Gall* periods, the average

sentence increasingly diverged from the guideline minimum, remaining relatively flat by comparison.⁸²

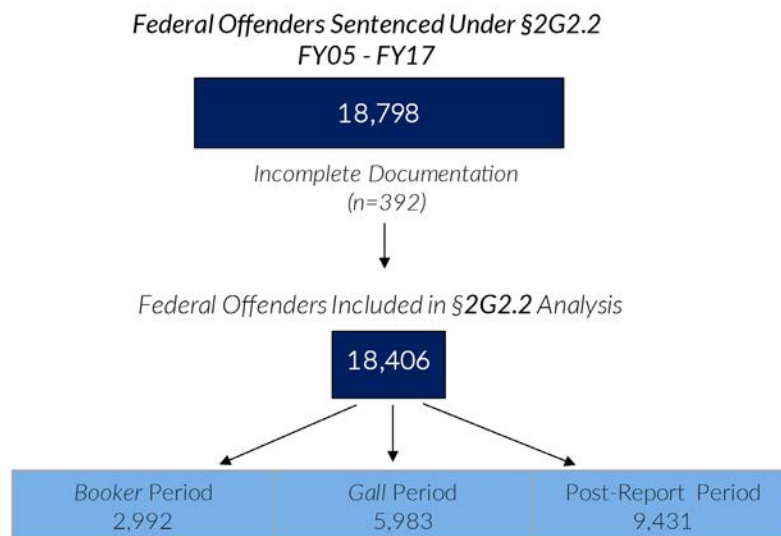
In 2012, the Commission also published its *Report to the Congress: Federal Child Pornography Offenses*, analyzing the data of offenders sentenced under both the non-production and production child pornography sentencing guidelines.⁸³ The report was spurred, in part, by the decline in the percentage of sentences imposed within the applicable guideline range in non-production cases, which indicated that courts increasingly believed the sentencing scheme was overly severe.⁸⁴ Moreover, changes in technology typically used by non-production offenders suggested that existing sentencing schemes no longer adequately distinguished between offenders with different degrees of culpability.⁸⁵ The Child Pornography Report found that guideline ranges and average sentences had substantially increased since the passage of the PROTECT Act of 2003.⁸⁶ Not only did the PROTECT Act create sentencing enhancements and mandatory minimum penalties, but the underlying conduct triggering such enhancements and penalties was increasingly common.⁸⁷ Since the publication of the 2012 *Booker* Report and the 2012 Child Pornography Report, the non-production child pornography guideline has not been substantially amended, and the previously identified trends have continued.⁸⁸



FINDINGS

Results of the §2G2.2 Analysis All Cases Methodology

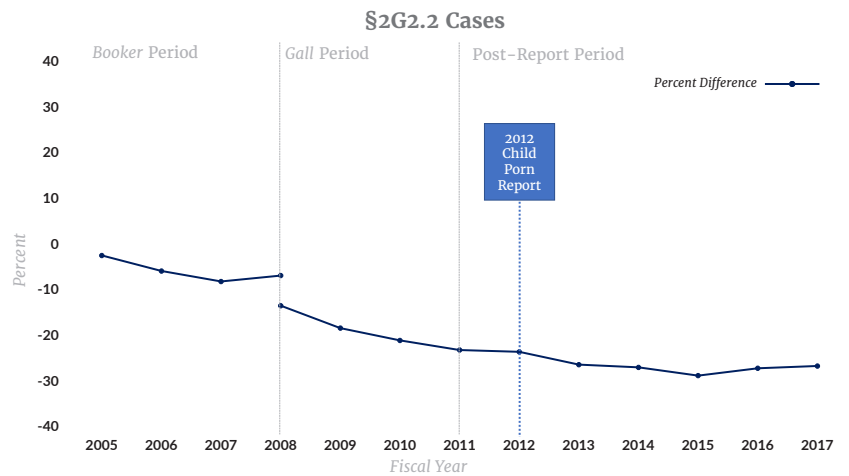
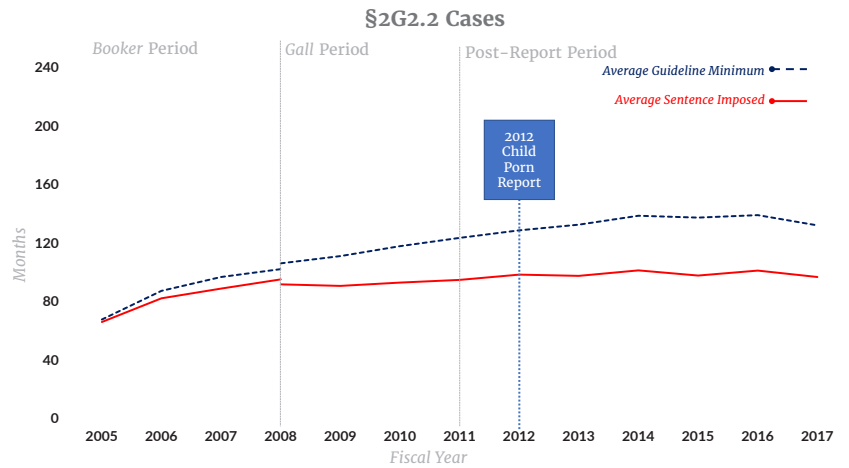
The Commission identified 18,798 cases during fiscal years 2005 to 2017 for which §§2G2.2 or 2G2.4 was the primary guideline. After excluding cases for which incomplete sentencing documentation was submitted to the Commission, the Guideline-Specific Analysis of offenders sentenced for non-production child pornography offenses under §2G2.2⁸⁹ from fiscal years 2005 to 2017 includes 18,406 cases.⁹⁰



The two-line and percentage graphs below examine non-production child pornography offenses under §2G2.2 before the application of any Methodology exclusions. The difference between the average guideline minimum and the average sentence imposed has increased since the *Booker* and *Gall* Periods, as rising average guideline minimums outpace the average sentences imposed. However, this increasing difference slightly stabilized in the most recent years of the Post-Report Period.

The two-line graph shows a steady and substantial widening of the spread between the average guideline minimum and average sentence imposed since *Booker*. At the start of the *Booker* Period in 2005, the guideline minimum and sentence tracked each other closely, averaging a difference of only 1.7 months. Between 2005 and the start of the *Gall* Period in 2008, however, the average guideline minimum increased by 38.4 months and the difference between it and the average sentence widened to 14.3 months. By the start of the Post-Report Period in 2012, the average guideline minimum had increased another 22.6 months, and the difference between the average guideline minimum and average sentence imposed further widened to 30.3 months. However, there is some indication that the difference may be stabilizing. Although the spread remains notably wider compared to the *Booker* and *Gall* Periods, it has slightly narrowed in the last two years of the study. This may reflect that the average guideline minimum itself did not substantially change during the Post-Report Period.

The percentage graph depicts the same trends. The percentage difference increased throughout the *Booker* and *Gall* Periods, varying from 2.5 percent below the



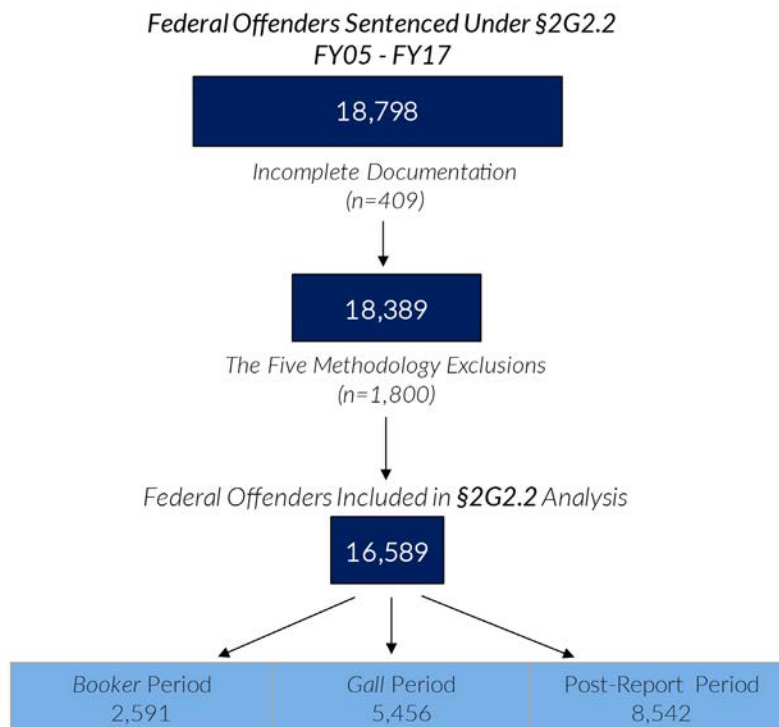
average guideline minimum at the start of the *Booker* Period to 13.5 percent at the start of the *Gall* Period. The percentage difference increased from the end of the *Gall* Period into the Post-Report Period, peaking at 28.8 percent in 2015. However, growth in the percentage difference slowed during the Post-Report Period and slightly decreased in the two years following its 2015 peak. Thus, the percentage graph reflects the divergence between the average guideline minimum and average sentence imposed that grew rapidly during the *Booker* and *Gall* Periods but relatively stabilized in the most recent years of the Post-Report Period.



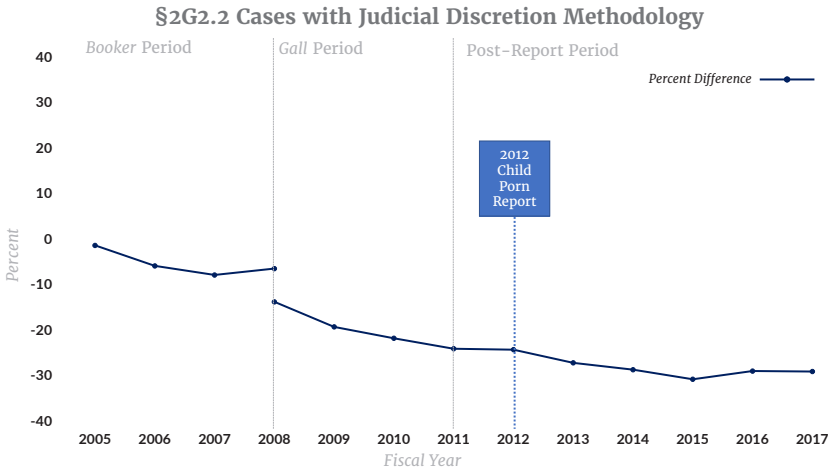
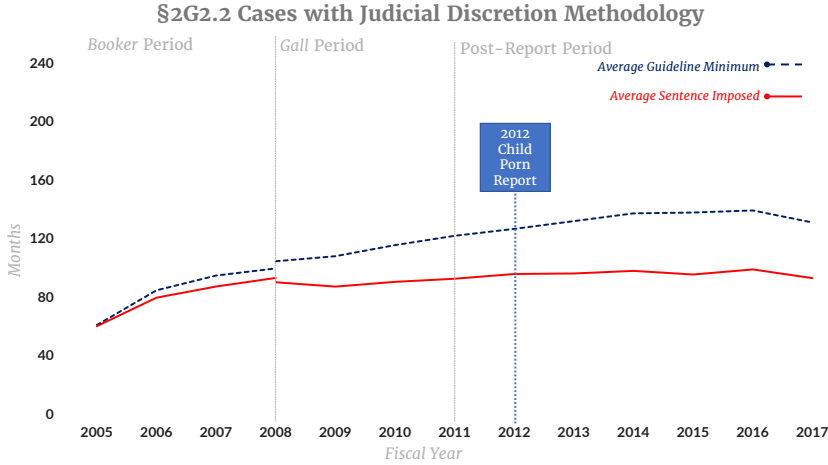
FINDINGS

Judicial Discretion Methodology

The following graphs apply the five Methodology exclusions to the non-production child pornography analysis. After exclusions, the number of non-production child pornography cases in the analysis decreases to 16,589 cases (including 2,591 cases in the *Booker* Period; 5,456 cases in the *Gall* Period; and 8,542 cases in the Post-Report Period).⁹¹



Unlike every other individual guideline discussed in this report, the difference between the average guideline minimum and average sentence imposed for non-production child pornography cases is slightly wider when limiting the analysis to those cases in which judicial discretion could be meaningfully assessed. For example, during the most recent year of the Post-Report Period, the difference between the average guideline minimum and average sentence imposed was 29.1 percent under the Judicial Discretion Methodology, compared to 26.7 percent for all non-production child pornography cases. This indicates that the guidelines exert slightly less influence on the sentences imposed for non-production child pornography cases in which judicial discretion can be meaningfully assessed than in cases in which it cannot. This reflects, at least in part, the policy disagreements discussed above that many courts have with the child pornography statutory and guideline sentencing scheme, as well as the fact that substantial assistance departures are much less frequent in these cases.



As with previous guidelines, the overall trends across the three time periods remain similar with or without the five methodology exclusions applied. Similar to the All Cases Methodology, limiting the analysis to those cases in which judicial discretion can be meaningfully assessed demonstrates the percentage difference

widened throughout the Booker and Gall Periods and into the Post-Report Period, peaking at 30.8 percent in 2015. Likewise, the growth in the percentage difference continued but at a slower rate during the Post-Report Period, before stabilizing during the most recent Post-Report Period.⁹²



OVERVIEW

Career Offenders Sentenced Under §4B1.1

Career Offender

The Commission's §4B1.1 analysis demonstrates a continuing decline in the guideline's influence, as reflected by the steady increase in the difference between the average guideline minimum and the average sentence imposed in career offender cases.

FINDINGS

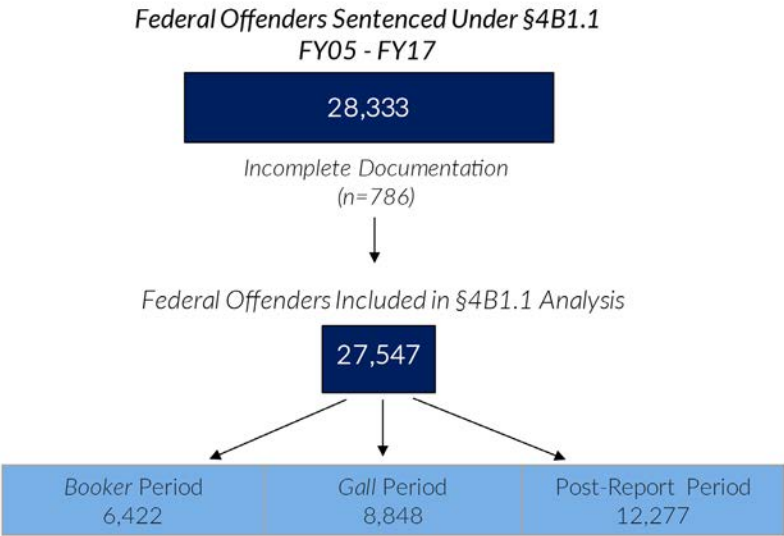
Results of the §4B1.1 Analysis All Cases Methodology

Like the non-production child pornography guideline, the career offender guideline represents a small proportion of the overall caseload. However, this guideline has also been the subject of longstanding concern and has among the lowest within-guideline rates each year.⁹³

Similar to the non-production child pornography guideline, the career offender guideline⁹⁴ has been shaped by a congressional directive.⁹⁵ Section 994(h) directed the Commission to set guidelines for individuals meeting the career offender definition at or near the statutory maximum for their offenses.⁹⁶ In 2016, following a multi-year study of the application and impact of the career offender guideline, the Commission amended the guideline and published a report to Congress recommending statutory changes.⁹⁷

The report found that career offenders often receive sentences below the guideline range, often at the government’s request, particularly when they qualified as career offenders based solely on drug trafficking offenses.⁹⁸ In the ten years prior to its publication, the proportion of career offenders receiving a sentence within the applicable guideline range decreased from 43.3 percent in 2005 to 27.5 percent in 2014.⁹⁹

The Commission identified 28,333 cases across the nation during fiscal years 2005 to 2017 for which the defendant was sentenced as a career offender under §4B1.1. After excluding cases for which incomplete sentencing documentation was submitted to the Commission, the Guideline-Specific Analysis of offenders sentenced as career offenders from fiscal years 2005 to 2017 includes 27,547 cases.¹⁰⁰

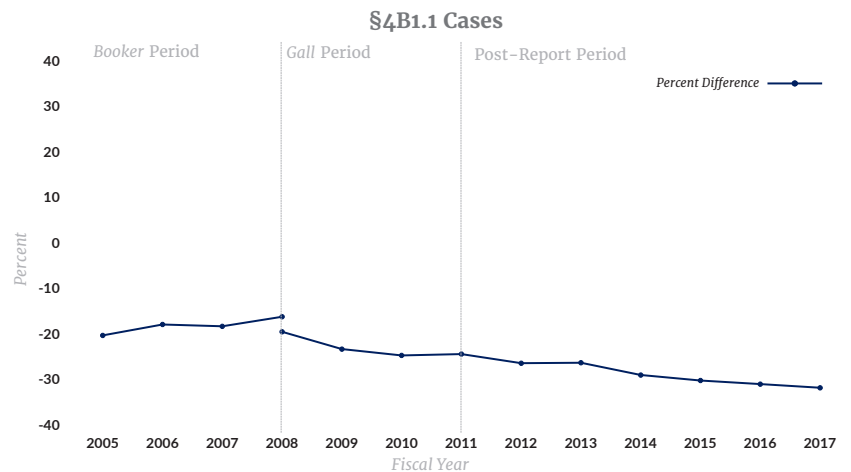
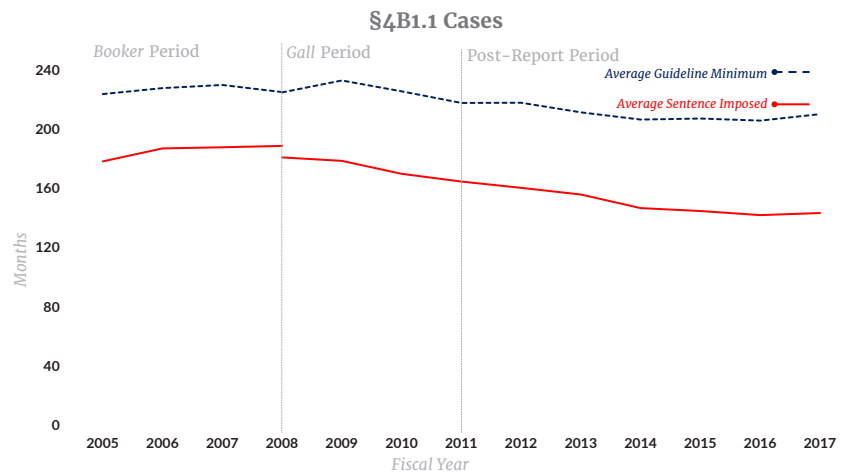




The two-line and percentage graphs below examine career offender cases under §4B1.1 before the application of any Methodology exclusions. The difference between the average guideline minimum and the average sentence imposed has steadily widened since the end of the *Booker* Period, suggesting an overall decline in the influence of the §4B1.1 guideline over time. This is consistent with the findings in the 2016 Career Offender Report, in which the Commission noted the increasing rate of sentences below the guideline range.¹⁰¹

The two-line graph shows a steady widening of the spread between the average guideline minimum and average sentence imposed. At the start of the *Booker* Period in 2005, the average guideline minimum and average sentence imposed differed by 45.6 months. During the *Booker* Period, that difference slightly narrowed, so the *Gall* Period in 2008 began with a difference of 44 months. Starting in the *Gall* Period and continuing into the Post-Report Period, however, the average sentence imposed began decreasing faster than the average guideline minimum. The Post-Report Period began with an average difference of 57.6 months, increasing to 66.9 months by the last year of the period.

Similarly, the percentage graph shows that the percentage difference narrowed slightly during the *Booker* Period but began steadily increasing during the *Gall* Period, varying from 16.2 percent below the

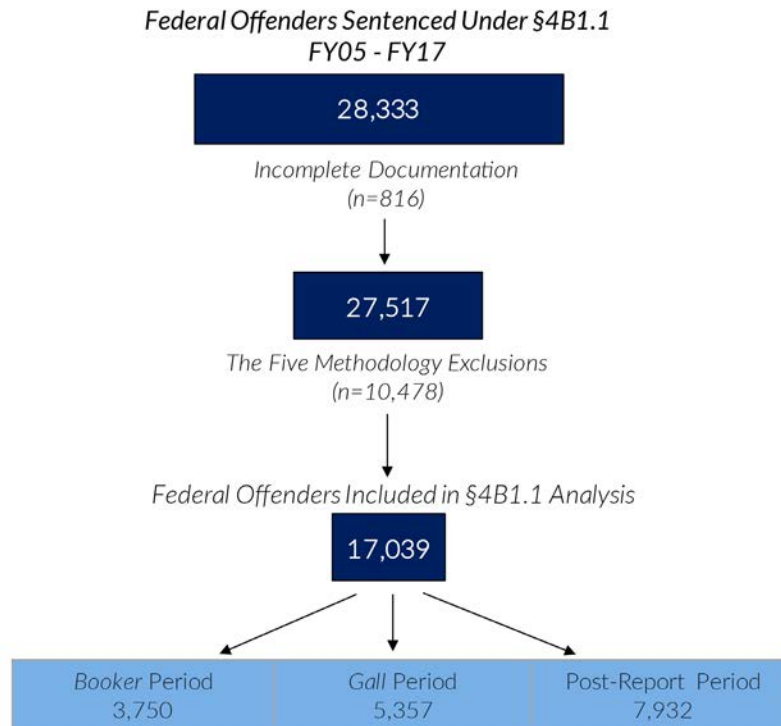


guideline minimum at the end of the *Booker* Period to 24.4 percent at the end of the *Gall* Period. The percentage difference increased from the end of the *Gall* Period into the Post-Report Period, peaking at 31.8 percent in 2017. However, the percentages from 2014 to 2017 ranged only from 29.0 percent to 31.8 percent, indicating that the widening of the difference between the average guideline minimum and average sentence imposed may be slowing.

FINDINGS

Judicial Discretion Methodology

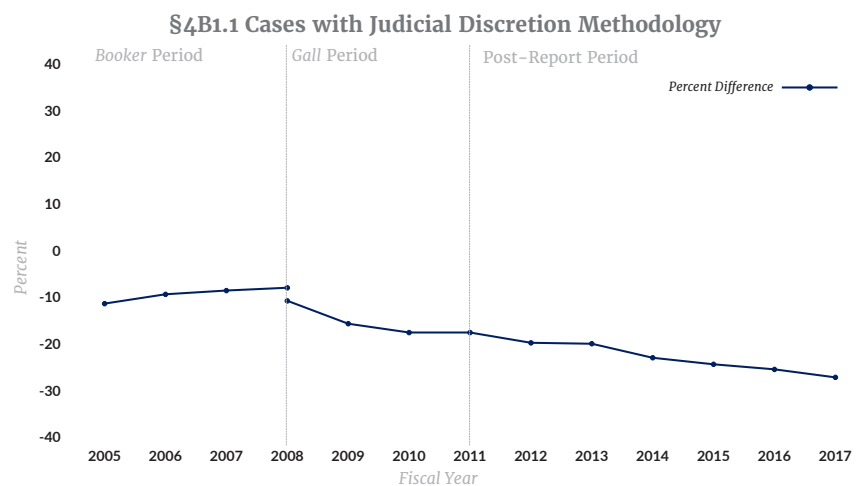
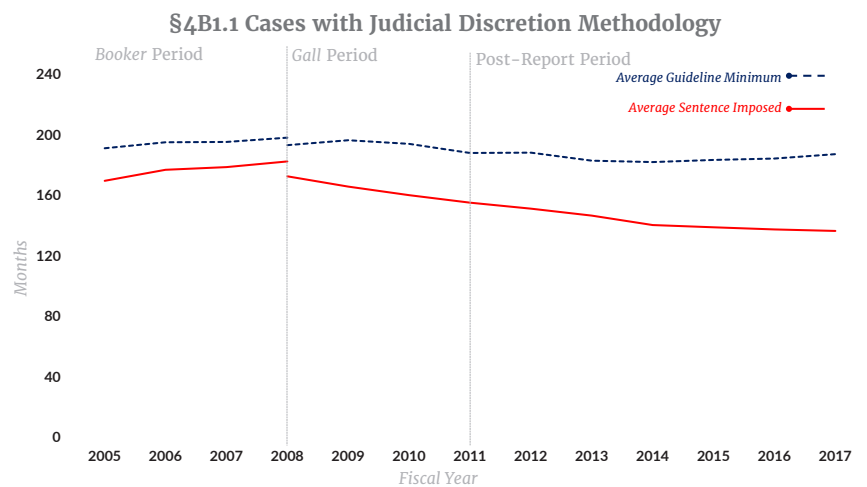
The following graphs apply the five Methodology exclusions to the career offender analysis. After exclusions, the number of career offender cases in the analysis decreases to 17,039 cases (including 3,750 cases in the *Booker* Period; 5,357 cases in the *Gall* Period; and 7,932 cases in the Post-Report Period).¹⁰²





Like most of the other guidelines, limiting the analysis to those cases in which judicial discretion can be meaningfully assessed demonstrates yields a smaller difference between the average guideline minimum and average sentence imposed. For example, during the most recent year of the Post-Report Period, the difference between the average guideline minimum and average sentence imposed was 27.1 percent in career offender cases under the Judicial Discretion Methodology compared to 31.8 percent for all career offender cases. This indicates that the guidelines exert a greater influence on the sentence imposed on career offenders in cases in which judicial discretion can be meaningfully assessed than in cases in which it cannot.

As with all of the preceding guidelines, the overall trends across the three time periods remain similar with or without Methodology exclusions. Similar to the All Cases Methodology, limiting the analysis to those cases with meaningful judicial discretion shows that the percentage difference began widening during the *Gall* Period and continued to increase into the Post-Report Period and, contrary to the All Cases Methodology, does not appear to be slowing.¹⁰³







CONCLUSION

The Influence of the Guidelines on Federal Sentencing Outcomes



This report's findings regarding the continued influence of the guidelines on sentencing outcomes update the Commission's findings in its 2012 *Booker* Report. Consistent with the findings in that report, the guidelines continued to substantially influence the sentences imposed in federal cases overall, but their influence diminished somewhat in the immediate years following the 2012 *Booker* Report before generally stabilizing in the most recent years of this report. This overall pattern applies to all of the major offense types studied in this report, but the influence of the guidelines varied depending on the individual offense type. The guidelines continued to exert a strong influence on sentences imposed in firearms and illegal reentry offenses, a more moderate influence on sentences imposed in fraud and drug offenses, and a weaker influence in non-production child pornography offenses and career offender cases.

These differences at times reflect the impact of the actions taken by the Commission on courts and litigants. For example, the difference between the average guideline minimum and the average sentence imposed widened substantially in 2014 as variances increased in anticipation of Amendment 782 to §2D1.1. On the other hand, the difference narrowed substantially

in illegal reentry cases after the Commission's 2016 comprehensive amendment to §2L1.1, which addressed many concerns regarding that guideline. The data also suggests that courts appear to be relying on the findings in the Commission's reports to Congress regarding the child pornography and career offender guidelines to support variances.

Finally, the guidelines generally exert a greater influence on sentences imposed in cases in which judicial discretion can be meaningfully assessed than in cases in which it cannot. When cases that limit the assessment of judicial discretion are excluded, the resulting narrower difference between the average guideline minimum and average sentence imposed is due in large part to removing cases with substantial assistance departures. This finding held true for all guidelines in the aggregate across all time periods, as well as for most individual guidelines across all time periods, with the sole exception of the non-production child pornography guideline. Thus, although the influence of the guidelines has diminished since the *Booker* decision, the report provides further empirical evidence that, as stated by the Supreme Court in *Peugh*, the guidelines remain "the lodestone of sentencing."¹⁰⁴

The guidelines continued to substantially influence the sentences in federal cases overall, but their influence diminished following *Booker* before stabilizing in the most recent years of this report.





APPENDIX A

Judicial Discretion Methodology with Substantial Assistance Cases Included



After applying the Judicial Discretion Methodology to the Aggregate Analysis and Guideline-Specific Analyses, the Commission subsequently conducted further analyses that added cases with substantial assistance departures into the Judicial Discretion Methodology for each guideline. The Commission did so to identify factors driving the narrower difference between the guideline minimum and average sentence imposed after the application of Methodology exclusions. The results of this analysis applying only four exclusions are set forth in the graphs below, in the same format as the graphs in the main text—first, depicted as the raw number difference between the average guideline

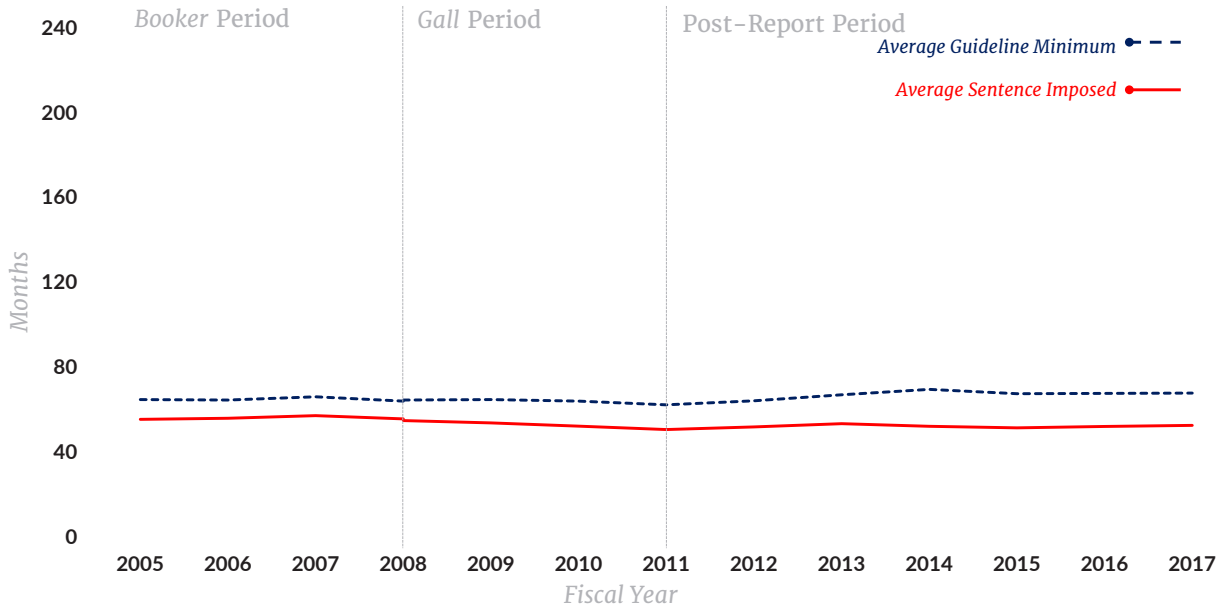
minimum and sentence imposed and second, as their percentage difference.

As shown in the graphs that follow, adding substantial assistance departure cases widens the spread between the guideline minimum and average sentence imposed across every guideline. This is particularly so for certain guidelines in which individuals frequently receive substantial assistance departures, such as §2D1.1. The analysis indicates that the smaller spread under the Judicial Discretion Methodology is largely due to the exclusion of departures granted for substantial assistance.

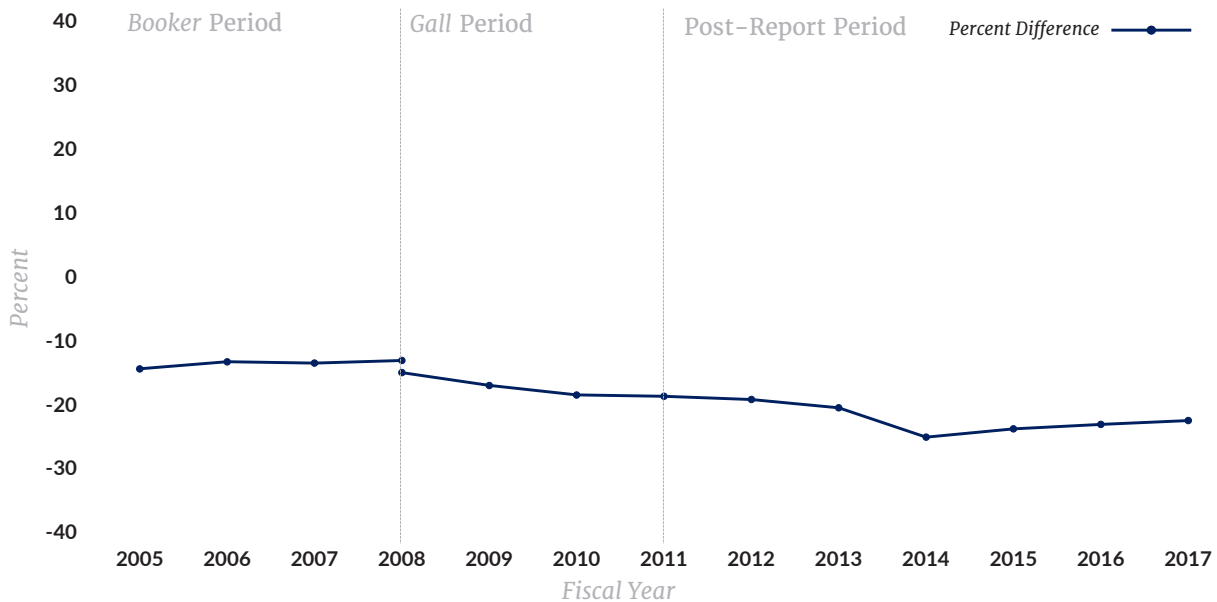


AGGREGATE ANALYSIS

Aggregate Analysis with Judicial Discretion Methodology:
Substantial Assistance Cases Included

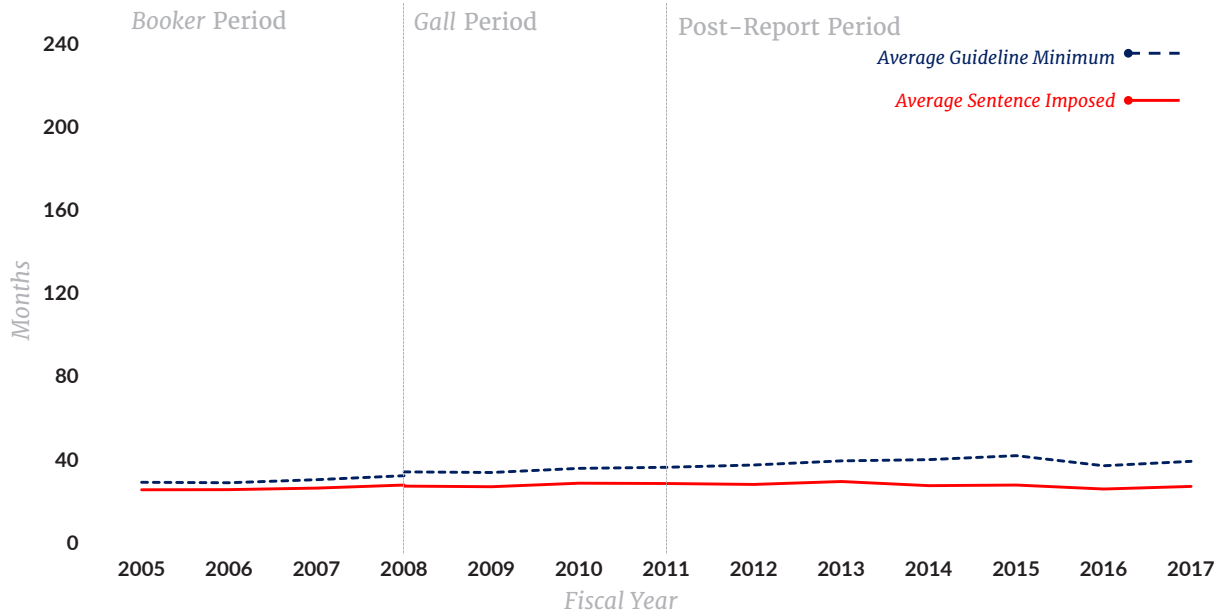


Aggregate Analysis with Judicial Discretion Methodology:
Substantial Assistance Cases Included

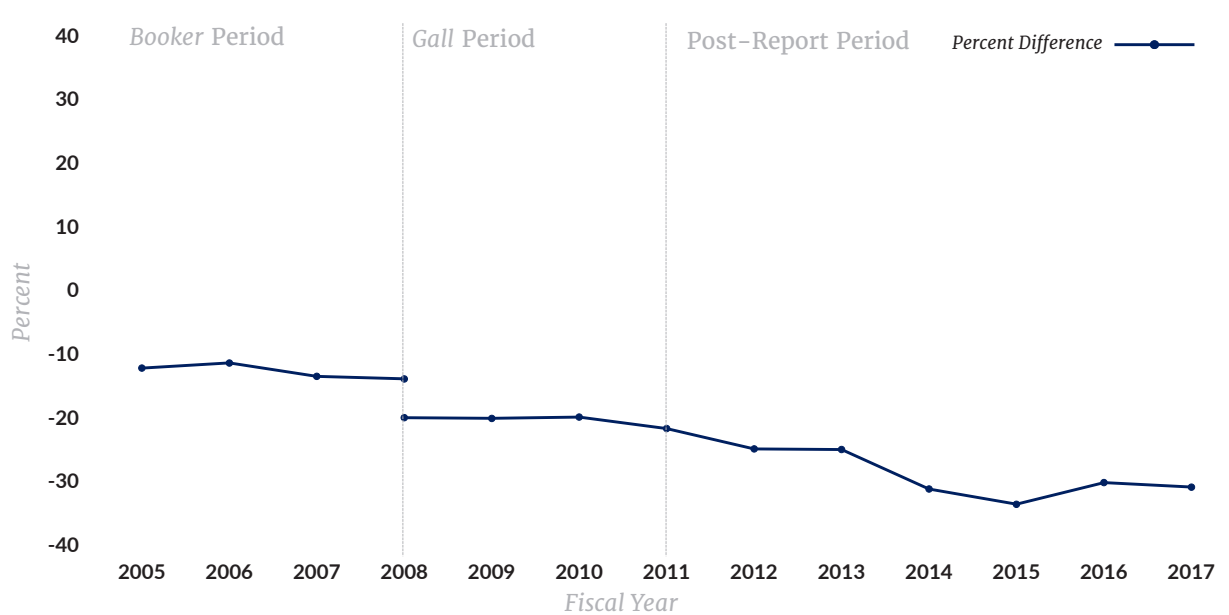


GUIDELINE-SPECIFIC ANALYSIS: ECONOMIC CRIMES

**§2B1.1 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included**



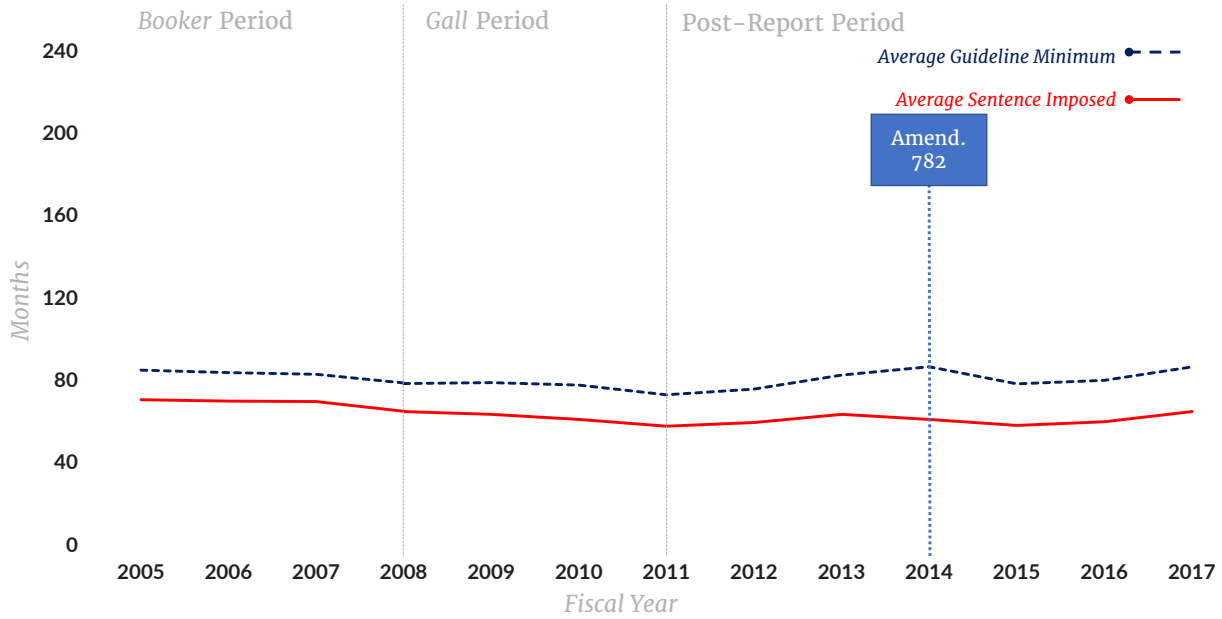
**§2B1.1 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included**



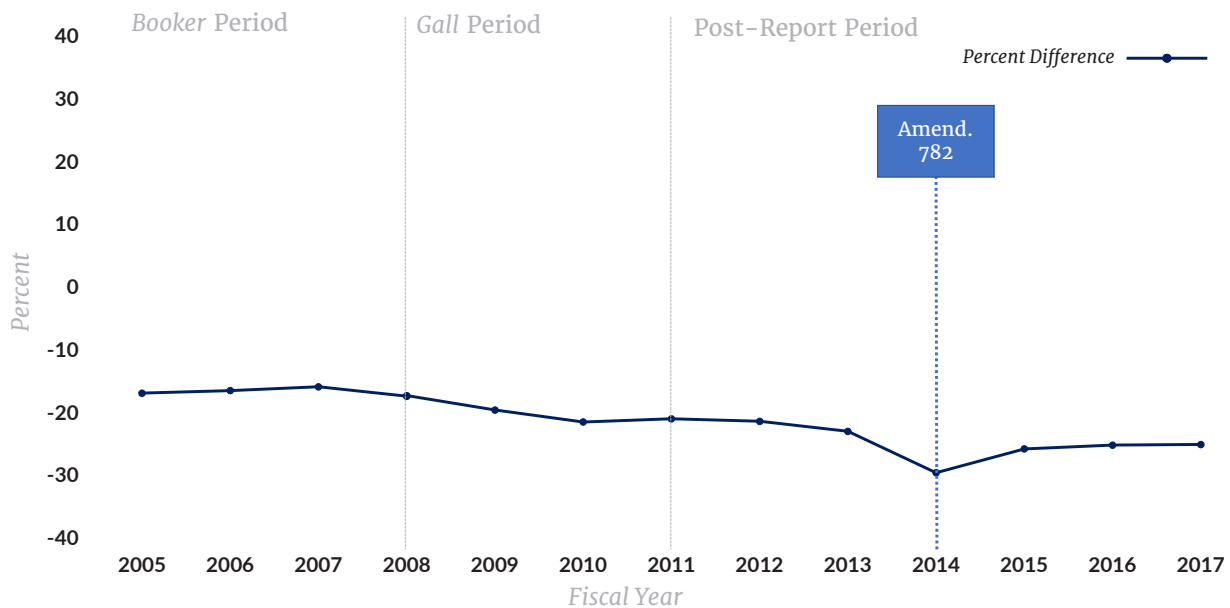


GUIDELINE-SPECIFIC ANALYSIS: DRUG TRAFFICKING

§2D1.1 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included

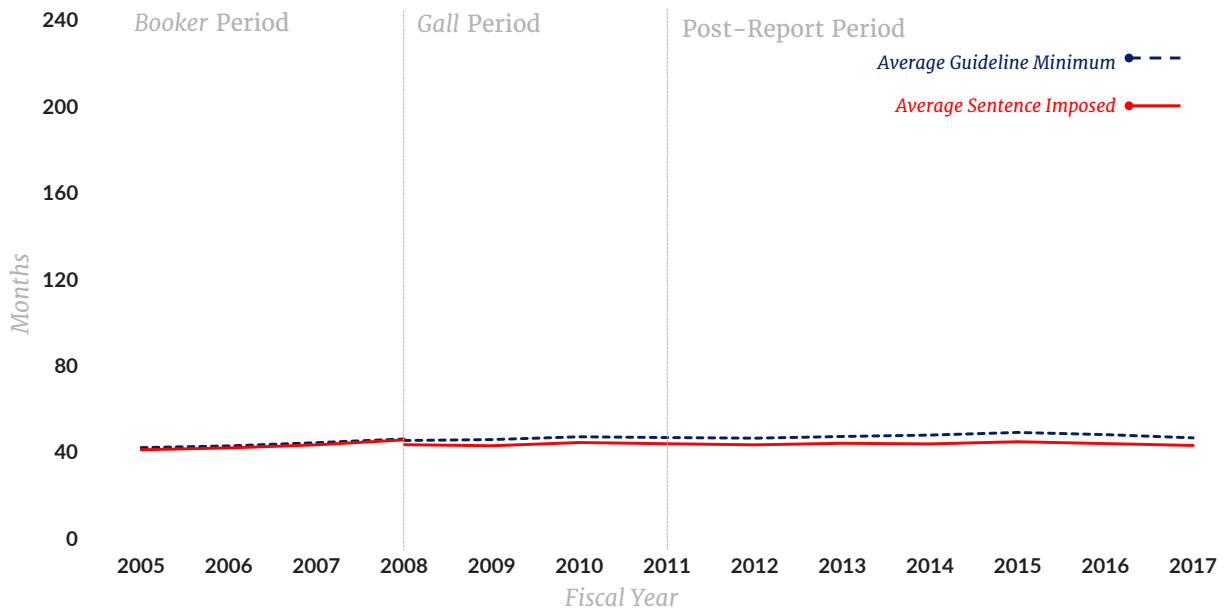


§2D1.1 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included

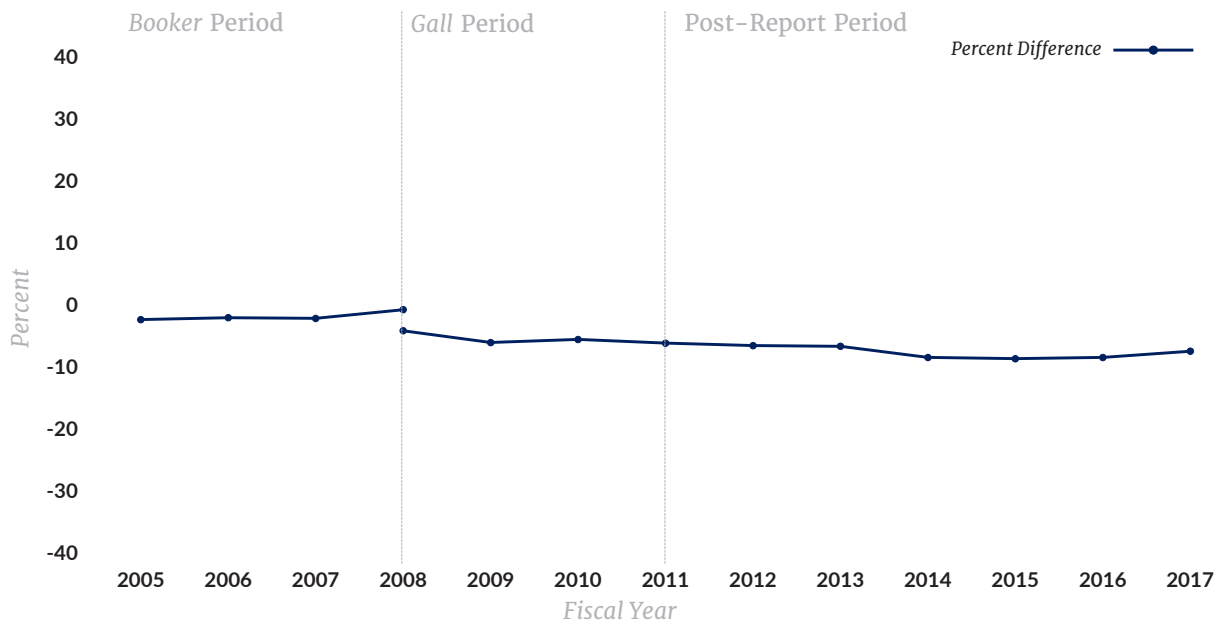


GUIDELINE-SPECIFIC ANALYSIS: FIREARMS

**§2K2.1 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included**



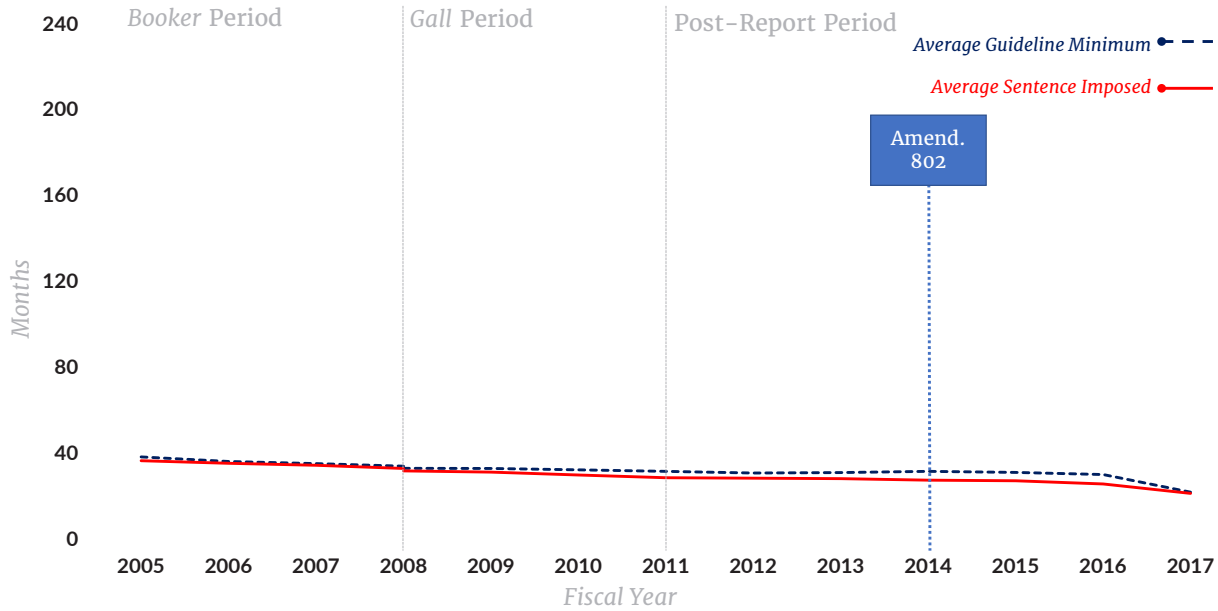
**§2K2.1 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included**



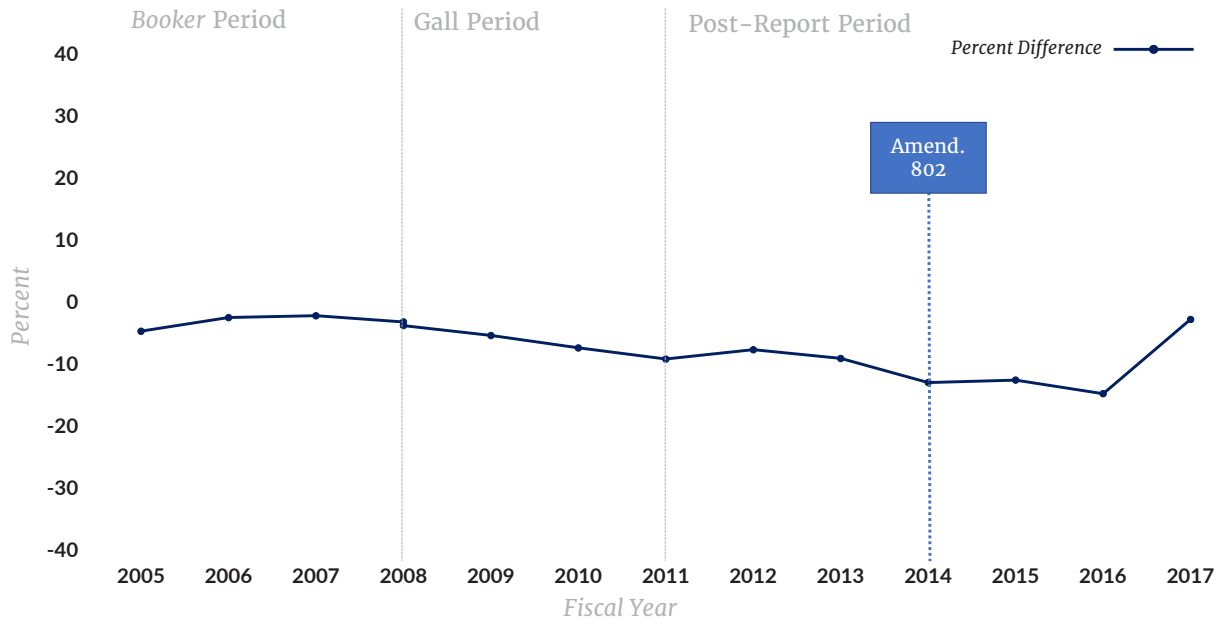


GUIDELINE-SPECIFIC ANALYSIS: ILLEGAL REENTRY

§2L1.2 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included

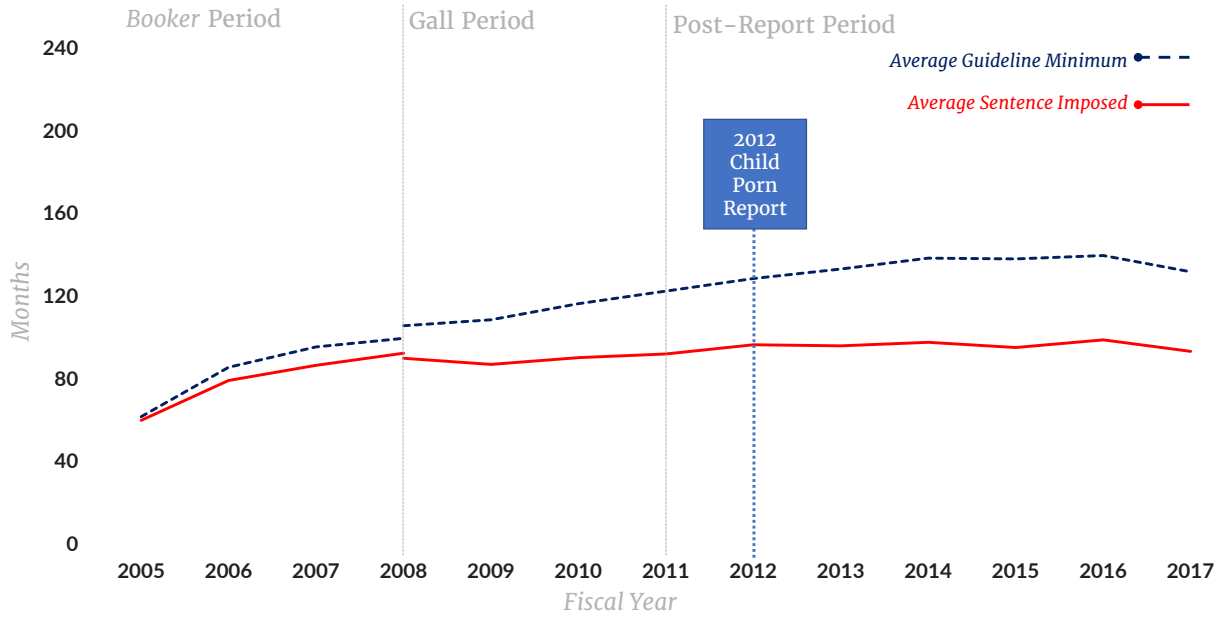


§2L1.2 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included

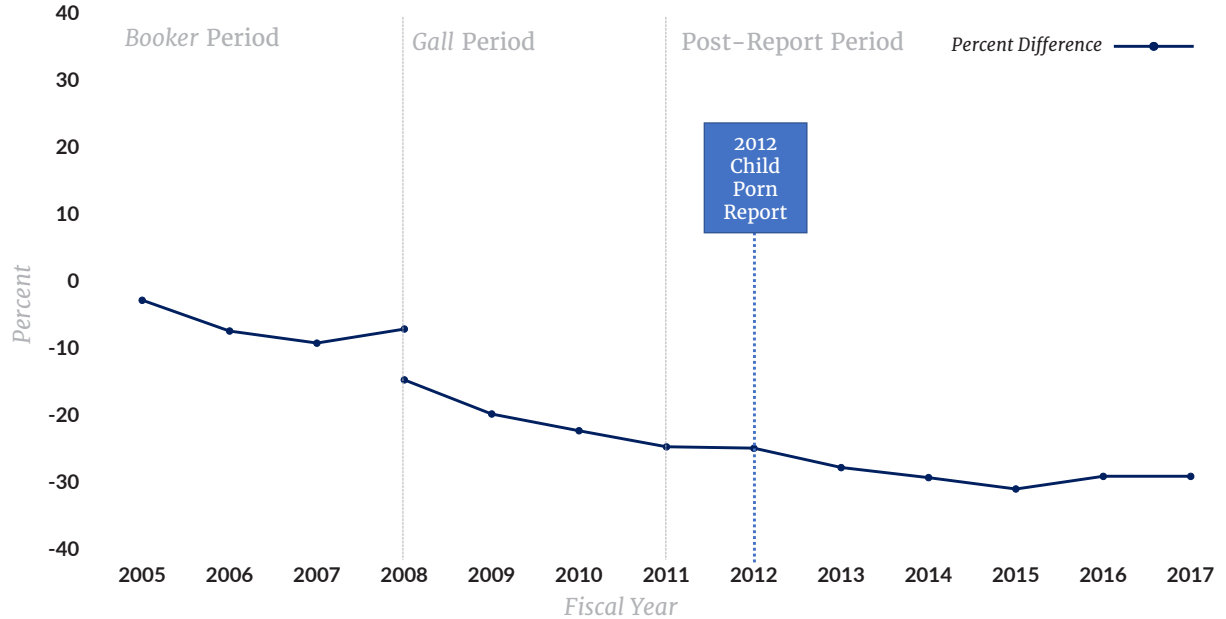


GUIDELINE-SPECIFIC ANALYSIS: CHILD PORNOGRAPHY

**§2G2.2 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included**



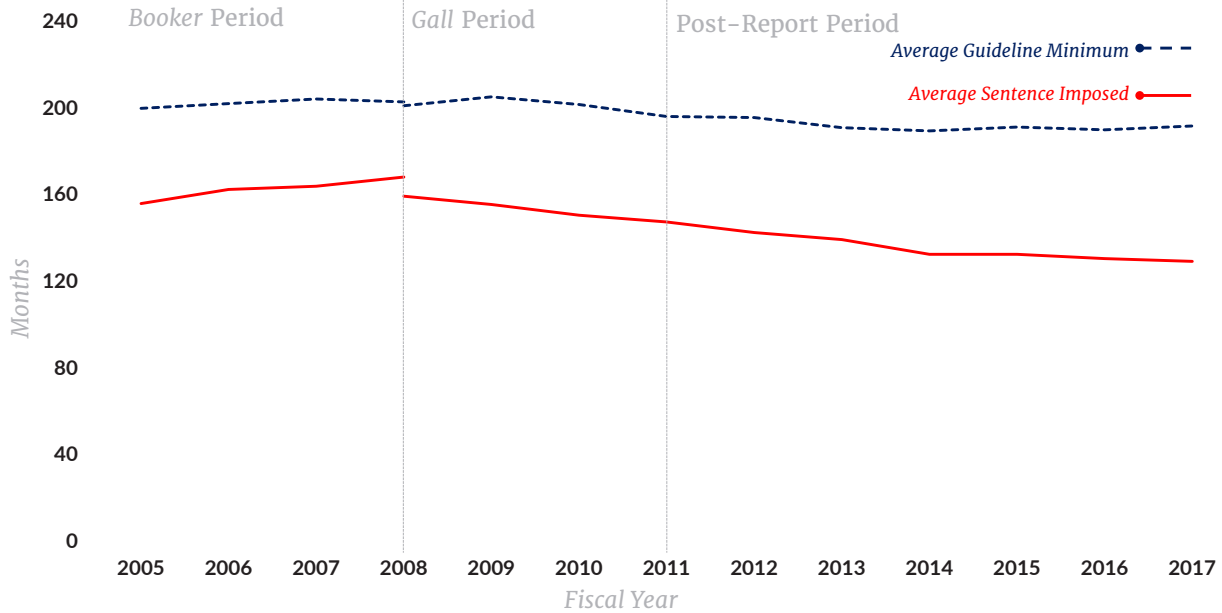
**§2G2.2 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included**





GUIDELINE-SPECIFIC ANALYSIS: CAREER OFFENDER

§4B1.1 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included



§4B1.1 Cases with Judicial Discretion Methodology:
Substantial Assistance Cases Included



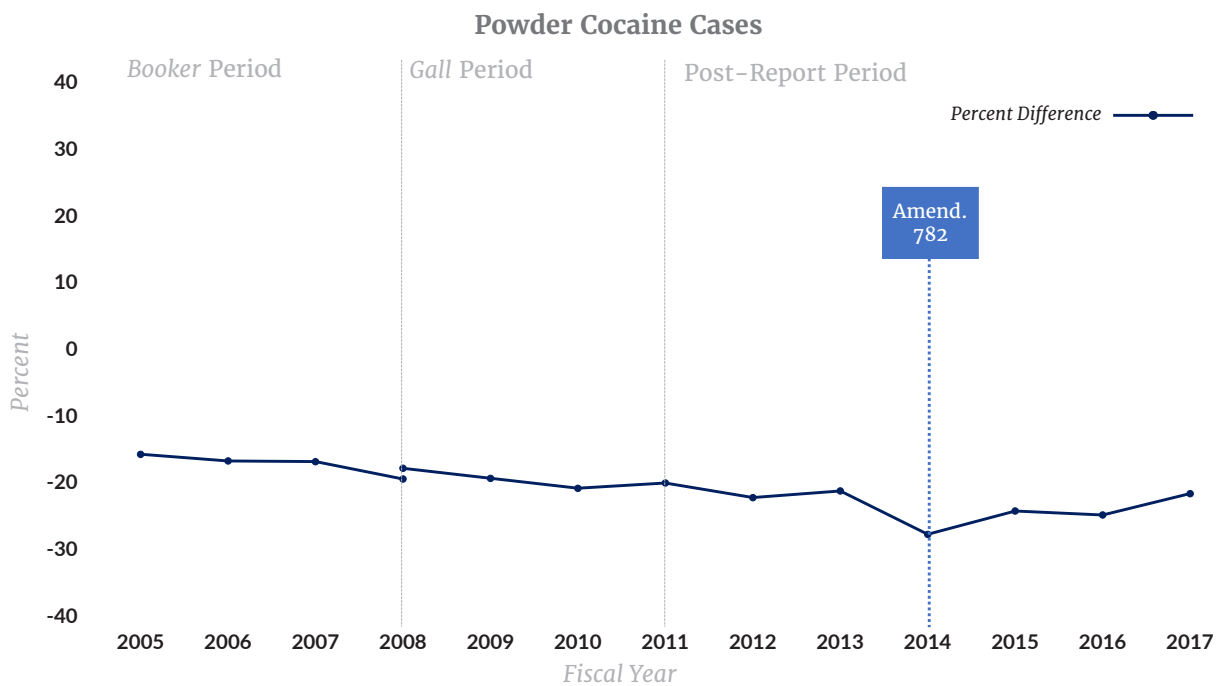
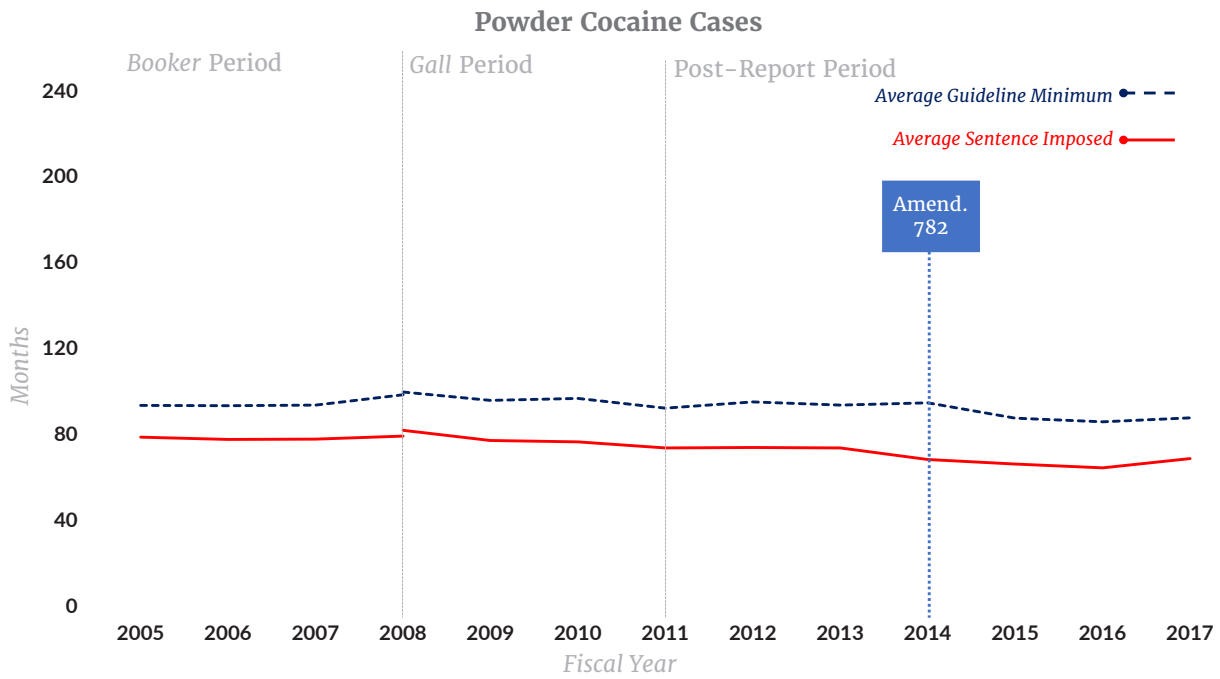
APPENDIX B

USSG §2D1.1 Analysis by Individual Drug Type

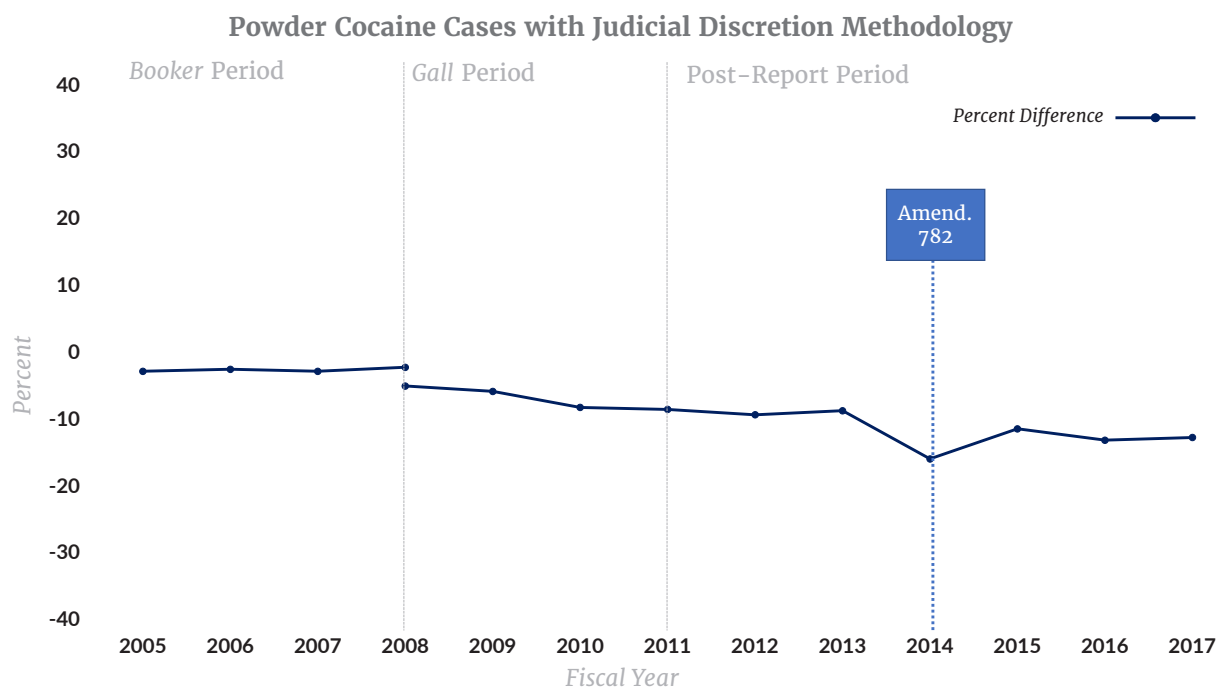
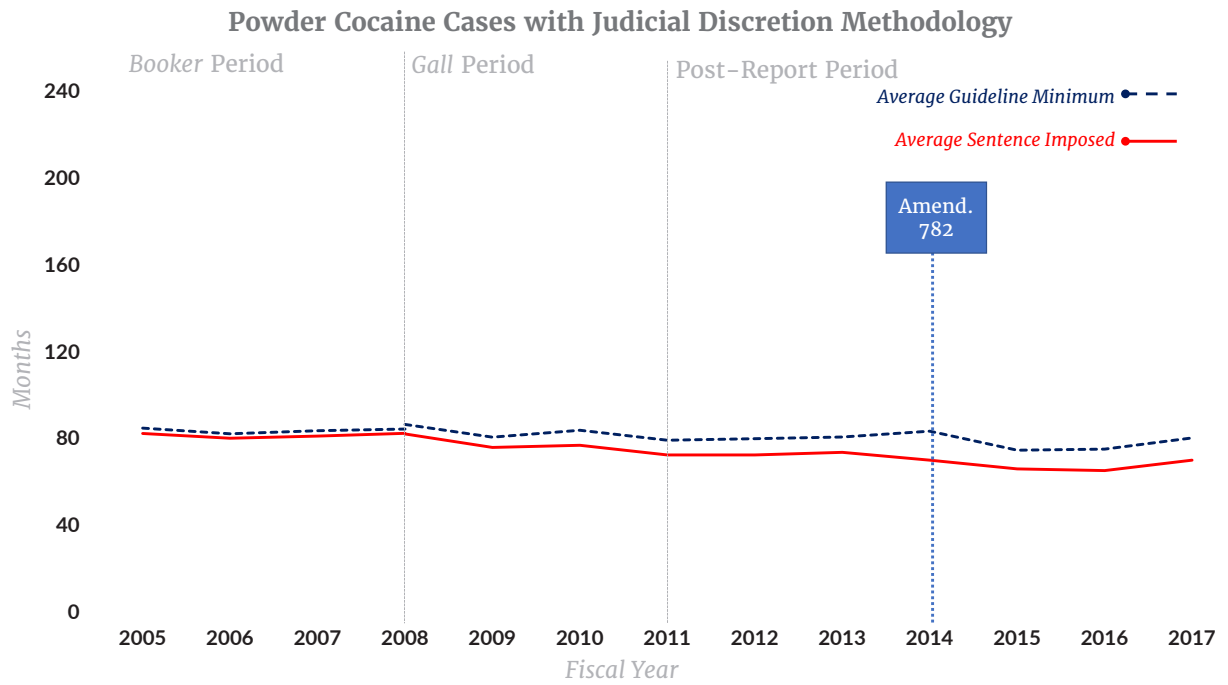
After conducting a Guideline-Specific Analysis of the drug trafficking guideline under §2D1.1, the Commission conducted further analyses by individual drug type: powder cocaine, crack cocaine, heroin, marijuana, methamphetamine, and all other drug cases. The results of these analyses are set forth in the graphs below, in the same format as the general §2D1.1 analysis in the main text—first, under the All Cases Methodology and second, under the Judicial Discretion Methodology. As shown in the graphs that follow, the individual drug type analyses largely mirror the same trends seen in the general drug trafficking analysis. In particular, the graphs reflect the peak in the difference between the guideline minimum and average sentence imposed which occurred in 2014, prior to the implementation of Amendment 782. For each individual drug, that peak was followed by a declining difference in the Post-Report Period years after 2014.



POWDER COCAINE DRUG ANALYSIS

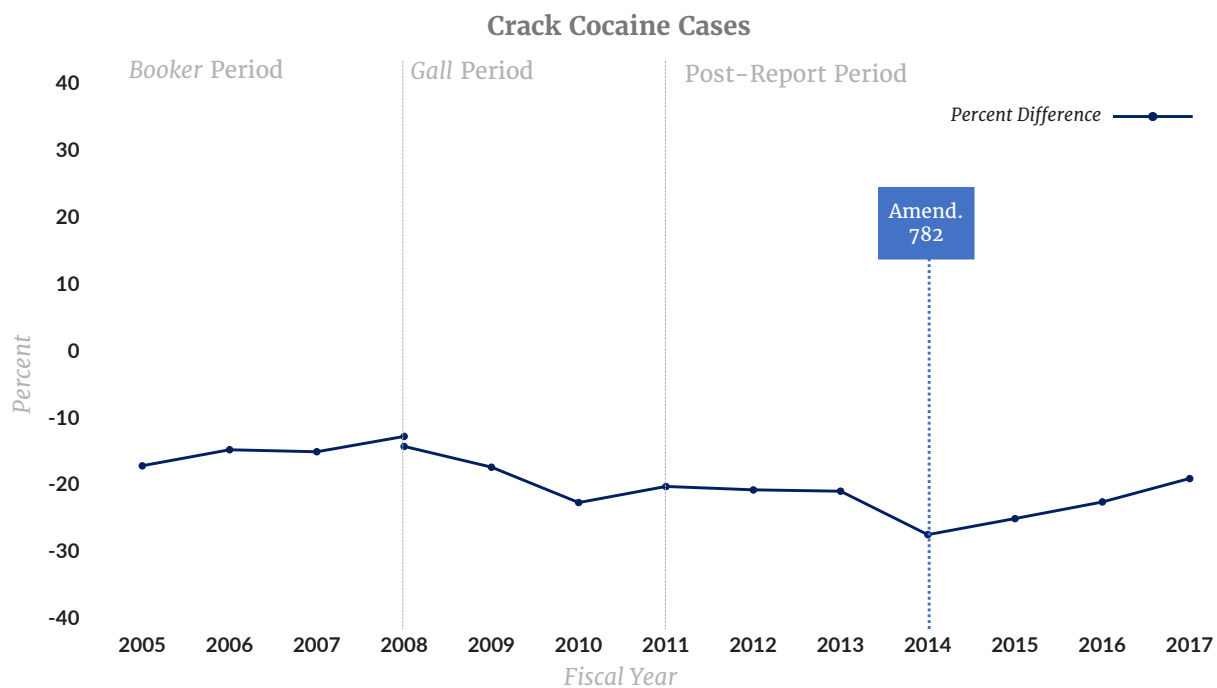
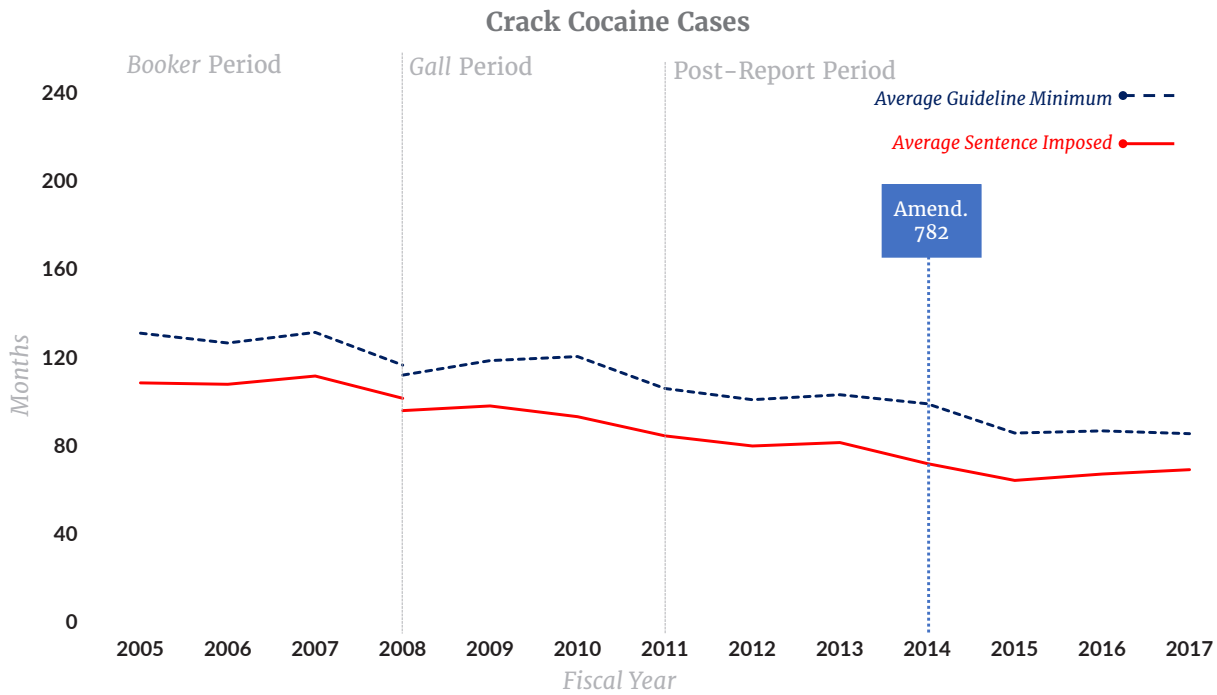


POWDER COCAINE DRUG ANALYSIS CONTINUED

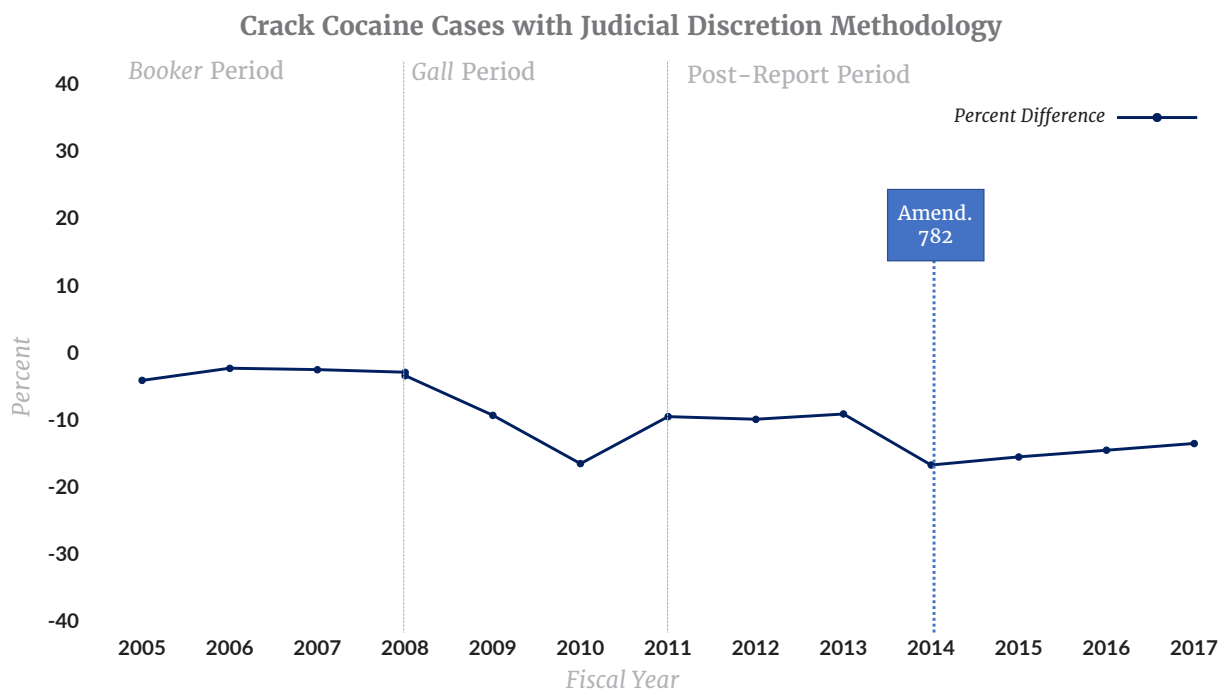
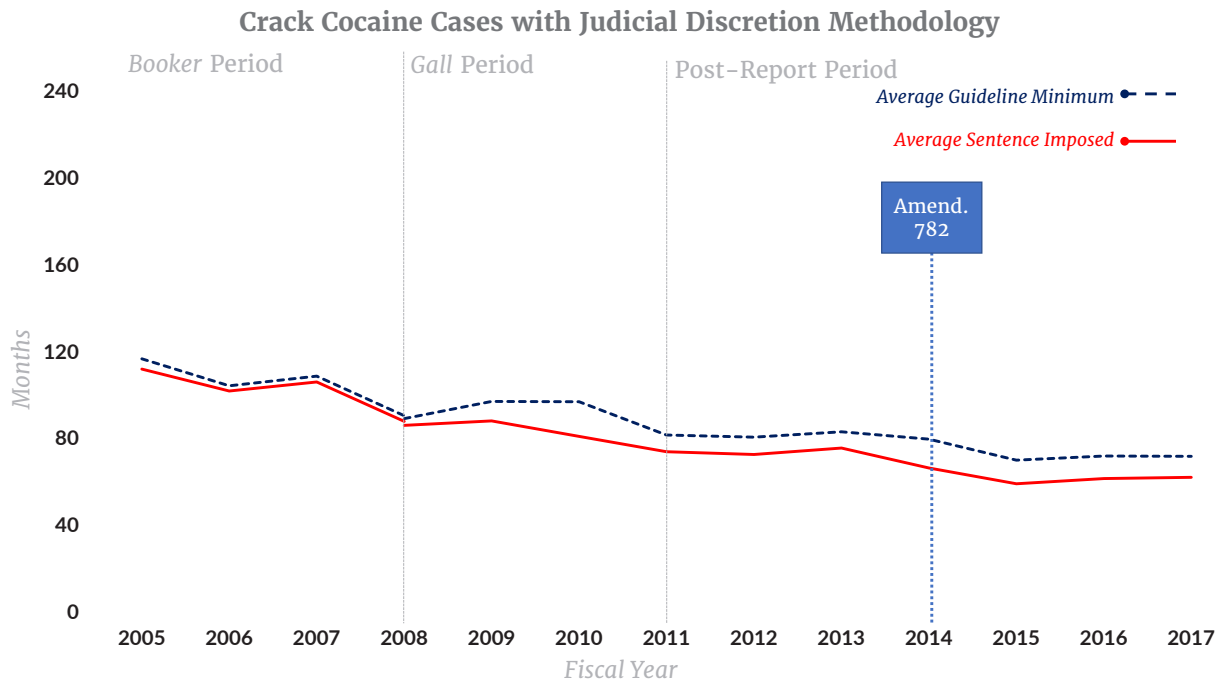
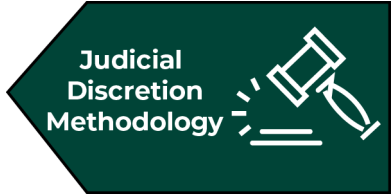




CRACK COCAINE DRUG ANALYSIS

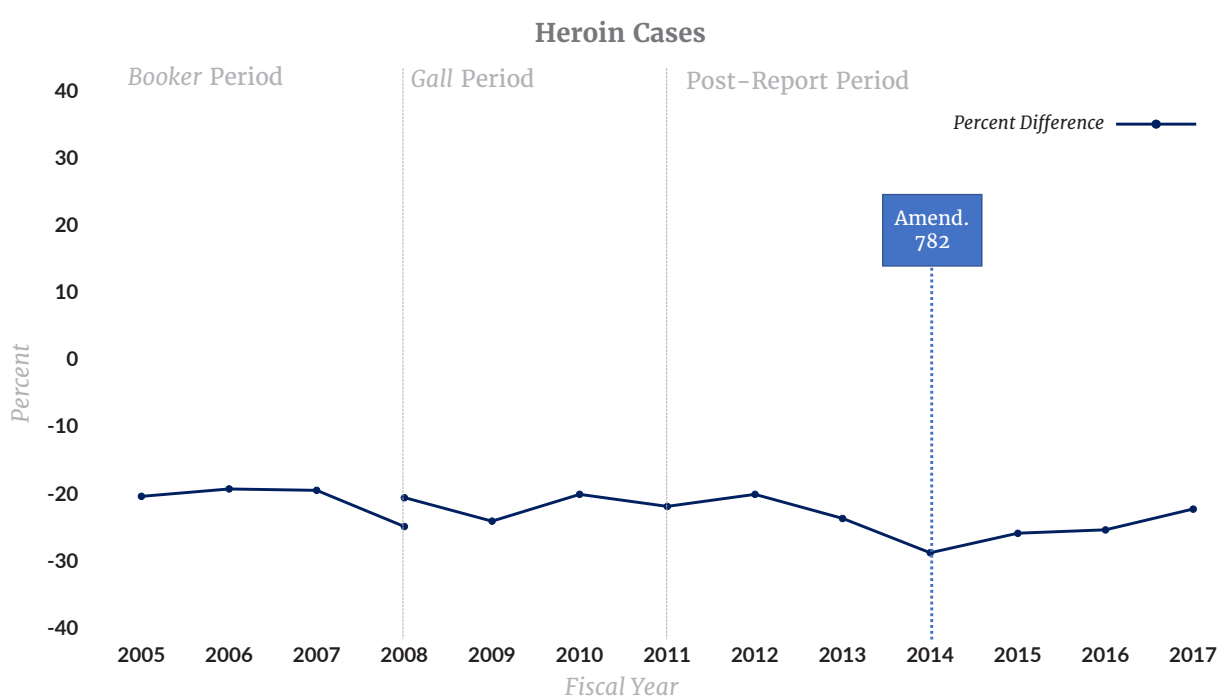
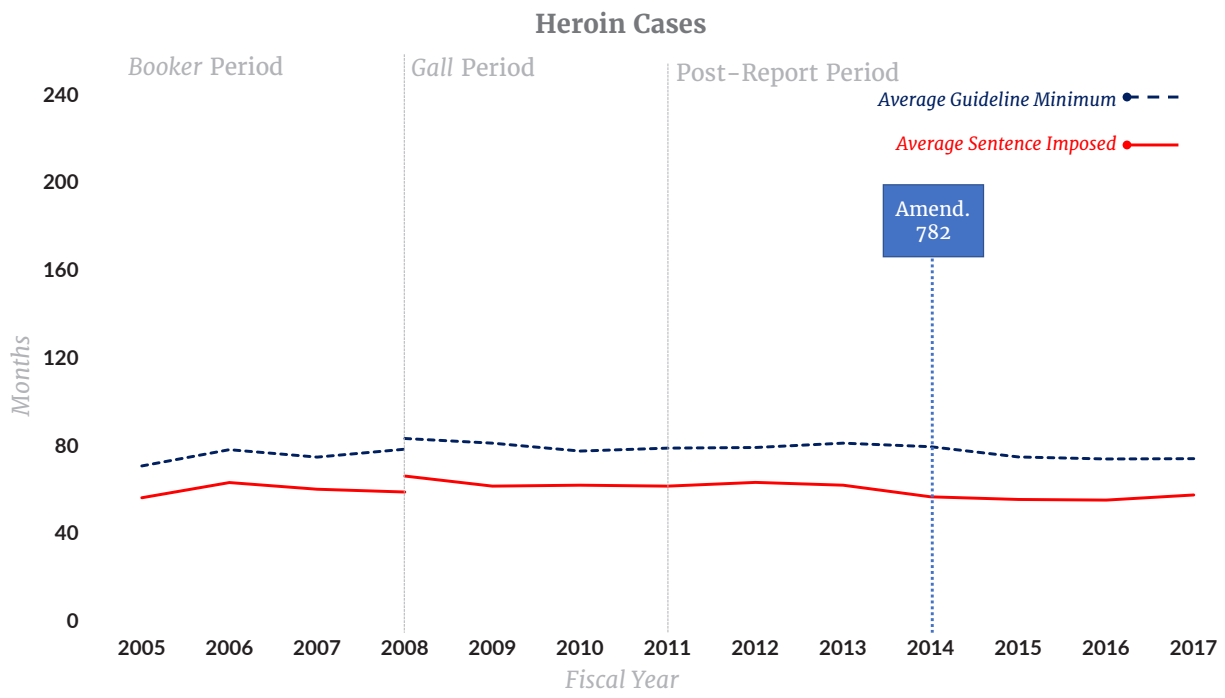


CRACK COCAINE DRUG ANALYSIS CONTINUED

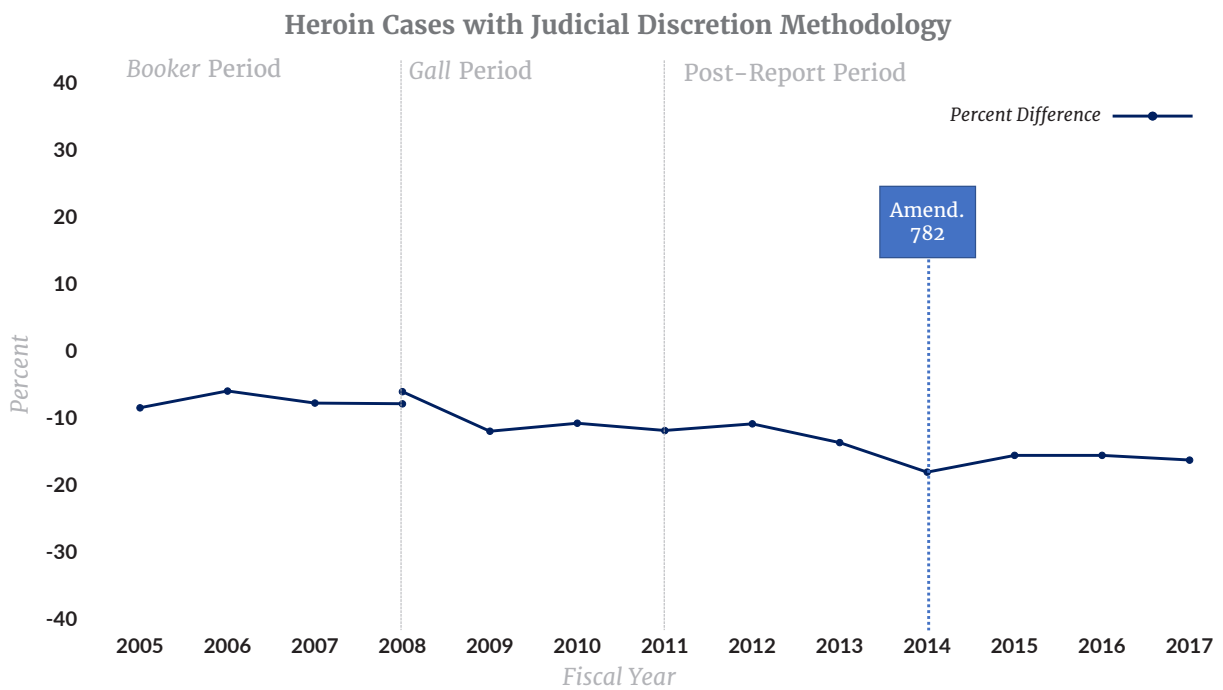
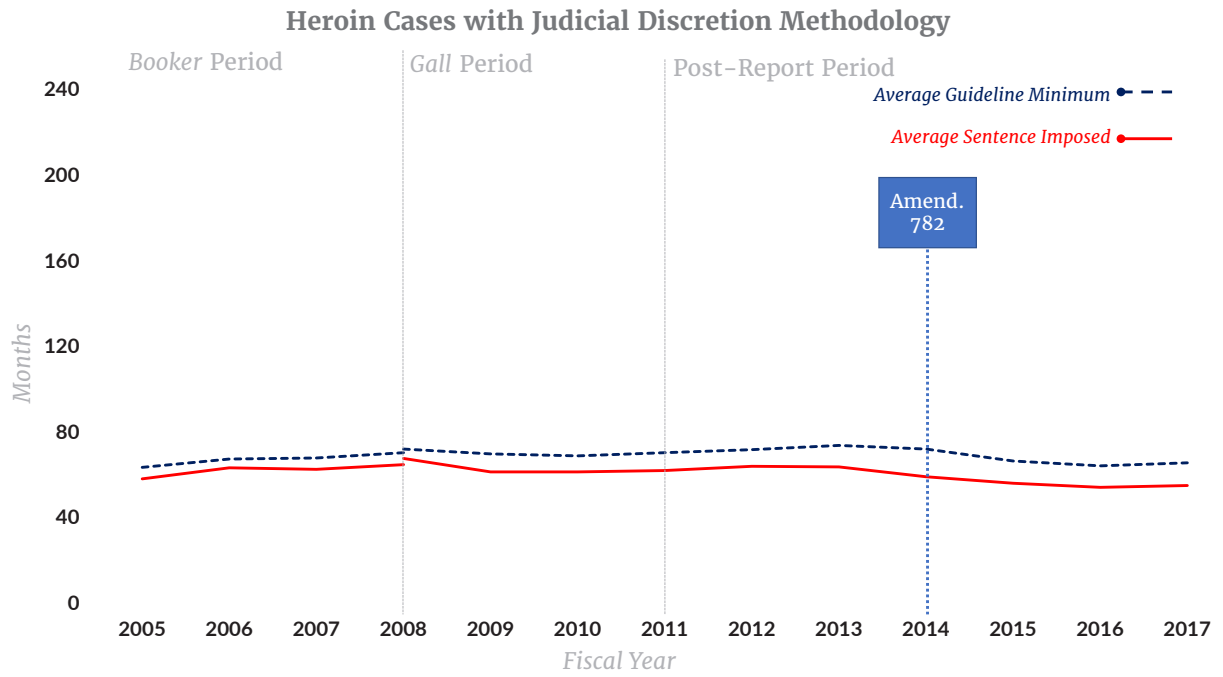
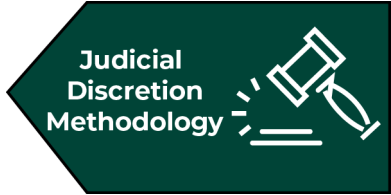




HEROIN DRUG ANALYSIS

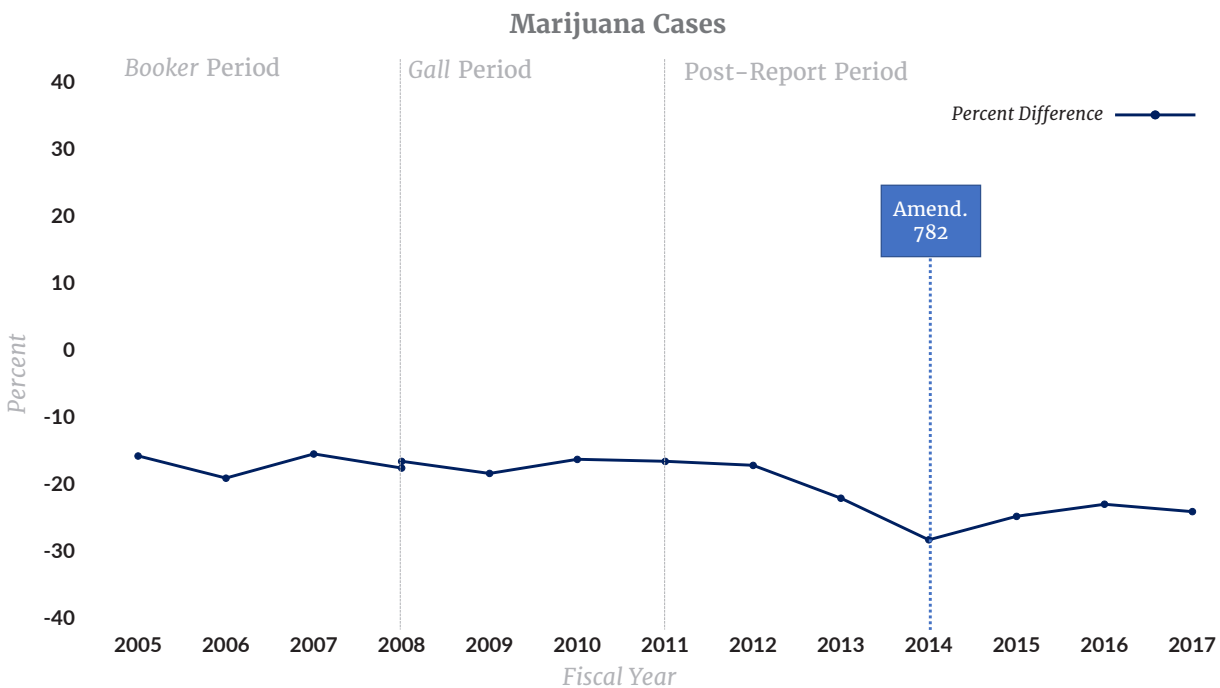
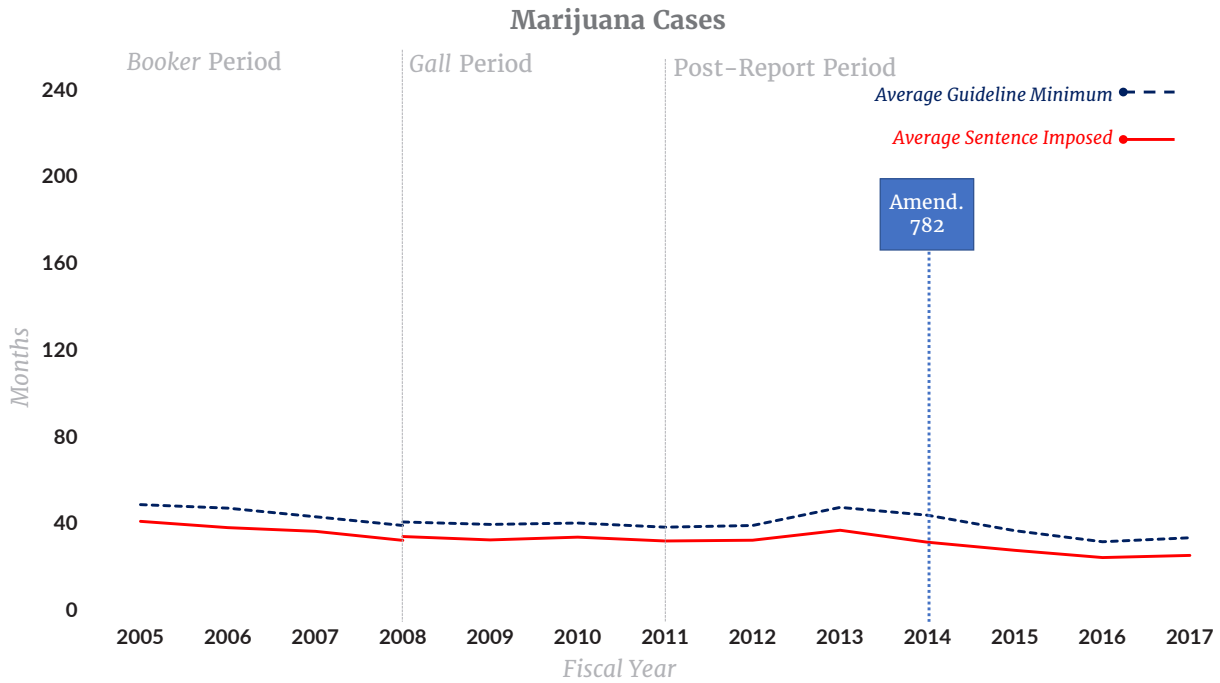


HEROIN DRUG ANALYSIS CONTINUED

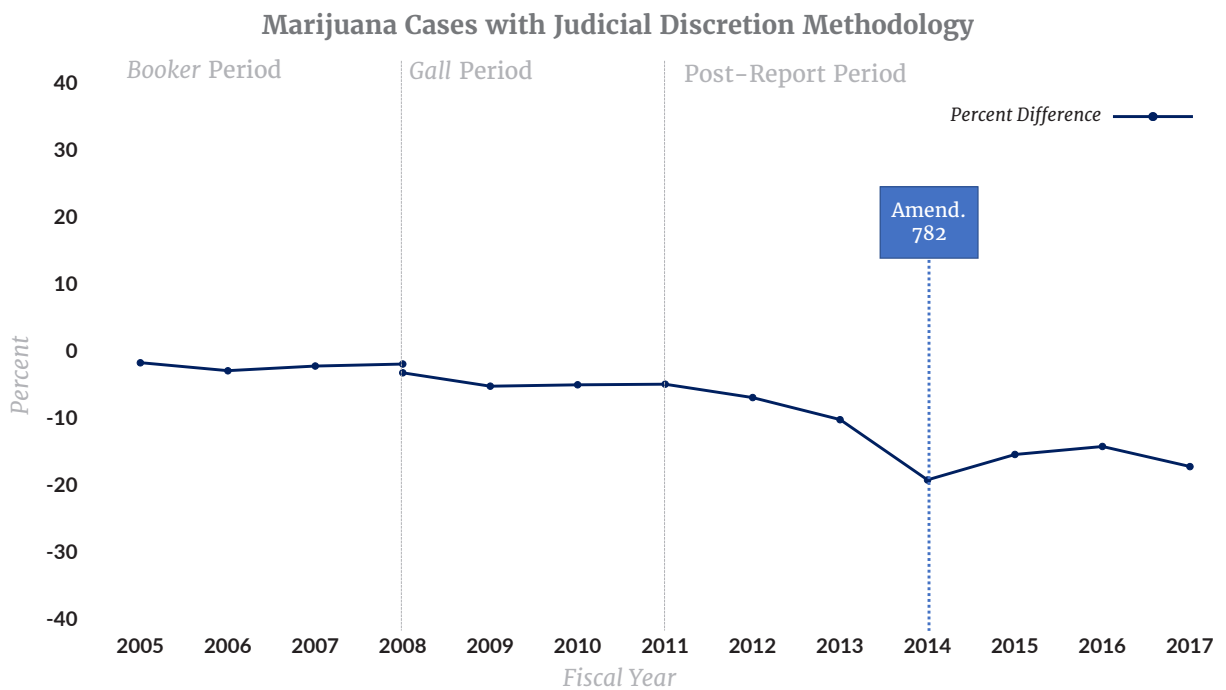
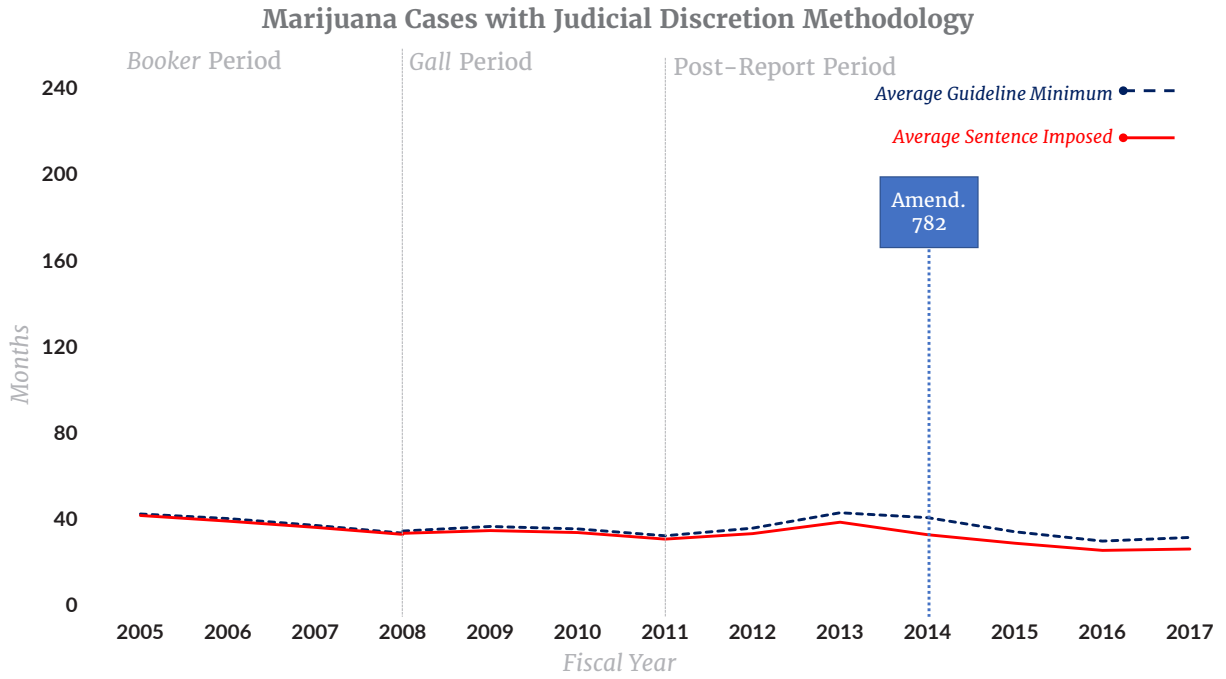
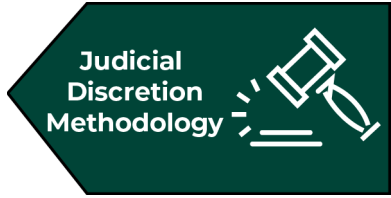




MARIJUANA DRUG ANALYSIS

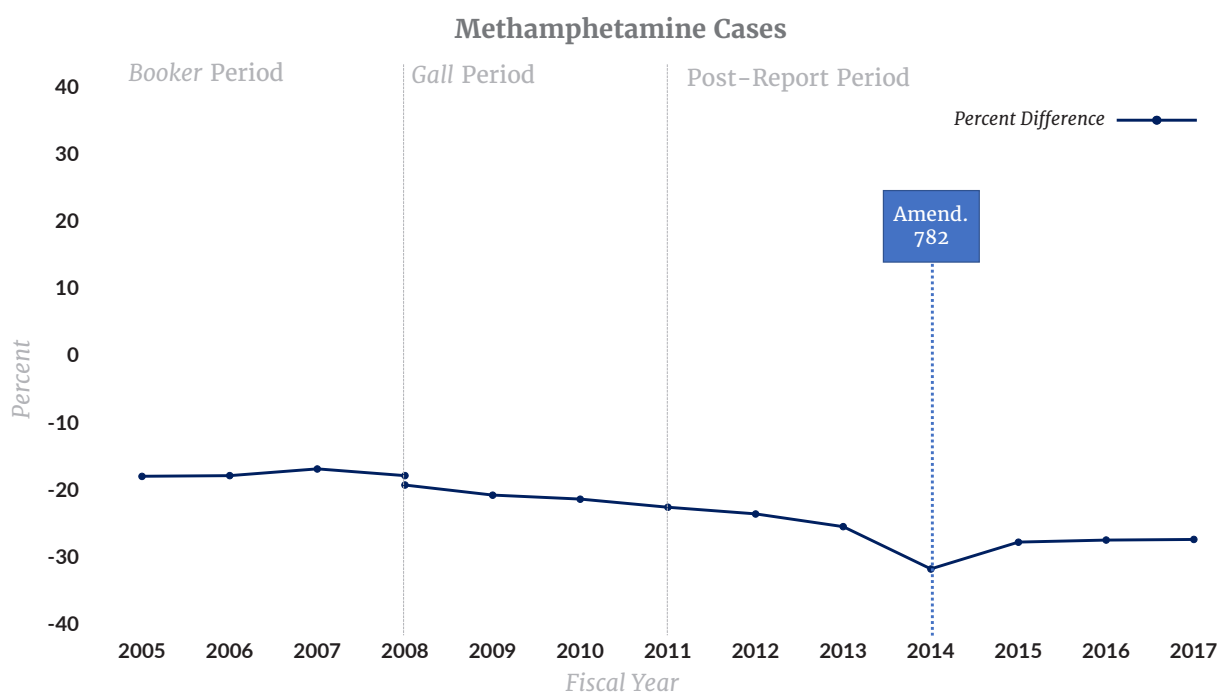
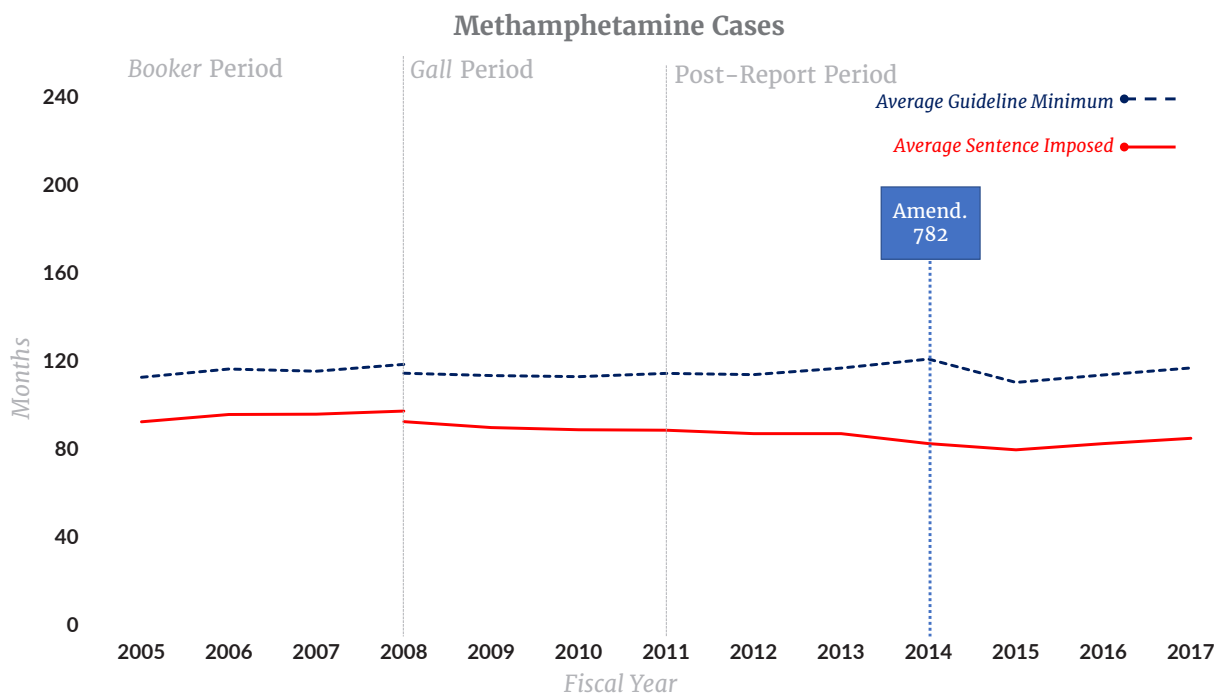


MARIJUANA DRUG ANALYSIS CONTINUED

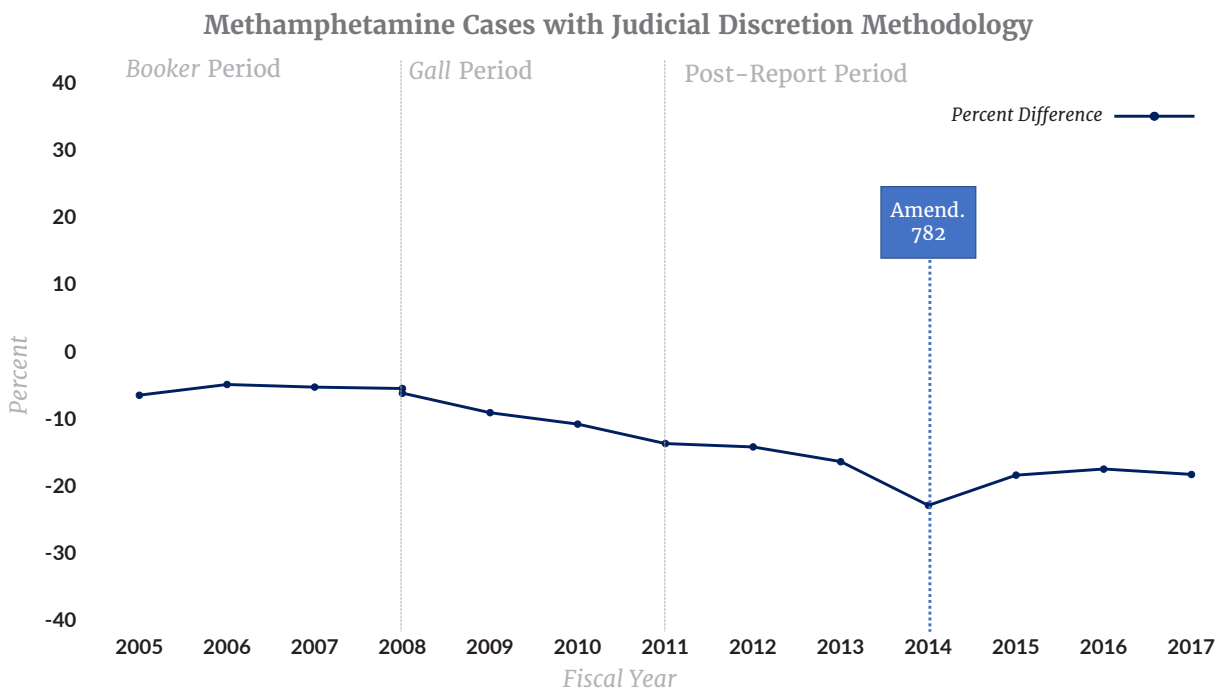
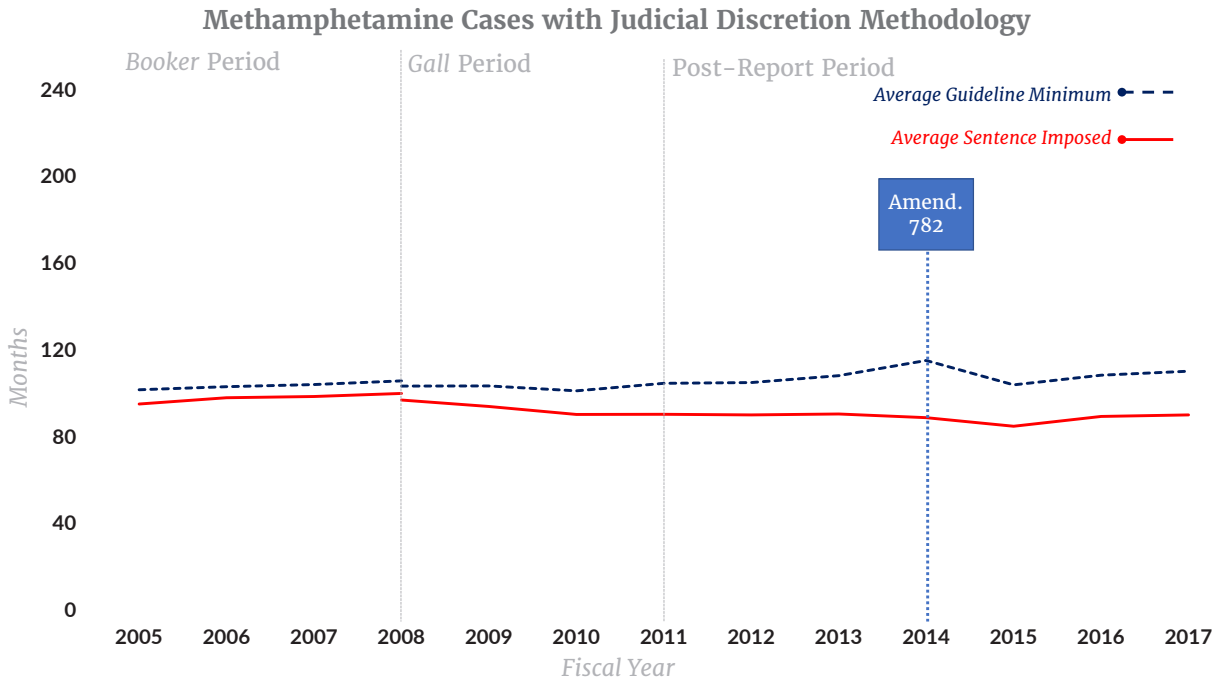
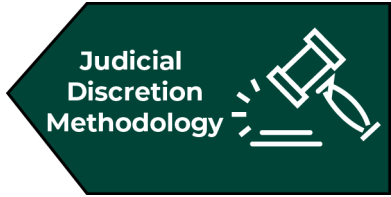




METHAMPHETAMINE DRUG ANALYSIS

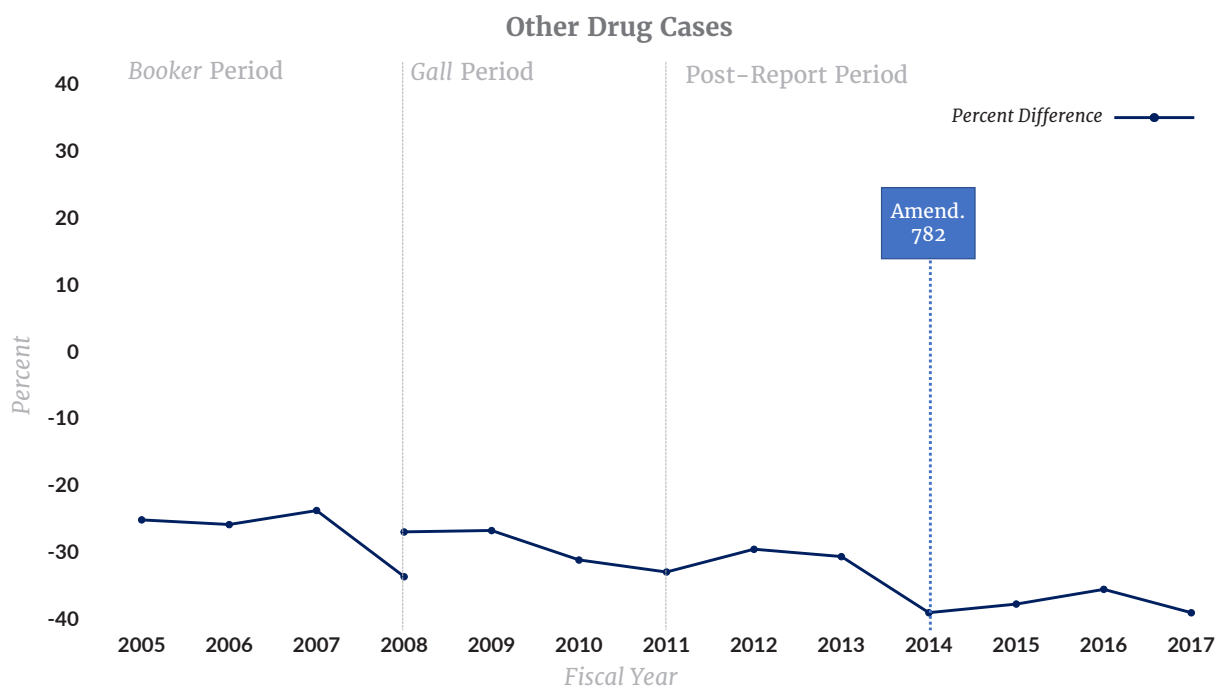
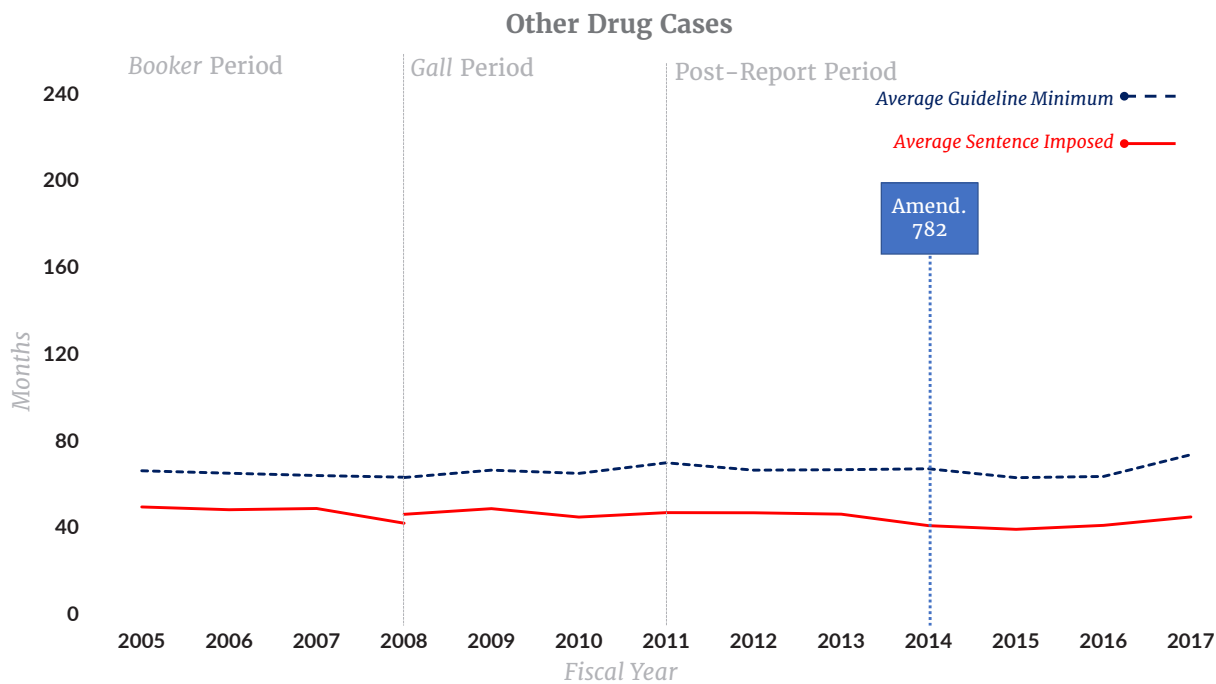


METHAMPHETAMINE DRUG ANALYSIS CONTINUED

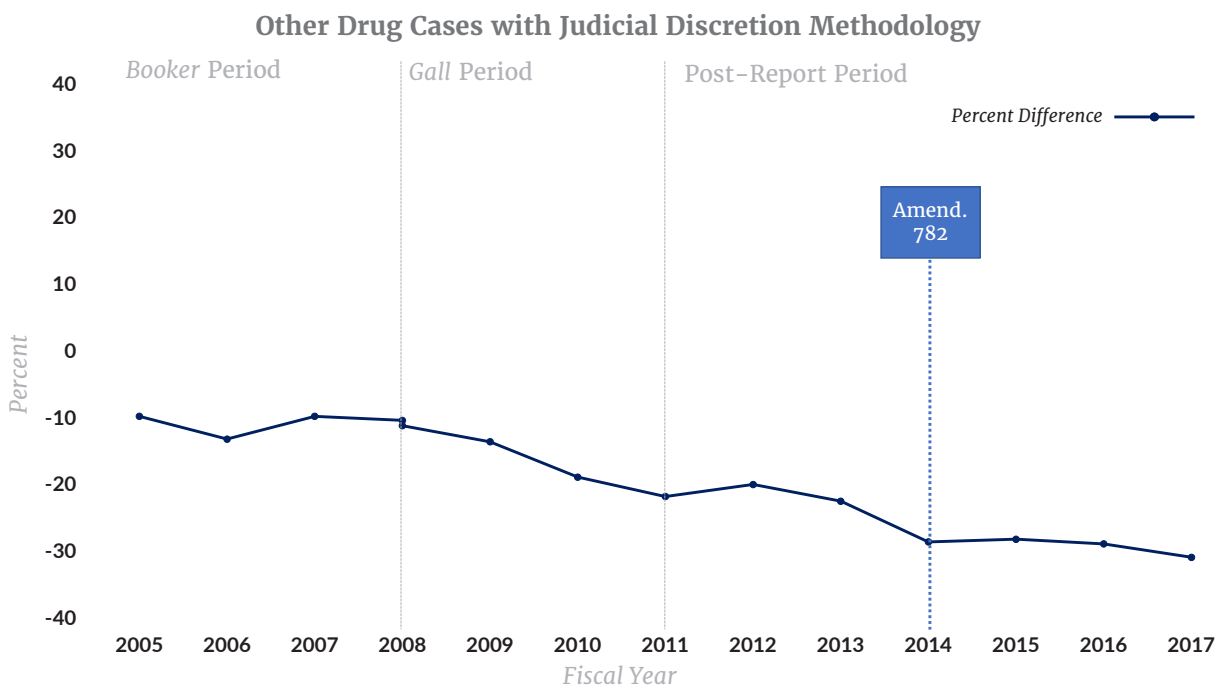
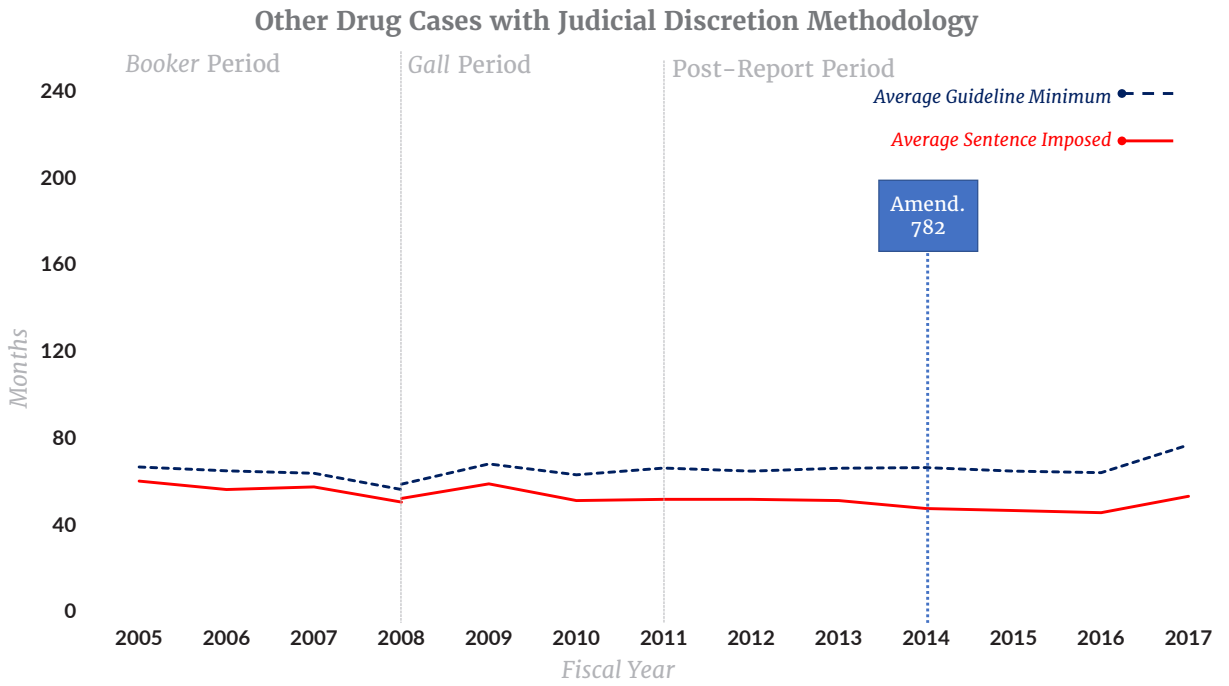
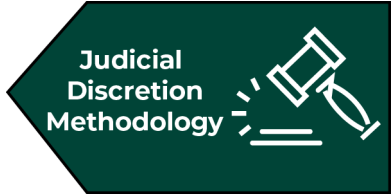




OTHER DRUG DRUG ANALYSIS



OTHER DRUG DRUG ANALYSIS CONTINUED



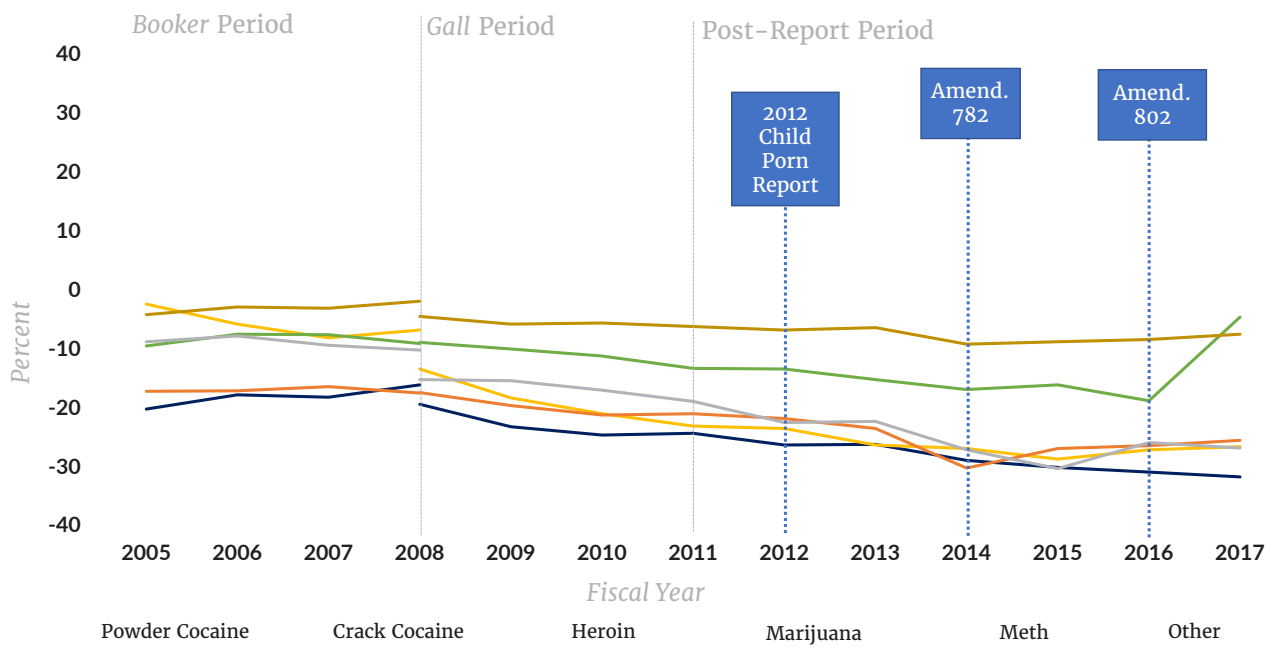


APPENDIX C

Percent Difference Graph of Combined Guideline-Specific Analyses

Using the All Cases Methodology, the graph below shows the percent difference between the guideline minimum and average sentence imposed for each individual guideline described in the main text of this report. By combining the percent difference lines included in each Guideline-Specific Analysis in the report, this graph allows for the direct comparison of each selected guideline across the *Booker*, *Gall*, and Post-Report Periods.

Percent Difference Between Average Guideline Minimum and Average Sentence Imposed



ENDNOTES

- 1 The Commission's data collection and dissemination efforts are consistent with its statutory mission. The Commission is an independent agency in the judicial branch of government. Established by the Sentencing Reform Act of 1984, its principal purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues. See 28 U.S.C. §§ 991(b)(1)(B), 995(a)(14)–(16), (20).
- 2 543 U.S. 220 (2005) (striking the mandatory provision of 18 U.S.C. § 3553(a) and rendering the guidelines advisory).
- 3 U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2012), https://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf [hereinafter 2012 *Booker* Report].
- 4 *Id.* at 3.
- 5 *Id.* at 62–68.
- 6 569 U.S. 530 (2013)
- 7 *Id.* at 544.
- 8 *Id.* at 543–44.
- 9 *Id.* at 549.
- 10 *Id.* at 544. Subsequently, in *Molina Martinez v. United States*, the Court again cited to Commission data as well as *Peugh* in reiterating that “the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar.” *Molina Martinez v. United States*, 136 S. Ct. 1338, 1345–46 (2016).
- 11 See U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT (2017), [HTTPS://WWW.USC.GOV/SITES/DEFAULT/FILES/PDF/RESEARCH-AND-PUBLICATIONS/RESEARCH-PUBLICATIONS/2017/20171114_DEMOGRAPHICS.PDF](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_DEMOGRAPHICS.PDF).
- 12 *Id.* at 2 (analysis of data from fiscal years 2012 to 2016 found that black males received a 19.1% higher sentence on average than white males).
- 13 U.S. SENTENCING COMM'N, INTRA-CITY DIFFERENCES IN FEDERAL SENTENCING PRACTICES (2019), [HTTPS://WWW.USC.GOV/SITES/DEFAULT/FILES/PDF/RESEARCH-AND-PUBLICATIONS/RESEARCH-PUBLICATIONS/2019/20190108_INTRA-CITY-REPORT.PDF](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190108_INTRA-CITY-REPORT.PDF) [hereinafter Intra-City Report].
- 14 See U.S. SENTENCING COMM'N, INTER-DISTRICT DIFFERENCES IN FEDERAL SENTENCING PRACTICES (2019), [HTTPS://WWW.USC.GOV/SITES/DEFAULT/FILES/PDF/RESEARCH-AND-PUBLICATIONS/RESEARCH-PUBLICATIONS/2020/20200122_INTER-DISTRICT-REPORT.PDF](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200122_INTER-DISTRICT-REPORT.PDF) [hereinafter Inter-District Report].
- 15 See U.S. Sentencing Comm'n, *Guidelines Manual*, App. C, amend. 664 (effective Nov. 1, 2004) (Nov. 2018) [hereinafter USSG]. Thus, this guideline only applies to cases prior to its 2004 deletion.
- 16 While the categories of cases studied in this report are similar to those in the 2012 *Booker* Report, this report focuses on the primary guideline for each of these offense types. For example, this report examines drug trafficking by analyzing cases sentenced under §2D1.1 while the 2012 *Booker* Report broadly grouped several drug guidelines in analyzing drug offenses. The guideline-specific approach in this report is consistent with the Commission's approach in the Inter-District Report.
- 17 The *Booker* Period (January 12, 2005–December 9, 2007); the *Gall* Period (December 10, 2007–September 30, 2011); and the Post-Report Period (October 1, 2011–September 30, 2017).
- 18 Two provisions were directed to the Commission, while the third was directed to sentencing judges. See 18 U.S.C. § 3553(a)(1)(6); 28 U.S.C. §§ 991(b)(1)(B), 994(f).



- 19 28 U.S.C. §§ 991(b)(1)(B), 994(f).
- 20 *United States v. Booker*, 543 U.S. 220, 263 (2005); *see also id.* at 264 (“The system remaining . . . , while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives [including avoiding unwarranted sentencing disparities].”).
- 21 518 U.S. 996 (1996).
- 22 In the PROTECT Act of 2003, Congress directed the Commission to amend the guidelines by increasing the number of sentencing enhancements in the child pornography guidelines and limited sentencing judges’ ability to depart below the guideline ranges in child pornography cases. *See* U.S. SENTENCING COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, 38-40 (Oct. 2009), [HTTPS://WWW.USCC.GOV/SITES/DEFAULT/FILES/PDF/RESEARCH-AND-PUBLICATIONS/RESEARCH-PROJECTS-AND-SURVEYS/SEX-OFFENSES/20091030_HISTORY_CHILD_PORNOGRAPHY_GUIDELINES.PDF](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_HISTORY_CHILD_PORNOGRAPHY_GUIDELINES.PDF) [hereinafter 2009 Child Pornography Report].
- 23 542 U.S. 81 (2004).
- 24 543 U.S. 220 (2005).
- 25 *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).
- 26 2012 *Booker* Report, *supra* note 3, at 60.
- 27 *Id.*
- 28 *Id.*
- 29 *Id.* at 61.
- 30 *Id.*; *see infra* at 60; *see infra* at 13-14 (explaining how substantial assistance departures under §5K1.1 may lessen the exercise of judicial discretion).
- 31 *Id.* at 60-61.
- 32 *Id.* at 60-68.
- 33 *Id.* at 60-61.
- 34 *Id.* at 61.
- 35 *Id.* at 60-68. In the report, the Commission made a number of recommendations relating to the guideline system. *See id.* at 111-15.
- 36 *Id.* at 68.
- 37 Where a drug trafficking offender is sentenced under the career offender enhancement rather than §2D1.1, that case is only included under the data for §4B1.1.
- 38 For each analysis and graphic depiction, two points are graphed in 2008 to account for the fact that the *Gall* Period began (and the *Booker* Period ended) in the middle of fiscal year 2008. The first point covers the months of the fiscal year before *Gall* was decided (Oct. 1, 2007 to Dec. 9, 2007), and the second point covers the months after *Gall* (Dec. 10, 2007 to Sept. 30, 2008).
- 39 USSG §5K1.1.
- 40 USSG §5K1.1, comment. (n.3).
- 41 Collectively, offenders sentenced under these four guidelines comprised 76.1% of the federal caseload in the 13 years covered in this report.
- 42 *See* U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES (2012), [HTTPS://WWW.USCC.GOV/SITES/DEFAULT/FILES/PDF/NEWS/CONGRESSIONAL-TESTIMONY-AND-REPORTS/SEX-OFFENSE-TOPICS/201212-FEDERAL-CHILD-PORNOGRAPHY-OFFENSES/FULL_REPORT_TO_CONGRESS.PDF](https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-FEDERAL-CHILD-PORNOGRAPHY-OFFENSES/FULL_REPORT_TO_CONGRESS.PDF) [hereinafter 2012 Child Pornography Report]; U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016), [HTTPS://WWW.USCC.GOV/SITES/DEFAULT/FILES/PDF/NEWS/CONGRESSIONAL-TESTIMONY-AND-REPORTS/CRIMINAL-HISTORY/201607_RtC-CAREER-OFFENDERS.PDF](https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-CAREER-OFFENDERS.PDF) [hereinafter 2016 Career Offender Report].

- 43 In total, 111,467 cases were excluded due to missing information. Additionally, 400,500 cases were removed from the analysis based on the five Methodology exclusions. The percentage excluded under each exclusion can be broken down into the following: (1) 19.6% had their guideline minimums trumped by a statutory mandatory minimum or were subject to a mandatory minimum sentence under the Armed Career Criminal Act; (2) 48.5% had a substantial assistance or fast-track departure; (3) 8.6% had at least one mandatory consecutive statutory minimum sentence under a statute such as section 924(c); (4) 19.4% had a guideline minimum of life imprisonment or involved an upward departure and variance to life imprisonment; and (5) 40.1% had guideline minimums of less than ten months. Some cases fell within more than one of these groups, which is why the above percentages add up to more than 100%.
- 44 See *Gall v. United States*, 552 U.S. 38, 49–50 (2007).
- 45 2012 *BOOKER* Report, *supra* note 3, at 60–68.
- 46 Collectively, offenders sentenced under these four guidelines comprised 76.8% of the federal caseload in fiscal year 2019, and 76.1% of the caseload in the years covered in this study.
- 47 For example, in fiscal year 2019, 30.2% of offenders sentenced under §2G2.2 received a within-guideline sentence, compared to the overall within-guideline rate of 51.4%.
- 48 2012 *BOOKER* Report, *supra* note 3, at 67. In 2001, §2F1.1 was deleted and consolidated with §2B1.1.
- 49 *Id.*
- 50 3,815 cases were excluded due to having incomplete documentation, a base offense level other than 6 or 7, or a discrepancy between the loss amount for which the defendant was held accountable and a specific offense characteristic that was applied.
- 51 2012 *BOOKER* Report, *supra* note 3, at 67.
- 52 USSG App. C, amend. 791 and 792 (effective November 1, 2015).
- 53 USSG App. C, amend. 792 (Reason for Amendment) (effective Nov. 1, 2015).
- 54 In total, 3,869 cases were excluded due to missing information. Additionally, 52,551 cases were excluded based on the five Methodology exclusions. The percentage excluded under each Methodology exclusion can be broken down into the following: (1) 13.8% had their guideline minimums trumped by a statutory mandatory minimum or were subject to a mandatory minimum sentence under the Armed Career Criminal Act; (2) 26.2% had a substantial assistance or fast-track departure; (3) 13.9% had at least one mandatory consecutive statutory minimum sentence under a statute such as section 924(c); (4) 34.2% had a guideline minimum of life imprisonment or involved an upward departure and variance to life imprisonment; and (5) 66.7% had guideline minimums of less than ten months. Some cases fell within more than one of these groups, which is why the above percentages add up to more than 100%.
- 55 The Commission also analyzed the effect of adding cases with substantial assistance departures back into the Judicial Discretion Methodology. Cases with substantial assistance departures represent 11.3% (10,975 cases) of the 97,504 economic offense cases in the All Cases Methodology, with an average sentence reduction of 57.4%. Adding those cases substantially widens the spread between the guideline minimum and sentence to be even wider than the All Cases Methodology, reflecting that substantial assistance departures are a large contributor to the spread. See Appendix A. The overall trend remains similar, showing a greater spread in the Post-Report Period than previous periods but a stabilization in that spread in recent years. *Id.*
- 56 2012 *BOOKER* Report, *supra* note 3, at 51. Section 2D1.2, which is not included in this report, covers drug offenses occurring near protected locations or involving underage or pregnant individuals.
- 57 *Id.* at 62.
- 58 USSG App. C, amend. 782 (effective Nov. 1, 2014) (reducing drug trafficking offense penalties across all drug types); USSG App. C, amend. 788 (effective Nov. 1, 2014) (making the two-level reduction for all drug types retroactive with the proviso that no offender may be released before November 1, 2015).
- 59 In March of 2014, the Department of Justice issued guidance to all United States Attorneys advising prosecutors not to object to a defense request for a two-level variance from the sentencing range calculated under the then-current version of the *Guidelines Manual* in drug trafficking offenses, provided that several other conditions were met. See Department of Justice, *Attorney Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshes Penalties for Most Serious Drug Traffickers* (Mar. 13, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-urges-changes-federal-sentencing-guidelines-reserve-harshes>. Additionally, judges and probation offices reported that in some districts, the prosecutors



themselves requested such variances. See U.S. SENTENCING COMM'N, 2014 ANNUAL REPORT (2015), <https://www.ussc.gov/about/annual-report/archive/annual-report-2014>.

60 USSG App. C., amend. 782 (Reason for Amendment) (effective Nov. 1, 2014).

61 The analysis in the drug-specific percentage graph was conducted under the All Cases Methodology so it includes all cases sentenced during the relevant time periods.

For the individual drug type analysis across each year of this study, refer to Appendix B of this report. Appendix B includes graphs displaying the raw number difference between the average guideline minimum and sentence imposed as well as percentage difference under the All Cases Methodology and the Judicial Discretion Methodology.

62 See Appendix B. The individual drug types showed the following peak percentages in 2014: 27.8% (powder cocaine), 27.5% (crack cocaine), 28.8% (heroin), 28.3% (marijuana), 31.8% (methamphetamine), and 39.1% (all other drugs).
Id.

63 *Id.*

64 *Supra* note 58.

65 In total, 9,214 cases were excluded due to missing information. Additionally, 116,661 cases were removed from the analysis based on the five Methodology exclusions. The percentage excluded under each Methodology exclusion can be broken down into the following: (1) 38.5% had their guideline minimum trumped by a statutory mandatory minimum or were subject to a mandatory minimum sentence under the Armed Career Criminal Act; (2) 68.3% had a substantial assistance or fast-track departure; (3) 10.5% had at least one mandatory consecutive statutory minimum sentence under a statute such as section 924(c); (4) 3.4% had a guideline minimum of life imprisonment or involved an upward departure and variance to life imprisonment; and (5) 6.8% had guideline minimums of less than ten months. Some cases fell within more than one of these groups, which is why the above percentages add up to more than 100%.

As previously noted, drug trafficking offenders whose guideline ranges were set by the career offender guideline rather than §2D1.1 are also omitted because they are counted under this report's §4B1.1 analysis.

66 Adding cases with substantial assistance departures back into the Judicial Discretion Methodology produced similar trends. Drug trafficking cases with substantial assistance departures represent 18.3% (47,598 cases) of the 259,944 drug trafficking cases in the All Cases Methodology, with an average substantial assistance sentence reduction of 46.1%. Adding those cases substantially widens the spread between the guideline minimum and sentence to be nearly identical to the All Cases Methodology. See Appendix A. This reflects both the large numbers of drug trafficking substantial assistance departure cases and the large amounts of departures granted. Like the other analyses, the results show a greater spread in the Post-Report Period than the *Booker* and *Gall* Periods but a stabilization in that spread in recent years.

67 2012 *BOOKER* Report, *supra* note 3, at 51.

68 *Id.* at 62–63.

69 In total, 1,622 cases were excluded due to missing information. Additionally, 14,632 cases were removed from the analysis based on the five Methodology exclusions. The percentage excluded under each Methodology exclusion can be broken down into the following: (1) 50.3% had their guideline minimums trumped by a statutory mandatory minimum or were subject to a mandatory minimum sentence under the Armed Career Criminal Act; (2) 44.6% had a substantial assistance or fast-track departure; (3) 9.5% had at least one mandatory consecutive statutory minimum sentence under a statute such as section 924(c); (4) 5.0% had a guideline minimum of life imprisonment or involved an upward departure and variance to life imprisonment; and (5) 13.8% had guideline minimums of less than ten months. Some cases fell within more than one of these groups, which is why the above percentages add up to more than 100%.

70 Adding cases with substantial assistance departures back into the Judicial Discretion Methodology produced similar trends. Firearms cases with substantial assistance departures represent 6.6% (5,018 cases) of the 75,914 firearms cases in the All Cases Methodology, with an average substantial assistance sentence reduction of 43.3%. Adding those cases back in slightly widens the spread between the guideline minimum and sentence to be similar to the All Cases Methodology. See Appendix A. Like the other analyses, the results show a greater spread in the Post-Report Period than the *Booker* and *Gall* Periods but a stabilization in that spread in the years following 2014.

71 2012 *BOOKER* Report, *supra* note, at 51. §2L1.1, which is not included in this report, covers smuggling, transporting, or harboring an unlawful alien.

72 *Id.* at 62–65.

- 73 See USSG App. C, amend. 802 (effective Nov. 1, 2016).
- 74 *Id.*
- 75 *Id.*
- 76 In total, 2,995 cases were excluded due to missing information. Additionally, 118,124 cases were removed from the analysis based on the five Methodology exclusions. The percentage excluded under each Methodology exclusion can be broken down into the following: (1) 0.1% had their guideline minimums trumped by a statutory mandatory minimum or were subject to a mandatory minimum sentence under the Armed Career Criminal Act; (2) 45.1% had a substantial assistance or fast-track departure; (3) 0.1% had at least one mandatory consecutive statutory minimum sentence under a statute such as section 924(c); (4) 25.2% had a guideline minimum of life imprisonment or involved an upward departure and variance to life imprisonment; and (5) 61.0% had guideline minimums of less than ten months. Some cases fell within more than one of these groups, which is why the above percentages add up to more than 100%.
- 77 2012 *Booker* Report, *supra* note 3, at 60.
- 78 Adding cases with substantial assistance departures back into the Judicial Discretion Methodology produced similar trends. Illegal reentry cases with substantial assistance departures represent 0.4% (817 cases) of the 201,682 illegal reentry cases in the All Cases Methodology, with an average substantial assistance sentence reduction of 39.3%. Adding those cases back in slightly widens the spread between the guideline minimum and sentence, but less so than other guidelines given that there are few illegal reentry cases with substantial assistance departures. See Appendix A. Like the other analyses, the results show a greater spread in the Post-Report Period than the *Booker* and *Gall* Periods but a sharp drop in that spread following the 2016 §2L1.2 guideline amendment.
- 79 See 2012 Child Pornography Report, *supra* note 47, at 213.
- 80 2012 *Booker* Report, *supra* note 3, at 67–68.
- 81 *Id.*
- 82 *Id.*
- 83 2012 Child Pornography Report, *supra* note 47.
- 84 *Id.* at 1.
- 85 *Id.* at 5.
- 86 *Id.* at 315. In the PROTECT Act of 2003, Congress directly amended the guidelines by increasing the number of sentencing enhancements in the child pornography guidelines and limited sentencing judges' ability to depart below the guideline ranges in child pornography cases. See 2009 Child Pornography Report, *supra* note 22. Among other things, the Act also created a new five-year mandatory minimum penalty for receipt, transportation, and distribution offenses, raised the mandatory minimum penalty for production offenses from ten to 15 years, and raised the statutory maximum penalties for all production and non-production offenses. *Id.*
- 87 2012 Child Pornography Report, *supra* note 47, at 316.
- 88 Though the child pornography guidelines have not been substantially amended, in 2016, the Commission amended the child pornography guidelines to address circuit conflicts and application issues regarding enhancements for infant and toddler victims and distribution of child pornography. See USSG app. C, amend. 801 (Reason for Amendment) (effective Nov. 1, 2016).
- 89 As previously explained, this includes cases sentenced under §2G2.4, which was deleted in 2004. See *supra* note 15.
- 90 Cases cross-referenced to §2G1.1, the child pornography guideline that includes production cases, were also omitted.
- 91 In total, 409 cases were excluded due to missing information. Additionally, 1,800 cases were removed from the analysis based on the five Methodology exclusions. The percentage excluded under each Methodology exclusion can be broken down into the following: (1) 72.1% had their guideline minimums trumped by a statutory mandatory minimum or were subject to a mandatory minimum sentence under the Armed Career Criminal Act; (2) 28.5% had a substantial assistance or fast-track departure; (3) 1.1% had at least one mandatory consecutive statutory minimum sentence under a statute such



as section 924(c); (4) 2.2% had a guideline minimum of life imprisonment or involved an upward departure and variance to life imprisonment; and (5) 0.1% had guideline minimums of less than 10 months. Some cases fell within more than one of these groups, which is why the above percentages add up to more than 100%.

92 Adding cases with substantial assistance departures back into the Judicial Discretion Methodology produced similar trends. Non-production child pornography cases with substantial assistance departures represent 2.4% (436 cases) of the 18,406 cases in the All Cases Methodology, with an average substantial assistance sentence reduction of 43.4%. Adding those cases slightly widens the spread between the guideline minimum and sentence, but less so than other guidelines given that there are relatively few non-production child pornography cases with substantial assistance departures. See Appendix A. Like the other analyses, the results show an increasing spread from the *Booker* and *Gall* Periods into the Post-Report Period but an apparent stabilization in recent years following the peak spread in 2015.

93 2016 Career Offender Report, *supra* note 47.

94 Unlike the offense-specific guidelines discussed above, the career offender guideline is an enhancement that applies to adult defendants whose instant offense is a “crime of violence” or “controlled substance offense” and who have at least two prior felony convictions that are also a “crime of violence” or “controlled substance offense.” USSG §4B1.1(a). Offenders qualifying for the career offender enhancement are subject to an enhanced base offense level and an automatic Criminal History Category of VI. USSG §4B1.1(b).

95 28 U.S.C. § 994(h).

96 *Id.*

97 2016 Career Offender Report, *supra* note 47.

98 *Id.* at 3.

99 *Id.* at 2. To achieve greater sentencing uniformity, the Commission recommended that the career offender directive be amended to differentiate between career offenders with different types of criminal records, focusing on punishing more severely those with a “crime of violence” rather than those qualifying based solely on drug trafficking offenses. *Id.* at 3.

100 Drug trafficking offenders sentenced under §4B1.1 are included in this analysis and not included in the §2D1.1 analysis.

101 See 2016 Career Offender Report, *supra* note 47, at 18.

102 In total, 816 cases were excluded due to missing information. Additionally, 10,478 cases were removed from the analysis based on the five Methodology exclusions. The percentage excluded under each Methodology exclusion can be broken down into the following: (1) 26.9% had their guideline minimums trumped by a statutory mandatory minimum or were subject to a mandatory minimum sentence under the Armed Career Criminal Act; (2) 69.8% had a substantial assistance or fast-track departure; (3) 29.7% had at least one mandatory consecutive statutory minimum sentence under a statute such as section 924(c); (4) 10.7% had a guideline minimum of life imprisonment or involved an upward departure and variance to life imprisonment; and (5) 0.0% had guideline minimums of less than ten months. Some cases fell within more than one of these groups, which is why the above percentages add up to more than 100%.

103 Adding cases with substantial assistance departures back into the Judicial Discretion Methodology produced similar trends. Career offender cases with substantial assistance departures represent 21.6% (5,949 cases) of the 27,547 career offender cases in the All Cases Methodology, with an average substantial assistance sentence reduction of 45.4%. Adding those cases widens the spread between the average guideline minimum and average sentence imposed to be slightly wider than the All Cases Methodology. See Appendix A. Like the other analyses, the results show a steadily increasing spread since the end of the *Booker* Period.

104 See *Peugh v. United States*, 569 U.S. 530, 544 (2013).



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