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# **Final Report on the Impact of United States v. Booker On Federal Sentencing**



UNITED STATES SENTENCING COMMISSION  
March 2006

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# FINAL REPORT ON THE IMPACT OF UNITED STATES v. BOOKER ON FEDERAL SENTENCING



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# TABLE OF CONTENTS

<i>Executive Summary</i> .....	iv
A. INTRODUCTION .....	iv
B. POST-BOOKER APPELLATE JURISPRUDENCE .....	v
C. IMPLEMENTATION OF THE ADVISORY GUIDELINE SYSTEM .....	v
D. FINDINGS FROM DATA ANALYSIS .....	vi
1. National Sentencing Trends .....	vi
2. Regional and Demographic Differences in Sentencing Practices.....	viii
3. Specific Sentencing Issues .....	ix
a. Cooperation Reductions without a Government Motion .....	ix
b. Sex Offenses .....	ix
c. Crack Cocaine Offenses.....	x
d. First Offenders .....	x
e. Career Offenders .....	x
f. Early Disposition Programs .....	xi
E. CONCLUSION.....	xi

## *Chapter 1*

INTRODUCTION .....	1
A. OVERVIEW OF REPORT .....	1
B. HISTORICAL DEVELOPMENT OF THE FEDERAL SENTENCING GUIDELINE SYSTEM....	2
1. The Statutory Requirements of the Sentencing Reform Act .....	2
2. Promulgation of the Sentencing Guidelines .....	5
C. LEGAL CHALLENGES TO THE OPERATION OF THE GUIDELINES .....	7
D. THE SUPREME COURT’S DEVELOPING SIXTH AMENDMENT JURISPRUDENCE.....	9
E. THE BLAKELY DECISION AND ITS RESULTING IMPACT ON THE FEDERAL SENTENCING GUIDELINE SYSTEM .....	12
F. UNITED STATES V. BOOKER .....	14

## *Chapter 2*

POST-BOOKER APPELLATE JURISPRUDENCE.....	20
A. INTRODUCTION .....	20
B. APPLICATION AND INTERPRETATION OF THE GUIDELINES.....	20
C. APPLICATION OF THE 18 U.S.C. § 3553(a) FACTORS .....	23
D. REASONABLENESS REVIEW .....	24
E. JURISDICTION.....	31
F. OTHER APPELLATE SENTENCING ISSUES .....	32
1. Crack and Powder Cocaine .....	32
2. Early Disposition Programs .....	33
G. STATUTORY PENALTY SCHEMES.....	33
1. Armed Career Criminal Act.....	33

2. Mandatory Minimum Sentences .....	34
H. APPELLATE COURT JURISPRUDENCE CONTINUES TO EVOLVE.....	35

*Chapter 3*

IMPLEMENTATION OF THE ADVISORY GUIDELINE SYSTEM.....	37
A. EMPHASIS ON DOCUMENT SUBMISSION REQUIREMENTS .....	37
B. REAL-TIME DATA COLLECTION AND REPORTING.....	38
C. TESTIMONY BEFORE CONGRESS .....	40
D. PUBLIC HEARING ON THE PRESENT AND FUTURE IMPACT OF BOOKER ON FEDERAL SENTENCING.....	41
E. GUIDELINES EDUCATION AND TRAINING.....	42

*Chapter 4*

ANALYSIS OF COMMISSION SENTENCING DATA: TRENDS IN FEDERAL SENTENCING PRACTICES .....	44
A. INTRODUCTION .....	44
B. MAJOR FINDINGS .....	46
C. ASSESSING TRENDS IN FEDERAL SENTENCING PRACTICES .....	47
1. Introduction.....	47
2. Changes in Rates of Within-Range and Out-of-Range Sentences.....	49
a. The Impact of Events Prior to the PROTECT Act .....	49
b. The PROTECT Act.....	52
c. The Immediate Effect of <i>Booker</i> on Rates of Within-and Out-of-Range Sentences .....	57
3. Changes in the Extent that Below-Range Sentences Fall below the Range .....	63
4. Changes in Sentence Length and the Use of Alternatives to Imprisonment.....	69
a. Changes in Average Recommended and Imposed Sentence Lengths .....	69
b. Changes in Sentence Type.....	73
c. Changes in Sentence Length.....	75
D. FACTORS RELIED UPON AND REASONS CITED FOR IMPOSITION OF BELOW-RANGE SENTENCES.....	77
1. Factors relied upon for imposition for below-range sentences.....	77
2. Reasons cited for imposition for below-range sentences.....	78

*Chapter 5*

ANALYSIS OF COMMISSION SENTENCING DATA: REGIONAL AND DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES.....	84
A. INTRODUCTION AND MAJOR FINDINGS .....	84
B. DIFFERENCES IN CIRCUIT AND DISTRICT SENTENCING PRACTICES .....	85
1. Differences in Circuit Sentencing Practices .....	86
2. Differences in District Sentencing Practices.....	89

C.	DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES .....	105
1.	Use of Multivariate Analysis .....	105
2.	Results.....	106

*Chapter 6*

	ANALYSIS OF COMMISSION DATA: IMPACT OF BOOKER ON SPECIFIC OFFENSE-AND OFFENDER-ISSUES.....	110
A.	INTRODUCTION .....	110
B.	FINDINGS .....	110
1.	Cooperation Reductions without a Government Motion.....	110
2.	Sex Offenses .....	110
3.	Crack Cocaine Offenses.....	111
4.	First Offenders .....	112
5.	Career Offenders.....	112
6.	Early Disposition Programs .....	112
C.	COOPERATION REDUCTIONS WITHOUT A GOVERNMENT MOTION .....	112
D.	SEX OFFENSES .....	115
1.	Criminal Sexual Abuse Offenses.....	116
2.	Sexual Exploitation Offenses.....	122
E.	CRACK COCAINE OFFENSES.....	126
F.	FIRST OFFENDERS AND CAREER OFFENDERS .....	131
1.	First Offenders .....	132
2.	Career Offenders.....	136
G.	EARLY DISPOSITION PROGRAMS AND OTHER “FAST TRACK” SENTENCING PRACTICES.....	140

*Chapter 7*

	CONCLUSION.....	143
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APPENDIX

A.	Statement of Reasons form (A0245B (rev. 06/05)).....	A-1
B.	Methodology for Data Collection and Analysis .....	B-1
C.	Summary of the Public Hearing Testimony.....	C-1
D.	Commission, Special Post-Booker Coding Project One Year Report .....	D-1
E.	Figures and Tables .....	E-1

## Executive Summary

### A. INTRODUCTION

This report assesses the impact of *United States v. Booker*<sup>1</sup> on federal sentencing. The report is prepared pursuant to the general statutory authority of the United States Sentencing Commission (the “Commission”) under 28 U.S.C. §§ 994-995, and the specific responsibilities enumerated in 28 U.S.C. § 995(a)(14) and (15), which require the Commission to publish data concerning the sentencing process and to collect and systematically disseminate information concerning the actual sentences imposed and the relationship of such sentences to the factors set forth in 18 U.S.C. § 3553(a).

On June 24, 2004, the Supreme Court decided *Blakely v. Washington*,<sup>2</sup> invalidating a sentence imposed under the State of Washington’s sentencing guideline system. The Supreme Court held that the Washington guidelines violated the right to trial by jury under the Sixth Amendment of the United States Constitution. Although the Court stated that it expressed no opinion on the federal sentencing guidelines,<sup>3</sup> the decision had an immediate impact on the federal criminal justice system. Following *Blakely*, district and circuit courts voiced varying opinions on the implication of the decision for federal sentencing and no longer uniformly applied the sentencing guidelines.

On January 12, 2005, the Supreme Court decided *Booker*, applying *Blakely* to the federal guideline system and determining that the mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. The Court remedied the Sixth Amendment violation by excising the provisions in the Sentencing Reform Act that made the federal sentencing guidelines mandatory, thereby converting the mandatory system that had existed for almost 20 years into an advisory one.

The uniformity that had been a hallmark of mandatory federal guideline sentencing no longer was readily apparent as courts began to address new issues raised by *Booker*. For example, some district courts began to consider only facts proved beyond a reasonable doubt at sentencing, reasoning that *Booker* required this elevated standard. Others continued to apply the preponderance standard generally accepted before *Booker*. Some district courts continued to use settled procedures for imposing sentences; others created new procedures to implement the decision. Some district courts fashioned sentences without any consideration of the applicable guideline range. In fashioning a sentence outside the applicable guideline range, some district courts decided to forego an analysis of whether a departure under the guidelines would be warranted and instead relied only on *Booker* to impose the sentence. The majority of district courts, however, considered the applicable guideline range first, considered guideline departure reasons under the guidelines, and then decided whether consideration of the factors listed in 18 U.S.C. § 3553(a) warranted imposition of an out-of-range sentence. While some of these questions have been answered by the courts of appeal, others remain unresolved.

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<sup>1</sup> 543 U.S. 220 (2005).

<sup>2</sup> 542 U.S. 296 (2004).

<sup>3</sup> *Id.* at 304, n.9.

## B. POST-BOOKER APPELLATE JURISPRUDENCE

As Chapter 2 illustrates, the appellate case law remains at an early stage of development. Requirements for the adequacy and specificity of the reasons for sentences provided by sentencing judges are just now beginning to take shape. Appellate jurisprudence setting forth the reasons that will, or will not, be considered reasonable for imposing a sentence outside the guideline range has just begun to emerge. However, the system has begun to settle as the appellate courts decide issues arising after *Booker*. For example, the circuit courts now have uniformly agreed that all post-*Booker* sentencing must begin with calculation of the applicable guideline range. As each respective circuit arrived at this conclusion, the district courts in that circuit began to use more uniform procedures to impose sentences. Six circuits — the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth — now have held that a sentence within the properly calculated guideline range is presumptively reasonable. Only one circuit has concluded that a sentence within the properly calculated guideline range is unreasonable. As appellate jurisprudence evolves, uncertainties are resolved, the system becomes more predictable, and a more complete picture of the impact of *Booker* on federal sentences can be developed.

## C. IMPLEMENTATION OF THE ADVISORY GUIDELINE SYSTEM

A lack of uniformity that existed pre-*Booker* in the reporting of sentencing information to the Commission, especially the reporting of reasons for the sentence imposed, was exacerbated post-*Booker*. Statutory amendments made by The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2004<sup>4</sup> required courts to submit sentencing documentation to the Commission, including the statement of reasons for imposing a particular sentence. Courts were not required, however, to use a standard form for reporting those reasons, although the Judicial Conference of the United States had developed a form for such use. The form, including all of its early iterations that existed prior to *Booker*, was not adequate to fully capture sentencing decisions made post-*Booker*.

As will be discussed in further detail in Chapter 3, the Judicial Conference, working closely with the Commission, revised the Statement of Reasons form<sup>5</sup> to encapsulate post-*Booker* changes in the sentencing guideline system. The revised form, approved in June, 2005, allows for a more complete picture of post-*Booker* sentencing practices. However, the revised form was not adopted until 6 months after the decision. Consequently, for the 6-month period preceding adoption of the revised form, courts used old forms, modified the forms, or created their own. Much of the improvement brought by the revised form, therefore, was not immediately realized. Moreover, use of the revised form has not been adopted by all courts. As of the date of this report, approximately two-thirds of the 94 federal districts have implemented use of the revised form to varying degrees.<sup>6</sup>

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<sup>4</sup> Pub. L. No. 108–21, 117 Stat. 650, hereinafter the “PROTECT Act.” See also 28 U.S.C. § 994(w) and 18 U.S.C. § 3553(c).

<sup>5</sup> See Statement of Reasons AO245B (Rev. 06/05), reproduced in Appendix A.

<sup>6</sup> The advisory committee for the Federal Rules of Criminal Procedure has taken steps to impose uniformity with respect to use of the statement of reasons form. See Proposed Rules Change to Fed. R. Crim. P. 32 (Judgment)(proposing to amend Rule 32(k) to require courts to use the judgment form, which includes the statement of reasons form, prescribed by the Judicial Conference of the United States). Congress also has taken steps to address this documentation issue through the Patriot Act conference report. See sec. 735 of H.Rep. 109–174, Pt. I

Such changes in practice and procedure have had an impact upon the Commission’s data collection and analysis. One of the assumptions upon which the Commission’s historical analysis of data is based is the relatively uniform application of the guidelines. This assumption is not necessarily valid after *Booker*. The differences in practice and procedure that resulted from *Booker* are not entirely quantifiable, and this impacts the quality of the data collected.

*Booker* also necessitated changes in the methodology used by the Commission in the collection and analysis of the data. The Commission had to refine the categorization of sentences in relation to the final guideline range.<sup>7</sup> The new methodology implemented in response to *Booker* uses 11 categories designed to collect and report the nuances of sentencing under the advisory guideline system. Despite the Commission’s best attempt to devise rigorous and specific categories, the categorization itself has limitations, and incomplete or unclear documentation often makes it difficult to characterize individual cases as falling into these categories. Moreover, because the reliability of any analyses conducted by the Commission directly correlates to the quality of the information collected, the results reported herein may not provide a complete picture of the system’s adaptation to advisory guidelines.

#### **D. FINDINGS FROM DATA ANALYSIS**

For the reasons described in Part C of this executive summary, some degree of caution should be exercised in drawing conclusions from the post-*Booker* data collected and analyzed thus far. Nevertheless, a number of conclusions reasonably can be drawn and are described in Chapters 4 through 6.

##### **1. National Sentencing Trends**

Chapter 4 of this report details the results of the Commission’s data analyses of the impact of *Booker* generally on federal sentencing. For ease of discussion, the terms “within-range,” “above-range,” and “below-range” are used throughout this report to describe sentences in relation to the applicable guideline range. Many of the analyses in Chapter 4 compare historical guideline trends and trends in the post-*Booker* system. In sum, these analyses yielded the following findings:<sup>8</sup>

- The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within-range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent. This conformance rate remained stable throughout the year that followed *Booker*. The

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2005 (requiring submission by courts of a “written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission.”).

<sup>7</sup> For a comprehensive discussion of the new methodology, see Appendix B.

<sup>8</sup> Unless otherwise noted, findings discussed throughout this report are based on data contained in Commission, Special Post-*Booker* Coding Project One Year Report, contained in Appendix D.

conformance rate in the pre-PROTECT Act period was 90.6 percent. The conformance rate in the post-PROTECT Act period was 93.7 percent.<sup>9</sup>

- The severity of sentences imposed has not changed substantially across time. The average sentence length after *Booker* has increased.
- With respect to within-range sentences, patterns for selecting the point at which to sentence within the range are unchanged after *Booker*. Approximately 60 percent of within-range sentences are still imposed at the minimum, or bottom, of the applicable guideline range.
- The rate of imposition of sentences of imprisonment has not decreased. Offenders are still being incarcerated in the vast majority of cases.
- The rate of imposition of above-range sentences doubled to a rate of 1.6 percent after *Booker*.
- The rate of government-sponsored, below-range sentences has increased slightly after *Booker* to a rate of 23.7 percent, with substantial assistance departures accounting for 14.4 percent, Early Disposition Program departures accounting for 6.7 percent, and other government-sponsored downward departures accounting for 2.6 percent.
- The rate of imposition of non-government-sponsored, below-range sentences has increased after *Booker* to a rate of 12.5 percent.
- In approximately two-thirds of cases involving non-government-sponsored, below-range sentences, the extent of the reductions granted are less than 40 percent below the minimum of the range. Courts have granted small sentence reductions, of 9 percent or less, at a higher rate after *Booker* than before. Courts have granted 100 percent sentence reductions, to probation, at a lower rate after *Booker* than before.
- The imposition of non-government-sponsored, below-range sentences often is accompanied by a citation to *Booker* or factors under 18 U.S.C. § 3553(a).
- The use of guideline departure reasons remains prevalent in many cases involving the imposition of non-government-sponsored, below-range sentences, including those citing *Booker* or factors under 18 U.S.C. § 3553(a).
- Multivariate analysis<sup>10</sup> indicates that four factors associated with the decision to impose a below-range sentence are different after *Booker* but not before: the

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<sup>9</sup> For purposes of this report, the pre-PROTECT Act period is the 7-month period from October, 2002 through April, 2003. The post-PROTECT Act period is a 13-month period from mid-2003 through mid-2004. The post-*Booker* period is a 1-year period generally in 2005.

application of a mandatory minimum sentence, criminal history points, career offender status, and citizenship. However, most factors associated with this decision are the same after *Booker*.

## 2. Regional and Demographic Differences in Sentencing Practices

Chapter 5 of this report details the results of the Commission’s data analyses of *Booker*’s impact on regional and demographic differences in federal sentencing practices. In sum, these analyses yielded the following findings:

- The regional differences in sentencing practices that existed before *Booker* continue to exist. There are varying rates of sentencing in conformance with the guidelines reported by the twelve circuits. Consistent with the national trend, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*.
- Fifty-two of the 94 districts, or 55 percent, have rates of imposition of within-range sentences at or above the national average of 62.2 percent. Forty-two districts have rates of imposition of within-range sentences below the national average. In 34 of these 42 districts, the rates of imposition of government-sponsored, below-range sentences exceed the rates of imposition of other below-range sentences.
- Multivariate analysis conducted on post-*Booker* data reveals that male offenders continue to be associated with higher sentences than female offenders. Such an association is found every year from 1999 through the post-*Booker* period. Associations between demographic factors and sentence length should be viewed with caution because there are unmeasured factors, such as violent criminal history or bail decisions, statistically associated with demographic factors that the analysis may not take into account.
- Multivariate analysis conducted on post-*Booker* data reveals that black offenders are associated with sentences that are 4.9 percent higher than white offenders. Such an association was not found in the post-PROTECT Act period but did appear in 4 of the 7 time periods analyzed from 1999 through the post-*Booker* period.
- Multivariate analysis conducted on post-*Booker* data reveals that offenders of “other” races (mostly Native American offenders) are associated with sentences that are 10.8 percent higher than white offenders. This association also was found in 2 of the 7 time periods from 1999 through the post-*Booker* period.

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<sup>10</sup> Multivariate analysis is one statistical method to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors. The purpose of conducting multivariate analysis is to determine whether any sentencing changes were statistically significant after controlling for relevant factors for which data are available. For a detailed discussion of the multivariate analyses undertaken for this report, *see* Appendix B.

- Multivariate analysis conducted on post-*Booker* data reveals that there is no statistical difference between the sentence length of Hispanic offenders and the sentence length of white offenders.

### 3. Specific Sentencing Issues

Chapter 6 of this report details the results of the Commission’s data analyses of *Booker*’s impact on specific sentencing issues. In sum, these analyses yielded the following findings:

#### a. Cooperation Reductions without a Government Motion

- Non-government-sponsored, below-range sentences based on the defendant’s cooperation with authorities, *i.e.*, below-range sentences granted for substantial assistance without a government motion for such, occur post-*Booker*. Post-*Booker*, there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government-sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with authorities was the only reason cited. In 230 of these cases, it was one of a combination of reasons for the below-range sentence.

#### b. Sex Offenses

- The average length of sentences for cases sentenced under each of the criminal sexual abuse guidelines has remained fairly constant.
- The rate of imposition of below-range sentences declined for criminal sexual abuse cases post-PROTECT, but increased slightly post-*Booker*. The rate of imposition of below-range sentences in criminal sexual abuse cases is below the rate for all cases post-*Booker*.
- The rate of imposition of below-range sentences for abusive sexual contact cases decreased following the PROTECT Act but increased post-*Booker*.
- The rate of imposition of below-range sentences for cases involving the sexual abuse of a minor decreased post-PROTECT Act but increased post-*Booker*. The increased rate post-*Booker* was less than what the rate had been pre-PROTECT Act.
- The rate of imposition of above-range sentences increased post-*Booker* for criminal sexual abuse offenses and abusive sexual contact offenses but declined for offenses involving the sexual abuse of a minor.
- The majority of below-range sentences in cases involving criminal sexual abuse are imposed for offenders with little or no criminal history.

- Consistent with the trend seen in the national post-*Booker* data for cases overall, the average length of sentences has increased for cases sentenced under the sexual exploitation, *i.e.*, child pornography, guidelines.
- The rate of imposition of below-range sentences for sexual exploitation offenses declined post-PROTECT Act but increased post-*Booker*.
- The rate of imposition of above-range sentences for cases involving production of child pornography decreased post-PROTECT Act but increased post-*Booker*. Above-range sentences have steadily increased for cases involving possession of child pornography.

**c. Crack Cocaine Offenses**

- Courts do not often appear to be using *Booker* or the factors under 18 U.S.C. § 3353(a) to impose below-range sentences in crack cocaine cases. Courts do not often explicitly cite crack cocaine/cocaine powder sentencing disparity as a reason to impose below-range sentences in crack cocaine cases.

**d. First Offenders**

- The rate of imposition of below-range sentences for first offenders increased after *Booker*.
- The rate of imposition of above-range sentences for first offenders increased after *Booker*.
- The proportion of first offenders receiving prison sentences has remained essentially the same, as has the average length of sentences imposed.

**e. Career Offenders**

- The rate of imposition of below-range sentences for career offenders increased after *Booker*. The majority of the cases in which below-range sentences are being imposed for career offenders are drug trafficking cases.
- The average length of sentences imposed for career offenders has decreased after *Booker*. This continues the pattern that existed before *Booker*.

**f. Early Disposition Programs**

- Sentencing courts in districts without early disposition programs (EDP)<sup>11</sup> report relatively low rates of imposition of below-range sentences. In its 2003 Departure Report, the Commission expressed concern that these districts increasingly might grant below-range sentences to reach outcomes for similarly-situated defendants similar to the outcomes that would be reached in EDP districts. The data do not reflect that these concerns generally have been realized. In districts without EDP, the data do not reflect widespread use of *Booker* to grant below-range sentences to reflect sentences available in EDP districts.

**E. CONCLUSION**

The Commission intends to continue its outreach and training efforts and to regularly release updated, real-time data on rates of imposition of within-range and out-of-range sentences, types of sentences imposed, average sentence lengths, the reasons judges report for sentencing outside the guidelines system, and the results of sentencing appeals. Uniform and complete statements of reasons and timely reporting to the Commission by the district courts can provide valuable feedback to Congress, the Commission, the courts, and all others in the federal criminal justice community regarding the long-term impact of *Booker* on the federal sentencing system. This report is an important part of the Commission's efforts to inform careful consideration of the evolving post-*Booker* federal sentencing system.

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<sup>11</sup> For a detailed discussion of Early Disposition Programs, see Chapter 6, Part G of this report.

## INTRODUCTION

### A. OVERVIEW OF REPORT

In 1984, Congress enacted the Sentencing Reform Act of 1984 (the “SRA”) in response to widespread sentencing disparity that existed in the federal sentencing system.<sup>12</sup> Promulgation of the SRA ushered in a new era of sentencing in federal courts through the creation of the United States Sentencing Commission (the “Commission”) and the promulgation of mandatory sentencing guidelines. For nearly twenty years, the mandatory sentencing guideline system required federal judges to impose sentences within the applicable guideline range, unless the court found the existence of an aggravating or mitigating circumstance not adequately taken into consideration by the Commission in formulating the sentencing guidelines.<sup>13</sup> This system changed on January 12, 2005, when the Supreme Court issued its opinion in *United States v. Booker*.<sup>14</sup> The *Booker* Court determined that mandatory application of the sentencing guidelines violated the right to trial by jury under the Sixth Amendment of the United States Constitution. The Court remedied the Sixth Amendment violation by excising the provisions in the SRA that made the sentencing guidelines mandatory, thereby turning the mandatory sentencing guideline system into an advisory guideline system.

This report assesses the impact of *Booker* on federal sentencing. It does so by discussing developing appellate court jurisprudence interpreting *Booker* and the resulting advisory guideline system and by reporting and analyzing data reflecting the sentences imposed subsequent to the *Booker* decision. This report is prepared pursuant to the Commission’s general statutory authority under 28 U.S.C. §§ 994-995 and the specific responsibilities enumerated in 28 U.S.C. § 995(a)(14) and (15), which require the Commission to publish data concerning the sentencing process, and to collect and systematically disseminate information concerning the actual sentences imposed and the relationship of such sentences to the factors set forth in 18 U.S.C. § 3553(a).

This chapter briefly summarizes the history of the promulgation of the sentencing guidelines and relevant Supreme Court precedent deciding challenges to their operation. The chapter then examines the Sixth Amendment line of Supreme Court decisions starting with *Apprendi v. New Jersey*,<sup>15</sup> and culminating with *Booker*. Chapter 2 provides an overview of the circuit court decisions interpreting and applying *Booker*, highlighting select decisions of import to the consideration of *Booker*’s overall impact on federal sentencing. Chapter 3 describes the Commission response to the advisory guidelines system created by *Booker*. Chapters 4 through 6 analyze Commission data to provide a comparative overview of sentencing practices before and after *Booker*. The analysis in

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<sup>12</sup> Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1837 (1984).

<sup>13</sup> 18 U.S.C. § 3553(b)(1), excised by *United States v. Booker*, 543 U.S. 220 (2005)

<sup>14</sup> 543 U.S. 220 (2005).

<sup>15</sup> 530 U.S. 466 (2000).

Chapter 6 also addresses *Booker*'s effect on specific guideline issues and offender groups.

## **B. HISTORICAL DEVELOPMENT OF THE FEDERAL SENTENCING GUIDELINE SYSTEM**

### **1. The Statutory Requirements of the Sentencing Reform Act**

The SRA responded to an emerging consensus that the federal sentencing system needed major reform.<sup>16</sup> Prior to the SRA, a federal judge possessed almost unlimited authority to fashion an appropriate sentence within a broad, statutorily prescribed range and “decided the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”<sup>17</sup> Sentences were limited only by statutorily prescribed minimum and maximum sentences. Because each judge was “left to apply his own notions of the purposes of sentencing,” the federal sentencing system exhibited “an unjustifiably wide range of sentences to offenders convicted of similar crimes.”<sup>18</sup> Neither party had a meaningful right of appellate review.<sup>19</sup> The parole system permitted the release of prisoners based upon inconsistent ideas regarding the potential for rehabilitation, exacerbated the lack of uniformity.<sup>20</sup>

The SRA was the culmination of lengthy bipartisan efforts. It sought to eliminate unwarranted disparity in sentencing and to address the inequalities created by sentencing indeterminacy.<sup>21</sup> Congress decided that sentencing should be tailored—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

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<sup>16</sup> See S. REP. NO. 97-307, at 956 (1981) (“glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence”); H.R. REP. NO. 98-1017, at 34 (1984) (“The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.”). A more comprehensive discussion of the events underlying the promulgation of the Act and its legislative history can be found in the *amicus* brief filed by Senators Hatch, Kennedy and Feinstein in *United States v. Booker*, Nos. 04-104 & 04-105.

<sup>17</sup> See Commission, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING, Vol. I (December 1991) [hereinafter Commission 1991 DISPARITY REPORT] at 9.

<sup>18</sup> S. REP. NO. 97-307, at 5.

<sup>19</sup> S. REP. NO. 97-307, at 956, n.3.

<sup>20</sup> Commission 1991 DISPARITY REPORT, at 9 (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

<sup>21</sup> See S. REP. NO. 97-307 (1981); H.R. REP. NO. 98-1017 (1984); 28 U.S.C. § 994(k).

(D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.<sup>22</sup>

To this end, the SRA created the Commission as an independent agency within the judicial branch of the federal government<sup>23</sup> and directed it to promulgate guidelines to be used for sentencing within the statutorily prescribed maximum sentence.<sup>24</sup>

Although the SRA directed the Commission to promulgate standardized guidelines for the courts to follow, it preserved judges' discretion to depart from the prescribed guideline range in a particular case if a judge found an important aggravating or mitigating factor present in the case that the Commission did not consider adequately when formulating the sentencing guidelines.<sup>25</sup> The SRA required courts to state their reasons for the sentences imposed and to articulate the specific reason for imposing sentences different from those described in a particular guideline.<sup>26</sup> The SRA authorized limited appellate review of the sentence, permitting a defendant to appeal a sentence above the defined range and the government to appeal a sentence falling below that range. It also allowed either party to appeal an incorrect application of the sentencing guidelines.<sup>27</sup> Finally, to limit further sentencing disparity, the SRA abolished federal parole and permitted a sentence to be reduced by not more than fifteen percent as a result of an inmate's good behavior while in custody.<sup>28</sup>

The SRA directed the Commission to create the sentencing guidelines with three goals in mind. First, the Commission was to assure the meeting of the purposes of sentencing, as set forth in 18 U.S.C. § 3553(a)(2).<sup>29</sup> Second, the Commission was to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been

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<sup>22</sup> See 18 U.S.C. § 3553(a)(2).

<sup>23</sup> Established as “as an independent commission in the Judicial Branch of the United States,” see 28 U.S.C. § 991(a), the Commission was placed in the Judicial Branch because Congress concluded that “sentencing should remain primarily a judicial function,” and because sitting judges would serve on the Commission. The Commission is comprised of seven voting members (including the Chair) appointed by the President “by and with the advice and consent of the Senate.” The SRA provided “[a]t least three of the [Commission] members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States” and no more than four members of the Commission could be members of the same political party. See 28 U.S.C. § 991. Although originally at least three commissioners were to be federal judges, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, Pub L. No. 108-21, 117 Stat. 650 (2003) (hereinafter “the PROTECT Act”), amended 28 U.S.C. § 991(a) to limit to “no more than three” the number of judges who may be members of the Commission. The Attorney General, or his designee, and the Chairman of the Parole Commission are designated as *ex officio* non-voting members.

<sup>24</sup> See 28 U.S.C. §§ 991, 994, and 995(a)(1). The SRA called for the abolition of the U.S. Parole Commission within five years after the effective date of the Guidelines, but the existence of the Parole Commission has been extended, and its duties revised, over time.

<sup>25</sup> See 18 U.S.C. § 3553(a), (b).

<sup>26</sup> See 18 U.S.C. § 3553(c).

<sup>27</sup> See 18 U.S.C. § 3742(a), (b).

<sup>28</sup> See 18 U.S.C. § 3624(a), (b). The Bureau of Prisons uses “good time” reductions for disciplinary purposes, not as a parole mechanism.

<sup>29</sup> See 28 U.S.C. § 991(b)(1)(A).

found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.<sup>30</sup> Finally, the Commission was to reflect, to the extent practicable, advancement in knowledge of human behavior as it relate[s] to the criminal justice process.<sup>31</sup>

Congress expected that “there [would] be numerous guidelines ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances,” including “several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances.”<sup>32</sup> Congress intended that there “be a complete set of sentencing guidelines that covers in one way or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results.”<sup>33</sup>

The SRA further directed the Commission to consider seven factors in its formulation of offense categories: (1) the grade of the offense; (2) the aggravating and mitigating circumstances of the crime; (3) the nature and degree of the harm caused by the crime; (4) the community view of the gravity of the offense; (5) the public concern generated by the crime; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense.<sup>34</sup> The SRA listed eleven additional factors for the Commission to consider in establishing categories of defendants, including, but not limited to, age, education, mental and emotional condition, physical condition, role in the offense, and criminal history.<sup>35</sup> The SRA prohibited the Commission from considering the race, sex, national origin, creed, and socioeconomic status of offenders,<sup>36</sup> and instructed that the sentencing guidelines should reflect the general inappropriateness of considering certain other factors that might serve as proxies for forbidden factors, such as current unemployment.<sup>37</sup>

To meet these goals, the SRA directed the Commission to develop sentencing ranges applicable for specific categories of offenses involving particular categories of defendants. More specifically, the SRA required that the sentencing ranges be consistent with all pertinent provisions of title 18, United States Code, and that they not include sentences in excess of the statutorily prescribed maximum sentence.<sup>38</sup> It also directed

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<sup>30</sup> See 28 U.S.C. § 991(b)(1)(B).

<sup>31</sup> See 28 U.S.C. § 991(b)(1)(C).

<sup>32</sup> S. REP. NO. 98–225, at 168.

<sup>33</sup> *Id.*

<sup>34</sup> See 28 U.S.C. § 994(c)(1)–(7).

<sup>35</sup> See 28 U.S.C. § 994(d)(1)–(11). The legislative history provides additional guidance for the Commission's consideration of the statutory factors. For example, the history indicates Congress' intent that the “criminal history . . . factor includes not only the number of prior criminal acts – whether or not they resulted in convictions – the defendant has engaged in, but their seriousness, their recency or remoteness, and their indication whether the defendant is a ‘career criminal’ or a manager of a criminal enterprise.” S. REP. NO. 98–225, at 174. The promulgated guidelines include these and other criminal history measures that necessarily may require judicial factfinding extending well beyond the ascertainment of the fact of prior convictions. See *Guidelines Manual*, Ch. 4 (2005).

<sup>36</sup> See 28 U.S.C. § 994(d).

<sup>37</sup> See 28 U.S.C. § 994(e).

<sup>38</sup> *Mistretta v. United States*, 488 U.S. 361, 375 (1989); see also 28 U.S.C. § 994(b)(1).

that, “for sentences of imprisonment, ‘the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.’”<sup>39</sup>

In addition to these constraints, the SRA provided additional considerations for the Commission to adhere to in the fulfillment of its duties. The SRA directed that sentencing guidelines require a term of confinement at or near the statutorily prescribed maximum sentence for certain crimes of violence and for drug offenses, particularly when committed by recidivists.<sup>40</sup> The SRA further directed the Commission to assure a substantial term of imprisonment for an offense constituting a third felony conviction, for a career felon, for an individual convicted of a managerial role in a racketeering enterprise, for a crime of violence by an offender on release from a prior felony conviction, and for an offense involving a substantial quantity of narcotics.<sup>41</sup> The SRA also enumerated various aggravating and mitigating circumstances to be reflected in the sentencing guidelines, such as multiple offenses and substantial assistance to the Government.<sup>42</sup>

## 2. Promulgation of the Sentencing Guidelines

In promulgating sentencing guidelines to implement the SRA, the Commission was required to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations.<sup>43</sup> Among those questions, the Commission had to decide whether appropriate punishment would be defined primarily on the principles of just deserts or crime control. Consistent with the SRA’s rejection of a single doctrinal approach in favor of one that would attempt to balance all the objectives of sentencing, the Commission did not choose one theory over the other.<sup>44</sup> Instead, the Guidelines embody aspects of both just deserts and crime-control philosophies of sentencing and give effect to both considerations.<sup>45</sup>

The Commission’s task was compounded by the complexity of the federal criminal code, which contained “innumerable statutes dealing with such basic offenses as theft and fraud” that were “scattered about hither and yon among various titles of the United States Code” resulting in “conflicting court interpretations.”<sup>46</sup> The first Guidelines Manual listed more than 700 penal statutes or subsections thereof in Appendix

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<sup>39</sup> *Mistretta*, 488 U.S. at 375 (quoting 28 U.S.C. § 994(b)(2)).

<sup>40</sup> *See* 28 U.S.C. § 994(h).

<sup>41</sup> *See* 28 U.S.C. § 994(i).

<sup>42</sup> *See* 28 U.S.C. § 994(l) and (n), respectively.

<sup>43</sup> *See Guidelines Manual*, §1A1.1, cmt. Intro. and Gen. App. Principles, (A)(4) (2005).

<sup>44</sup> *See* Commission, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987) [hereinafter “Commission, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES”] at 16.

<sup>45</sup> *Id.*

<sup>46</sup> Commission, PRELIMINARY REPORT TO THE CONGRESS: STATUTORY PENALTIES PROJECT DESCRIPTION AND COMPILATIONS OF FEDERAL CRIMINAL OFFENSES (1989), at vi (quoting *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Law and Procedures of the Senate Committee on the Judiciary*).

A,<sup>47</sup> and the 2005 *Guidelines Manual* references more than 1200 different statutes or subsections thereof.<sup>48</sup> Because the major goal of the SRA was to increase uniformity in sentencing while not sacrificing proportionality, the sentencing guidelines had to authorize appropriately different sentences for criminal conduct of significantly different severity.<sup>49</sup> Consequently, the Commission determined that the sentencing guidelines should be descriptive of generic conduct rather than track statutory language.<sup>50</sup>

The Commission employed an empirical approach as a starting point for its work, examining detailed data from more than 10,000 presentence investigations and less detailed data on nearly 100,000 federal convictions. The Commission also examined the United States Parole Commission's guidelines and resulting statistics, public commentary, and information from other relevant sources to determine existing sentencing practices.<sup>51</sup> The Commission concluded that "[t]his approach provided a concrete starting point and identified a list of relevant distinctions that, although of considerable length, [was] still short enough to create a manageable set of guidelines."<sup>52</sup>

The Commission also examined existing state guidelines systems.<sup>53</sup> The Commission rejected the approach used by many states, concluding that "[s]tate guidelines systems which use relatively few, simple categories and narrow imprisonment ranges . . . are ill suited to the breadth and diversity of federal crimes."<sup>54</sup> For example, under many states' systems, "a single category of robbery . . . lumped together armed and unarmed robberies, robberies with and without injuries, [and] robberies of a few dollars and robberies of millions," and thus "would have been far too simplistic to achieve just and effective [federal] sentences, especially given the narrowness of the permissible sentencing ranges."<sup>55</sup>

The Commission decided to create a system requiring a court to consider, within constraints, a defendant's real offense conduct and the defendant's criminal history. The Commission created a sentencing table with 43 offense levels and six criminal history categories. The offense level (located on the vertical axis of the Sentencing Table) is determined based upon the elements of the offense committed by the defendant and the particular harms associated with the defendant's crime. The offense level increases based upon the severity of the offense committed, as well as by the number of identified harms associated with the commission of the offense. For example, in a drug crime, the base offense level is determined by the quantity and type of drug involved in the offense of conviction and related criminal conduct (whether charged or uncharged). The base offense level is enhanced, for example, if the crime involves a firearm.<sup>56</sup> Finally, a

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<sup>47</sup> See *Guidelines Manual*, App. A (1987).

<sup>48</sup> See *Guidelines Manual*, App. A (2005).

<sup>49</sup> Commission, SUPPLEMENTARY REPORT TO THE CONGRESS: STATUTORY PENALTY REVIEW PROJECT (1991), at 13.

<sup>50</sup> See *Guidelines Manual*, §1A1.1, cmt. Intro. and Gen. App. Principles, (A)(4)(a) (2005).

<sup>51</sup> See Commission, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES, at 16.

<sup>52</sup> *Id.*

<sup>53</sup> Commission, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES, at 14.

<sup>54</sup> *Id.*

<sup>55</sup> Commission, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES, at 13.

<sup>56</sup> See *Guidelines Manual*, §2D1.1 (2005).

defendant's role in the offense or other conduct can result in an increase or decrease of the offense level.<sup>57</sup> Calculation of the sentence also requires a determination of the defendant's criminal history (located on the horizontal axis of the Sentencing Table).<sup>58</sup> Once the offense level and criminal history are calculated, the applicable sentencing range is determined by use of the sentencing table.<sup>59</sup>

The Commission expected that its work on the sentencing guidelines would be evolutionary<sup>60</sup> and that it would issue guidelines, gather data from actual practice, analyze the data, and revise the guidelines over time.<sup>61</sup> The monitoring function alone requires the Commission to review the charging and sentencing documents for approximately 70,000 cases per year,<sup>62</sup> and the Commission codes hundreds of pieces of information with respect to each of these cases. The resulting, steadily expanding database is an invaluable source of information for the criminal justice community.<sup>63</sup> Congress also "necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial interpretations might suggest."<sup>64</sup> Since the promulgation of the original set of sentencing guidelines through the present, the sentencing guidelines frequently have been amended to respond to court decisions, congressional directives, and the Commission's own evaluations of the need for guideline refinement.<sup>65</sup>

### C. LEGAL CHALLENGES TO THE OPERATION OF THE GUIDELINES

Legal challenges to the operation of the sentencing guidelines began immediately after their promulgation. The constitutionality of the sentencing guidelines was first addressed by the United States Supreme Court in *Mistretta v. United States*.<sup>66</sup> In *Mistretta*, the defendant raised nondelegation and separation of powers challenges to both the federal sentencing guidelines and the Sentencing Commission. In upholding the constitutionality of both, the Supreme Court held that "Congress neither delegated

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<sup>57</sup> See *Guidelines Manual*, Chapter 3 (2005) for other adjustments that apply to a wide variety of offenses.

<sup>58</sup> See *Guidelines Manual*, Chapter 4 (2005).

<sup>59</sup> See *Guidelines Manual*, Chapter 5 Pt. A (2005). For a more comprehensive discussion of how the sentencing guidelines determine the presumptive sentence, see Commission, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (Nov. 2004) (hereinafter "FIFTEEN YEAR REVIEW") at 16-18 and Chapter 4 c.4. of this report.

<sup>60</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest* [hereinafter Breyer, *Key Compromises*], 17 HOFSTRA L. REV. 1, 8 (1988).

<sup>61</sup> *Id.*

<sup>62</sup> See Commission, 2003 ANNUAL REPORT, at 34; *Mistretta*, 488 U.S. at 369.

<sup>63</sup> See William W. Wilkins, Jr. and John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 65 (1993). The Commission also uses the database to evaluate whether the sentencing guidelines have achieved the goals of the SRA. To that end, the Commission issued a report examining how the sentencing guidelines have met the goals of the SRA. See Commission, FIFTEEN YEAR REVIEW.

<sup>64</sup> *Braxton v. United States*, 500 U.S. 344, 348 (1991).

<sup>65</sup> Amendments to the sentencing guidelines automatically take effect unless Congress, within a 180-day waiting period, affirmatively acts to reject them. See 28 U.S.C. § 994(p).

<sup>66</sup> 488 U.S. 361 (1989). The case was decided by an 8-to-1 vote, and Justice Blackmun authored the opinion. Justice Scalia was the lone dissenter.

excessive legislative power [to the Commission] nor upset the constitutionally mandated balance of powers among the coordinate branches” by placing the Commission within the Judicial Branch.<sup>67</sup> Likening the role of the Commission to that of the courts in promulgating rules of procedure,<sup>68</sup> the Supreme Court stated that “[the Guidelines] do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum or maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits set by Congress.”<sup>69</sup> The Court further went on to state that the “judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputations of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law.”<sup>70</sup>

Once the Supreme Court settled the question of the constitutionality of the sentencing guidelines, courts were then required to impose federal sentences in accordance with the sentencing guidelines. This did not, however, put an end to all litigation concerning challenges to the operation of the sentencing guidelines. The Court was then called upon to decide issues relating to the relevant conduct rules and sentence enhancements for conduct that could have been charged but was not.

In *United States v. Dunnigan*,<sup>71</sup> the Court unanimously held that the Constitution permits a court to enhance the defendant’s sentence pursuant to the obstruction of justice enhancement, USSG §3C1.1, if the court finds that the defendant committed perjury at trial.<sup>72</sup> In so holding, the Court noted that “the enhancement provision is part of a sentencing scheme designed to determine the appropriate type and extent of punishment after the issue of guilt has been resolved.”<sup>73</sup> In *Witte v. United States*,<sup>74</sup> the Court held that consideration of relevant conduct at sentencing did not bar a subsequent prosecution for the related criminal conduct. The Supreme Court also held that a jury’s verdict of acquittal does not prevent the sentencing judge from considering the conduct underlying the acquitted charge, so long as the conduct has been proved by a preponderance of evidence.<sup>75</sup> In *United States v. Nichols*,<sup>76</sup> the Court upheld the consideration of an uncounseled misdemeanor conviction to enhance punishment for a subsequent conviction. The Court noted that recidivism is an important factor in determining what

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<sup>67</sup> *Id.* at 384-85.

<sup>68</sup> *Id.* at 391.

<sup>69</sup> *Id.* at 396.

<sup>70</sup> *Id.* at 407.

<sup>71</sup> 507 U.S. 87 (1993). Justice Kennedy delivered the opinion of the Court.

<sup>72</sup> *Id.* at 89.

<sup>73</sup> *Id.* at 94.

<sup>74</sup> 515 U.S. 389, 406 (1995). Justice O’Connor delivered the opinion of the Court, in Parts I, II, and IV, of which Chief Justice Rehnquist, and Justices Kennedy, Souter, Ginsburg, and Breyer joined, and in Part III of which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice Scalia filed an opinion concurring in the judgment, in which Justice Thomas joined.

<sup>75</sup> *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*).

<sup>76</sup> 511 U.S. 738 (1994). Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O’Connor, Scalia, Kennedy, and Thomas, joined. Justice Souter filed an opinion concurring in the judgment.

sentence to impose on a defendant and thus upheld the constitutionality of such consideration.<sup>77</sup>

In *Edwards v. United States*,<sup>78</sup> the Court held that the sentencing guidelines authorized the judge to determine for sentencing purposes whether crack cocaine, as well as powder cocaine, was involved in the defendants' offense related activities and the applicable quantities of each drug form. In upholding the sentence, the Court stated that "regardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require the judge to determine the 'controlled substances' at issue and how much of those controlled substances consisted of cocaine, crack, or both."<sup>79</sup> The Court summarily disposed of the defendant's statutory and constitutional claims, stating that perhaps those claims "would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine only conspiracy."<sup>80</sup>

#### **D. THE SUPREME COURT'S DEVELOPING SIXTH AMENDMENT JURISPRUDENCE**

The aforementioned cases appeared to solidify the sentencing guidelines' role in the federal sentencing system. Moreover, judicial factfinding in order to calculate sentences, a critical component of the sentencing guidelines, seemed firmly grounded by this precedent as constitutionally sound. The Supreme Court then decided *Apprendi*.<sup>81</sup> *Apprendi* was one of a series of cases challenging under the Sixth Amendment of the Constitution judicial factfinding when imposing sentences. This section of the report focuses on *Apprendi* and its progeny, which ultimately culminated in *Booker*.

*Apprendi* involved a challenge to a sentence imposed in state court. The defendant was convicted of a firearms violation, which carried a prison term of 5 to 10 years. After he pleaded guilty to the crime, the State of New Jersey filed a motion to enhance the sentence under the State's hate crime statute, alleging that the defendant committed the crime of conviction to intimidate a person or group because of racial animus. After finding by a preponderance of the evidence that the crime was racially motivated, the trial court imposed a 12-year sentence. The Supreme Court reversed, holding that the Sixth Amendment requires that "[o]ther than the fact of a prior conviction,<sup>82</sup> any fact that increases the penalty for a crime beyond the prescribed

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<sup>77</sup> *Id.* at 747-48.

<sup>78</sup> 523 U.S. 511 (1998). Justice Breyer delivered the opinion for a unanimous Court.

<sup>79</sup> *Id.* at 514.

<sup>80</sup> *Id.* at 515.

<sup>81</sup> 530 U.S. 466 (2000). Justice Stevens wrote the opinion, joined by Justices Souter, Scalia, Thomas and Ginsburg.

<sup>82</sup> The exception for prior convictions is derived from the Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Justice Breyer delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas joined. The Court held that Congress' decision to treat recidivism as a sentencing factor upon an alien's subsequent conviction of an illegal reentry offense, rather than as an element of that offense, did not exceed due process or other constitutional limits on Congress' power to define elements of crime.

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>83</sup>

*Harris v. United States*<sup>84</sup> raised the issue of whether the *Apprendi* rule applied to facts that trigger a statutory mandatory minimum penalty, thereby calling into question *McMillan v. Pennsylvania*.<sup>85</sup> The case involved the interpretation of 18 U.S.C. § 924(c),<sup>86</sup> which allowed the court to increase a statutory minimum penalty from 5 to 7 years upon a finding that a firearm was brandished during and in relation to a crime of violence or drug trafficking crime.<sup>87</sup> The defendant’s indictment did not charge that he had brandished the weapon. After the defendant was convicted, his presentence report recommended that he receive the 7-year minimum sentence. The defendant objected, arguing that brandishing was an element of a separate statutory offense for which he was not indicted or convicted. The lower court overruled his objection, and sentenced him to a seven year term of imprisonment. The court of appeal also rejected the defendant’s constitutional argument, finding that *McMillan* foreclosed his argument that if brandishing is a sentencing factor, then 18 U.S.C. § 924(c) is unconstitutional under *Apprendi*.

The Supreme Court agreed, explaining that *Apprendi* and *McMillan* were not inconsistent with one another because “there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* held that any fact extending the defendant’s sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of *an aggravated crime* — and thus the domain of the jury — by those who framed the Bill of Rights.”<sup>88</sup> *McMillan* recognized that once the jury’s verdict has authorized the judge to impose the minimum sentence, a statute may reserve to the judge the finding of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutorily prescribed maximum sentence), without violating the Constitution.<sup>89</sup>

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<sup>83</sup> *Id.* at 490.

<sup>84</sup> 536 U.S. 545 (2002). Justice Kennedy announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which Chief Justice Rehnquist and Justices O’Connor, Scalia, and Breyer joined, and an opinion with respect to Part III, in which Chief Justice Rehnquist and Justices O’Connor and Scalia joined. Justice O’Connor filed a concurring opinion. Justice Breyer filed an opinion concurring in part and concurring in the judgment).

<sup>85</sup> 477 U.S. 79 (1986). In *McMillan*, the Court sustained a statute that increased the minimum penalty for a crime, though not beyond the statutorily prescribed maximum sentence, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm.

<sup>86</sup> 18 U.S.C. § 924(c) provides a separate criminal offense for carrying a weapon during and in relation to a crime of violence or drug trafficking crime. The statute imposes a mandatory minimum penalty of 5 years, which must be served consecutively to any sentence imposed for the underlying offense. The minimum penalty increases to 7 and 10 years, if the firearm was brandished or discharged, respectively.

<sup>87</sup> See 18 U.S.C. § 924(c).

<sup>88</sup> *Id.* at 557 (emphasis added).

<sup>89</sup> *Id.*

The Court distinguished 18 U.S.C. § 924(c) from the federal carjacking statute in *Jones v. United States*.<sup>90</sup> In *Jones*, the Court had “accorded great significance to the ‘steeply higher penalties’ authorized by the carjacking statute’s three subsections, which enhanced the defendant’s maximum sentence from 15 years, to 25 years, to life — enhancements the Court doubted Congress would have made contingent upon judicial factfinding.” By contrast, 18 U.S.C. § 924(c) has “an effect on the defendant’s sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge’s discretion.”<sup>91</sup>

Citing *Apprendi*,<sup>92</sup> the Court noted that the “Fifth and Sixth Amendments ensure that the defendant ‘will never get more punishment than he bargained for when he did the crime,’ but they do not promise that he will receive ‘anything less’ than that.”<sup>93</sup> The Court then concluded that 18 U.S.C. § 924(c) was constitutional and did not evade the requirements of the Fifth and Sixth Amendment. “Congress ‘simply took one factor that has always been considered by sentencing courts to bear on punishment .... and dictated the precise weight to be given that factor.’”<sup>94</sup> “That factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.”<sup>95</sup>

In *Ring v. Arizona*,<sup>96</sup> the Court considered whether the State of Arizona’s death penalty statute violated the defendant’s Sixth Amendment right to a jury trial in capital prosecutions. The statute allowed the trial judge, sitting alone, to determine the presence or absence of the aggravating factors required by Arizona law to impose the death penalty, following a jury adjudication of a defendant’s guilt of first-degree murder. Reasoning that “[t]he Arizona first-degree murder statute ‘authorizes a maximum penalty of death only in a formal sense,’ for it explicitly cross-references the statutory provision requiring a judicial finding of an aggravating circumstance before imposition of the death penalty,” the Court concluded that the Arizona statute violated the Sixth Amendment. Because the “enumerated aggravating factors operated as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that they be found by a jury.”<sup>97</sup>

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<sup>90</sup> 526 U.S. 227 (1999). Justice Souter delivered the opinion of the Court, in which Justices Stevens, Scalia, Thomas, and Ginsburg joined. Justices Stevens and Scalia filed concurring opinions. *Jones* held that the federal carjacking statute, 18 U.S.C. § 2119, establishes three separate offenses, each of which must be charged in the indictment, proven beyond a reasonable doubt, and submitted to the jury for its verdict. *See also United States v. Castillo*, 530 U.S. 120 (2000). Justice Breyer delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, O’Connor, Kennedy, Souter, Thomas, and Ginsburg joined, and in which Justice Scalia joined except as to point Fourth of Part II.

<sup>91</sup> *Id.* at 554.

<sup>92</sup> 530 U.S. at 498.

<sup>93</sup> *Id.* at 554.

<sup>94</sup> *Id.* at 568 (citing *McMillan*, 477 U.S. at 89-90).

<sup>95</sup> *Id.*

<sup>96</sup> 536 U.S. 584 (2002).

<sup>97</sup> *Id.* at 609 (citing *Apprendi*, 530 U.S. at 494, n. 19). *See Shriro v. Summerlin*, 542 U.S. 348 (2004), in which the Supreme Court held that the decision in *Ring* was properly classified as procedural rather than substantive and did not apply retroactively to death penalty cases already final on direct review and that *Ring* did not announce a watershed rule of criminal procedure.

## E. THE BLAKELY DECISION AND ITS RESULTING IMPACT ON THE FEDERAL SENTENCING GUIDELINE SYSTEM

On June 24, 2004, the Supreme Court decided *Blakely v. Washington*,<sup>98</sup> invalidating a sentence imposed under Washington's sentencing guidelines system. The state trial court sentenced the defendant to a term of imprisonment more than 3 years above the 53-month statutory standard range for his offense, based on the court's finding that the defendant had acted with deliberate cruelty. Deliberate cruelty was a statutorily enumerated ground for departing from the standard sentencing range. Washington law required an exceptional sentence to be based on factors other than those used in computing the standard range. Because the defendant had not made admissions supporting the sentencing court's finding of deliberate cruelty, the Court held that the judicial application of an enhanced range under the Washington state guidelines violated the defendant's right to a jury trial under the Sixth Amendment. The Court made this finding notwithstanding the fact that the sentence imposed did not exceed that statutory maximum penalty of 10 years.<sup>99</sup> In so holding, the Court redefined the term "statutory maximum" as used in *Apprendi* to mean the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted to by the defendant, not the maximum the judge may impose after making additional findings. Although the Court stated that it expressed no opinion on the federal sentencing guidelines, which were not before it,<sup>100</sup> the decision had an immediate impact upon the federal criminal justice system.

After *Apprendi* but before *Blakely*, the federal circuit courts of appeal unanimously had concluded that the maximum sentence a defendant could receive "if punished according to the facts reflected in the jury verdict alone,"<sup>101</sup> was the maximum penalty provided in the statute setting forth the offense of conviction (or whatever penalty statute was referenced by the statute setting forth the offense of conviction), not the top of the guideline sentencing range mandated by those facts.<sup>102</sup> The Court's redefinition of the term "statutory maximum" caused many courts to question the reasoning underlying these decisions. Following the *Blakely* decision, district and circuit courts voiced varying opinions on the implications of the decision for federal sentencing and no longer uniformly applied the sentencing guidelines.

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<sup>98</sup> 542 U.S. 296 (2004).

<sup>99</sup> *Id.* at 303-04.

<sup>100</sup> *Id.* at 304, n.9.

<sup>101</sup> *Apprendi*, 530 U.S. at 483.

<sup>102</sup> See *United States v. Reyes-Echevarria*, 345 F.3d 1, 6-7 (1<sup>st</sup> Cir. 2003); *United States v. Garcia*, 240 F.3d 180, 182-84 (2d Cir. 2001); *United States v. Williams*, 235 F.3d 858, 862-63 (3d Cir. 2000); *United States v. Kinter*, 235 F.3d 192, 198-202 (4<sup>th</sup> Cir. 2000); *United States v. Doggett*, 230 F.3d 160, 166 (5<sup>th</sup> Cir. 2000); *United States v. Lawrence*, 308 F.3d 623, 634-35 (6<sup>th</sup> Cir. 2002); *United States v. Knox*, 301 F.3d 616, 620 (7<sup>th</sup> Cir. 2002); *United States v. Walker*, 324 F.3d 1032, 1041 (8<sup>th</sup> Cir.); *United States v. Ochoa*, 311 F.3d 1133, 1135-36 (9<sup>th</sup> Cir. 2002); *United States v. Jackson*, 240 F.3d 1245, 1249 (10<sup>th</sup> Cir. 2001); *United States v. Harris*, 244 F.3d 828, 829-30 (11<sup>th</sup> Cir. 2001); *United States v. Fields*, 251 F.3d 1041, 1043-44 (D.C. Cir. 2001).

Two circuits immediately declared that the operation of the federal sentencing guidelines violated the Sixth Amendment. In *United States v. Booker*,<sup>103</sup> the Seventh Circuit held that the Sixth Amendment, as interpreted in *Blakely*, was violated by the sentencing court's factual determinations on drug quantity and obstruction of justice.<sup>104</sup> Because the parties had neither briefed nor argued the question of severability,<sup>105</sup> the Seventh Circuit declined to rule on that issue.<sup>106</sup> Instead the court remanded the case for resentencing.<sup>107</sup> In *United States v. Ameline*,<sup>108</sup> the Ninth Circuit concluded that *Blakely*'s definition of statutory maximum applies to the determination of the base offense levels and any applicable upward enhancements imposed under the sentencing guidelines.<sup>109</sup> The court declined to invalidate the sentencing guidelines entirely, holding that where the procedural aspects of applying the sentencing guidelines violated the Sixth Amendment, those portions could be severed and a sentence using the remaining guideline provisions could be imposed.<sup>110</sup>

Five circuits held that *Blakely* did not affect the constitutionality of the federal sentencing guidelines. In *United States v. Pineiro*,<sup>111</sup> the Fifth Circuit became the first circuit to hold that *Blakely* did not extend to the sentencing guidelines. After examining circuit precedent and Supreme Court case law that had "consistently embraced and relied upon the distinction between guideline ranges and maximum sentences in rejecting various challenges to the Guidelines,"<sup>112</sup> the court concluded that this precedent supported the view that the sentencing guidelines were a tool for channeling judicial discretion and that *Blakely* did not compel a departure from the long-embraced distinction between guideline ranges and the maximum penalties established in the United States Code for various offenses.<sup>113</sup> Four circuits similarly declared that *Blakely* did not invalidate the sentencing guidelines.<sup>114</sup>

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<sup>103</sup> 375 F.3d 508 (7<sup>th</sup> Cir. 2004).

<sup>104</sup> *Id.* at 513.

<sup>105</sup> The issue of severability addresses the remedy the court should apply if finding that the operation of the sentencing guidelines violated the Sixth Amendment. Possible remedies included invalidation of the sentencing guidelines in their entirety, resulting in a return to indeterminate sentencing; invalidation of only those portions of the sentencing guidelines violating the Sixth Amendment in a particular case, and imposition of the requirement that all base offense levels and enhancements under the sentencing guidelines be determined by a jury.

<sup>106</sup> *Id.* at 514-15.

<sup>107</sup> *Id.* at 515.

<sup>108</sup> 376 F.3d 967 (9<sup>th</sup> Cir. 2004).

<sup>109</sup> *Id.* at 978.

<sup>110</sup> *Id.* at 981.

<sup>111</sup> 377 F.3d 464 (5<sup>th</sup> Cir. 2004).

<sup>112</sup> *Id.* at 471.

<sup>113</sup> *Id.* at 470-73.

<sup>114</sup> *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (holding that absent a Supreme Court ruling to the contrary, the Sixth Amendment does not require that every enhancement factor under the sentencing guidelines be pleaded and proved to a jury beyond a reasonable doubt); *United States v. Hammoud*, 381 F.3d 316 (4<sup>th</sup> Cir. 2004) (*en banc*) (holding that *Blakely* did not invalidate the sentencing guidelines and directing the district courts within the circuit to continue sentencing defendants in accordance with the sentencing guidelines); *United States v. Koch*, 383 F.3d 436 (6<sup>th</sup> Cir. 2004) (*en banc*) (ruling that *Blakely* does not invalidate the sentencing guidelines and the sentencing guidelines do not violate the Sixth Amendment); *United States v. Reese*, 382 F.3d 1308 (11<sup>th</sup> Cir. 2004) (declining to conclude that *Blakely* compels an alteration of the established view of the sentencing guidelines as a tool for channeling the

## F. UNITED STATES V. BOOKER

On August 2, 2004, the Supreme Court accepted for expedited review two federal sentencing guidelines cases, *Booker* and *United States v. Fanfan*,<sup>115</sup> to clarify the implications of the *Blakely* decision for the federal sentencing guidelines.

The petitions for certiorari presented two questions for the Court's resolution:

- (1) Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
- (2) If the answer to the first question is "yes," ... whether, in a case in which the Guidelines would require the court to find a sentence enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.<sup>116</sup>

In an opinion authored by Justice Stevens, the Court<sup>117</sup> held that both lower courts correctly concluded that the Sixth Amendment, as construed in *Blakely*, does apply to the sentencing guidelines.<sup>118</sup> In so holding, the Court reaffirmed the holding in *Apprendi*, rephrasing it as "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."<sup>119</sup>

In answering the first question, the Court undertook to explain the genesis of its recent Sixth Amendment doctrine as enunciated in *Jones*, *Apprendi*, *Ring*, and *Blakely*. According to the Court, the basic precepts of the right to trial by jury and the right to have the crime proved beyond a reasonable doubt were undercut by a new trend in the legislative regulation of sentencing, which placed an increasing emphasis on facts that enhanced sentencing ranges. It thus became the judge, and not the jury, who determined the upper limits of sentencing based upon facts not required to be raised before trial or proved beyond a reasonable doubt. The legislative trend thereby operated to increase the judge's power and decrease that of the jury.<sup>120</sup> This new circumstance "forced the Court to address the question of how the right to jury trial could be preserved, in a meaningful

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sentencing court's discretion within a crime's minimum and maximum sentence provided in the United States Code, with that maximum being the only constitutionally relevant maximum sentence).

<sup>115</sup> 524 U.S. 956 (2004).

<sup>116</sup> *United States v. Booker*, 543 U.S. at 229, n.1.

<sup>117</sup> The *Blakely* majority (Justices Stevens, Scalia, Souter, Thomas and Ginsburg) formed the majority in this portion of the court's opinion.

<sup>118</sup> 543 U.S. at 243.

<sup>119</sup> *Id.* at 244.

<sup>120</sup> *Id.* at 236.

way, guaranteeing that the jury would still stand between the individual and the power of the government in the new sentencing regime.”<sup>121</sup> The Court answered the question as it did in the *Apprendi* line of cases to “preserve Sixth Amendment substance.”<sup>122</sup>

The question of the appropriate remedy for the constitutional violation was answered by a different majority of the Court in an opinion authored by Justice Breyer.<sup>123</sup> After considering the legislative intent underlying the SRA, the Court concluded that the Sixth Amendment requirement that a jury find certain sentencing facts was incompatible with components of the SRA. The Court concluded that the severability question must be answered by excising from the SRA those provisions that made the sentencing guidelines mandatory. The Court stated:

We must decide whether or to what extent, "as a matter of severability analysis," the Guidelines "as a whole" are "inapplicable ... such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction." Pet. for Cert. in No. 04-104, p. I.

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C.A. § 3553(b)(1) (Supp.2004), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (main ed. and Supp.2004), which depends upon the Guidelines' mandatory nature. So modified, the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 et seq., 28 U.S.C. § 991 et seq., makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004).<sup>124</sup>

In determining that these mandatory provisions could be excised, the Court first decided that the two remedies suggested by the dissent and the respondents were insufficient to preserve the intent of Congress in enacting the SRA. Notably, in rejecting the Government's proposed remedy that would “render the Guidelines advisory in ‘any case in which the Constitution prohibits’ judicial factfinding,” the Court determined that the proposal would impose a one-way mandatory system that would limit only judges’

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<sup>121</sup> *Id.* at 237.

<sup>122</sup> *Id.* The Court's opinion is devoid of any discussion of *Harris*, raising many questions about whether that decision is still good law. The holding in *Harris*, which allows judicial factfinding for the imposition of minimum sentences, is critical to the efficacy of what some commentators call a “topless guidelines” proposal for reforming the federal guideline system. See *infra*, Appendix C.

<sup>123</sup> Along with Justice Breyer, Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg formed the majority that fashioned the remedy.

<sup>124</sup> *Id.* at 245.

ability to reduce sentences, but put no limits on a judge’s ability to increase sentences. This one-way limit, the Court concluded, would not promote the congressional objective of uniformity in sentencing.<sup>125</sup>

The Court also rejected the dissent’s proposal to graft a jury factfinding requirement onto the provisions of the SRA by reading “the court” as meaning “the judge working together with the jury,” because such a reading would be contrary to the intent of Congress. The Court based this conclusion on the determination that a jury factfinding sentencing system would be incompatible with the use of real offense conduct in sentencing, an element the Court considered critical to congressional intent to achieve sentencing reform. The Court also noted that application of jury factfinding to the guideline system would result in very complicated trial procedures and increased power to prosecutors through plea bargaining as more sentencing enhancements would have to be charged.<sup>126</sup>

In devising the remedy, the Court targeted only two provisions of the SRA. The Court excised 18 U.S.C. § 3553(b)(1), which required the court to impose a sentence as determined by the sentencing guidelines unless “the court finds there exists an aggravating or mitigating circumstance of the kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” The Court determined that “the existence of [this section] is a necessary condition of the constitutional violation.”<sup>127</sup> The Court also excised 18 U.S.C. § 3742(e), which provided for a *de novo* standard of review for departures from the guidelines, and replaced it with “reasonableness.” It left intact all other provisions of the SRA, explicitly mentioning 18 U.S.C. § 3553(a), relating to considerations when imposing a sentence, and 18 U.S.C. § 3742(a) and (b), relating to the right of appeal of sentencing decision. The Court identified as problematic only those provisions making the sentencing guidelines mandatory.<sup>128</sup>

By severing these provisions, the Court rendered the sentencing guidelines effectively advisory, thereby permitting the courts to continue factfinding under a preponderance of the evidence standard. Although the Court recognized that Congress expected the guideline system to be mandatory, it reasoned that Congress would prefer a system in which the guidelines were considered in every case.<sup>129</sup> Congress’ important objectives when creating the Commission to promulgate sentencing guidelines included honesty, uniformity, and proportionality in sentencing.<sup>130</sup> The Court theorized that “[t]he system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives.”<sup>131</sup> For example,

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<sup>125</sup> *Id.* at 266.

<sup>126</sup> *Id.* at 249-58.

<sup>127</sup> *Id.* at 259.

<sup>128</sup> *Id.* at 258-61. The remaining portions of the Act require a sentencing court to consider guidelines ranges but permit a court to tailor the sentence in light of other statutory concerns. *See* 18 U.S.C. § 3553(a).

<sup>129</sup> *Booker*, 543 U.S. at 248.

<sup>130</sup> *Id.* at 264.

<sup>131</sup> *Id.*

“[t]he Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process.”<sup>132</sup>

*Booker*'s instruction that the courts consider the guidelines, but “tailor the sentence in light of other statutory concerns,”<sup>133</sup> immediately raised the question of the extent to which courts must take the sentencing guidelines into account in imposing sentence. Section 3553(a) of title 18, United States Code, lists seven factors, including the guidelines and policy statements, particularly those governing departures from the guidelines, that must be taken into consideration in imposing a sentence. Following *Booker*, two schools of thought emerged regarding the extent to which courts must take the sentencing guidelines into account. The first school of thought accords substantial weight to the sentencing guidelines. This viewpoint was first espoused in *United States v. Wilson*,<sup>134</sup> which concluded that the sentencing guidelines already take the other factors enumerated in 18 U.S.C. § 3553(a) into account. The opposing viewpoint was offered in *United States v. Ranum*,<sup>135</sup> in which the court concluded that the sentencing guidelines are only one of the factors included in 18 U.S.C. § 3553(a), all of which must be given equal consideration when arriving at an appropriate sentence.

The weight to be accorded the sentencing guidelines is only one of many legal issues that have arisen since the Supreme Court decided *Booker*. District courts applied different approaches to sentencing.<sup>136</sup> Some district courts fashioned sentences without any consideration of the applicable guideline range. More specifically, in fashioning a sentence outside the applicable guideline range, some courts decided to forego an analysis of whether a departure under the guidelines would be warranted and instead relied only on *Booker* to impose the sentence. The majority of courts, however, considered the applicable guideline range first and then proceeded to decide whether consideration of the factors listed in 18 U.S.C. § 3553(a) warranted imposition of a non-guideline sentence. This continued until all circuit courts uniformly agreed that post-

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<sup>132</sup> *Id.* at 263.

<sup>133</sup> *Id.* at 245.

<sup>134</sup> 350 F. Supp. 2d 910 (D. Utah 2005); *see also United States v. Wanning*, 354 F. Supp. 2d 1056 (D. Neb. 2005).

<sup>135</sup> 353 F. Supp. 2d 984 (E.D. Wis. 2005).

<sup>136</sup> Compare *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (concluding that a sentencing court should give considerable weight to the guidelines in determining what sentence to impose and stating that the court will depart from the guidelines range in unusual cases for clearly identified and persuasive reasons), and *United States v. Wanning*, 354 F. Supp. 2d 1056, 1062-63 (D. Neb. 2005) (positing that a sentencing court should give substantial weight to the guidelines range and that the guidelines should be considered presumptively reasonable because the Sentencing Commission crafted the guidelines at the direction of Congress and to implement congressional intent), with *United States v. Ranum*, 353 F. Supp. 2d 984, 985-87 (E.D. Wis. 2005) (explaining that under *Booker*, the court will treat the guidelines sentence as just one of a number of sentencing factors), and *United States v. Myers*, 353 F. Supp. 2d 1026, 1028 (S. D. Iowa 2005) (announcing that the court will treat the guidelines sentence as one of the sentencing factors because treating the guidelines range as presumptively reasonable makes the guidelines mandatory).

*Booker* sentencing must begin with calculation of the applicable guideline range.<sup>137</sup> District courts also differed over the proper evidentiary standard to be applied for factfinding at sentencing.<sup>138</sup> For example, some district courts began to consider only facts proved beyond a reasonable doubt at sentencing, reasoning that *Booker* required this elevated standard. Others continued to apply the preponderance standard generally accepted before *Booker*. Some courts no longer considered acquitted conduct and others continued to apply the standards for acquitted conduct that existed before *Booker*.<sup>139</sup>

Debate also arose regarding whether a district court's disagreement with policy decisions made by Congress could form the basis for imposition of a below-range sentence. Conflicting opinions quickly developed in the areas of crack cocaine<sup>140</sup> and fast track immigration cases,<sup>141</sup> which will be explored in further detail in later chapters.

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<sup>137</sup> See *infra* n. 147.

<sup>138</sup> See *United States v. Kwame Okai*, No. 05-19, 2005 WL 2042301 (D. Neb. Aug. 22, 2005) (requiring proof beyond a reasonable doubt); *United States v. Malouf*, 377 F. Supp. 2d 315 (D. Mass. 2005) (same); *United States v. Gray*, 362 F. Supp. 2d 714 (S.D.W. Va 2005) (same).

<sup>139</sup> See *United States v. Pimental*, 367 F. Supp. 2d 143 (D. Mass. 2005) (If acquitted conduct could be considered at sentencing, burden of proof would be proof beyond a reasonable doubt); *United States v. Coleman*, 370 F. Supp. 2d 661 (S.D. Ohio 2005) (same); *United States v. Baldwin*, 389 F. Supp. 2d (D.D.C. 2005) (same). Cf. *United States v. Agostini*, 365 F. Supp. 2d 530 (S.D.N.Y. 2005) (“The Supreme Court's decision in *Booker* did not alter the court's ability to enhance a defendant's sentence on the basis of acquitted conduct.”).

<sup>140</sup> *United States v. Smith*, 359 F. Supp. 2d 771 (E.D. Wis. 2005) (deviating from the Guidelines to account for the harsh sentence produced under the Guidelines for crack cocaine; instead of a 100:1 crack:powder ratio, using the 20:1 crack:powder ratio recommended by the Commission in a report to Congress); *Simon v. United States*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005) (deviating from the sentencing range of 324 to 405 months and imposing a sentence of 262 months because the guidelines range substantially overstates the seriousness of the offense which involved crack cocaine; following the guidelines in sentencing the defendant would create unjust sentencing disparities and more deterrence than necessary to protect the public; the 20:1 crack:powder ratio of crack to powder cocaine recommended by the Commission in a report to Congress would avoid disparity with the sentence imposed on the co-defendant who engaged in the same criminal conduct); *United States v. Fisher*, No. S3-03-CR-1501-SAS, 2005 WL 2542916 (S.D.N.Y. Oct. 11, 2005) (after an extensive analysis of the crack/powder cocaine sentencing guidelines, using a 10:1 ratio instead of a 100:1 crack:powder ratio to punish the defendant because that ratio is sufficient to punish crack cocaine dealers more harshly than those who deal in powder cocaine and because a sentence based largely on the crack cocaine/powder cocaine disparity is greater than necessary to satisfy the purposes of sentencing). Cf. *United States v. Tabor*, 365 F. Supp. 2d 1052 (D. Neb. 2005) (although critical of the crack cocaine/powder cocaine sentencing disparity, the court rejects the idea that a judge should exercise his discretion under *Booker* to deviate from the guidelines in a case involving crack cocaine; deviating from the guidelines would contradict clear legislative intent to punish crack dealers more harshly); *United States v. John Doe*, No. 02-0406, 2006 WL 177396 (D.D.C. Jan. 26, 2006) (it is not up to federal judges to reject as bad policy a legislative determination made by Congress; in circumstances where no other 18 U.S.C. § 3553 factors support mitigation in sentencing, judges cannot conclude that a guidelines sentence for crack (which reflects the 100:1 crack:powder ratio) creates an “unwarranted sentence disparit[y]” solely because an offender who possessed the same amount of powder cocaine would get a much lower sentence”).

<sup>141</sup> *United States v. Galvez-Barrrios*, 355 F. Supp. 2d 958 (E.D. Wis. 2005) (holding because fast-track programs in border districts for illegal reentry offenses are creating serious sentencing disparities, it may be appropriate in some cases for a sentencing court to exercise its discretion under *Booker* to minimize the sentencing disparity that fast-track programs create); *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728 (E.D. Va. 2005) (sentencing below the guidelines in an illegal reentry case where the defendant's sentence was enhanced based on a crime of violence, after considering the 18 U.S.C. § 3553(a) factors, in

Although some district courts concluded that disagreement with policy decisions could justify below-range sentences, no appellate court has sustained that conclusion.<sup>142</sup>

Some of the issues that arose after *Booker* have been resolved at the circuit court level, while still others remain to be answered as cases wind their way through the appellate process. Chapter 2 of this report discusses the developing appellate jurisprudence in further detail and will identify the areas of concern that remain unresolved.

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large part, based on the absence of a fast-track program in the district). *Cf. United States v. Perez-Chavez*, No. 05-CR-00003PGC, 2005 U.S. Dist. Lexis 9252 (D. Utah May 16, 2005) (explaining why it is inappropriate to deviate from the guidelines range based on the absence of a fast-track program; the issue is foreclosed by a pre-*Booker* decision in which the Tenth Circuit determined that the absence of a fast-track program is not a basis for a downward departure; Congress approved the disparity created by fast-track programs when it enacted the PROTECT Act; judicially created fast-track programs encroached on the Executive Branch's responsibility to enforce the nation's criminal laws).

<sup>142</sup> See generally Chapter 2.

## POST-BOOKER APPELLATE JURISPRUDENCE

### A. INTRODUCTION

The Supreme Court instructed in *Booker* that “[t]he district courts, while not bound to apply the Guidelines, must consult those guidelines and take them into account when sentencing.”<sup>143</sup> This chapter will discuss cases interpreting that directive. Moreover, upon excising the *de novo* standard of review in 18 U.S.C. § 3742(e), the Court directed courts of appeal to “review sentencing decisions for unreasonableness.”<sup>144</sup>

Chapters 4 through 6 will examine the impact of *Booker* as evidenced by sentencing information received from the district courts. In many instances, however, sentencing decisions do not end at the district court level. Both the government and the defendant have a limited right of appellate review.<sup>145</sup> Consequently, no discussion about the impact of *Booker* on the federal sentencing system would be complete without examining the post-*Booker* appellate court decisions interpreting and applying *Booker*.

This chapter is intended to explore the developing appellate court jurisprudence discussing reasonableness. It also highlights select decisions relevant to the consideration of *Booker*’s overall impact on the federal sentencing system.

### B. APPLICATION AND INTERPRETATION OF THE GUIDELINES

Sentencing after *Booker*, like sentencing under the mandatory guideline regime, begins with consideration of the sentencing guidelines. For example, the Fourth Circuit has stated: “In any given case after *Booker*, a district court will calculate, consult, and take into account *the exact same guideline range* that it would have applied under the pre-*Booker* mandatory guidelines regime.”<sup>146</sup> Thus, the “guideline range remains the starting point for the sentencing decision. And, if the district court decides to impose a sentence outside that range, it should explain its reasons for doing so.”<sup>147</sup> Indeed, courts

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<sup>143</sup> *Booker*, 543 U.S. at 264.

<sup>144</sup> *Id.*

<sup>145</sup> See 18 U.S.C. § 3742(a) & (b) (2005).

<sup>146</sup> *United States v. White*, 405 F.3d 208, 219 (4<sup>th</sup> Cir. 2005), citing (*Booker*, 543 U.S. at 264); *United States v. Hughes II*, 401 F.3d 540, 546 (4<sup>th</sup> Cir. 2005).

<sup>147</sup> *White*, 405 F.3d at 219 (internal citations omitted). See also *United States v. Vaughn*, 430 F.3d 518 (2<sup>d</sup> Cir. 2005) (“District courts remain statutorily obliged to calculate guidelines ranges in the same manner as before *Booker* and to find facts relevant to sentencing by a preponderance of the evidence”); *United States v. Mares*, 402 F.3d 511 (5<sup>th</sup> Cir. 2005) (stating that ordinarily, the sentencing judge must determine the applicable guidelines range in the same manner as before *Booker*; this process includes finding all facts relevant to sentencing using a preponderance of the evidence standard); *United States v. Stone*, 432 F.3d 651 (6<sup>th</sup> Cir. 2005) (“District courts . . . must, therefore, calculate the guideline range as they would have done prior to *Booker*”); *United States v. Rodriguez-Alvarez*, 425 F.3d 1041 (7<sup>th</sup> Cir. 2005) (“Sentencing courts must continue to calculate the applicable guidelines range even though the guidelines are now advisory.”); *United States v. Pizano*, 403 F.3d 991 (8<sup>th</sup> Cir. 2005) (stating that although the Guidelines are

have opined that “while [] the appropriate circumstances for imposing a sentence outside the guideline range will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range.”<sup>148</sup>

In *Booker*, the Supreme Court adopted a remedy to the Sixth Amendment violation that “maintains a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.”<sup>149</sup> Thus, *Booker* reaffirmed the role of relevant conduct<sup>150</sup> in the advisory guideline scheme. Consequently, relevant conduct considerations continue to play an integral part of post-*Booker* sentencing.<sup>151</sup>

Calculation of the guideline range continues to include factfinding by the court to resolve disputed issues. Although defendants have argued that the sentencing judge is now prohibited from resolving disputed facts during sentencing, those courts considering the issue have rejected this argument. These courts reason that *Booker* does not prohibit

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no longer mandatory, a sentencing court must still begin its analysis by considering them); *United States v. Cantrell*, 433 F.3d 1269 (9<sup>th</sup> Cir. 2006) (holding that although district courts are not bound to sentence within the applicable Guidelines ranges, district courts still must consult the Guidelines and take them into account when sentencing); *United States v. Medrano*, No. 05-2057, 2006 WL 165017 (10<sup>th</sup> Cir. Jan. 24, 2006) (unpub.) (holding that although the guideline range is now advisory, the process of determining the correct guideline range is the same); *United States v. Talley*, 431 F.3d 784 (11<sup>th</sup> Cir. 2005) (noting that sentencing involves two steps—first calculate the guideline range then consider the 18 U.S.C. § 3553(a) factors to determine a reasonable sentence).

<sup>148</sup> *United States v. White*, 405 F.3d at 218. See also *United States v. Mykytiuk*, 415 F.3d 606, 607 (7<sup>th</sup> Cir. 2005) (“When the Supreme Court directed the federal courts to continue using the Guidelines as a source of advice for proper sentences, it expected that many (perhaps most) sentences would continue to reflect the results obtained through an application of the Guidelines”). This echoes sentiments expressed by many witnesses at the Commission’s public hearing in February, 2005. See generally Appendix C.

<sup>149</sup> *Booker*, 543 U.S. at 246.

<sup>150</sup> See *Guidelines Manual*, §1B1.3 (2005), which provides that the defendant’s offense level shall be determined on the basis of the following: (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense; (2) solely with respect to offenses of a character for which USSG §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction; (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and (4) any other information specified in the applicable guideline.

<sup>151</sup> See *United States v. Killgo*, 397 F.3d 628, 631, n.5 (8<sup>th</sup> Cir. 2005) (“Relevant conduct also relates to the ‘history and characteristics of the defendant,’ § 3553(a)(1), as well as the need to ‘protect the public from further crimes of the defendant,’ § 3553(a)(2)(C). Using relevant conduct in sentencing a defendant also aids in the ‘need to avoid unwarranted sentence disparities.’ 18 U.S.C. § 3553(a)(6)”); *United States v. Speelman*, 431 F.3d 1226 (9<sup>th</sup> Cir. 2005) (stating that the district court may apply a cross reference based on relevant conduct alleged on charges dismissed pursuant to a plea agreement).

any and all judicial factfinding.<sup>152</sup> Instead, the circuits have held that *Booker* proscribes only judicial factfinding that increases a sentence beyond the maximum authorized by the jury verdict or supported by the defendant's admissions. Likewise, arguments that the burden of proof for judicial factfinding is now beyond a reasonable doubt have proved unavailing. Most circuits have held that the district court may resolve factual disputes using a preponderance of the evidence burden of proof.<sup>153</sup> This same burden of proof generally was applied to factual determinations in the pre-*Booker* mandatory guidelines era.<sup>154</sup>

Furthermore, since *Booker*, the appellate courts have held that sentencing courts may still consider reliable hearsay in fashioning a sentence in the advisory guidelines scheme.<sup>155</sup> Circuit courts also have held that the district judge can still consider acquitted conduct in determining the guideline range, as long as the consideration of acquitted conduct does not increase the sentence above the statutory maximum

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<sup>152</sup> *United States v. Gonsalves*, 435 F.3d 64, (1<sup>st</sup> Cir. 2006); *United States v. Sheikh*, 433 F.3d 905 (2d Cir. 2006); *United States v. McKinney*, 406 F.3d 744 (5<sup>th</sup> Cir. 2005); *United States v. Coffee*, 434 F.3d 887 (6<sup>th</sup> Cir. 2006); *United States v. Manning*, No. 05-1406, 2005 WL 3557446 (8<sup>th</sup> Cir. Dec. 30, 2005) (unpub.); *United States v. Haack*, 403 F.3d 997 (8<sup>th</sup> Cir. 2005); *United States v. Fifield*, 432 F.3d 1056 (9<sup>th</sup> Cir. 2005); *United States v. Stephenson*, 159 F.App'x 50 (10<sup>th</sup> Cir. 2005); *United States v. Smith*, No. 05-3252, 2005 WL 3485985 (10<sup>th</sup> Cir. Dec. 21, 2005) (unpub.).

<sup>153</sup> *United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005); *United States v. Ledesma*, No. 05-1563, 2005 WL 3477715 (3d Cir. Dec. 20, 2005) (unpub.); *United States v. Mares*, 402 F.3d 511 (5<sup>th</sup> Cir. 2005); *United States v. Garcia-Gonon*, 433 F.3d 587 (8<sup>th</sup> Cir. 2006); *United States v. Tynes*, No. 05-13035, 2005 WL 3536189 (11<sup>th</sup> Cir. Dec. 28, 2005) (unpub.).

<sup>154</sup> Prior to *Booker*, the courts of appeal have held that a preponderance of the evidence was sufficient for most factfinding under the sentencing guidelines. See, e.g., *United States v. Morgan*, 384 F.3d 1, 5 (1<sup>st</sup> Cir. 2004); *United States v. Leung*, 360 F.3d 62, 67 (2d Cir. 2004); *United States v. Mack*, 229 F.3d 226, 233 (3d Cir. 2000); *United States v. Hill*, 322 F.3d 301, 307 (4th Cir. 2003); *United States v. Bieganowski*, 313 F.3d 264, 294 (5<sup>th</sup> Cir. 2002); *United States v. Helton*, 349 F.3d 295, 299 (6<sup>th</sup> Cir. 2003); *United States v. Peterson*, 256 F.3d 612, 615 (7<sup>th</sup> Cir. 2001); *United States v. Flores*, 362 F.3d 1030, 1037 (8<sup>th</sup> Cir. 2004); *United States v. Gonzales*, 307 F.3d 906, 909 (9<sup>th</sup> Cir. 2002); *United States v. Keifer*, 198 F.3d 798, 800 (10<sup>th</sup> Cir. 1999); *United States v. Polar*, 369 F.3d 1248, 1255 (11<sup>th</sup> Cir. 2004). But see *United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990) (holding that where "the magnitude of a contemplated departure is sufficiently great that the sentencing hearing can fairly be characterized as 'a tail which wags the dog of the substantive offense,'" "the factfinding underlying that departure must be established at least by clear and convincing evidence"); *United States v. Jordan*, 256 F.3d 922 (9<sup>th</sup> Cir. 2001) (holding when a sentencing factor has extremely disproportionate effect on the sentence relative to offense of conviction, due process requires that government prove the facts underlying the enhancement by clear and convincing evidence).

<sup>155</sup> *United States v. Baker*, 432 F.3d 1189 (11<sup>th</sup> Cir. 2005) (holding *Booker* did not change the rule that a sentencing court may base sentencing determinations on reliable hearsay). See also *United States v. Katzopoulos*, 437 F.3d 569 (6<sup>th</sup> Cir. 2006) (the defendant's Sixth Amendment rights were not violated by the admission of hearsay at sentencing); *United States v. Luciano*, 414 F.3d 174 (1<sup>st</sup> Cir. 2005) (Sixth Amendment confrontation rights were not violated by the admission of hearsay at sentencing); *United States v. Martinez*, 413 F.3d 239 (2d Cir. 2005) (post-*Booker*, the Sixth Amendment rights of confrontation do not bar judicial consideration of hearsay at sentencing proceedings); *United States v. Brown*, 430 F.3d 942 (8<sup>th</sup> Cir. 2005) ("We see nothing in *Booker* that would require the court to determine the sentence in any manner other than the way the sentence would have been determined pre-*Booker*").

sentence.<sup>156</sup> These courts rely in part upon the Supreme Court’s decision in *Watts*<sup>157</sup> and 18 U.S.C. § 3661 to support this conclusion.

### C. APPLICATION OF THE 18 U.S.C. § 3553(a) FACTORS

Once the court has correctly calculated the applicable guideline range, the court must then consider the policy statements issued by the Commission in determining guideline departure factors that may be applicable under the guidelines. After considering guideline departure factors under the Commission’s policy statements, the courts must then consider the factors set forth in 18 U.S.C. § 3553(a) before imposing the sentence.<sup>158</sup> Section 3553(a) states that a “court shall impose a sentence sufficient but not greater than necessary to comply with the purposes set forth” herein. Those factors are —

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established

for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.<sup>159</sup>

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<sup>156</sup> *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005); *United States v. Ashworth*, 139 F. App’x 525 (4<sup>th</sup> Cir. 2005); *United States v. Price*, 418 F.3d 771 (7<sup>th</sup> Cir. 2005); *United States v. Lynch*, 437 F.3d 902 (9<sup>th</sup> Cir. 2006) (*en banc*); *United States v. Magallanez*, 408 F.3d 672 (10<sup>th</sup> Cir. 2005); *United States v. Duncan*, 400 F.3d 1297 (11<sup>th</sup> Cir.), *cert. denied*, 126 S. Ct. 432 (2005).

<sup>157</sup> *See supra*, n. 71.

<sup>158</sup> *See Hughes II*, 401 F.3d at 546; *Stone*, 432 F.3d at 655; *Talley*, 431 F.3d at 786.

<sup>159</sup> 18 U.S.C. § 3553(a)(1)-(7).

The sentencing court need not categorically recite each of the 18 U.S.C. § 3553(a) factors on the record when it imposes a sentence.<sup>160</sup> Nevertheless, the record on appeal must include sufficient evidence to demonstrate affirmatively the court's consideration of these factors. The circuit courts are more likely to find “procedural unreasonableness in the court's sentencing determination,” if a district court hides its reasoning or requires the appellate court “to ponder and speculate” what the reasons for the sentence might have been.<sup>161</sup> Consequently, the sentencing court’s consideration of the 18 U.S.C. § 3553(a) factors has become an essential part of the imposition of sentence.<sup>162</sup>

#### **D. REASONABLENESS REVIEW**

Review of a sentence in the advisory system created by *Booker* begins with an examination of the guideline calculation. Indeed, the appellate courts have concluded that a sentence based on an error of law, including improper guideline calculation, is unreasonable. As a result, the appellate courts first determine whether the sentencing judge correctly calculated the guideline range. If the sentencing judge erred in calculating the guideline range, the appellate courts do not reach the question of whether the sentence is reasonable in light of all statutory factors.<sup>163</sup>

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<sup>160</sup> *United States v. McBride*, 434 F.3d 470 (6<sup>th</sup> Cir. 2006); *United States v. Dieken*, 432 F.3d 906 (8<sup>th</sup> Cir. 2006); *United States v. Scott*, 426 F.3d 1324 (11<sup>th</sup> Cir. 2005) (“nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors”), *but see United States v. Cunningham*, 429 F.3d 673, 679 (7<sup>th</sup> Cir. 2005) (“A rote statement that the judge considered all relevant factors will not always suffice; the temptation to a busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored”).

<sup>161</sup> *McBride*, 434 F.3d at 476, n.3. *See also United States v. Lenover*, 157 F. App’x 917 (7<sup>th</sup> Cir. 2005) (stating that the court cannot review the appellant’s sentence for reasonableness because the “absence of an explanation leaves us in the dark as to the district judge’s reasons for rejecting the proffered § 3553 factors and requires that the case be remanded to the district court”); *United States v. Oduardo*, No. 05-10921, 2006 WL 231645 (11<sup>th</sup> Cir. Feb. 11, 2006) (unpub.) (holding that to fashion a reasonable sentence, a sentencing judge must be guided by the 18 U.S.C. § 3553(a) factors; the judge need not establish the reasonableness of a sentence by explicitly considering every factor, but he must indicate in some way that he adequately and properly considered appropriate factors in imposing a within- range sentence).

<sup>162</sup> *United States v. Till*, 434 F.3d 880 (6<sup>th</sup> Cir. 2006).

<sup>163</sup> *See, e.g., United States v. Cantrell*, 433 F.3d 1269 (9<sup>th</sup> Cir. 2006) (explaining that a reasonableness review includes two steps: (1) first determining whether the sentencing court correctly calculated the Guideline range, and (2) and then determining reasonableness; but, the court will review for reasonableness only if the district court correctly calculated the Guidelines range—otherwise, the court will remand for resentencing from the recommended sentencing range under the Guidelines.”); *United States v. Williams*, 435 F.3d 1350 (11<sup>th</sup> Cir. 2006) (holding that the first step in imposing a reasonable sentence is to correctly calculate the Guidelines range); *United States v. Price*, 409 F.3d 436 (D.C. Cir. 2005) (stating that a sentence is unreasonable, regardless of length, if it resulted from legal errors, which include improper guideline calculations); *United States v. Kristl*, 437 F.3d 1050 (10<sup>th</sup> Cir. 2006).

The circuit courts have not changed the way they review challenges to the district court's application and interpretation of the sentencing guidelines. The courts still review a district court's factual findings for clear error and the district court's conclusions of law *de novo*.<sup>164</sup> The courts applied the same type of review to factual findings and conclusions of law before *Booker*.<sup>165</sup>

As stated previously, the *Booker* remedial opinion excised the *de novo* standard of appellate review under 18 U.S.C. § 3742 and replaced it with a reasonableness review. The reasonableness standard is necessarily deferential to the district court because “‘reasonableness’ is inherently a concept of flexible meaning, generally lacking precise boundaries.”<sup>166</sup> One court has made clear that “[a]lthough this standard clearly requires us to afford a degree of deference to the sentencing decisions of the district court, ‘reasonableness’ is not a code-word for ‘rubber stamp.’”<sup>167</sup> To enable the court of

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<sup>164</sup> *United States v. Robinson*, 433 F.3d 31 (1<sup>st</sup> Cir. 2005) (observing that despite *Booker*'s reasonableness standard, the court continues to review the district court's interpretations of the legal meaning of the sentencing guidelines *de novo* and its factual findings for clear error); *United States v. Powell*, 404 F.3d 678 (2d Cir. 2005) (stating that the question of what constitutes a separate conviction is a question of law reviewed *de novo*); *United States v. Savage*, No. 04-5127, 2006 WL 10893 (4<sup>th</sup> Cir. Jan. 3, 2006) (unpub.) (stating the court reviews the district court's application of the sentencing guidelines *de novo*); *United States v. Amaya-Portillo*, 423 F.3d 427 (4<sup>th</sup> Cir. 2005) (holding that the court of appeals reviews “the district court's imposition of the sentence enhancement *de novo* because it entails the interpretation of a statute”); *United States v. Villegas*, 404 F.3d 355 (5<sup>th</sup> Cir. 2005) (holding that the *de novo* standard of review still applies to determining whether the district court correctly interpreted and applied the sentencing guidelines); *United States v. Hazelwood*, 398 F.3d 792 (6<sup>th</sup> Cir. 2005) (the court reviews the district court's factual findings for clear error and the district court's conclusions of law *de novo*); *United States v. Arnaout*, 431 F.3d 994 (7<sup>th</sup> Cir. 2005) (“[W]e continue to review the district court's factual findings at sentencing for clear error and the application of those facts to the Sentencing Guidelines *de novo*”); *United States v. Mashek*, 406 F.3d 1012 (8<sup>th</sup> Cir. 2005) (stating that “the most appropriate standard for reviewing a district court's interpretation and application of the guidelines is the *de novo* standard”); *United States v. Mathijssen*, 406 F.3d 496 (8<sup>th</sup> Cir. 2005) (stating that the court continues to review the interpretation and application of the guidelines provisions *de novo*); *United States v. Speelman*, 431 F.3d 1226 (9<sup>th</sup> Cir. 2005) (the court reviews the application of the guidelines *de novo*); *United States v. Kimbrew*, 406 F.3d 1149, 1151 (9<sup>th</sup> Cir. 2005) (holding that after *Booker*, the court of appeals continues to review the district court's interpretation of the sentencing guidelines *de novo*, the court's application of the guidelines to the facts of a case for an abuse of discretion, and the court's factual findings for clear error); *United States v. Souser*, 405 F.3d 1162 (10<sup>th</sup> Cir. 2005) (the court reviews district court's interpretation of the guidelines *de novo*); *United States v. Scott*, No. 05-13132, 2005 WL 3501863 (11<sup>th</sup> Cir. Dec. 23, 2005) (unpub.) (explaining that because *Booker* did not alter the court's review of the application of the sentencing guidelines, the court of appeals reviews the district court's application of the sentencing guidelines *de novo*); *United States v. Crawford*, 407 F.3d 1174 (11<sup>th</sup> Cir. 2005) (noting whether a factor is a permissible ground for a downward departure is a question of law subject to *de novo* review).

<sup>165</sup> See, e.g., *United States v. Alegria*, 192 F.3d 179, 191 (1<sup>st</sup> Cir. 1999); *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004); *United States v. Cothran*, 286 F.3d 173, 177 (3d Cir. 2002); *United States v. Montgomery*, 262 F.3d 233, 248 (4<sup>th</sup> Cir. 2001); *United States v. Miles*, 360 F.3d 472, 481 (5<sup>th</sup> Cir. 2004); *United States v. Sandlin*, 291 F.3d 875, 880 (6<sup>th</sup> Cir. 2002); *United States v. Mabrook*, 301 F.3d 503, 510 (7<sup>th</sup> Cir. 2002); *United States v. Dabney*, 367 F.3d 1040, 1043 (8<sup>th</sup> Cir. 2004); *United States v. Castillo*, 181 F.3d 1129, 1135 (9<sup>th</sup> Cir. 1999); *United States v. Bolden*, 23 Fed.App'x. 900, 904 (10<sup>th</sup> Cir. 2001); *United States v. Cook*, 181 F.3d 1232 (11<sup>th</sup> Cir. 1999).

<sup>166</sup> *United States v. Dominguez-Hernandez*, No. 05-1870-CR, 2005 WL 3528883 (2d Cir. Dec. 21, 2005) (unpub.); see also *United States v. Pizano*, 403 F.3d 991 (8<sup>th</sup> Cir. 2005) (noting that in reviewing reasonableness, the court asks whether the district court abused its discretion).

<sup>167</sup> *United States v. Moreland*, 437 F.3d 424 (4<sup>th</sup> Cir. 2006).

appeals to review a sentence for reasonableness, the district court must articulate carefully its reasons for the sentence imposed. “These reasons should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable.”<sup>168</sup> “The determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it.”<sup>169</sup> The court of appeals must consider not only the length of the sentence, but also the factors evaluated and the procedures employed by the district court in imposing the sentence. A sentence is unreasonable if the district judge fails to consider the sentencing guidelines or neglects to consider the 18 U.S.C. § 3553(a) factors, and instead simply selects what he believes is an appropriate sentence.<sup>170</sup> Moreover, “the farther the judge’s sentence departs from the guidelines sentence (in either direction . . .), the more compelling the justification based on factors in section 3553(a) that the judge must offer.”<sup>171</sup>

Although *Booker* instructed appellate courts to review a sentence to determine if it is unreasonable, the circuits have uniformly referred to such reviews as reasonableness reviews. Six circuits — the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth — have held that a sentence within the applicable guideline range is presumptively reasonable.<sup>172</sup> These circuits reasoned that a *per se* or conclusively reasonable test would be “inconsistent with the Supreme Court’s decision in *Booker*, as such a standard ‘would effectively re-institute mandatory adherence to the Guidelines.’”<sup>173</sup> Exhibit 1 shows the leading appellate decisions for each circuit discussing reasonableness or the weight of the sentencing guidelines.

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<sup>168</sup> *United States v. Hardin*, 437 F.3d 463 (5<sup>th</sup> Cir. 2006).

<sup>169</sup> *United States v. Hughes*, 401 F.3d 540 (4<sup>th</sup> Cir. 2005).

<sup>170</sup> *United States v. Webb*, 403 F.3d 373 (6<sup>th</sup> Cir. 2005).

<sup>171</sup> *United States v. Dean*, 414 F.3d 725 (7<sup>th</sup> Cir. 2005); *see also United States v. Moreland*, 437 F.3d 424 (4<sup>th</sup> Cir. 2006) (stating that the farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be); *United States v. McMannus*, 436 F.3d 871 (8<sup>th</sup> Cir. 2006) (“[T]he farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be.”).

<sup>172</sup> *United States v. Green*, 436 F.3d 449 (4<sup>th</sup> Cir. 2006); *United States v. Alonzo*, 435 F.3d 551 (5<sup>th</sup> Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6<sup>th</sup> Cir. 2006); *United States v. Mykytiuk*, 415 F.3d at 607; *United States v. Tobacco*, 428 F.3d 1148 (8<sup>th</sup> Cir. 2005); *United States v. Kristl*, 437 F.3d 1050 (10<sup>th</sup> Cir. 2006).

<sup>173</sup> *United States v. Webb*, 403 F.3d 373, 385 n.9 (6<sup>th</sup> Cir. 2005) citing *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005). *See also United States v. Alonzo*, 435 F.3d 551 (5<sup>th</sup> Cir. 2006); *United States v. Cunningham*, 429 F.3d 673 (7<sup>th</sup> Cir. 2005); *Mykytiuk*, 415 F.3d at 607; *Talley*, 431 F.3d at 786..

**Exhibit 1**  
**Leading Appellate Case in Each Circuit**  
**Discussing Reasonableness or Weight of the Sentencing Guidelines**

<b>Circuit</b>	<b>Leading Case</b>	<b>Determination</b>
<b>First</b>	<i>United States v. Jiminez-Beltre</i> , No. 05-1268, 2006 WL 562154 (1 <sup>st</sup> Cir. Mar. 9, 2006) ( <i>en banc</i> ).	“[T]he guidelines cannot be called just ‘another factor’ in the statutory list because they are the only <i>integration of multiple</i> factors.”
<b>Second</b>	<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005).	“[W]e decline to fashion any <i>per se</i> rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline.”
<b>Third</b>	<i>United States v. Cooper</i> , 437 F.3d 324 (3d Cir. 2006).	“[A]ppellants have the burden of demonstrating unreasonableness. A sentence that falls within the guidelines range is more likely to be reasonable than one outside the guidelines range.”
<b>Fourth</b>	<i>United States v. Green</i> , 436 F.3d 449 (4 <sup>th</sup> Cir. 2006).	Guideline sentence is presumptively reasonable.
<b>Fifth</b>	<i>United States v. Alonzo</i> , 435 F.3d 551 (5 <sup>th</sup> Cir. 2006).	Guideline sentence is presumptively reasonable.
<b>Sixth</b>	<i>United States v. Williams</i> , 436 F.3d 706 (6 <sup>th</sup> Cir. 2006).	Guideline sentence is presumptively reasonable.
<b>Seventh</b>	<i>United States v. Mykytiuk</i> , 415 F.3d 606 (7 <sup>th</sup> Cir. 2005).	Guideline sentence is presumptively reasonable.
<b>Eighth</b>	<i>United States v. Lincoln</i> , 413 F.3d 716 (8 <sup>th</sup> Cir. 2005).	Guideline sentence is presumptively reasonable.
<b>Ninth</b>	<i>United States v. Cantrell</i> 433 F.3d 1269 (9 <sup>th</sup> Cir. 2006).	“[W]e are stressing that district courts still ‘must consult [the] [g]uidelines and take them into account when sentencing,’ even though they now have the discretion to impose non-[g]uidelines sentences.”
<b>Tenth</b>	<i>United States v. Kristl</i> , 437 F.3d 1050 (10 <sup>th</sup> Cir. 2005).	Guideline sentence is presumptively reasonable.
<b>Eleventh</b>	<i>United States v. Talley</i> , 431 F.3d 784 (11 <sup>th</sup> Cir. 2005).	“When the district court imposes a sentence within the advisory Guidelines range, we ordinarily will expect that choice to be a reasonable one.” <i>See also United States v. Lisbon</i> , No. 05-12637, 2006 WL 306343 (11 <sup>th</sup> Cir. Feb. 10, 2006) (unpub.) (“A sentence within the guideline range is not presumptively reasonable.”).
<b>DC</b>	---	None as of the date of the report.

The Seventh Circuit, for example, explained the reasoning underlying its adoption of a presumption of reasonableness for sentences within the guideline range. “The Sentencing Guidelines represent at this point eighteen years’ worth of careful consideration of the proper sentence for federal offenses.”<sup>174</sup> “[W]hile a *per se* or conclusively presumed reasonableness test would undo the Supreme Court’s merits analysis in *Booker*, a clean slate that ignores the proper Guidelines range would be inconsistent with the remedial opinion.”<sup>175</sup> Because “[t]he Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country... [t]he best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.”<sup>176</sup> “The defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in § 3553(a).”<sup>177</sup> Two other circuits — the Eighth and the Eleventh — have stated that the guidelines were fashioned taking the other § 3553(a) factors into account.<sup>178</sup>

A recent opinion from the Sixth Circuit explained, however, that the presumption of reasonableness “does not mean that a sentence outside of the Guidelines – either higher or lower – is presumptively *un* reasonable.”<sup>179</sup> Nor does it mean that a guidelines sentence is reasonable in the absence of evidence that “the district court followed its statutory mandate to ‘impose a sentence sufficient, but not greater than necessary’ to comply with the purposes of sentencing in section 3553(a)(2).”<sup>180</sup> In comparison, the Second Circuit has stated that a sentence is not reasonable merely because it falls within the applicable guideline range and that it is not unreasonable just because it falls outside the applicable guideline range.<sup>181</sup> While the circuit courts continue to consider the reasonableness standard, the Commission has identified only one reported case in which a guideline sentence was held to be unreasonable.<sup>182</sup>

The following are illustrative examples of sentences above and below the guideline range that the circuit courts have found to be reasonable. In *United States v. Adams*,<sup>183</sup> the Eighth Circuit upheld a sentence of 327 months, based upon an upward departure from a guideline range of 188 to 235 months. Although recognizing that the sentence was lengthy, the district court indicated that the lengthy sentence was necessary

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<sup>174</sup> *Mykytiuk*, 415 F.3d at 607.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 608.

<sup>177</sup> *Id.*

<sup>178</sup> See *United States v. Claiborne*, No. 05-2198, 2006 WL 452899 (8<sup>th</sup> Cir. Feb. 27, 2006) (“The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study.”); *United States v. Shelton*, 400 F.3d 1325 (11<sup>th</sup> Cir. 2005) (“Indeed, the factors the Sentencing Commission were required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under *Booker* and § 3553(a).”).

<sup>179</sup> *United States v. Foreman*, 436 F.3d 638 (6<sup>th</sup> Cir. 2006).

<sup>180</sup> *Id.*

<sup>181</sup> *Crosby*, 397 F.3d at 115.

<sup>182</sup> *United States v. Lazenby*, No. 05-2216 (8<sup>th</sup> Cir. Mar. 10, 2006), available at <http://www.ca8.uscourts.gov>.

<sup>183</sup> 401 F.3d 886 (8<sup>th</sup> Cir.), *cert. denied*, 126 S. Ct. 492 (2005).

to ensure the community would be safe from the defendant's behavior. In *United States v. Menyweather*,<sup>184</sup> the Ninth Circuit upheld as reasonable a probationary sentence with the condition that the defendant pay restitution and spend 40 days in jail. This sentence represented an 8-level reduction below the applicable guideline range. When imposing the sentence, the district court relied on the defendant's evidence that she suffered from post-traumatic stress disorder and that she was the sole support for her minor child.<sup>185</sup>

The following are illustrative examples of sentences above and below the guideline range that the circuit courts have found to be unreasonable. In *United States v. McMannus*,<sup>186</sup> the Eighth Circuit vacated a sentence that was 54 percent less than the sentencing guideline range. The district court deviated from the sentencing guidelines because of the defendant's criminal history. The Eighth Circuit concluded that this basis did not justify a variance of that magnitude. The Seventh Circuit found a sentence of more than double the high end of the guideline range to be unreasonable in *United States v. Castro-Juarez*.<sup>187</sup> The district judge acknowledged the need to consider the 18 U.S.C. § 3553(a) factors but failed to single out any factor except the defendant's criminal history to support the non-guideline sentence. In *United States v. Clark*,<sup>188</sup> the Fourth Circuit explained that while considering state sentencing practices is not per se unreasonable, deviating from the sentencing guidelines simply because a defendant would have received a different sentence in state court, without considering the need to avoid unwarranted sentence disparities among federal defendants with similar records who have been found guilty of similar conduct, is unreasonable. The Eighth Circuit has reversed several downward departures resulting from substantial assistance motions filed by the government, concluding that the extent of the departures was unreasonable.<sup>189</sup> Exhibit 2 shows selected appellate decisions addressing reasonableness.

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<sup>184</sup> 431 F.3d 692 (9<sup>th</sup> Cir. 2005).

<sup>185</sup> Judge Kleinfeld authored a vigorous dissent arguing that reasonableness still requires review and that the appellate court may not properly defer to an unreasonable sentencing decision. He opined that the grounds justifying the below-range sentence were insufficient even in the post-*Booker* advisory era. *Id.* at 702.

<sup>186</sup> 436 F.3d 871 (8<sup>th</sup> Cir. 2006).

<sup>187</sup> 425 F.3d 430 (7<sup>th</sup> Cir. 2005).

<sup>188</sup> 434 F.3d 684 (4<sup>th</sup> Cir. 2006).

<sup>189</sup> *See, e.g., United States v. Coyle*, 429 F.3d 1192 (8<sup>th</sup> Cir. 2005) (concluding that a 73% reduction was unreasonably large given the extent of the defendant's cooperation); *United States v. Saenz*, 428 F.3d 1159 (8<sup>th</sup> Cir. 2005) (holding that a 50% reduction in sentence is an extraordinary reduction and the district court was wrong to conclude that a defendant who cooperates truthfully and timely always warrants a 50% reduction); *United States v. Dalton*, 404 F.3d 1029 (8<sup>th</sup> Cir. 2005) (stating that a 75% downward departure was unreasonable when the district judge placed a higher value on the defendant's assistance than the government did and viewed the defendant as a drug offender with a good chance at being rehabilitated).

**Exhibit 2**  
**Reasonableness Review Doctrines for Selected Appellate Decisions**

**AFFIRMANCES**

**Within-Guideline Range as Reasonable**

Numerous

**Below-Guideline Range as Reasonable**

*United States v. Berni*, No. 05-1678, 2006 WL 463173 (8<sup>th</sup> Cir. Feb. 28, 2006).

*United States v. Burns*, No 04-2901, 2006 WL 345850 (8<sup>th</sup> Cir. Feb. 16, 2006).

*United States v. Pizano*, 403 F.3d 991 (8<sup>th</sup> Cir. 2005).

*United States v. Menyweather*, 431 F.3d 692 (9<sup>th</sup> Cir. 2005).

*United States v. Williams*, 435 F.3d 1350 (11<sup>th</sup> Cir. 2006).

*United States v. Montgomery*, No. 05-13935, 2006 WL 284205  
(11<sup>th</sup> Cir. Feb. 7, 2006)(unpub.).

**Above-Guideline Range as Reasonable**

*United States v. Fairclough*, No. 05-2799, 2006 WL 465367 (2d Cir. Feb. 17, 2006).

*United States v. Reinhart*, No 05-30245, 2006 WL 541037 (5<sup>th</sup> Cir. Mar. 7, 2006).

*United States v. Zuniga-Peralta*, No. 04-50575, 2006 WL 522459  
(5<sup>th</sup> Cir. Mar. 6, 2006).

*United States v. Smith*, No 05-30313, 2006 WL 367011 (5<sup>th</sup> Cir. Feb. 17, 2006).

*United States v. Smith*, 417 F.3d 483 (5<sup>th</sup> Cir. 2005).

*United States v. Saldana*, 427 F.3d 298 (5<sup>th</sup> Cir. 2005).

*United States v. Jordan*, 435 F.3d 693 (7<sup>th</sup> Cir. 2006).

*United States v. Johnson*, 427 F.3d 425 (7<sup>th</sup> Cir. 2005).

*United States v. Long*, 425 F.3d 482 (7<sup>th</sup> Cir. 2005).

*United States v. Larrabee*, 436 F.3d 890 (8<sup>th</sup> Cir. 2006).

*United States v. Rogers*, 423 F.3d 823 (8<sup>th</sup> Cir. 2005).

*United States v. Winters*, 416 F.3d 856 (8<sup>th</sup> Cir. 2005).

*United States v. Shannon*, 414 F.3d 921 (8<sup>th</sup> Cir. 2005).

*United States v. Adams*, 401 F.3d 886 (8<sup>th</sup> Cir. 2005).

**REVERSALS/REMANDS**

**Within-Guideline Range as Unreasonable**

*United States v. Lazenby*, No. 05-2214 (8<sup>th</sup> Cir. Mar. 10, 2006).

**Below-Guideline Range as Unreasonable**

*United States v. Pho*, 433 F.3d 53 (1<sup>st</sup> Cir. 2006).

*United States v. Eura*, No. 05-4437, 2006 WL 440099 (4<sup>th</sup> Cir. Feb. 24, 2006).

*United States v. Moreland*, 437 F.3d 424 (4<sup>th</sup> Cir. 2006).

*United States v. Clark*, 434 F.3d 684 (4<sup>th</sup> Cir. 2006).

*United States v. Duhon*, No. 05-30387, 2006 WL 367017 (5<sup>th</sup> Cir. Feb 17, 2006).

*United States v. Castillo*, 430 F.3d 230 (5<sup>th</sup> Cir. 2005).

*United States v. Claiborne*, No. 05-2198, 2006 WL 452899  
(8<sup>th</sup> Cir. Feb. 27, 2006).

*United States v. Gatewood*, No. 05-1865, 2006 WL 452902  
(8<sup>th</sup> Cir. Feb. 27, 2006).

*United States v. Shafer*, No. 05-2049, 2006 WL 453200 (8<sup>th</sup> Cir. Feb. 27, 2006).

*United States v. McMannus*, 436 F.3d 871 (8<sup>th</sup> Cir. 2006).

*United States v. Coyle*, 429 F.3d 1192 (8<sup>th</sup> Cir. 2005).

*United States v. Saenz*, 428 F.3d 1159 (8<sup>th</sup> Cir. 2006).

*United States v. Rogers*, 400 F.3d 640 (8<sup>th</sup> Cir. 2005).

*United States v. Dalton*, 404 F.3d 1029 (8<sup>th</sup> Cir. 2005).

*United States v. Devegter*, No. 04-14075, 2006 WL 345849  
(11<sup>th</sup> Cir. Feb. 16, 2006).

**Above-Guideline Range as Unreasonable**

*United States v. Castro-Juarez*, 425 F.3d 430 (7<sup>th</sup> Cir. 2005).

*United States v. Wolfe*, 435 F.3d 1289 (10<sup>th</sup> Cir. 2006).

**Reversed/Remanded For Further Explanation**

*United States v. Cunningham*, 429 F.3d 673 (7<sup>th</sup> Cir. 2005).

*United States v. Castro-Juarez*, 425 F.3d 430 (7<sup>th</sup> Cir. 2005).

*United States v. Myers*, No. 05-1543, 2006 WL 488411 (8<sup>th</sup> Cir. Mar. 2, 2006).

*United States v. Feemster*, 435 F.3d 881 (8<sup>th</sup> Cir. 2006).

## E. JURISDICTION

Separate and apart from the reasonableness analysis, circuit courts also are examining issues of jurisdiction. Congress provided for limited appellate review of sentences in the SRA.<sup>190</sup> Before *Booker*, neither the defendant nor the government had the right to appeal a sentence within a properly calculated guideline range. The appellate courts simply lacked jurisdiction to review such a sentence. *Booker* did not excise the relevant portions of 18 U.S.C. § 3742 that established limited review. Hence, many have drawn the legal conclusion that *Booker* rendered no change to the review standard for within-range sentences.

To date, that conclusion has found no support in any reported cases.<sup>191</sup> Following *Booker*, the government has raised jurisdictional challenges to the review of within-range sentences. These challenges have not been successful. Three circuits categorically have rejected the argument.<sup>192</sup> These circuits reason that a within-range sentence might be unreasonable in a particular case. The sentence would therefore be “in violation of the law” and subject to review under 18 U.S.C. § 3742(a)(1).

Prior to *Booker*, the circuit courts agreed that they lacked jurisdiction to review the denial of a motion to depart downward if the district court correctly understood its authority to depart downward and declined to exercise that discretion.<sup>193</sup> The circuit courts agree post-*Booker* that a district judge’s denial of a motion for downward departure is still unreviewable.<sup>194</sup> With the Supreme Court’s excision of the *de novo* standard of review for departures, the appellate courts have reverted to the standard of

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<sup>190</sup> See 18 U.S.C. § 3742(a), (b).

<sup>191</sup> It has, however, been the subject of some concurring/dissenting opinions. See *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006) (Judge Aldisert, concurring in part, dissenting in part).

<sup>192</sup> *United States v. Jimenez-Beltre*, No. 05-1268, 2006 WL 562154 (1<sup>st</sup> Cir. Mar. 9, 2006); *United States v. Martinez*, 434 F.3d 1318 (11<sup>th</sup> Cir. 2006) (rejecting the government’s argument that the court cannot review a guidelines sentence because an unreasonable sentence would violate the law and therefore is subject to review under 18 U.S.C. § 3742(a)(1)); *United States v. Mickelson*, 433 F.3d 1050 (8<sup>th</sup> Cir. 2006) (rejecting the government’s argument that the court cannot review a sentence that falls within the guidelines range because “an unreasonable sentence would be ‘in violation of law’ and subject to review under 18 U.S.C. § 3742(a)(1) regardless of whether it was within the guideline range”).

<sup>193</sup> See, e.g., *United States v. Castelli*, 392 F.3d 35, 54-55 (1<sup>st</sup> Cir. 2004); *United States v. Scott*, 387 F.3d 139, 142 (2d Cir. 2004); *United States v. Minutoli*, 374 F.3d 236, 239 (3d Cir. 2004); *United States v. Shaw*, 313 F.3d 219, 222 (4<sup>th</sup> Cir. 2002); *United States v. Buck*, 324 F.3d 786, 797 (5<sup>th</sup> Cir. 2003); *United States v. Clark*, 385 F.3d 609, 622 (6<sup>th</sup> Cir. 2004); *United States v. Fudge*, 325 F.3d 910, 917-18 (7<sup>th</sup> Cir. 2003); *United States v. Lopez-Arce*, 267 F.3d 775, 784-85 (8<sup>th</sup> Cir. 2001); *United States v. Smith*, 330 F.3d 1209, 1212 (9<sup>th</sup> Cir. 2003); *United States v. Alcorn*, 329 F.3d 759, 768 (10<sup>th</sup> Cir. 2003); *United States v. Liss*, 265 F.3d 1220, 1231 (11<sup>th</sup> Cir. 2001).

<sup>194</sup> *United States v. Melendez-Torres*, 420 F.3d 45 (1<sup>st</sup> Cir. 2005); *United States v. Morrell*, 138 F. App’x 373 (2d Cir. 2005); *United States v. Forbes*, No. 04-4211, 2006 WL 197581 (3d Cir. Jan. 27, 2006) (unpub.); *United States v. Hatcher*, 132 F. App’x 468 (4<sup>th</sup> Cir. 2005); *United States v. Puckett*, 422 F.3d 340 (6<sup>th</sup> Cir. 2005); *United States v. Baretz*, 411 F.3d 867 (7<sup>th</sup> Cir. 2005); *United States v. Frokjer*, 415 F.3d 865 (8<sup>th</sup> Cir. 2005); *United States v. Hagberg*, 138 F. App’x 949 (9<sup>th</sup> Cir. 2005); (*United States v. Sierra-Castillo*, 405 F.3d 932, 936 (10<sup>th</sup> Cir. 2005); *United States v. Winingear*, 422 F.3d 1241 (11<sup>th</sup> Cir. 2005).

review for departures enunciated in *Koon v. United States*.<sup>195</sup> Accordingly, when the district court departs from the guidelines range, the appellate courts consider whether the departure constituted an abuse of the court's discretion.<sup>196</sup>

## F. OTHER APPELLATE SENTENCING ISSUES

### 1. Crack and Powder Cocaine

To date, no circuit court has concluded that a policy disagreement with the crack cocaine and powder cocaine sentencing ratio is a proper basis for imposing a non-guideline sentence.<sup>197</sup> In several cases, the circuit courts have affirmed sentences within the applicable guideline range, dismissing arguments that the sentences are unreasonable because of the disparity caused by the ratio.<sup>198</sup>

The First Circuit considered the reasonableness of a below range sentence imposed in a case involving crack cocaine in which the district court judge expressed his disagreement with the 100:1 crack:powder sentencing ratio.<sup>199</sup> The district court then fashioned the sentence using a 20:1 crack:powder ratio. The First Circuit reversed the sentence, holding that “the district court erred as a matter of law when it constructed a new sentencing range based on the categorical substitution of a 20:1 crack-to-powder ratio for the 100:1 crack:powder ratio embedded in the sentencing guidelines.”<sup>200</sup> The court further noted that “this holding recognizes that sentencing decisions must be done case by case and must be grounded in case-specific considerations...”<sup>201</sup> Accordingly, in the post-*Booker* advisory guidelines scheme, a district court's general disagreement with

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<sup>195</sup> 518 U.S. 81, 98 (1996).

<sup>196</sup> See *United States v. Fuller*, 426 F.3d 556 (2d Cir. 2005); *United States v. Saldana*, 427 F.3d 298 (5<sup>th</sup> Cir. 2005); *United States v. Williams*, 432 F.3d 621 (6<sup>th</sup> Cir. 2005); *United States v. Macedo*, 406 F.3d 778 (7<sup>th</sup> Cir. 2005); *United States v. Mashek*, 406 F.3d 1012 (8<sup>th</sup> Cir. 2005); *United States v. Menyweather*, 431 F.3d 692 (9<sup>th</sup> Cir. 2005); *United States v. Serrata*, 425 F.3d 886 (10<sup>th</sup> Cir. 2005); *United States v. Magluta*, 418 F.3d 1166 (11<sup>th</sup> Cir. 2005). But see *United States v. Johnson*, 427 F.3d 423, 426 (7<sup>th</sup> Cir. 2005) (“It is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the ‘departures’ as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory”).

<sup>197</sup> See Chapter 6 E for a discussion of the crack powder/powder cocaine sentencing ratio.

<sup>198</sup> *United States v. Morrison*, 152 F. App'x 385 (5<sup>th</sup> Cir. 2005) (rejecting the appellant's argument that he should have received a lesser sentence due to the disparity in the punishment imposed for offenses involving powder cocaine because sentencing judges must still consult the Guidelines and the guidelines distinction between crack and powder cocaine remains intact); *United States v. Gipson*, 425 F.3d 335 (7<sup>th</sup> Cir. 2005) (noting that where the district court imposes a sentence within the Guideline range, it is not unreasonable to refuse to consider the differential in sentences for crack cocaine versus powder cocaine); *United States v. Cawthorn*, 429 F.3d 793 (8<sup>th</sup> Cir. 2005) (observing that sentencing within the Guidelines based on the crack-powder disparity is not inherently unreasonable). But see *United States v. Stephen*, No. 05-2100, 2005 WL 3479301 (7<sup>th</sup> Cir. Dec. 20, 2005) (unpub.) (noting that although the court previously held that it was not unreasonable for the district court to depart downward on the discrepancy between Guideline ranges for crack and powder cocaine, “[n]othing prevents the district court from considering the discrepancy in selecting a reasonable sentence”).

<sup>199</sup> *United States v. Pho*, 433 F.3d 53 (1<sup>st</sup> Cir. 2006).

<sup>200</sup> *Id.* at 64-65.

<sup>201</sup> *Id.* at 65.

broad-based policies enunciated by Congress or the Commission, as its agent, cannot serve as the basis for sentencing outside the applicable guidelines range.<sup>202</sup>

The Fourth Circuit categorically has rejected imposition of below-range sentences based solely on a rejection of congressional policy in a crack cocaine case. In *United States v. Eura*,<sup>203</sup> the court stated that “[i]n arriving at a reasonable sentence, the court simply must not rely on a factor that would result in a sentencing disparity that totally is at odds with the will of Congress.”<sup>204</sup>

## 2. Early Disposition Programs

The Commission has not identified any reported cases in which circuit courts have upheld sentences below the guidelines range in non-Early Disposition Programs (EDP)<sup>205</sup> districts, because the district court cited the resulting disparity between districts that qualify for EDP departures and those that do not qualify. Two circuits have rejected the defendant’s argument that the sentence was unreasonable because the district judge failed to consider the unwarranted disparities in sentencing created by the existence of EDP in other jurisdictions. These circuits explained that the policymaking branches of government can determine that certain disparities are warranted and thus courts need not avoid the disparity created by these programs.<sup>206</sup>

## G. STATUTORY PENALTY SCHEMES

### 1. Armed Career Criminal Act

In *Booker*, the Supreme Court repeated its holding in *Apprendi* that facts “other than a prior conviction” are subject to the jury requirements of the Sixth Amendment. As a result, the circuits that have addressed *Booker*’s effect on the Armed Career Criminal Act<sup>207</sup> have agreed that the fact of a prior conviction is not a fact that a jury must find

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<sup>202</sup> *Id.*

<sup>203</sup> Nos. 05-4437, 05-4533, 2006 WL 440099 (4<sup>th</sup> Cir. Feb. 24, 2006)

<sup>204</sup> *Id.* at \*6. See also *United States v. Moreland*, 437 F.3d 424 (4<sup>th</sup> Cir. 2006)(observing that to the extent that the sentence imposed by the district court rests on a rejection of congressional policy with respect to repeat drug offenders, it is subject to reversal on that basis alone).

<sup>205</sup> See Chapter 6 G for a discussion of early disposition programs.

<sup>206</sup> *United States v. Sebastin*, 436 F.3d 913 (8<sup>th</sup> Cir. 2006); *United States v. Hernandez-Cervantes*, No. 05-5414, 2005 WL 3529114 (6<sup>th</sup> Cir. Dec. 23, 2005) (unpub.) (rejecting the appellant’s argument that his sentence was unreasonable because the district judge failed to consider the unwarranted disparities in sentencing created by the existence of fast-track programs in other jurisdictions, in part, because Congress explicitly authorized such disparities the PROTECT Act). See also *United States v. Martinez-Flores*, 428 F.3d 22, 30 n. 3 (1<sup>st</sup> Cir. 2005) (“It is arguable that even post-*Booker*, it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress’ clear (if implied) statement in the PROTECT Act provision that such disparities are acceptable”).

<sup>207</sup> 18 U.S.C. § 924(e)(1), which states: “In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).”

beyond a reasonable doubt.<sup>208</sup> The circuits do differ about the extent of this exception. The majority of circuits extend the exception to facts they characterize as inherent in the fact of a conviction.<sup>209</sup>

## 2. Mandatory Minimum Sentences

The circuit courts have reasoned that *Booker* does not apply to mandatory minimum sentences, which are driven by statutes, not by the sentencing guidelines. Thus, district courts still must comply with the requirements of mandatory minimum statutes.<sup>210</sup> The recognized exceptions to this rule remain; the court may depart below the mandatory minimum sentence upon the filing of a government motion based upon

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<sup>208</sup> See, e.g., *United States v. Lewis*, 406 F.3d 11 (1<sup>st</sup> Cir. 2005); *United States v. Ivery*, 427 F.3d 69 (1<sup>st</sup> Cir. 2005); *United States v. Ordaz*, 398 F.3d 236 (3<sup>d</sup> Cir. 2005); *United States v. Thompson*, 421 F.3d 278 (4<sup>th</sup> Cir. 2005); *United States v. Martin*, 431 F.3d 846 (5<sup>th</sup> Cir. 2005); *United States v. Barnett*, 398 F.3d 516 (6<sup>th</sup> Cir. 2005); *United States v. Powers*, 129 F. App'x 942 (6<sup>th</sup> Cir. 2005); *United States v. Lewis*, 405 F.3d 511 (7<sup>th</sup> Cir. 2005); *United States v. Brown*, 417 F.3d 1077 (9<sup>th</sup> Cir. 2005); *United States v. Moore*, 401 F.3d 1220 (10<sup>th</sup> Cir. 2005); *United States v. Burge*, 407 F.3d 1183 (11<sup>th</sup> Cir. 2005).

<sup>209</sup> See, e.g., *United States v. Thompson*, 421 F.3d 278 (4<sup>th</sup> Cir. 2005) (holding that the date on which a prior crime was committed is a fact inherent in the fact of a prior conviction and does not have to be admitted by the defendant or found by a jury and observing that the fact of a prior conviction cannot be severed from its essential components, e.g., whether prior convictions occurred on different occasions; “some facts are so inherent in a conviction that they need not be found by a jury”); *United States v. Powers*, 129 F. App'x 942 (6<sup>th</sup> Cir. 2005) (“the determination by a district court that prior convictions exist and were committed on ‘different occasions,’ are so intimately related that the ‘different occasions’ requirement of § 924(e) sufficiently comes within the exception in *Apprendi*.”); *United States v. Carrillo-Beltran*, 424 F.3d 845 (8<sup>th</sup> Cir. 2005) (stating that in addition to determining the “fact of a prior conviction,” the court can also determine those facts so intimately related to the prior conviction to fall within the *Apprendi* exception; thus, a court can determine whether the defendant has a prior conviction under an alias); *United States v. Corchado*, 427 F.3d 815, 820 (10<sup>th</sup> Cir. 2005) (holding that the prior-conviction exception extends to subsidiary findings such as whether a defendant was under court supervision at the time of the subsequent crime and when the defendant was released from prison; “such facts are merely aspects of the defendant’s recidivist potential, are easily verified, and their application for purposes of enhancing a sentence requires nothing more than official records, a calendar, and the most self-evident mathematical computation”); *United States v. Greer*, 435 F.3d 1327 (11<sup>th</sup> Cir. 2006) (“There is no reason the Constitution would permit a judge to decide whether the person the conviction documents describe was the defendant but forbid the judge from deciding what type of crime those same documents describe. . . . If a judge may determine the facts about whether the defendant has been convicted, a judge may determine the facts about the type of crime for which he was convicted.”). But see *United States v. Kortgaard*, 425 F.3d 602 (9<sup>th</sup> Cir. 2005) (finding that the guideline range did not adequately represent the seriousness of defendant’s criminal history and that likelihood of recidivism is not within the *Apprendi* exception; “[t]he mere fact that the sentencing judge considered prior convictions in departing upward does not bring this case within the exception for ‘the fact of a prior conviction’”).

<sup>210</sup> *United States v. Sanchez-Berrios*, 424 F.3d 65 (1<sup>st</sup> Cir. 2005); *United States v. Sharpley*, 399 F.3d 123 (2<sup>d</sup> Cir. 2005); *United States v. Robinson*, 404 F.3d 850 (4<sup>th</sup> Cir. 2005); *United States v. Smith*, 419 F.3d 521 (6<sup>th</sup> Cir. 2005); *United States v. Ngamwuttibal*, Nos. 04-5818, 04-6019, 2006 WL 45256 (6<sup>th</sup> Cir. Jan. 9, 2006) (unpub.); *United States v. Lee*, 399 F.3d 864 (7<sup>th</sup> Cir. 2005); *United States v. Cannon*, 429 F.3d 1158 (7<sup>th</sup> Cir. 2005); *United States v. Blaylock*, 421 F.3d 758 (8<sup>th</sup> Cir. 2005); *United States v. Cardenas*, 405 F.3d 1046 (9<sup>th</sup> Cir. 2005); *United States v. Payton*, 405 F.3d 1168, 1173 (10<sup>th</sup> Cir. 2005); *United States v. Cherry*, 433 F.3d 698 (10<sup>th</sup> Cir. 2005); *United States v. Shelton*, 400 F.3d 1325 (11<sup>th</sup> Cir. 2005).

substantial assistance under 18 U.S.C. § 3553(a), or if the defendant qualifies for the “safety valve” under 18 U.S.C. § 3553(f).<sup>211</sup>

## H. APPELLATE COURT JURISPRUDENCE CONTINUES TO EVOLVE

As has been discussed throughout this report, the federal criminal justice system continues to adapt to *Booker*. Nevertheless, the evolution of appellate jurisprudence occurs gradually rather than overnight. Thus, issues known to be of interest to the Commission and the rest of the criminal justice community have not been answered in all circuits. For example, as noted earlier, six circuits have adopted a presumption of reasonableness for a guidelines sentence. One circuit — D.C.— has not addressed the issue in any published or unpublished opinions. The Third Circuit has expressly noted that it is unnecessary to adopt a presumption of reasonableness because the appellant already has the burden of demonstrating that the sentence is unreasonable.<sup>212</sup> The Eleventh Circuit has noted in an unpublished case that it rejects the presumption of reasonableness.<sup>213</sup> The Second Circuit seems to have rejected the presumption of reasonableness, and the Ninth Circuit recently appeared to adopt the standard, but then issued a corrected opinion which deleted reference to the presumption of reasonableness.<sup>214</sup>

Regardless of any standard adopted, only one circuit court has held a properly calculated guideline sentence to be unreasonable.<sup>215</sup> No circuit court has upheld a below-range sentence granted on the basis of either a prohibited factor or the defendant’s cooperation without a government motion having been filed. Further, courts generally appear to reversing below- ranges sentences more often than above-range sentences.<sup>216</sup>

Finally, many circuits have rejected disagreement with congressional policies as a legitimate basis to impose a below-range sentence. The First and Fourth Circuits have discussed this in the context of crack cocaine. The Sixth and Eighth Circuits have

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<sup>211</sup> See *United States v. Robinson*, 404 F.3d 850 (4<sup>th</sup> Cir. 2005) (“Except upon motion of the Government on the basis of substantial assistance, a district court still may not depart below a statutory minimum.”). See also 18 U.S.C. § 3553(f) (2005). It is also the subject of supplemental briefing. See *United States v. Plouffe*, 437 F.3d 917(9<sup>th</sup> Cir. 2006) (parties ordered to file supplemental briefs about whether the court has jurisdiction to review a within-range sentence).

<sup>212</sup> See *United States v. Cooper*, 437 F.3d 324 (3<sup>d</sup> Cir. 2006).

<sup>213</sup> See *United States v. Lisbon*, No. 04-00441, 2006 WL 306343 (11<sup>th</sup> Cir. Feb. 10, 2006) (unpub.).

<sup>214</sup> See *United States v. Crosby*, 397 F.3d 103 (2<sup>d</sup> Cir. 2005); *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9<sup>th</sup> Cir. 2006) (the corrected version of the opinion). The first version of the opinion, *United States v. Guerrero-Velasquez*, No. 05-30066, n. 1 (9<sup>th</sup> Cir. Jan. 19, 2006), is available at <http://www.ca9.uscourts.gov>.

<sup>215</sup> *United States v. Lazenby*, No. 05-2216 (8<sup>th</sup> Cir. Mar. 10, 2006), available at <http://www.ca8.uscourts.gov>.

<sup>216</sup> *United States v. Eura*, Nos. 05-4437, 05-4533, 2006 WL 440099 (4<sup>th</sup> Cir. Feb. 24, 2006) (reversing below-range sentence); *United States v. Duhon*, No. 05-30387, 2006 WL 367017 (5<sup>th</sup> Cir. Feb. 17, 2006) (same); *United States v. Claiborne*, No. 05-2198, 2006 WL 452899 (8<sup>th</sup> Cir. Feb. 27, 2006) (same); *United States v. Gatewood*, No. 05-1865, 2006 WL 452902 (8<sup>th</sup> Cir. Feb. 27, 2006) (same); *United States v. Shafer*, No. 05-2049, 2006 WL 453200 (8<sup>th</sup> Cir. Feb. 27, 2006) (same). Cf. *United States v. Fairclough*, No. 05-2799, 2006 WL 465367 (2<sup>d</sup> Cir. Feb. 17, 2006) (affirming above-range sentence); *United States v. Rogers*, 423 F.3d 823 (8<sup>th</sup> Cir. 2005) (same);

considered the issue as it relates to Congress' fast track policies. Finally, the Fifth Circuit has reversed a sentence in a pornography case<sup>217</sup> on this basis.

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<sup>217</sup> *United States v. Duhon*, No. 05-30387, 2006 WL 367017 (5<sup>th</sup> Cir. Feb. 17, 2006) (“We agree with the First and Eighth Circuits that a sentencing disparity intended by Congress is not unwarranted”).

## IMPLEMENTATION OF THE ADVISORY GUIDELINE SYSTEM

The Commission and other actors in the criminal justice system took immediate steps to implement the advisory guideline system. This chapter summarizes the results of the Commission’s efforts to implement the system in the year following *Booker*.

### A. EMPHASIS ON DOCUMENT SUBMISSION REQUIREMENTS

The Commission maintains a comprehensive, computerized data collection system that forms the basis for its clearinghouse of federal sentencing information.<sup>218</sup> The Commission relies upon this database for its ongoing monitoring and evaluation of the guidelines, for many of its research projects, and for responding to the hundreds of data requests received from Congress and other criminal justice entities each year. For each case sentenced under the guidelines, the Commission routinely collects hundreds of pieces of information, including defendant demographics, statutes of conviction, sentencing guideline applications, and sentences imposed.<sup>219</sup>

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2004<sup>220</sup> established new statutory documentation requirements aimed in part at improving the Commission’s ability to collect and report complete and accurate sentencing data. Section 401(h) of the PROTECT Act, entitled “Improved Data Collection,” amended 28 U.S.C. § 994(w) to state—

The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);

(C) any plea agreement;

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<sup>218</sup> See 28 U.S.C. § 995(a)(14),(15).

<sup>219</sup> See Commission, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE SENTENCING GUIDELINES (October 2003) [hereinafter “2003 DEPARTURES REPORT”] at 25.

<sup>220</sup> Pub. L. No. 108–21, 117 Stat. 650, hereinafter the “PROTECT Act”; see also 28 U.S.C. § 994(w) and 18 U.S.C. § 3553(c).

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.<sup>221</sup>

The PROTECT Act also amended 18 U.S.C. § 3553(c) to require the sentencing court, if imposing a sentence outside the prescribed guidelines range, to state “the specific reason” for departing from the guidelines “with specificity in the written order of judgment and commitment.”

Immediately following *Booker*, a portion of the federal criminal justice community expressed uncertainty about *Booker*’s impact on the PROTECT Act’s statutory documentation submission requirements, prompting the need for immediate action. On January 21, 2005, United States District Judge Sim Lake, Chair of the Criminal Law Committee of the Judicial Conference, and United States District Judge Ricardo H. Hinojosa, the Chair of the Commission, issued a joint memorandum to all United States District Judges and other court personnel reminding them of the duty to continue fulfilling the document submission requirements imposed by the PROTECT Act. The memorandum emphasized that the *Booker* decision had rendered no changes to the relevant statutes mandating submission of documents to the Commission.<sup>222</sup>

The Chair of the Commission also participated in a broadcast presented by the Federal Judicial Center entitled “Federal Sentencing after *Booker*,” in which the Commission reiterated that the courts should continue to submit five specific sentencing documents to the Commission within 30 days of entry of judgment: Submission of the sentencing documents is of the utmost importance to enable the Commission to generate the sentencing data needed to evaluate the impact of *Booker*.

## **B. REAL-TIME DATA COLLECTION AND REPORTING**

The Commission reorganized its data receipt, analysis, editing, and reporting tasks to provide real-time post-*Booker* information to the federal criminal justice community, Congress, and other interested persons. For the past fourteen months, the Commission has analyzed post *Booker* sentencing data to monitor the proportion of within-range and out-of-range sentences. These data have been updated and published nearly every month since the *Booker* decision.<sup>223</sup> The Commission also has performed in-depth analyses of trends evidenced by the data. The results of these analyses are

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<sup>221</sup> Section 994(w) previously did not contain a 30-day deadline for submission of the documents and did not impose a duty on the Chief Judge of each district to ensure compliance with this section. Additionally, the only document specifically required by statute to be submitted to the Commission prior to the PROTECT Act was a “written report of the sentence.” Other documents were submitted to the Commission pursuant to a longstanding Memorandum of Understanding between the Administrative Office of the United States Courts and the Commission. See 2003 DEPARTURES REPORT at 24, n.65.

<sup>222</sup> For the text of the memorandum, see <http://www.ussc.gov/Blakely/DIR5-014.PDF>.

<sup>223</sup> The Commission’s Post-*Booker* sentencing updates are available at <http://www.ussc.gov>.

discussed in the following chapters of this report. Recognizing that comparisons of historical guideline trends and trends in the post-*Booker* system might provide further insight into the efficacy of the advisory guideline system, the Commission also recently released data tables including information on all guideline calculations performed on cases received during Fiscal Years 2003 and 2004.

*Booker* presented new challenges to the Commission's data collection efforts. The existing Statement of Reasons form had been tailored to capture information in a mandatory guideline regime. It did not provide a suitable format for reporting information about sentences outside the guideline range, which were not based upon reasons for departure limited to, and affirmatively and specifically identified, in the policy statements and commentary of the Guidelines Manual. For approximately 6 months after the decision, courts used the old form, modified it, or created their own. This lack of uniformity in reporting sentencing data impacted the Commission's collection efforts.

As part of its continuing efforts to improve data collection, the Commission assisted the Judicial Conference with revisions to the Statement of Reasons Form (AO245B (Rev. 6/05)). These revisions were designed to capture more accurately the courts' reasons for imposing sentences outside the advisory guideline range. The revised form distinguishes between sentences within the advisory guideline range, departures provided for by the guidelines, and sentences outside the advisory guideline system. The changes to the form will enable the Commission to report with greater specificity the impact of *Booker* on federal sentences.

The Commission encourages all districts to use the standardized form.<sup>224</sup> Uniformity in the method of reporting sentencing information will augment the completeness and accuracy of the Commission's sentencing data, which are directly dependent on the documentation the Commission receives from the sentencing courts. The judicial districts generally are highly compliant with document submission requirements. The Commission has, as of the date of this report, received documentation for Fiscal Year 2005 at an overall rate of 98.4 percent.

The Commission also implemented an electronic submission program designed to enable the federal district courts to submit required documentation to the Commission, in "pdf" format. After conducting a successful pilot program involving 5 districts, the Commission implemented the program nationwide. To date, 64 districts are submitting their sentencing documentation electronically. The Commission's goal is to achieve 100 percent participation by Fiscal Year 2007. Participation in the program is cost-effective

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<sup>224</sup> The advisory committee for the Federal Rules of Criminal Procedure has taken steps to impose uniformity with respect to use of the statement of reasons form. See Proposed Rules Change to Fed. R. Crim. P. 32 (Judgment)(proposing to amend Rule 32(k) to require courts to use the judgment form, which includes the statement of reasons form, prescribed by the Judicial Conference of the United States). Congress also has taken steps to address this documentation issue through the Patriot Act conference report. See Sec. 735, H. REP. 109-174, Pt. I (requiring submission by courts of a "written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission.").

for the courts, eliminating postage and copying costs. The ease of submission of the documents is a time-saving device, as well. Finally, the Commission anticipates that the on-line submission of documents eventually will result in a completely paperless file storage system.

### C. TESTIMONY BEFORE CONGRESS

On February 10, 2005, the Commission presented testimony at an oversight hearing on the Implications of the *Booker* for the sentencing guidelines before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee. The Chair of the Commission testified on its behalf, stating that the *Booker* decision rendered no changes to the Commission's statutory obligations under the SRA.<sup>225</sup> Moreover, although excising the statutory provisions that made the guidelines mandatory, the decision instructed that "district courts, while not bound to apply the Guidelines, must consult those guidelines and take them into account when sentencing," subject to review by the courts of appeal for unreasonableness.<sup>226</sup> Thus, "the guidelines remain an important and essential factor in the imposition of Federal sentences."<sup>227</sup>

The Commission, through its Chair, explained that "the *Booker* decision makes clear that the sentencing courts must consider the guidelines and that such consideration necessarily requires the sentencing court to calculate the guideline sentencing range and consider the departure policy statements of the Federal sentencing guidelines."<sup>228</sup> Although the decision does not expressly address the question of how much weight the guidelines should be accorded by the sentencing court, "[t]he Commission believes that the courts should give substantial weight to the guidelines in determining the appropriate sentence because as mandated by the [SRA], the Commission has considered the factors listed in section 3553(a) during the process of promulgating and refining the guidelines."<sup>229</sup> Moreover, "Congressional action through the history of the Federal sentencing guidelines indicates Congress' belief that [the guidelines] generally achieve the statutory purposes of sentencing as they are submitted for Congressional review before they become effective, and Congressional approval can only be interpreted as a sign that Congress believes that the guidelines have done so."<sup>230</sup>

The Commission informed Congress of its continuing commitment to assist in assessing and responding to the decision.<sup>231</sup> The Commission then outlined the actions it had undertaken to ensure that the guidelines continue to be an effective sentencing tool.<sup>232</sup> Among other things, the Commission conducted a 2-day hearing on November

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<sup>225</sup> *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Judiciary Comm.* 109<sup>th</sup> Cong. 14-15 (2005) (Statement of Judge Ricardo H. Hinojosa, Chairman, United States Sentencing Commission).

<sup>226</sup> *Id.* citing *Booker*, 543 U.S. at 264 (opinion of Justice Breyer)

<sup>227</sup> *Id.* at 15.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 17.

<sup>232</sup> *Id.* at 15.

16 and 17, 2004, at which it heard testimony from the Department of Justice, defense attorneys, and academics. The Commission and its staff also attended various conferences and meetings following the *Blakely* decision and continued to attend similar events following the *Booker* decision. Participation in these events informed the Commission of a number of proposals that were being debated in the federal criminal justice community as possible responses to *Booker*.

Those proposals include, among others, a ‘wait and see’ approach, statutory implementation in some form of the *Booker* sentencing scheme, providing a jury trial mechanism for sentencing guidelines enhancements, ‘simplification’ of the guidelines either by reducing the number of guidelines adjustments and/or by expanding the sentencing guidelines ranges, equating the maximum of the guidelines sentencing ranges with the statutory maximum for the offense of conviction, and broader reliance on statutory mandatory minimum penalties.<sup>233</sup>

The Commission expressed the hope that if Congress decided at some point to pursue legislation, it would “preserve the core principles of the SRA and, to the extent possible, avoid a wholesale rewriting of a system that has operated well for nearly two decades. [The Commission] believe[s] that the [SRA] was a landmark piece of legislation and that the resulting guidelines have made significant strides in furthering the goals of the SRA.”<sup>234</sup>

The Chair concluded the Commission’s remarks by assuring Congress that “the Commission and its staff are dedicated to the mission of carrying out the goals of sentencing reform and, as the *Booker* decision itself says, ‘to provide certainty and fairness in meeting the purposes of sentencing [while] avoiding unwarranted sentencing disparities...[and] maintaining sufficient flexibility to permit individualized sentences when warranted.’”<sup>235</sup>

#### **D. PUBLIC HEARING ON THE PRESENT AND FUTURE IMPACT OF BOOKER ON FEDERAL SENTENCING**

On February 15 and 16, 2005, the Commission conducted a public hearing in Washington, D.C., to solicit testimony from judges, prosecutors, the defense bar, advocacy groups, academics, and representatives of state sentencing commissions on the present and future impact of *Booker* on federal sentencing. The participants were asked to testify regarding specific topics, including legislative responses to the *Booker* decision, the weight to be given to the sentencing guidelines after *Booker*, and state advisory

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<sup>233</sup> *Id.* at 19.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* citing *Booker*, 543 U.S. at 264 (opinion of Justice Breyer)(internal citation omitted).

guideline systems.<sup>236</sup> Those topics and the participants' responses are summarized in Appendix C.

## **E. GUIDELINES EDUCATION AND TRAINING**

Immediately after the *Booker* decision, the Commission developed a post-*Booker* guidelines training program. The program is designed to provide information about the *Booker* decision and legal developments resulting from the decision. The program describes federal sentencing under *Booker* as a 3-step process.<sup>237</sup> First, because the *Booker* decision requires that courts consult the sentencing guidelines, a sentencing court must calculate the applicable guideline range in the customary fashion. Second, the court should determine whether a departure from the guideline range is consistent with the guidelines' policy statements and commentary. Third, the court should evaluate whether a variance, *i.e.*, a sentence outside the advisory guideline range is warranted under the authority of 18 U.S.C. § 3553(a). Appellate courts should apply a reasonableness standard of review.

The standard training program explains how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight in fashioning sentences in post-*Booker*. The program also encompasses a discussion of the most recent sentencing data released by the Commission. Finally, the program emphasizes the importance of sentencing data in post-*Booker*. Submission of documentation by the district courts meets the statutory requirements of 28 U.S.C. § 994(w). Data collected from these documents also contribute to transparency in sentencing and allow Congress and others to evaluate whether the post-*Booker* guidelines system is meeting the intent of the SRA. In discussing the data, the program highlights the revised Statement of Reasons form (AO245B) approved by the Judicial Conference and encourages the courts to use the new form.

To date, the Commission has presented this program to judges, judicial law clerks, probation officers, prosecutors, and defense attorneys in 61 of the 94 districts. These districts account for 75.5 percent of the post-*Booker* cases analyzed in this report. The Commission also has presented this post-*Booker* training program to circuit staff attorney offices in ten circuits and at the training program for new judges. In addition to staff presentations of this training program, individual commissioners have attended circuit court judicial conferences in most of the circuits. At these conferences, the commissioners have reported recent sentencing data and discussed the 3-step approach to sentencing. The commissioners also have emphasized the importance of submitting complete documentation to the Commission.

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<sup>236</sup> United States Sentencing Commission February 15 and 16, 2005 Public Hearing (hereinafter "USSC February 2005 Public Hearing"), [http://www.ussc.gov/hearings/02\\_15\\_05/topics\\_02\\_05.htm](http://www.ussc.gov/hearings/02_15_05/topics_02_05.htm).

<sup>237</sup> The Judicial Conference has adopted this approach in proposed rules changes to the Federal Rules of Criminal Procedure. For the text of the proposed changes, see [www.uscourts.gov/rules](http://www.uscourts.gov/rules).

The Commission's "HelpLine" has provided guideline application assistance to more than 100 callers each month.

The Commission, along with the Federal Bar Association, hosted the Fourteenth Annual National Seminar on the Federal Sentencing Guidelines in San Francisco on May 25-27, 2005. The program featured more than 80 speakers and welcomed over 500 participants. The presentations included in-depth discussions of the impact of the *Booker* decision on the federal sentencing. The Commission also included guideline application lectures on drugs, immigration, and firearms offenses, among other topics.

The Commission co-sponsored and participated in the National Sentencing Policy Institute, presenting data on national sentencing trends. Commission staff provided assistance to the Federal Judicial Center and the Criminal Law Committee of the Judicial Conference at the program, held in Washington, D.C. on July 11-12, 2005. In conjunction with the D.C. Sentencing Commission, the Commission hosted the National Association of Sentencing Commission's Annual Conference. The program focused on the impact of the *Blakely* and *Booker* decisions on guidelines sentencing scheme and included more than 30 speakers and 150 participants.

The Commission, along with the Federal Bar Association, has scheduled the Fifteenth Annual National Seminar on the Federal Sentencing Guidelines for May 31 through June 2, 2006, in Miami, Florida. The program will feature more than 70 speakers, including district and circuit court judges, all former chairs of the Commission, prosecutors, defense attorneys, probation officers, and academics. The presentations will include discussions assessing the impact of *Booker* on federal sentencing and developing appellate jurisprudence. As a result of the data discussed in this report, the Commission expects to refine and update its training programs.

The Commission also continues to perform its core mission to promulgate and revise the sentencing guidelines, as the Supreme Court noted in *Booker*.<sup>238</sup>

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<sup>238</sup> The Commission has the continuing obligation to promulgate and revise the sentencing guidelines. Accordingly, on May 1, 2005, the Commission promulgated amendments pertaining to antitrust and aggravated identity theft offenses, effective November 1, 2005 in response to congressional directives. On October 24, 2005, the Commission promulgated emergency amendments in response to congressional directives. The first was an amendment to the intellectual property guideline, USSG §2B5.3, which implemented the directive in section 105 of the Family Entertainment and Copyright Act of 2005. Pub. L. No. 109-9, 119 Stat. 218 (2005). The second emergency amendment implemented section 6703 of the Intelligence Reform and Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004), relating to obstruction of justice and false statements made in connection with international or domestic terrorism and sentenced under USSG §2J1.2. At the Commission's January 2006 meeting, the Commission voted to publish for comment proposed amendments implementing Commission policy priorities for this amendment cycle. See 71 Fed.R 4782-01 (January 27, 2006). The proposed amendments address *inter alia* issues related to the sentencing of immigration, firearms, and steroid offenses. In addition to seeking public comment on all of the proposed amendments, the Commission scheduled a public hearing on the proposed amendments on March 15, 2006, in Washington, D.C., and two regional public hearings principally focused on the proposed immigration amendments in San Antonio, Texas, on February 21, 2006, and San Diego, California, on March 5, 2006.

## ANALYSIS OF COMMISSION SENTENCING DATA: TRENDS IN FEDERAL SENTENCING PRACTICES

### A. INTRODUCTION

One measurement of *Booker's* impact on federal sentencing is the rate of imposition of sentences in conformance with the guidelines. Additionally and more specifically, *Booker's* impact can be measured to a large degree by analyzing the available data to answer the following questions:

- Has *Booker* affected the rate of imposition of sentences within and outside the applicable guideline range and if so, how has it affected sentence type and length, including the extent of any departure or variance from the guideline range?
- Has *Booker* affected federal sentencing compared to sentencing practices occurring prior to the decision?
- In what circumstances do judges find sentences outside the guideline range more appropriate than a guideline sentence? In other words, for what reasons do judges impose non-guideline sentences, and have those reasons changed after *Booker*?

As described in Chapter 3, the Commission post-*Booker* regularly has analyzed and published sentencing data to monitor the proportion of cases sentenced within and outside the applicable guideline range.<sup>239</sup> Cognizant of the need to measure and analyze more fully the implication of *Booker* beyond that rate of imposition of within-range sentences, the Commission has performed more in-depth analysis of trends evidenced by the data. Comparisons of historical guideline trends with post-*Booker* data help put *Booker's* overall effect on federal sentencing practices in context.

Analysis of the data also provides insight into how judges are exercising discretion in the imposition of sentences after *Booker*. This in turn might provide useful information to gauge the efficacy of the advisory guideline system itself. For example, analysis of the reasons given by the courts for non-government-sponsored, below-range sentences could illustrate judicial sentiment for particular changes in the guideline system.

The analyses presented in this chapter are subject to two important caveats that affect the reliability of these early results. First, in the early months following the opinion, courts did not apply uniform practices and procedures for imposing sentences post-*Booker*.<sup>240</sup> Even now, the courts do not report sentences in a uniform fashion. The

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<sup>239</sup> See post-*Booker* sentencing updates, <http://www.ussc.gov>.

<sup>240</sup> Some, but not all, of the lack of uniformity in practice has been resolved by circuit court case law. See generally Chapter 2.

differences in practice and procedure that resulted after *Booker* undoubtedly have had an impact on the data collected, warranting cautious interpretation of the findings.

Second, in addition to changes in post-*Booker* practices and procedures, changes necessitated by *Booker* in the Commission's methodologies for data collection and analysis, and the emerging appellate jurisprudence make it difficult to quantify fully *Booker's* impact on federal sentencing. With this in mind, results of the Commission's analysis are presented in this chapter as follows:

Part B gives a brief overview of major findings discussed throughout this chapter regarding the impact of *Booker* generally on federal sentencing practices.

Part C assesses *Booker's* impact on federal sentencing practices by examining several national guideline sentencing trends. The Commission used the following three salient time periods as points of comparison to discern these trends: the pre-PROTECT Act period,<sup>241</sup> which is the 7-month period from October, 2002 through April, 2003, the post-PROTECT Act period,<sup>242</sup> which is a 13-month period from mid-2003 through mid-2004, and the post-*Booker* period,<sup>243</sup> which is a 1-year period generally in 2005. In addition to aggregate, national data, data are presented either in this chapter or in Appendix E, for sentences under the 5 most commonly used guidelines.<sup>244</sup> Multivariate analyses also are included to assess whether any changes in national sentencing trends are significant after controlling for a number of relevant factors.

As an initial gauge of *Booker's* impact, Part C assesses trends with respect to the imposition of within-range above-range, and below-range sentences. For ease of

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<sup>241</sup> The pre-PROTECT Act time period used for purposes of this analysis is the period from October 1, 2002 (the beginning of Fiscal Year 2003) through April 30, 2003 (the date of the enactment of the PROTECT Act). Accordingly, the pre-PROTECT Act datafile is a subset of the Commission's Fiscal Year 2003 datafile consisting of data on 40,917 offenders sentenced between October 1, 2003 and April 30, 2003.

<sup>242</sup> The post-PROTECT Act time period used for purposes of this analysis is the period from May 1, 2003 (the date after the enactment of the PROTECT Act) through June 24, 2004 (the day of issuance of the *Blakely* decision by the Supreme Court). Accordingly, the post-PROTECT Act datafile consists of an aggregation of the Commission's Fiscal Year 2003 and Fiscal Year 2004 datafiles consisting of the 81,206 offenders sentenced from May 1, 2003 through June 24, 2004. As explained in Chapter 1, information on sentences imposed after issuance of the *Blakely* decision but before issuance of the *Booker* decision is not included in this analysis.

<sup>243</sup> The post-*Booker* time period used for purposes of this analysis is the period from January 12, 2005 (the date of issuance of the *Booker* decision by the Supreme Court) and January 11, 2006 (the date through which the Commission's data has been analyzed for this report). Accordingly, the post-*Booker* datafile consists of data on all 67,564 offenders sentenced between January 12, 2005 and January 11, 2006 for which the Commission has received information. Other Commission datafiles, collected by fiscal year, are included in the analysis as appropriate, and their use is indicated in figures and tables throughout this chapter.

<sup>244</sup> These five guidelines, the theft and fraud guideline (USSG §2B1.1), the drug guideline (USSG §2D1.1), the firearms guideline (USSG §2K2.1), the alien smuggling guideline (USSG §2L1.1), and the immigration illegal reentry guideline (USSG §2L1.2) were selected for analysis because, combined, they consistently account for the overwhelming majority of the total federal caseload (69.4% pre-PROTECT Act, 71.4% post-PROTECT Act, and 73.8% post-*Booker*).

discussion, the terms “within-range”, “above-range”, and “below-range” are used to describe sentences in relation to the applicable guideline range.<sup>245</sup> Part C also assesses trends occurring in the length and type of sentences actually imposed, as well as changes occurring in the severity of the sentence to which defendants potentially are subject. Finally, Part D examines the reasons given and factors relied upon by the courts for imposition of below-range sentences.

## **B. MAJOR FINDINGS**

The Commission’s data analyses of *Booker*’s impact on federal sentencing trends yielded the following findings:

- The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within-range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent. The conformance rate remained stable throughout the year that followed *Booker*. The conformance rate in the pre-PROTECT Act period was 90.6 percent. The conformance rate in the post-PROTECT Act period was 93.7 percent.
- The severity of sentences imposed has not changed substantially across time. The average sentence length after *Booker* has increased.
- With respect to within-range sentences, patterns for selecting the point at which to sentence within the range are unchanged after *Booker*. Approximately 60 percent of within-range sentences are still imposed at the minimum, or bottom, of the applicable guideline range.
- The rate of imposition of sentences of imprisonment has not decreased. Offenders are still being incarcerated in the vast majority of cases.
- The rate of imposition of above-range sentences doubled to a rate of 1.6 percent after *Booker*.
- The rate of government-sponsored, below-range sentences has increased slightly after *Booker* to a rate of 23.7 percent, with substantial assistance departures accounting for 14.4 percent, Early Disposition Program departures accounting for 6.7 percent, and other government-sponsored downward departures accounting for 2.6 percent .

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<sup>245</sup> For purposes of this report, a “below-range” sentence is one indicated by the court on the Statement of Reasons form as a downward departure of any type for the pre-PROTECT Act and post-PROTECT Act data. For the post-*Booker* data, a “below-range” sentence is one indicated by the court on the Judgment and Commitment Order that falls below the final sentencing guideline range indicated by the court on the Statement of Reasons form.

- The rate of imposition of non-government-sponsored, below-range sentences has increased after *Booker* to a rate of 12.5 percent.
- In approximately two-thirds of cases involving non-government-sponsored, below-range sentences, the extent of the reductions granted are less than 40 percent below the minimum of the range. Courts have granted small sentence reductions, of 9 percent or less, at a higher rate after *Booker* than before. Courts have granted 100 percent sentence reductions, to probation, at a lower rate after *Booker* than before.
- The imposition of non-government-sponsored, below-range sentences often is accompanied by a citation to *Booker* or factors under 18 U.S.C. § 3553(a).
- The use of guideline departure reasons remains prevalent in many cases involving the imposition of non-government-sponsored, below-range sentences, including those citing *Booker* or factors under 18 U.S.C. § 3553(a).
- Multivariate analysis<sup>246</sup> indicates that four factors associated with the decision to impose a below-range sentence appear after *Booker* but not before: the application of a mandatory minimum sentence, criminal history points, career offender status, and citizenship. However, most factors associated with this decision are the same after *Booker*.

## C. ASSESSING TRENDS IN FEDERAL SENTENCING PRACTICES

### 1. Introduction

The effects of *Booker* may be examined in the context of long-term trends in sentencing practices and the impact of other changes to the law of sentencing.<sup>247</sup> The

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<sup>246</sup> Multivariate analysis is one statistical method to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors. The purpose of conducting multivariate analysis is to determine whether any sentencing changes were statistically significant after controlling for relevant factors for which data are available. For a detailed discussion of the multivariate analyses undertaken for this report, see Appendix B.

<sup>247</sup> As a general matter, understanding trends in federal sentencing practices also requires understanding the many influences on these practices and how they have developed over the long term. Since implementation of the federal sentencing guidelines nearly 20 years ago, the law of federal sentencing has been revised and amended numerous times through statutory enactment, Supreme Court ruling, or amendment of the guidelines themselves. Although these legal changes influence sentencing practices, they are not the sole influences affecting sentencing. Experts on guideline systems have noted that practices such as sentencing in conformance with the guidelines depend on a multitude of institutional and cultural factors, as well as structural features of each system. Just as the law influences a guideline system, informal incentives for compliance and the norms and culture that develop in each court likewise have an influence. See Kim H. Hunt & Michael Connelly, *Advisory Guidelines in the post-Blakely Era*, 17 FED. SENT'G REP. 233 (2005); Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155 (2005), 156. Some commentators have suggested that these informal and cultural factors will be important in the federal

most detailed account of these long-term trends is reported in the Commission's 2004 study of the first 15 years of federal sentencing under the Sentencing Reform Act of 1984.<sup>248</sup> That report contains data on long-term trends in incarceration rates and average sentence lengths from Fiscal Years 1987 through 2002 for a wide variety of offenses. The Commission's 2003 report on downward departures from the guidelines contains additional analyses of trends in guideline sentencing from 1991 through 2001.<sup>249</sup> These data do not take into account, however, three later-occurring, major events in federal sentencing: the April 2003 enactment of the PROTECT Act,<sup>250</sup> the June 2004 Supreme Court decision in *Blakely*, and the January 2005 decision in *Booker*. Accordingly, this section begins by examining long-term trends generally but with a particular focus on the effects produced by the PROTECT Act and *Booker*.<sup>251</sup>

Because the shift to an advisory guideline system has raised particular interest in how much weight judges would afford the guidelines and how frequently they would continue to sentence within the guideline range, this section begins with an examination of trends in within-range and out-of-range sentences. It then discusses trends in the use of probation and alternatives to prison and in the length of prison sentences imposed. Changes in the factors that determine whether a within-range or out-of-range sentence was imposed are discussed, along with factors that affect changes in sentence severity.

Customarily, the Commission reports data by fiscal year, which runs from October 1 through September 30. The Commission concluded, however, that use of fiscal year data in this report generally would not lend itself to meaningful analysis. As discussed earlier, the Commission used data for the analysis in this report from 3 time periods: pre-PROTECT Act, post-PROTECT Act, and post-*Booker*. Most analyses in this chapter compare data from these 3 time periods. When appropriate, some analyses may use the Commission's fiscal year data, as reported in the Commission's *Annual Reports* and *Sourcebooks*, and these data will be identified when used.

When conducting statistical analysis of small numbers of cases, extreme values in either direction will tend to have an undue impact on averages, thereby skewing the results of the analysis. By contrast, because the median represents the mid-point, use of this statistic provides a more moderate measure of the central tendency of the data. It represents the value of the "middle" case in a category: half of the cases have values below the median and the other half of the cases have values above the median. This is a more conservative approach to the statistical analysis of a small universe of cases, customarily accepted by researchers. In fact, the Commission generally reports data in the *Sourcebook* in this format. Use of the average is an accepted measure of the central

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system after *Booker*. See Douglas Berman, *Same Old Sentencing*, 27 LEGAL TIMES, Dec. 26, 2005 (stating that "in the wake of *Booker*, federal sentencing practices and outcomes have not really changed much (at least not yet)" and suggesting that culture influences sentencing practices more than doctrine).

<sup>248</sup> Commission FIFTEEN YEAR REVIEW, available at [www.ussc.gov](http://www.ussc.gov).

<sup>249</sup> Commission, 2003 DEPARTURES REPORT, available at [www.ussc.gov](http://www.ussc.gov).

<sup>250</sup> Pub. L. No. 108-21, 117 Stat. 650.

<sup>251</sup> The analysis in this chapter does not include assessment of the effects of *Blakely* on federal sentencing practices because of the difficulty of interpreting information received from the courts on cases sentenced after *Blakely* but before *Booker*.

tendencies of data for larger numbers. Consequently, the average (or mean) has also been included in this report when the analysis involves a larger number of cases.

## 2. Changes in Rates of Within-Range and Out-of-Range Sentences

### a. The Impact of Events Prior to the PROTECT Act

From Fiscal Year 1991 through Fiscal Year 2003, the Commission reported four major types of sentences in its *Annual Reports* and *Sourcebooks* throughout the guidelines era:<sup>252</sup> (1) within-range sentences, (2) upward departures from the within-range sentence, (3) departures from the within-range sentence under USSG §5K1.1 for providing substantial assistance in the prosecution of other persons, and (4) other downward departures from the within-range sentence. These latter could be based on mitigating circumstances identified by the judge or agreed to by the parties in a plea agreement. Figure 1 shows quarterly rates, from Fiscal Year 1991 through Fiscal Year 2003, of these four major types of sentences. Vertical lines on Figure 1 show the occurrence of historic events that were expected to have, or appear to have had, an effect on rates of imposition of within-range sentences. In interpreting the data in Figure 1, it should be noted that the Commission's methods for distinguishing government-sponsored from other downward departures were refined beginning in Fiscal Year 2003. The rates for fiscal years before 2003 were calculated by combining several reported reasons for departure that indicated government sponsorship.<sup>253</sup> Subsequently, plea agreements and the new Statement of Reasons form were scrutinized to more accurately identify government-sponsored departures.

Examination of the historical data illustrated in Figure 1 reveals a series of gradual, long-term trends. Notably, the data illustrated in Figure 1 do not indicate substantial changes in sentencing rates at previous points when the law governing departures was changed. For example, amendment 508, which authorized departures based on "combination of . . . characteristics or circumstances"<sup>254</sup> took effect November 1994. The rates of downward departures, as illustrated by the green line on Figure 1, did not sharply increase after that date. Indeed, the data show little, if any, effect of the amendment on departure rates.<sup>255</sup>

The data reflect a similar response to the Supreme Court's decision in June 1996 in *Koon v. United States*.<sup>256</sup> The decision established an abuse-of-discretion standard for review of guideline departures. Although downward departures increased slightly after *Koon*, the increase was gradual rather than abrupt. Moreover, the increase appears to be

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<sup>252</sup> These data are contained in U.S. Sentencing Commission annual datafiles and are available from the University of Michigan's website at [www.icpsr.umich.edu/nacjd/archive.html](http://www.icpsr.umich.edu/nacjd/archive.html).

<sup>253</sup> See 2003 DEPARTURES REPORT, footnote 130.

<sup>254</sup> *Guidelines Manual*, App. C, amend. 508.

<sup>255</sup> Restrictive appellate decisions also may have had an impact on departure rates at this time. See e.g., *United States v. Dyce*, 91 F.3d 1462 (D.C. Cir. 1996) (reversing departure based on the "totality of circumstances" when none of the factors cited by the district court alone could serve as a basis for departure).

<sup>256</sup> 518 U.S. 81 (1996).

continuing a long-term trend that pre-dated *Koon* and was likely based on a variety of factors.<sup>257</sup>

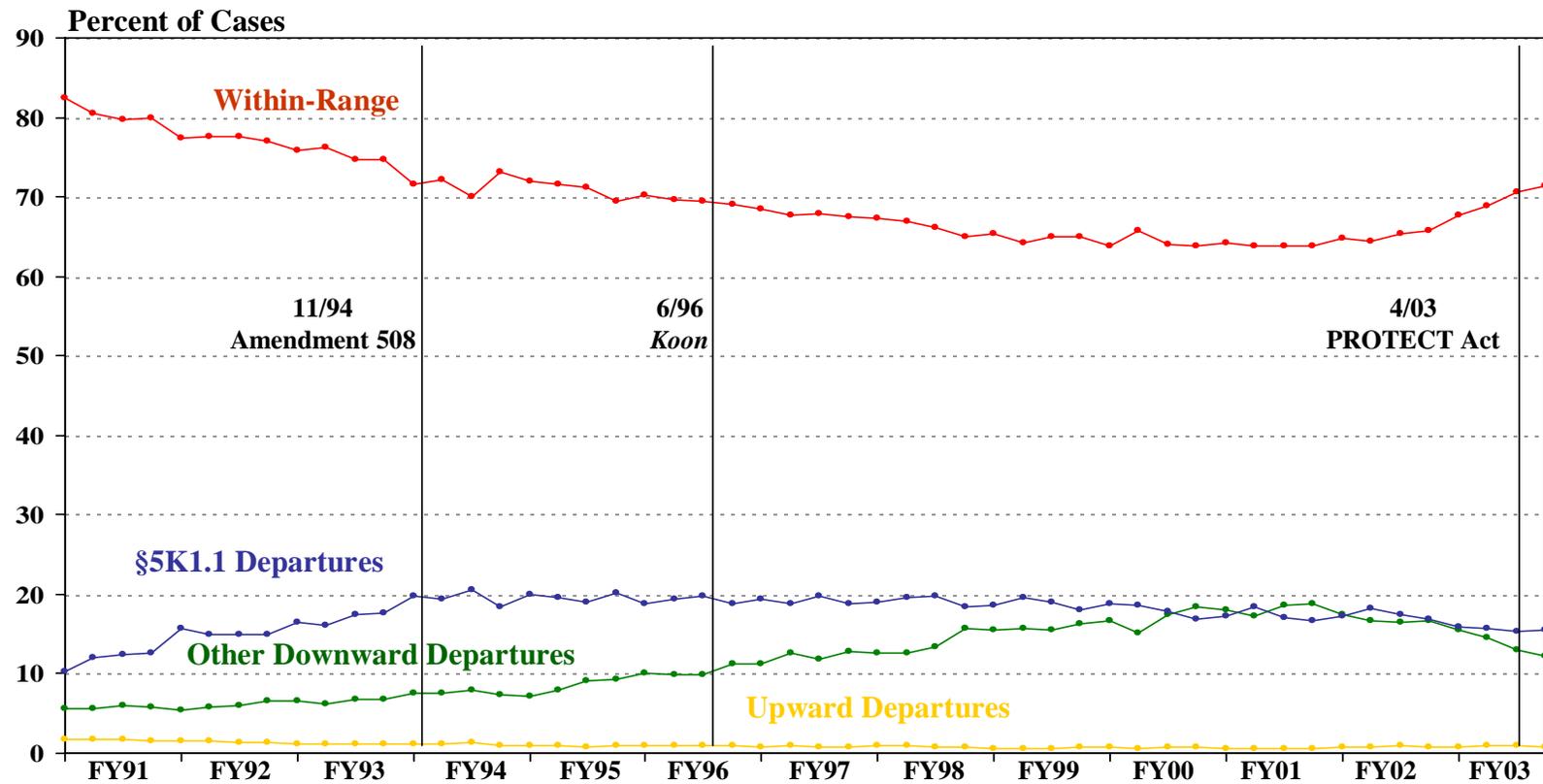
The increase in downward departures from 1991 until the mid-1990s was most pronounced with respect to substantial assistance departures under USSG §5K1.1<sup>258</sup> and then became more evident in other grounds for departure as USSG §5K1.1 rates stabilized and then began a gradual decline. Except for some shifting between 2000 and 2002, rates of imposition of USSG §5K1.1 departures always were higher than other departures. For most of the 1990s, they were markedly higher. The long-term trend toward higher rates of imposition of other downward departures began to reverse itself in 2002.

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<sup>257</sup> Mark T. Bailey, *Feeney's Folly: Why Appellate Courts Should Review Departures from the Federal Sentencing Guidelines with Deference*, 90 IOWA L. REV. 269 (2004)(noting that the government rarely appealed downward departures after *Koon* but was highly successful when it did, and arguing that *Koon* had little effect on departure rates).

<sup>258</sup> *Guidelines Manual* USSG §5K1.1 provides that “Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”

**Figure 1**  
**Quarterly Data for Within-Range and Out-of-Range Sentences**  
**FY1991-FY2003**



See Appendix B for information regarding the determination of sentencing categories. The “other downward departures” category includes both government sponsored and non-government sponsored downward departures.

SOURCE: U.S. Sentencing Commission, 1991-2003 Datafiles, USSCFY1991-USSCFY2003.

## b. The PROTECT Act

In 2003 Congress expressed growing concern<sup>259</sup> that the rate of downward departures was too great to control crime and eliminate unwarranted sentencing disparity, particularly in sex offenses against children.<sup>260</sup> The PROTECT Act made significant changes to the federal law of sentencing.<sup>261</sup> In particular, the PROTECT Act re-instituted a *de novo* standard of appellate review for departures, thereby undoing the abuse of discretion standard of review established by *Koon*, and limited the district court's discretion to identify new grounds for departure on remand. It also directed the Commission to amend the guidelines "to ensure that the incidence of downward departures are substantially reduced" and prohibited the Commission from creating new grounds for downward departures for 2 years.<sup>262</sup>

Although Congress sought to reduce the incidence of downward departures with the PROTECT Act, it also sanctioned the use of government-sponsored downward departures for "fast track" reasons. In the years prior to the PROTECT Act, prosecutors had developed so-called "fast track" programs in districts with heavy immigration and drug trafficking caseloads. Under these programs, offenders who enter into plea agreements in a timely fashion and waive certain procedural rights—for example, pre-trial discovery or deportation hearings—obtain more favorable sentences. The programs had been created on a more-or-less ad hoc basis, with varying degrees of formality. With the PROTECT Act, Congress sought to standardize these programs by authorizing the Department of Justice to certify "Early Disposition Programs" ("EDP") in certain districts. The PROTECT Act directed the Commission to authorize a departure of up to four offense levels for offenders whom the government certified met the criteria for such programs. The newly-authorized government-sponsored departure was added to the *Guidelines Manual* at USSG §5K3.1 effective October 27, 2003.<sup>263</sup>

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<sup>259</sup> Those concerns had been the subject of an earlier Congressional hearing. See *Oversight of the U.S. Sentencing Commission: Are the Guidelines Being Followed?: Hearing Before the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee*, 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (2000).

<sup>260</sup> Representative Tom Feeney, Reaffirming the 1984 Sentencing Reforms, 27 *HAMLIN L. REV.* 383 (2004) (arguing that since *Koon* some judges had "systematically crafted ways to circumvent the Sentencing Guidelines and substitute their judgment for that of Congress and the Federal Sentencing Commission." p. 383); 149 *CONG. REC.* H2424 (daily ed. March 27, 2003) (statement of Representative Feeney) (arguing that adoption of the "Feeney Amendment" would provide a deterrent effect).

<sup>261</sup> For history and description of the PROTECT Act and the responses of the Department of Justice, the Sentencing Commission, and certain members of Congress and the Judiciary see David P. Mason, *Barking Up the Wrong Tree: The Misplaced Furor over the Feeney Amendment as a Threat to Judicial Independence*, 46 *WILLIAM AND MARY L. REV.* 731 (2004); Noelle Tsigounis Valentine, *An Exploration of the Feeney Amendment: The Legislation that Prompted the Supreme Court to Undo Twenty Years of Sentencing Reform*, 55 *SYRACUSE L. REV.* 619 (2005).

<sup>262</sup> PROTECT Act, Pub. L. No. 108-21 § 401(m)(2)(a), 2003 U.S.C.C.A.N. (117 Stat.) 650, 675.

<sup>263</sup> *Guidelines Manual*, App. C, amend. 651. The legislation and amendment are described in Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 *HAMLIN L. REV.* 357 (2004).

These developments, among others,<sup>264</sup> alerted both the courts and the Commission to the need more carefully to distinguish between downward departures that were initiated, encouraged, or at least tacitly approved by the prosecution from those that were initiated by the court. In response, the Judicial Conference of the United States, through the Administrative Office of the United States Courts, worked closely with the Commission to modify the form that judges use to report the reasons for imposing a sentence. The modified Statement of Reasons form (form AO245B (Rev. 12/03)) more clearly differentiated among different types of downward departure.

Further, the Commission, in its 2003 Departures Report, began to further distinguish government-sponsored downward departures from other downward departures. In addition to departures under USSG §5K1.1 for substantial assistance and departures under USSG §5K3.1 for the use of early disposition programs, the Commission included in this new category other government-initiated downward departures that were made for reasons such as “pursuant to a plea agreement, “deportation,” and “savings to government.”<sup>265</sup>

Figure 2 uses this new distinction between government-sponsored and other downward departures to illustrate quarterly rates of imposition of within-range and out-of-range sentences from October 2001 through December 2005. Figure 2 includes data from the date the PROTECT Act was signed into law until the decision in *Booker*, and approximately one year of data following that decision, with the exception of the 6 months between the *Blakely* decision (June 24, 2004) and *Booker* on January 12, 2005. The Commission excluded post-*Blakely* information it received from the courts because, as more fully described in Chapter 1, the Commission could not rely upon the assumption that the guidelines had been uniformly applied due to a split of opinions about *Blakely*'s applicability to the federal sentencing guidelines, resulting in inconsistent approaches to sentencing. Figure 3 illustrates the rates of sentences in conformance with the guidelines, using the same data depicted in Figure 2.

The differentiation initiated in the documentation in 2003 between government-sponsored and other downward departures reveals that a very large portion of below-range sentences were, and still are, initiated or approved by the government. For all of the years shown in Figure 2, the rate of imposition of government-sponsored departures was consistently higher than the other categories. Further, the rate of government-sponsored downward departures in the first two years depicted remains relatively constant, displaying only a slight decrease prior to the PROTECT Act. In contrast, the rate of imposition of other downward departures remained relatively steady from the beginning of Fiscal Year 2002, declining sharply in the period preceding the decision in *Booker*.

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<sup>264</sup> See U.S. General Accounting Office, *Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences Fiscal Years 1999-2001* (Oct. 2003).

<sup>265</sup> The Commission's methods for distinguishing government-sponsored from other downward departures were refined beginning in Fiscal Year 2003. In Figures 2 and 3, the rates for fiscal years before 2003 were calculated by combining several reported reasons for departure that indicated government sponsorship. (See 2003 DEPARTURES REPORT). In later years, plea agreements and the new Statement of Reasons form were scrutinized to more accurately identify government-sponsored departures.

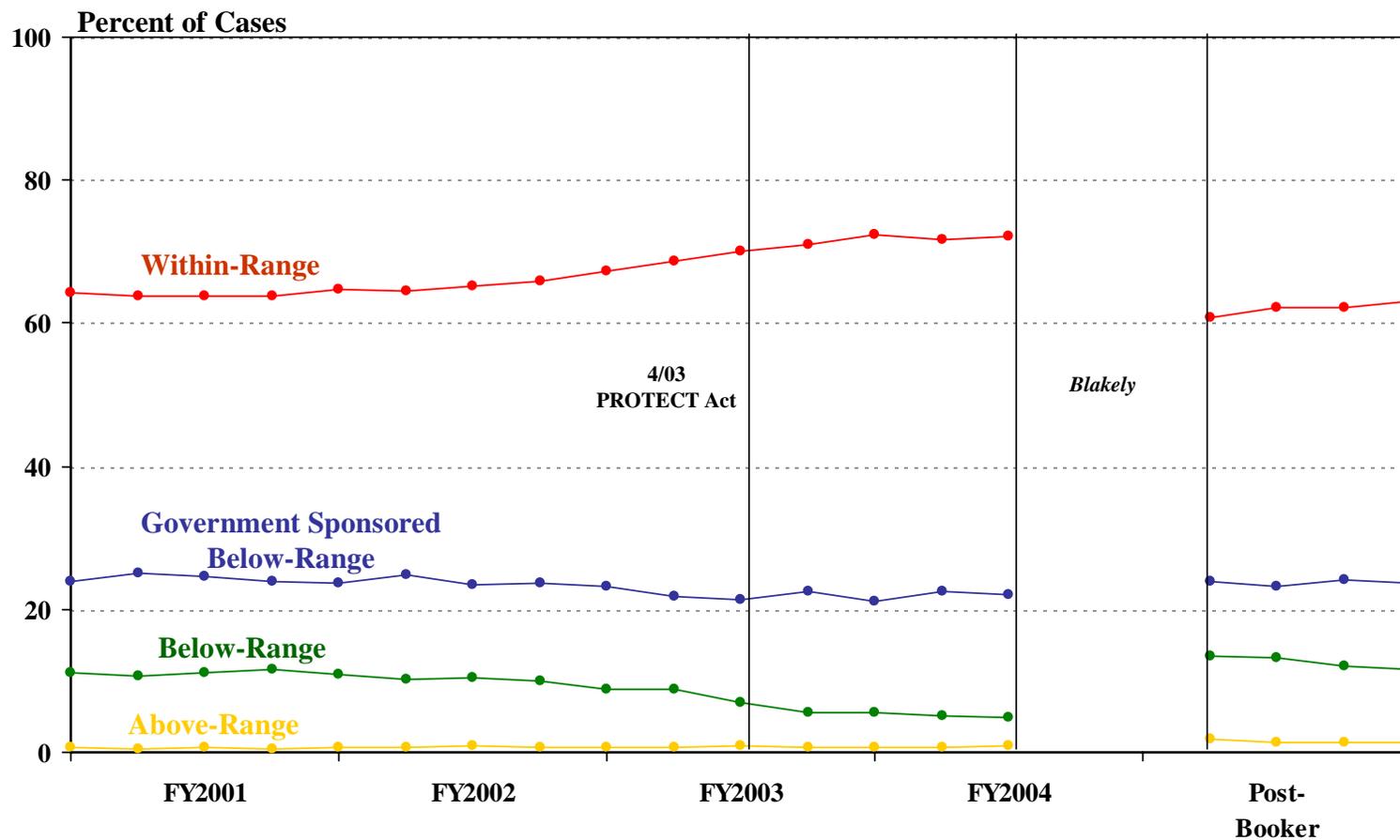
The downward trend in other downward departures beginning prior to the PROTECT Act and continuing in the quarters following it, settled in at between 4.9 and 5.5 percent in Fiscal Year 2004. The rate of imposition of government-sponsored downward departures showed little change and was about four times greater than non-government-sponsored departures during this period. That rate ranged from 21.2 to 22.4 percent of all cases.

Quantifying the PROTECT Act's effect on non-government-sponsored downward departures is difficult for several reasons. The date of the PROTECT Act is shown on Figure 1 with the line at the quarter containing April 2003. While downward departure rates decreased after that date, to some extent they may have been continuing the trend that began some time before. In addition, the changes created by the PROTECT Act did not take place all at once. Some of the restrictions on downward departures took effect upon signing of the PROTECT Act, while Commission-developed guideline amendments were not effective until the end of October 2003. Many changes could not immediately apply to all cases sentenced after the PROTECT Act or effective date of the guideline amendments due to *ex post facto* considerations.<sup>266</sup> Whatever their precise contributions, the combination of the various aspects of the PROTECT Act and the factors accounting for the pre-existing trend contributed to a reduction of non-government-sponsored downward departures to their lowest rates since the early 1990s.

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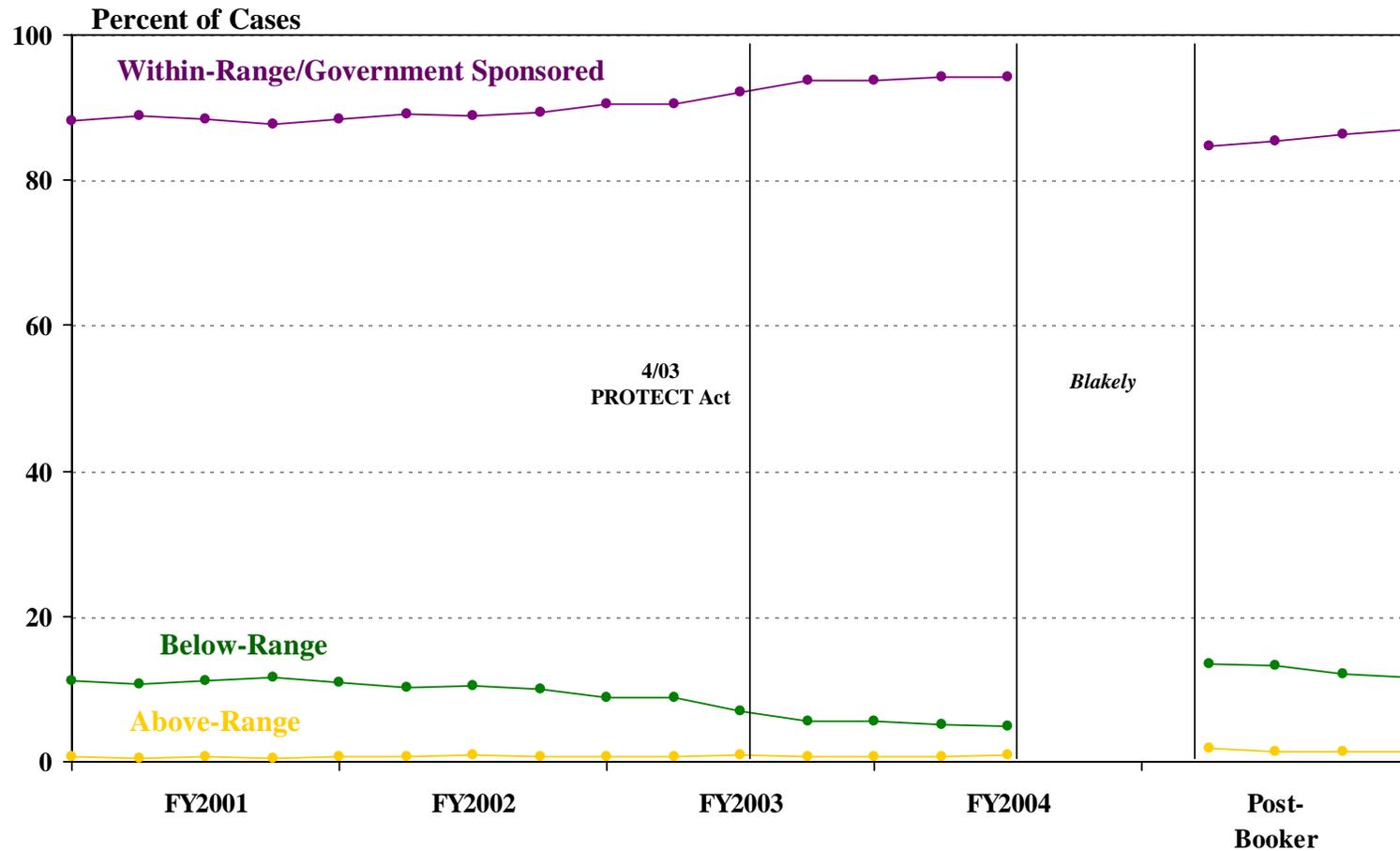
<sup>266</sup> The *ex post facto* clause in Article I, § 9 of the United States Constitution has been held to require that cases be sentenced under the guidelines in effect at the time the offense was committed, not sentenced, if changes occurring after the offense increase the severity of the applicable sentence. See *Guidelines Manual* §1B1.11 (2005).

**Figure 2**  
**Quarterly Data for Within-Range and Out-of-Range Sentences**  
**FY2001 – Post-Booker**



See Appendix B for information regarding the determination of sentencing categories.  
 Cases sentenced on or before December 31, 2005 (last full quarter of post-Booker data) were included in this figure.  
 SOURCE: U.S. Sentencing Commission, 2001-2003 Datafiles, USSCFY2001-USSCFY2003 and 2006 Booker Report Datafiles.

**Figure 3**  
**Quarterly Data for Within-Range/Government and Out-of-Range Sentences**  
**FY2001 – Post-Booker**



See Appendix B for information regarding the determination of sentencing categories.

Cases sentenced on or before December 31, 2005 (last full quarter of post-Booker data) were included in this figure.

SOURCE: U.S. Sentencing Commission, 2001-2003 Datafiles, USSCFY2001-USSCFY2003 and 2006 *Booker* Report Datafiles.

**c. The Immediate Effect of *Booker* on Rates of Within- and Out-of-Range Sentences**

As has been discussed in Chapter 3 of this report, the nature of below-range sentences changed in *Booker*'s wake. To respond to the change, the Commission significantly revised its procedures for collecting and reporting sentences relative to the applicable guideline range. Because of the broader sentencing authority created by *Booker*, guideline downward departures no longer are the single mechanism by which courts can fashion below-range sentences when appropriate. In response, the Judicial Conference, through the Administrative Office of the United States Courts, after consulting with the Commission and others, modified the Statement of Reasons form (form AO245B 06/05) more clearly to differentiate between downward departures made under guideline departure authority and other below-range sentences (*i.e.*, "variances").

Before the changes to the Statement of Reasons form took effect, the Commission revised its data coding protocols to reflect the new sentencing patterns and documentation that emerged in the *Booker* era with respect to the imposition of below-range sentences using *Booker* rather than or in addition to guideline departures.<sup>267</sup> The latest revision to the Statement of Reasons form, and the ensuing data collection and reporting changes, initiated a widespread Commission outreach and training program designed to introduce the new Statement of Reasons form and to provide in-depth explanations of how the Commission extracts its data from the Statement of Reasons and other court documents. This training initiative is aimed, in part, at producing the most accurate and complete data possible in the post-*Booker* era. As of the date of this report, the Commission has conducted training sessions in 61 of the 94 federal judicial districts. Sentencings in these 61 districts account for 75.5 percent of the post-*Booker* cases analyzed for this report.

As is illustrated in Figure 2, the majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within-range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent. This conformance rate remained stable throughout the year that followed *Booker*. This compares to a conformance rate of 90.6 percent pre-PROTECT Act and a conformance rate of 93.7 percent post-PROTECT Act. Changes in the rates of imposition of within-range and non-government-sponsored, below-range sentences occur more suddenly immediately following *Booker* than following any previous change in sentencing law during the guidelines era. The post-*Booker* data demonstrate a decrease in the rate of imposition of within-range sentences of 8.9 percentage points from the end of the post-PROTECT Act period and a concomitant 6.7 percentage point increase in the rate of imposition of non-government-sponsored, below-range sentences.<sup>268</sup>

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<sup>267</sup> Methodologies associated with the revised collection and reporting of data post-*Booker* are more thoroughly detailed in Appendix B. Below-range categories are described in the discussion of non-government-sponsored, below-range sentences later in this chapter.

<sup>268</sup> Rates of imposition of within-range and out-of-range sentences for offenses covered by the 5 most frequently applied guidelines show trends similar to the overall trends presented herein (*See* Appendix E-1), with the exception of trends indicated for immigration offenses sentenced under USSG §§2L1.1 and

The rate of imposition of above-range sentences approximately doubled to a rate of 1.6 percent. Multivariate analysis undertaken for this report confirmed that the likelihood of receiving an above-range sentence is higher post-*Booker* than pre-*Booker*. Specifically, offenders are 20.7 percent more likely post-*Booker* than pre-*Booker* to receive an above-range sentence.

The rate of government-sponsored, below-range sentences has increased slightly after *Booker* to a rate of 23.7 percent, with substantial assistance departures accounting for 14.4 percent, Early Disposition Program departures accounting for 6.7 percent, and other government-sponsored downward departures accounting for 2.6 percent. Government-sponsored, below-range sentences continue to account for the highest percentage of below-range sentences post-*Booker*. Most of the increase in the rate of imposition of government-sponsored, below-range sentences is attributable to non-substantial assistance reasons. Specifically, results of multivariate analysis undertaken for this report demonstrate that the likelihood of receiving a substantial assistance departure is lower post-*Booker* than pre-*Booker*. Offenders post-*Booker* have a greater likelihood of receiving other below-range sentences, whether initiated by the government (excluding substantial assistance) or by the court.

The likelihood of obtaining a government-initiated, downward departure (excluding substantial assistance) is 61.4 percent greater post-*Booker* than pre-*Booker*. Offenders in the post-*Booker* period are 6.2 percent less likely than those in the Post-PROTECT period to receive a substantial assistance departure.

Figure 4 charts the monthly rates of imposition of within-range and out-of-range sentences for the year following *Booker*. As illustrated, immediately after the *Booker* decision, the rate of imposition of non-government-sponsored, below-range sentences increased to 14.6 percent. The rate dropped back in the following months, varying between 9.6 and 13.8 percent. Part of these changes may be due to other changes occurring over the same time period, such as changes in the types of cases being sentenced. Nevertheless, *Booker* likely had some independent impact.

Figure 5 illustrates the rates of sentences in conformance with the guidelines, using the same data depicted in Figure 4. Using the data illustrated in Figures 4 and 5, Table 1 provides the percentages of within-range and out-of-range sentence.

Despite the initial increase in the imposition of non-government-sponsored, below-range sentences, a relatively stable month-to-month trend was immediately established and has continued. Some commentators have expressed surprise that judges

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2L1.2. For those guidelines, there was an overall decrease in the imposition of non-government-sponsored, below-range sentences accompanied by an increase in the imposition of government-sponsored, below-range sentences that employed early disposition programs under USSG §5K3.1.

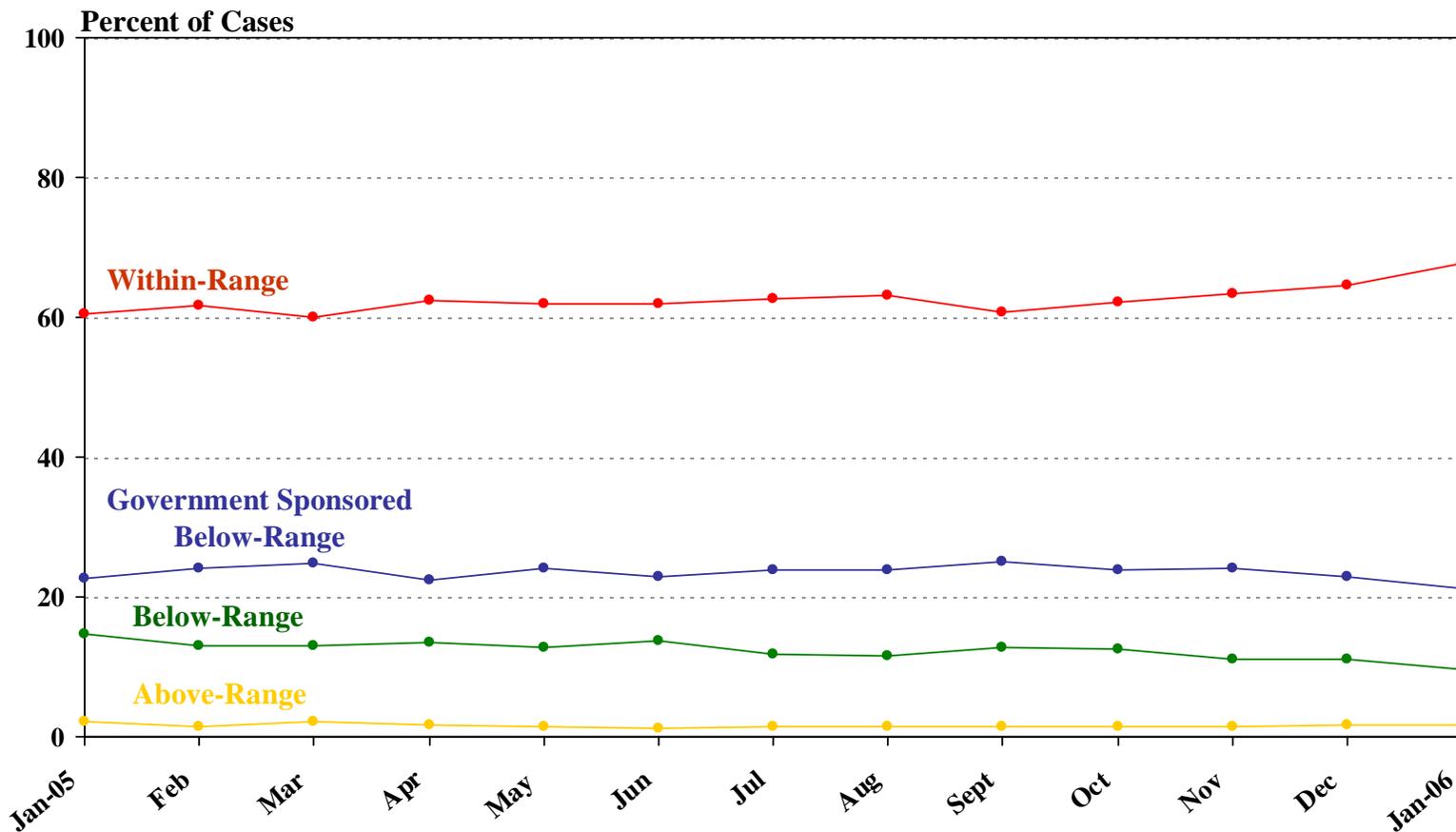
have continued to sentence within-range over 60 percent of the time.<sup>269</sup> Those who predict considerable long-term stability in the system may also be intrigued by what appears, upon visual inspection of Figure 4, to be a possible beginning of an upward trend in the rate of imposition of within-range sentences and a concomitant decrease in the rate of imposition of non-government sponsored, below-ranges sentences. Drawing conclusions from these data should be done cautiously. At this time, the number of months is still too small to establish the certainty of any emerging trend, and the large number of continuances granted in the *Blakely* interim period make the cases sentenced in the first few months following *Booker* a sample potentially biased in unknown ways.<sup>270</sup> The Commission will continue to monitor this trend, especially as the appellate courts give substance to “reasonableness” review.

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<sup>269</sup> Douglas Berman, *Same Old Sentencing*, 27 LEGAL TIMES, December 26, 2005 (stating that “in the wake of *Booker*, federal sentencing practices and outcomes have not really changed much (at least not yet)” and suggesting that culture influences sentencing practices more than doctrine).

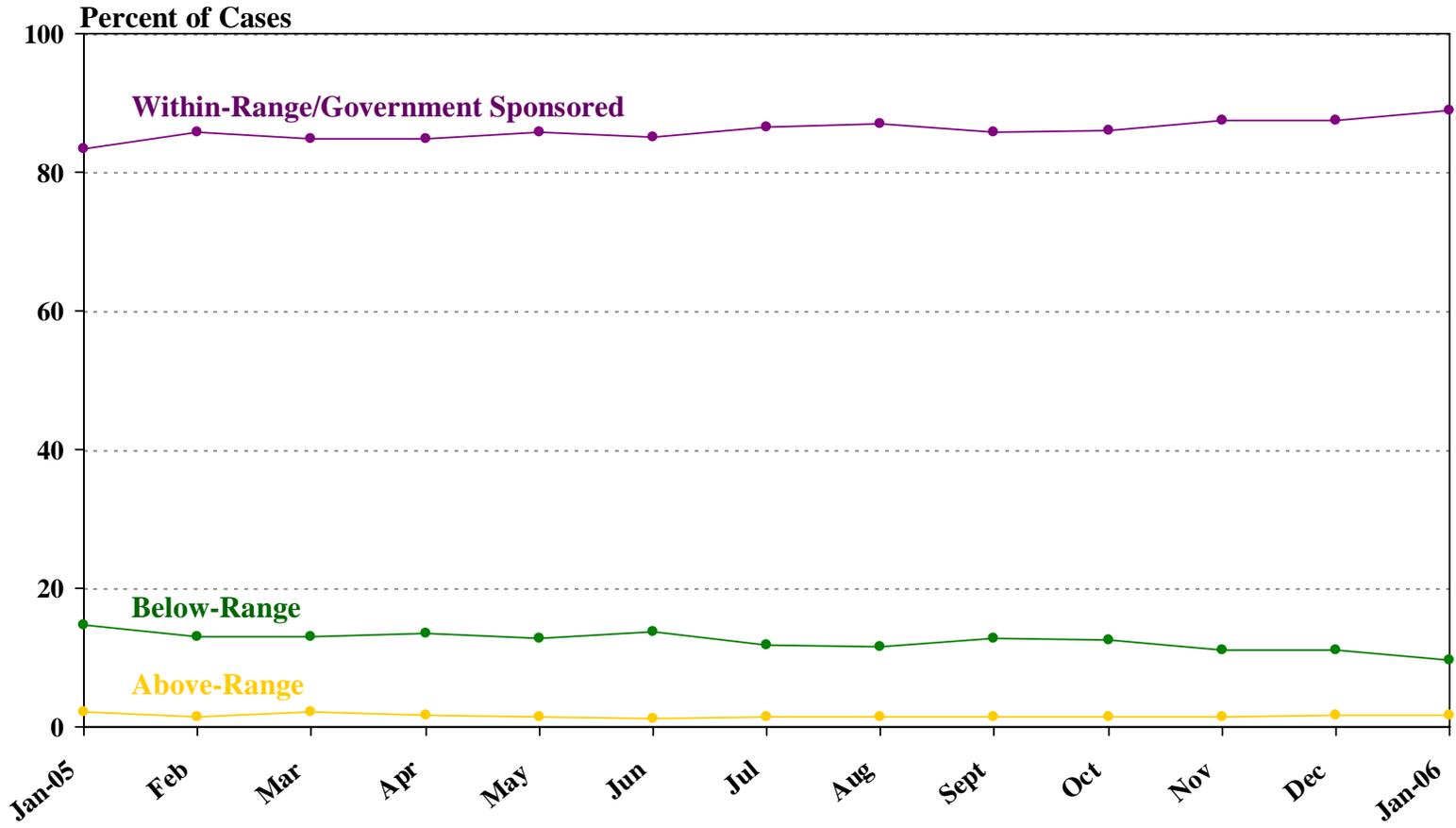
<sup>270</sup> Commission, 2004 *Survey Results/Preliminary Findings on Blakely Effect*, <http://www.ussc.gov>.

**Figure 4**  
**Monthly Data for Within-Range and Out-of-Range Sentences Post-Booker**  
**January 12, 2005-January 11, 2006**



See Appendix B for information regarding the determination of sentencing categories. Cases sentenced on or before January 11, 2006 were included in this figure. As of the data extraction date for the post-Booker datafile, the Commission had received, coded and edited 1,300 cases sentenced between January 1, 2006 and January, 11, 2006.  
 SOURCE: U.S. Sentencing Commission, 2006 Booker Report Datafiles.

**Figure 5**  
**Monthly Data for Within-Range/Government Sponsored**  
**and Out-of-Range Sentences Post-Booker**  
**January 12, 2005-January 11, 2006**



See Appendix B for information regarding the determination of sentencing categories. Cases sentenced on or before January 11, 2006 were included in this figure. As of the data extraction date for the post-Booker datafile, the Commission had received, coded and edited 1,300 cases sentenced between January 1, 2006 and January, 11, 2006.

SOURCE: U.S. Sentencing Commission, 2006 Booker Report Datafiles.

**Table 1**  
**National Comparison of Sentence Imposed and Position Relative to the Guideline Range**  
**Post-Booker**

	<b>n</b>	<b>%</b>
<b>TOTAL</b>	<b>65,368</b>	<b>100.0</b>
<b>Within-Guideline Range</b>	<b>40,645</b>	<b>62.2</b>
<b>Departure Above Guideline Range</b>	<b>175</b>	<b>0.3</b>
Upward Departure from the Guideline Range <sup>271</sup>	127	0.2
Upward Departure with <i>Booker</i> /18 U.S.C. § 3553 <sup>272</sup>	48	0.1
<b>Otherwise Above the Guideline Range</b>	<b>859</b>	<b>1.3</b>
Above the Range with <i>Booker</i> /18 U.S.C. § 3553 <sup>273</sup>	426	0.6
All Remaining Cases Above the Guideline Range <sup>274</sup>	433	0.7
<b>Government Sponsored Below-Range</b>	<b>15,500</b>	<b>23.7</b>
§5K1.1 Substantial Assistance Departure	9,402	14.4
§5K3.1 Early Disposition Program Departure	4,366	6.7
Government-Sponsored Departure <sup>275</sup>	1,732	2.6
<b>Departures Below Guideline Range</b>	<b>2,101</b>	<b>3.2</b>
Downward Departure from the Guideline Range	1,456	2.2
Downward Departure with <i>Booker</i> /18 U.S.C. § 3553	645	1.0
<b>Otherwise Below the Guideline Range</b>	<b>6,088</b>	<b>9.3</b>
Below the Range with <i>Booker</i> /18 U.S.C. § 3553	3,850	5.9
All Remaining Cases Below the Guideline Range	2,238	3.4

SOURCE: U.S. Sentencing Commission Special Post-Booker Coding Project

<sup>271</sup> All cases with imposed sentences outside of the guideline range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*. The same classification applies to “Downward Departure from the Guideline Range” category.

<sup>272</sup> All cases with imposed sentences outside of the guideline range citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, and additionally mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range. The same classification applies to the “Downward Departure with *Booker*/18 U.S.C. § 3553” category.

<sup>273</sup> All cases with imposed sentences outside of the guideline range mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range. The same classification applies to the “Below the Range with *Booker* /18 U.S.C. § 3553” category.

<sup>274</sup> Cases with imposed sentences outside of the guideline range that do not fall into the three previous categories. Based on the information submitted on the Statement of Reasons, these cases cannot be classified as a guideline departure, or as a sentence outside the guideline range pursuant to *Booker*/18 U.S.C. § 3553. This category includes cases which cite departure reasons that are not affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reason for the sentence outside of the guideline range. The same classification applies to the “All Remaining Cases Below the Guideline Range” category.

<sup>275</sup> Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

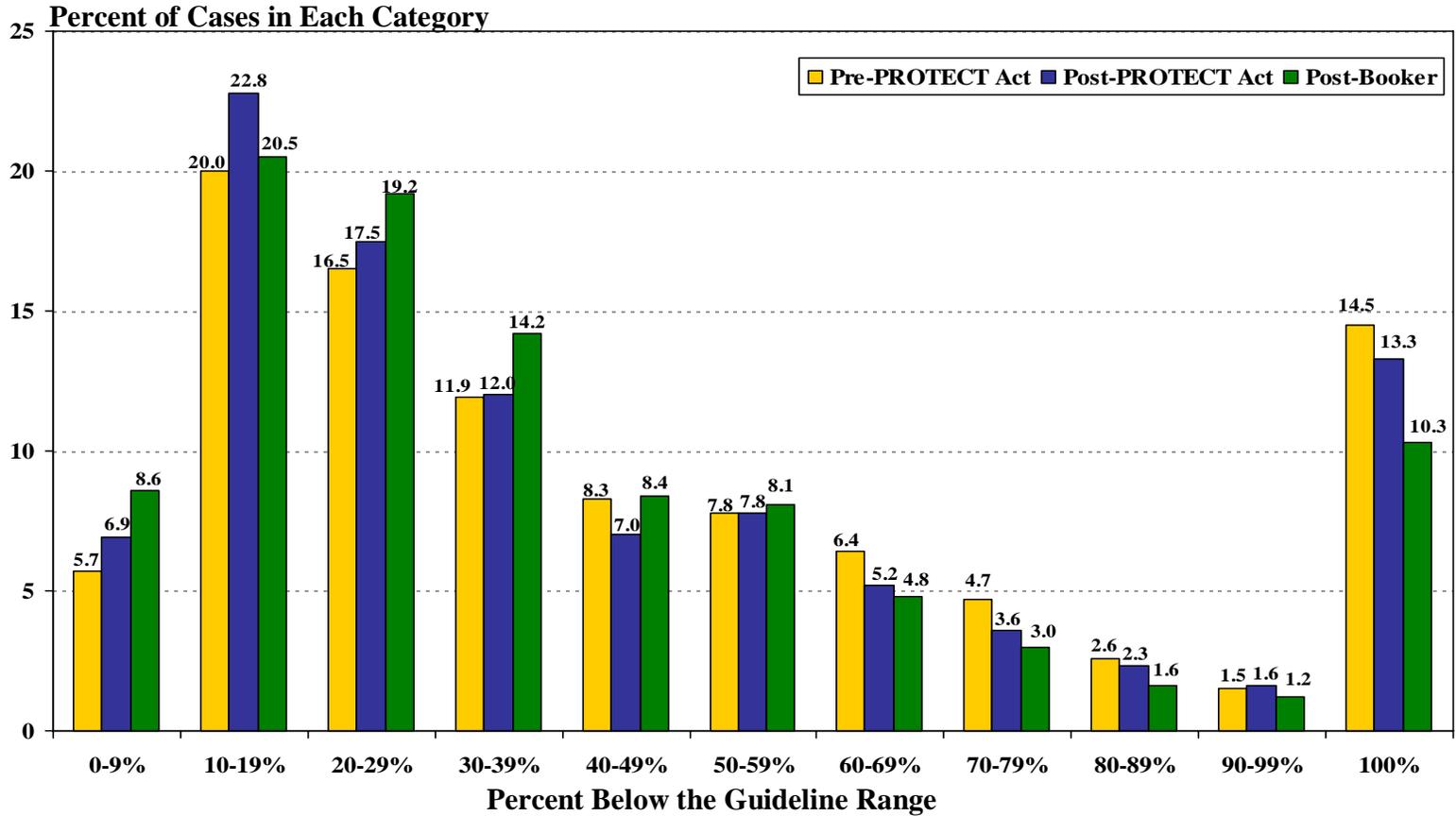
### 3. Changes in the Extent that Below-Range Sentences Fall below the Range

One of the questions that the Commission sought to answer in this report is whether the magnitude of the reductions granted for below-range sentences after *Booker* has changed. Even though the data evidences an increase in the rates of imposition of below-range sentences, the overall impact of this increased rate may be affected somewhat by the extent to which sentences are below range. The data indicate that while the rates of imposition of below-range sentences have increased, the extent of the reductions being granted do not differ from the recommended guideline sentence by a greater degree today than they did in earlier periods. Figure 6 compares the magnitude of reductions below the applicable guideline range in the three relevant time periods: pre-PROTECT Act, post-PROTECT Act and post-*Booker*. In order to display the extent of the difference among non-government-sponsored, below-range sentences during three time periods, the Commission classified the reductions into one of ten percentile categories, listed on the horizontal axis of the grid (*e.g.*, 0-9 percent, 10-19 percent, etc.) A below-range sentence is placed in the category that corresponds to its percentage below the guideline minimum. The vertical axis displays the percent of cases falling in each of the ten percentile categories. For example, Figure 6 demonstrates that the proportion of cases sentenced between zero and 9 percent below the applicable guideline minimum was 5.7 percent pre-PROTECT Act, 6.9 percent post-PROTECT Act, and 8.6 percent post-*Booker*. Sentences in this first category were less than 10 percent below the recommended guideline range.

The 100 percent category represents instances in which the court imposed a sentence of probation rather than a term of imprisonment. Among the cases sentenced below-range post-*Booker*, courts sentenced a smaller portion to probation in lieu of imprisonment than they did prior to the *Booker* decision. Figure 6 shows a decline in the percentage of below-range probationary sentences from 14.5 percent pre-PROTECT Act, to 13.3 percent post-PROTECT Act, to 10.3 percent post-*Booker*.

In general, sentence reductions in the post-*Booker* era tend to be distributed more heavily among the smaller reductions than among the large ones. As Figure 6 indicates, the vast majority of below-range sentences in all three time periods show sentence reductions between 10 to 29 percent below the guideline minimum. Notably, large reductions below the minimum of the within-range sentence (*i.e.*, reductions of the within-range sentence by greater than 59 percent) have decreased in the post-*Booker* time period. Overall, the courts are imposing below-range sentences more often but are not differing from the guideline sentence by a greater extent today compared to the two previous time periods.

**Figure 6**  
**Extent of Non-Government Sponsored Below-Range Sentences**  
**Pre-PROTECT Act, Post-PROTECT Act and Post-Booker**



Only cases sentenced in Zone D of the Sentencing Table (requiring that, absent a below-range sentence, the minimum sentence term be satisfied with a sentence of imprisonment) were included for each of the three time periods (Pre-PROTECT Act (10/01/02 – 04/30/03); Post-PROTECT Act (05/01/03 – 06/24/04); Post-Booker (01/12/05 – 01/11/06)).

SOURCE: U.S. Sentencing Commission, 2006 *Booker* Report Datafiles.

As a complement to the analysis illustrated in Figure 6, the Commission examined below-range sentences to determine the median percentage decrease and median months of decrease from the guideline minimum across the 3 time periods for all cases and for the five most commonly cited guidelines.<sup>276</sup> Table 2 shows the results of this analysis. The universe of cases for some categories was relatively small, as can be seen in the columns labeled “n” on the table. The analysis revealed that there is little variation between most of the guidelines across the 3 time periods. The median percentages of decreases remain relatively constant during each time period (*see* Table 2, columns labeled Med %), as do the absolute months of sentence reductions, shown as median months below the guideline minimum (*see* Table 2, columns labeled Med Mths).

For example, the extent of the reduction for theft and fraud offenses under USSG §2B1.1 has remained relatively constant. The median percentage decreases from the guideline minimum remain at approximately 100 percent. This indicates that half of the offenders receiving below-range sentences under this guideline are sentenced to probation. The median reduction below the guideline minimum consistently is about 9 months, which indicates that most of these theft and fraud cases involve relatively low guideline minimums.

The pattern for immigration offenses is slightly different. Alien smuggling offenses sentenced under USSG §2L1.1 and illegal reentry offenses sentenced under USSG §2L1.2 show a decrease in median percentage reduction from the minimum of the within-range sentence following the PROTECT Act. The median percentage reduction then increased post-*Booker*, essentially to pre-PROTECT Act rates. After a post-PROTECT Act decline, USSG §2L1.1 reductions have increased to a median percentage below the guideline minimum of 50 percent for downward departures and 43.7 percent for other non-government-sponsored, below-range sentences. Similarly, USSG §2L1.2 sentence reductions declined following the PROTECT Act and returned to median percentages below the guideline minimum of 25 percent for downward departures and 28.6 percent for other non-government-sponsored, below-range sentences. The absolute months of sentence reductions, shown as median months below the guideline minimum, have not changed substantially, about 6 months and 11 months, for USSG §2L1.1 and USSG §2L1.2, respectively.

The pattern for drug trafficking offenses under USSG §2D1.1, also is slightly different. As Table 2 indicates, for these offenses, the median percentage reduction from the minimum of the within-range sentence continued to decrease post-*Booker*.

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<sup>276</sup> These five guidelines, the theft and fraud guideline (USSG §2B1.1), the drug guideline (USSG §2D1.1), the firearms guideline (USSG §2K2.1), the alien smuggling guideline (USSG §2L1.1), and the immigration illegal reentry guideline (USSG §2L1.2) were selected for analysis because, combined, they consistently account for the overwhelming majority of the total federal caseload (69.4% pre-PROTECT Act, 71.4% post-PROTECT Act, and 73.8% post-*Booker*).

**Table 2**  
**Degree of Decrease Below Guideline Minimum**  
**for All Cases and Selected Sentencing Guidelines**

	Pre-PROTECT Act (10/1/02-4/30/03)			Post-PROTECT Act (5/1/03-6/24/04)			Downward Departure			Post-Booker (1/12/05-1/11/06)		
	n	Med	Med	n	Med	Med	n	Med	Med	n	Med	Med
		Mths	%		Mths	%		Mths	%		Mths	%
<b>All Guidelines</b>	2,945	12	40.0	3,714	12	35.1	1,977	12	34.8	5,611	12	33.6
<b>Theft and Fraud §2B1.1<sup>277</sup></b>	217	9	100.0	398	10	100.0	222	10	99.7	673	8	90.0
<b>Drug Trafficking §2D1.1<sup>278</sup></b>	967	16	34.1	1,179	16	30.0	664	17	27.7	2,068	18	26.4
<b>Firearms §2K2.1</b>	307	12	40.0	438	13	39.0	255	10	35.3	692	12	33.2
<b>Alien Smuggling §2L1.1</b>	153	7	44.4	152	6	33.2	84	6	50.0	180	6	43.7
<b>Illegal Reentry §2L1.2</b>	565	11	28.3	657	9	21.7	315	10	25.0	627	11	28.6

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

<sup>277</sup> Includes amendment years 2001 and later.

<sup>278</sup> Includes offenders under both USSG §§2D1.1 and 2D1.2.

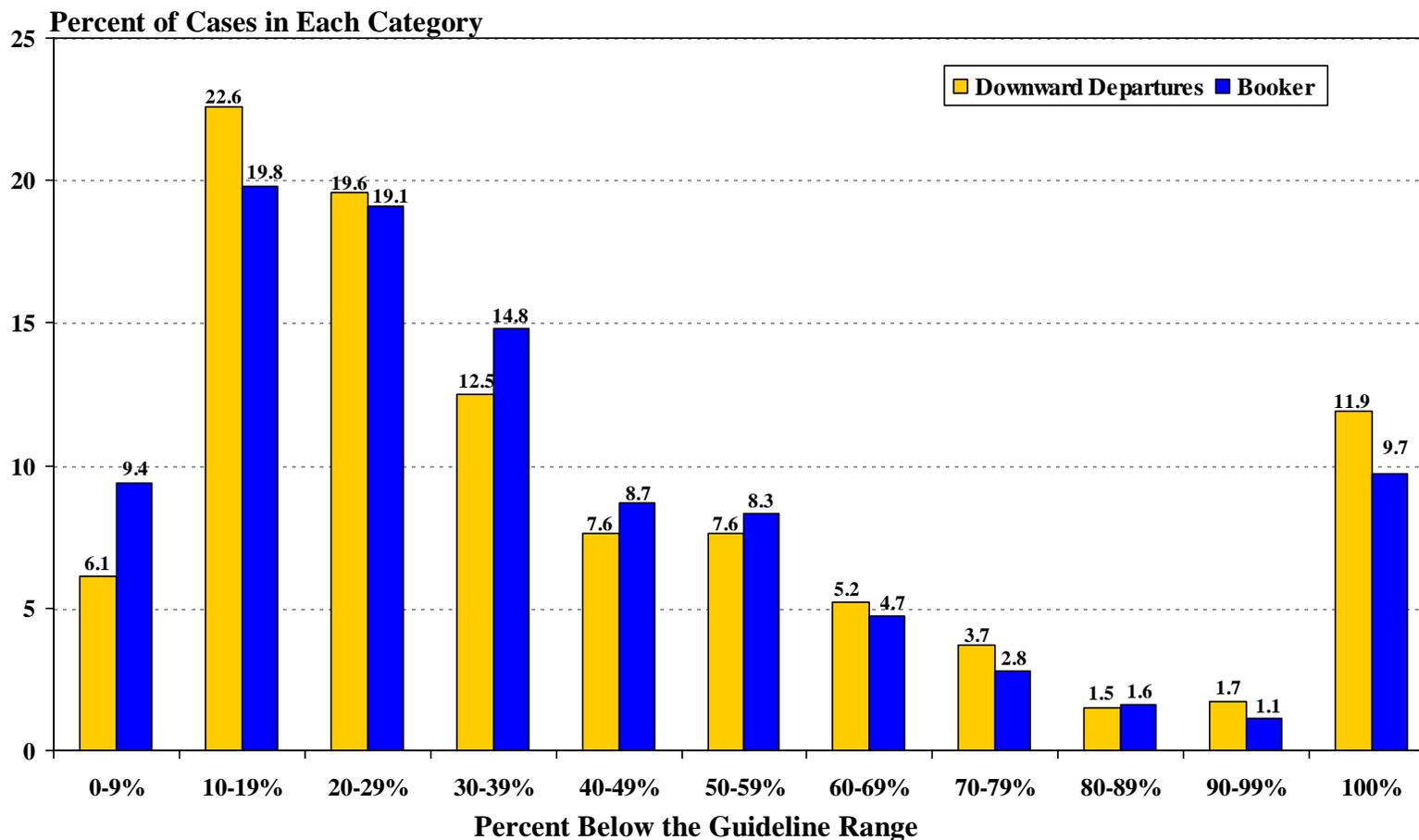
Regardless of whether courts use guideline downward departures or cite *Booker* to impose below-range sentences, the extent of the reductions is essentially the same. This is illustrated in Figure 7. Using post-*Booker* data, Figure 7 compares the extent of guideline downward departures to the extent of below-range sentences imposed under *Booker*. This comparison indicates that there is little difference in the magnitude to which below-range sentences fall below the guideline minimum, whether achieved through guideline departure reasons or through the use of *Booker*.<sup>279</sup> For example, 6.1 percent of downward departures and 9.4 percent of *Booker* below-range sentences fell between zero and nine percent below the applicable guideline minimum. Further, about half of the reductions in either category (48.3 percent of both downward departures and *Booker* below-range sentences) had a median percentage decrease below the guideline minimum of 29 percent or less.<sup>280</sup>

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<sup>279</sup> Descriptions of the various below-range categories are set forth in Appendix B.

<sup>280</sup> In general, a 25% sentence decrease equates to a 2-level offense level decrease on the Sentencing Table.

**Figure 7**  
**Extent of Downward Departures Compared to**  
***Booker* Below-Range Sentences**



See Appendix B for information regarding the determination of sentencing categories.

Only cases sentenced in Zone D of the Sentencing Table (requiring that, absent a below-range sentence, the minimum sentence term be satisfied with a sentence of imprisonment) were included.

SOURCE: U.S. Sentencing Commission, 2006 *Booker* Report Datafiles.

#### **4. Changes in Sentence Length and the Use of Alternatives to Imprisonment**

Despite the increase in the rate of imposition below-range sentences in the post-*Booker* era, the average length of sentences imposed actually has increased in the caseload taken as a whole. More specifically, average sentences have increased for all major offense types except for certain immigration offenses.<sup>281</sup> Moreover, several other indicators of sentencing practices suggest continuity in the use of imprisonment instead of probation or alternatives to imprisonment. This section explores this overall continuity and how it is possible that sentence lengths have increased when the rate of imposition of below-range sentences also has increased.

##### **a. Changes in Average Recommended and Imposed Sentence Lengths**

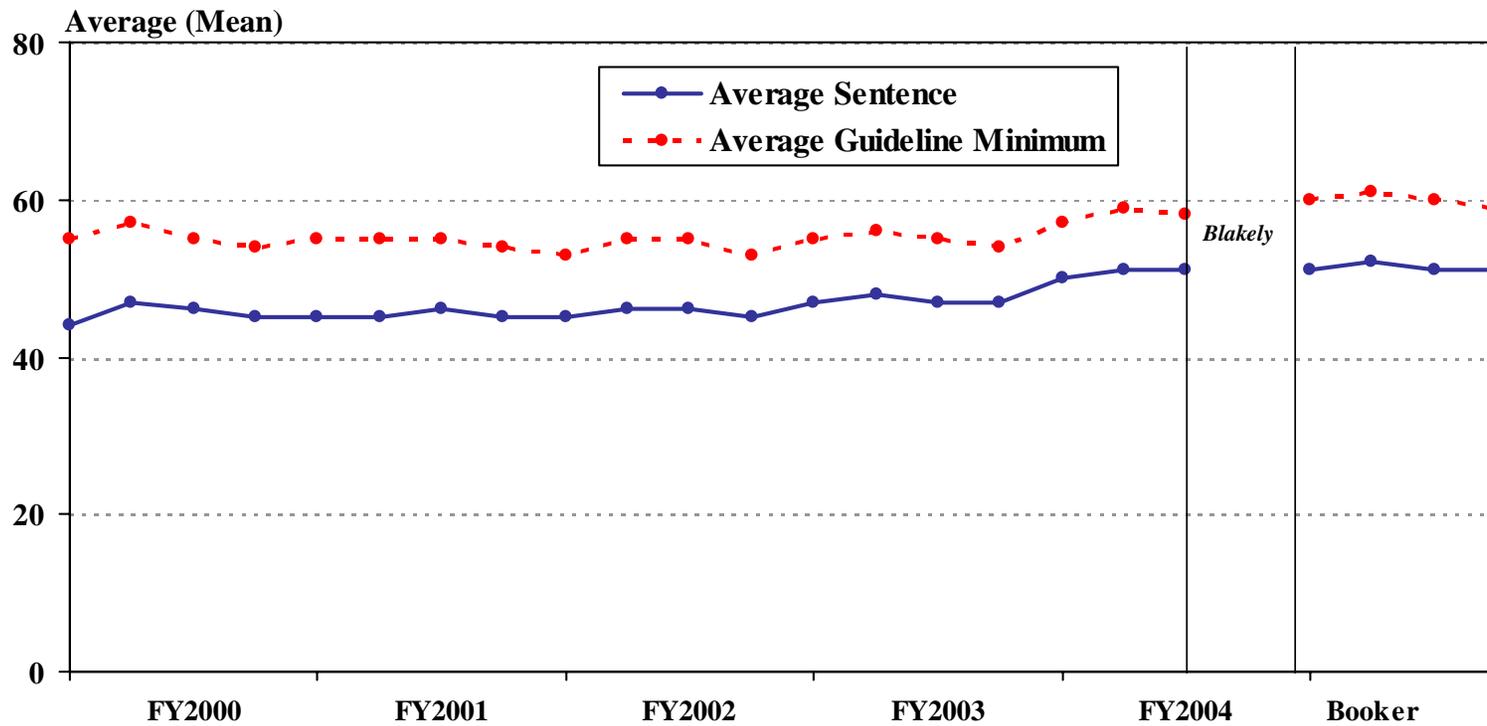
Beginning in Fiscal Year 2000 and continuing through 2002, the length of sentences imposed averaged between 44 and 47 months and remained fairly constant. By Fiscal Year 2003, however, a trend toward increasing severity in the length of sentences imposed began to emerge and accelerated in the months preceding the gap representing the *Blakely* period. Figure 8 shows the average length of sentence imposed for each quarter beginning in Fiscal Year 2000 and continuing through the first year of the post-*Booker* era. Figure 8 also illustrates the average applicable guideline minimum for the same time period. The increased length in the average sentence is also apparent in Table 3, which shows the average sentence length for offenses covered by all guidelines combined and for offenses covered by the 5 most frequently applied guidelines. This trend toward lengthier prison sentences has continued after *Booker*. As shown in both Figure 8 and Table 3, sentence lengths post-*Booker* increased for the caseload overall.<sup>282</sup>

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<sup>281</sup> For illegal reentry offenses sentenced under USSG §2L1.2, the average length of the sentence recommended under the guidelines and the average length of the sentence imposed both have declined over time beginning, as indicated in Figure E-6, roughly in 2002 and continuing post-*Booker*. Factors that may account for the continuing decline in sentence length in illegal reentry cases include changes in the guideline and use of EDP departures. For an analysis of these cases, *see* Commission, INTERIM STAFF REPORT ON IMMIGRATION REFORM AND THE FEDERAL SENTENCING GUIDELINES (Jan. 20, 2006), [http://www.ussc.gov/publicat/imigration\\_06.pdf](http://www.ussc.gov/publicat/imigration_06.pdf).

<sup>282</sup> *See also* Appendix E-2 through E-6 which contains figures, showing similar trends with respect to sentence length for offenses covered by the five most frequently applied guidelines.

**Figure 8**  
**Average Sentence Imposed and Average Guideline Minimum**  
**Quarterly Data for All Cases**  
**FY2000 – Post-Booker**



Cases with guideline minimums of life or probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively. Guideline minimums account for applicable statutory mandatory penalties. Only cases with a single guideline computation were included. Cases sentenced on or before December 31, 2005 (last full quarter of post-Booker data).  
 SOURCE: U.S. Sentencing Commission 2000-2003 Datafiles, USSCFY2000-USSCFY2003. 2006 Booker Report Datafiles.

**Table 3<sup>283</sup>**  
**Sentence Type and Length**  
**for All Cases and Selected Sentencing Guidelines**

<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>All Guidelines</b>	40,678	85.2	56	33
<b>Theft and Fraud (§2B1.1)<sup>284</sup></b>	4,002	53.4	16	12
<b>Drug Trafficking (§2D1.1)<sup>285</sup></b>	14,619	95.7	80	60
<b>Firearms (§2K2.1)</b>	3,175	91.6	60	40
<b>Alien Smuggling (§2L1.1)</b>	1,349	88.9	16	12
<b>Illegal Reentry (§2L1.2)</b>	5,147	99.6	29	24
<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>All Guidelines</b>	80,782	85.9	57	33
<b>Theft and Fraud (§2B1.1)</b>	8,622	56.2	20	12
<b>Drug Trafficking (§2D1.1)</b>	27,880	96.6	83	60
<b>Firearms (§2K2.1)</b>	7,460	92.2	61	41
<b>Alien Smuggling (§2L1.1)</b>	2,603	91.5	17	15
<b>Illegal Reentry (§2L1.2)</b>	11,210	99.8	29	24
<b>Post-Booker (1/12/05-1/11/06)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>All Guidelines</b>	67,417	88.6	58	36
<b>Theft and Fraud (§2B1.1)</b>	6,723	61.6	23	15
<b>Drug Trafficking (§2D1.1)</b>	23,203	96.7	85	60
<b>Firearms (§2K2.1)</b>	6,474	92.8	60	41
<b>Alien Smuggling (§2L1.1)</b>	3,078	90.9	17	14
<b>Illegal Reentry (§2L1.2)</b>	10,291	99.5	27	24

The Commission's post-*Booker* data evidence an increase in average sentence length, despite an increase in the rate of imposition of below-range sentences. The cause of this apparent inconsistency is a matter of interest to participants in the criminal justice community. There are a number of reasons why average sentence lengths can increase when the rate of imposition of sentences below the guideline range also increases.

<sup>283</sup> Excludes cases missing information on primary sentencing guideline, sentence imposed and sentence length. Cases with zero months of prison ordered or missing or indeterminable information were excluded. The information in this table does not include any time of confinement as defined in USSG §5C1.1.

<sup>284</sup> Includes amendment years 2001 and later.

<sup>285</sup> Includes offenders sentenced under both USSG §§2D1.1 and USSG 2D1.2.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

Average sentence lengths depend on both the rate of imposition of sentences outside the range and the extent to which they fall outside the range.

Perhaps as important, average sentence lengths depend on the recommended guideline ranges for the offenses being sentenced at a given time. Social science research refers to the most likely sentence within the guideline range as the “presumptive sentence”, *i.e.*, the sentence recommended by the guidelines and most likely to be imposed by the court if the sentence is within the guidelines. In the federal system, the presumptive sentence is assumed to be the minimum of the guideline range.<sup>286</sup>

The presumption that the minimum of the range is the most likely sentence to be imposed if the sentence is within-range is borne out by sentencing practices over time. In all three time periods analyzed for this report, approximately 60 percent of within-range sentences were located at the bottom of the range. Approximately 10 percent of cases were sentenced at the top of the range in each respective time period. Table 4 catalogues the position of sentences within the guideline range for all cases sentenced during the relevant time periods. Interestingly, there is no marked difference between the patterns of selecting the position of sentence in each of the three time periods.

**Table 4**  
**Position of Sentence Within the Guideline Range for All Cases**

<b>Position Within Guideline Range</b>	<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	<b>Post-Booker (1/12/05-1/11/06)</b>
<b>Guideline Minimum</b>	59.3%	60.4%	58.2%
<b>Lower Half of Range</b>	14.5%	14.2%	15.6%
<b>Mid Point of Range</b>	8.9%	9.0%	8.4%
<b>Upper Half of Range</b>	6.7%	6.5%	7.5%
<b>Guideline Maximum</b>	10.6%	10.0%	10.3%

SOURCE: U.S. Sentencing 2006 *Booker* Report Datafiles.

<sup>286</sup> A discussion of the “presumptive sentence model” may be found in Paul J. Hofer and Kevin R. Blackwell, *What are We Learning from Multiple Regression Studies of Federal Sentencing Decisions*, (Paper presented at the American Society of Criminology Meeting, November 9, 2001, Atlanta, GA). Available from the authors; Rodney L. Engen and Randy R. Gainey, *Modeling the Effects of Legally Relevant and Extralegal Factors Under Sentencing Guidelines: The Rules Have Changed*, *CRIMINOLOGY* 38(4): 1207 (2000).

The applicable guideline minimum presented in Figure 8 therefore is also the presumptive sentence. There is a consistent relationship over time between the severity of the sentence recommended by the guidelines for an offense, *i.e.*, the presumptive sentence, and the sentence imposed for that offense. The proximity of the two lines in Figure 8 demonstrates this relationship. This relationship partly explains why average sentence lengths have increased when the rate of imposition of below-range sentences also has increased.

Presumptive sentences have been increasing since the middle of Fiscal Year 2003 and have continued to do so following the decision in *Booker*. Presumptive sentences increase for a variety of reasons. Part of the increase is due to guideline and statutory amendments that stiffened penalties and increased the guideline range, such as those in the Commission’s 2001 “Economic Crime Package,” the 2002 Sarbanes-Oxley Act,<sup>287</sup> or the PROTECT Act. In addition, more serious offenses may have been brought for prosecution. As shown in Figure 8, the average sentences recommended by the guidelines have varied between 59 and 61 months since *Booker*. Partly because of this relationship between the length of the sentence recommended by the guidelines and the length of sentence imposed, the average sentence imposed since *Booker* consequently varies between 51 and 52 months in the caseload as a whole.

The effect of the higher post-*Booker* rate of imposition of below-range sentences can be seen in the somewhat wider gap between the recommended and imposed sentences in the post-*Booker* era. This widening was not enough, however, to undo the effects of the increases in the presumptive sentence.

#### **b. Changes in Sentence Type**

Several other indicators of federal sentencing practices suggest continuity over time in the type of sentence imposed, for example, in the use of imprisonment instead of probation or other alternatives to imprisonment. Overall, rates in the imposition of particular types of sentences have remained relatively constant, and rates of imprisonment actually have increased somewhat, across the three time periods, indicating that *Booker* itself has not had an effect on rates of imposition of particular types of sentence.

Table 3 demonstrates the Commission’s analysis of the pattern of increase for all cases in the proportion of offenders sentenced to prison.<sup>288</sup> Analysis revealed that 85.2 percent of offenders were sentenced to prison in the pre-PROTECT Act period, as compared to 85.9 percent post-PROTECT Act and 88.6 percent post-*Booker*. The Commission also analyzed the data to show the imprisonment rates for the 5 most commonly applied guidelines. (*see* Table 3) For example, rates of imprisonment for theft and fraud offenders sentenced under USSG §2B1.1 increased more than eight percentage

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<sup>287</sup> Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>288</sup> The columns labeled “n” reflect the number of cases included in each category, “percent prison” indicated the number of offenders in each category sentenced to a term of imprisonment, and the average and median sentences imposed are also listed on Table 3.

points during the 3-year time frame (53.4% pre-PROTECT Act, to 56.2% post-PROTECT Act, to 61.6% post-*Booker*).

There likely are two factors contributing to the increased rate of imprisonment for theft and fraud offenders. First, statutory and guideline penalties increased for many fraud offenses as a result of the Commission's Economic Crime Package of 2001, the 2002 Sarbanes-Oxley Act and other recent legislation. The proportion of cases sentenced under USSG §2B1.1 that are subject to the higher base offense level of level seven under that guideline increased from 0.7 percent post-PROTECT Act to 13.7 percent post-*Booker*.<sup>289</sup> Second, the government may be prosecuting more serious economic crimes. The amount of economic loss involved in theft and fraud cases has increased. The median loss amounts for cases with loss amounts sufficient to trigger a sentence increase from the loss table in USSG §2B1.1 increased during the three time periods from \$33,929 pre-PROTECT Act, to \$41,595 post-PROTECT Act, to \$54,566 post-*Booker*.<sup>290</sup> These median loss amounts depict a steady increase in offense severity. Additionally, the victim table at USSG §2B1.1(b)(2) is being applied at a steadily increased rate. The victim-related increases applied to 10.6 percent of USSG §2B1.1 cases pre-PROTECT Act, 13.9 percent of cases post-PROTECT Act, and 16.7 percent of cases post-*Booker*.

In addition to the analysis discussed above, analysis was conducted to determine whether alternatives to imprisonment were being used post-*Booker*, in cases where imprisonment was mandated by the guidelines. The data indicate that, notwithstanding the increased sentencing discretion afforded by *Booker*, alternatives to imprisonment are not being imposed at an increased rate, particularly in regard to the most serious category of offenders. For all cases for which the final offense level was in Zone D of the Sentencing Table (requiring that, absent a below-range sentence, the minimum sentence term be satisfied with a sentence of imprisonment),<sup>291</sup> the percentages of Zone D offenders sentenced to a term of imprisonment were 94.1 percent pre-PROTECT Act, 95.2 percent post-PROTECT Act, and 94.5 percent post-*Booker*, respectively.<sup>292</sup>

Multivariate analysis was undertaken to assess independently whether *Booker* had any impact on the court's decision to impose imprisonment. Since courts have increased discretion, including the ability to sentence offenders to non-incarceration sentences, one might hypothesize that the courts would impose more alternative sentences and less

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<sup>289</sup> Because the base offense level of 7 was effective November 1, 2003, it is not applicable to the Fiscal Year 2003 pre-PROTECT Act offenders.

<sup>290</sup> See *Guidelines Manual* §2B1.1(b)(1) (2005). There also was a change in the definition of "loss" in USSG § 2B1.1 in 2001, but the effect on loss amounts is not clear.

<sup>291</sup> See *Guidelines Manual* §5C1.1(f) (2005). In contrast, sentence terms in Zone B and C can be satisfied in part with alternative confinement, and sentence terms in Zone A do not require confinement or imprisonment. Within any given criminal history category, the sentence terms of guideline ranges in Zone D have the greatest length in the sentencing table.

<sup>292</sup> These percentages are less than 100 percent due to departures that result in sentences in other zones of the Sentencing Table, all of which permit forms of punishment alternative to imprisonment. The Commission's data indicate that offenders in Zones B and C are being sentenced to probationary sentences, rather than confinement, in 10.4 percent and 9.2 percent of these cases, respectively. This compares to Pre-PROTECT Act rates of 8.2 percent and 8.4 percent, respectively, and post-PROTECT Act rates of 9.0 percent and 6.9 percent, respectively.

prison only sentences. The multivariate analysis indicated that there is no statistically significant difference in the decision to imprison or not before and after *Booker*. This relationship holds for drug and non-drug cases.

### c. Changes in Sentence Length

The Commission also examined the pattern of increase in the average length of prison sentences for all cases. Table 3 sets forth the results of that analysis. Prior to the PROTECT Act, the average sentence was 56 months. The average sentence in the post-PROTECT Act period was 57 months, and increased to 58 months post-*Booker*. Table 3 also includes average sentence lengths across the three time periods for the 5 most commonly applied guidelines. For most of the 5 types, the average sentence increased. For example, the average sentence for theft and fraud offenders sentenced under USSG §2B1.1 increased a total of 7 months (16 months pre-PROTECT Act, to 20 months post-PROTECT Act, to 23 months post-*Booker*). Average sentences in illegal reentry cases declined post-*Booker* by a few months.

Multivariate analysis also was conducted to assess whether there are any differences in the factors associated with an increased or decreased sentence before and after *Booker*.<sup>293</sup> Table 5 shows the percentage difference pre-*Booker* and post-*Booker* in the association between sentence length and factors such as offense type, criminal history, role in the offense, and other characteristics of the case. As Table 5 indicates, factors associated with sentence length are essentially the same before and after *Booker*. For example, violent offenders were associated with sentences 9.5 percent lower than drug trafficking offenders in the post-PROTECT Act period and 10.8 percent lower sentences post-*Booker*. Only one guideline relevant factor was significant post-*Booker* and not significant before. After controlling for all other factors, post-*Booker* offenders convicted of white collar offenses had sentences 9.7 percent lower than those convicted of drug trafficking offenses. This relationship was not statistically significant in the post-PROTECT Act period. Whether an offender went to trial was statistically significant in the post-PROTECT Act population but was not so for the post-*Booker* population. Post-PROTECT Act, an offender who went to trial was sentenced 10.6 percent lower than an offender who pled after controlling for all other factors.<sup>294</sup> Going to trial had no significant effect on sentences of offenders in the post-*Booker* population. A discussion of the association of demographic factors and sentence length is discussed in Chapter 5.

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<sup>293</sup> Table B-1 in Appendix B provides the results of this analysis.

<sup>294</sup> This seems to contradict the “trial penalty” hypothesis that has usually been put forth (Nancy King, *et al.* 2005). *When Process Affects Punishment Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guideline States*, 105 COLUM. LAW REV: 959.

**Table 5**  
**Guideline Relevant Factors Post-Booker and Post-PROTECT Act**

	<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	<b>Post-Booker (1/12/05-1/11/06)</b>
	<b><u>Percent Difference</u></b>	<b><u>Percent Difference</u></b>
<b>Offense Type (reference category is drug trafficking offenses)</b>		
<b>Violent Offense</b>	-9.5	-10.8
<b>Sex Offense</b>	-20.5	-16.7
<b>Other Drug Offense</b>	367.7	132.3
<b>Immigration Offense</b>	43.0	39.8
<b>White Collar Offense</b>	ns <sup>295</sup>	-9.7
<b>Other Offenses</b>	-12.4	-16.9
<b>Criminal History</b>		
<b>Criminal History Points</b>	-1.5	-0.6
<b>Career Offender<sup>296</sup></b>	30.4	30.7
<b>Armed Career Criminal</b>	ns	ns
<b>Role in the offense (reference category is no role adjustment applied)</b>		
<b>Mitigating Role</b>	-15.1	-18.7
<b>Aggravating Role</b>	ns	ns
<b>Case Characteristics</b>		
<b>Trial</b>	-10.6	ns
<b>18 U.S.C. § 924(c) conviction</b>	ns	ns
<b>Weapon SOC</b>	ns	ns
<b>Mandatory Minimum applied</b>	6.0	12.4
<b>Safety Valve</b>	-17.8	ns

<sup>295</sup> Not statistically significant.

<sup>296</sup> For career offender, armed career criminal, and all case characteristic variables, the reference categories are comprised of offenders who did not receive the specified adjustment or statutory designation. The reference category for the trial variable is guilty plea.

## **D. FACTORS RELIED UPON AND REASONS CITED FOR IMPOSITION OF BELOW-RANGE SENTENCES**

### **1. Factors relied upon for imposition for below-range sentences**

As indicated earlier in this chapter, findings thus far indicate that the most substantial effect of *Booker* on federal guideline sentences is the increased rate of imposition of non-government sponsored, below-range sentences, including a shift in fashioning these sentences from the use of guideline downward departures to general citations of *Booker* or 18 U.S.C. § 3553(a) factors. The proportion of non-government-sponsored, below-range sentences has increased from 8.6 percent pre-PROTECT Act, to 12.5 percent post-*Booker*. As classified by the Commission, post-*Booker* non-government-sponsored, below-range sentences are comprised of 3.2 percent departure sentences and 9.3 percent *Booker* or otherwise below-range sentences.

Multivariate analysis was conducted to determine whether any factors associated with the court's decision to impose a below-range sentence changed after *Booker*. Most of the variables analyzed were significant in both time periods, and their magnitudes remain relatively constant. For example, post-*Booker*, an offender with an aggravating role adjustment had a 32.6 percent less likelihood of receiving a court-initiated, downward departure as compared to those with no role adjustment. In the post-PROTECT Act period, this likelihood was 41.8 percent.

Four factors associated with non-government-sponsored, below-range sentences were shown to be statistically significant in the post-*Booker* period but not statistically significant before *Booker*:<sup>297</sup> the application of a mandatory minimum sentence, criminal history points, career offender status, and citizenship. After *Booker*: (1) offenders who had a mandatory minimum sentence applied were 26.7 percent less likely than those without a mandatory minimum sentence to obtain a non-government-sponsored, below-range sentence; (2) each criminal history point attributable to the offender decreased the likelihood of a non-government-sponsored, below-range sentence by 2.9 percent; (3) career offender status decreased the likelihood of receiving a non-government-sponsored, below-range sentence by 44.6 percent compared to those without career offender status; and (4) non-U.S. citizenship decreased the likelihood of receiving a non-government-sponsored, below-range sentence by 11.8 percent compared to U.S. citizenship.

Two factors were statistically significant post-PROTECT Act but not significant post-*Booker*. The application of safety valve decreased the likelihood post-PROTECT Act of receiving a downward departure by 29.2 percent, and offenders over the age of 25 had 11.1 percent greater likelihood of a below-range sentence compared with those 25 years of age and younger.

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<sup>297</sup> See Table B-2 for complete results.

## 2. Reasons cited for imposition for below-range sentences

In order to assess the specific circumstances that prompted courts to sentence below the range after *Booker*, the Commission examined the types and frequency of reasons given by the courts for the imposition of non-government-sponsored, below-range sentences. Four post-*Booker* below-range categories presented separately for this analysis are as follows:

- Downward Departure/Guideline Reason:<sup>298</sup> All cases with imposed sentence below the range and citing reasons for departure limited to, and affirmatively and specifically identified in the policy statements, or commentary of the federal *Guidelines Manual*.
- Downward Departure/*Booker* Reason: All cases with imposed sentence below the range and citing reasons for departure limited to, and affirmatively and specifically identified in the policy statements, or commentary of the federal *Guidelines Manual*, and additionally mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence below-range.
- Below-range *Booker*: All cases with imposed sentences below the range mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a below-range sentence.
- Otherwise below-range: Cases with imposed sentences below the range that do not fall into the three previous categories. Based on the information submitted on the Statement of Reasons, these cases cannot be classified as a guideline departure, or as a below-range sentence pursuant to *Booker*/18 U.S.C. § 3553. This category includes cases which cited departure reasons that are not affirmatively and specifically identified in the policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reasons for the below-range sentence.

Overall, reasons used under the guidelines for the imposition of downward departures often are used in all but one of the *Booker* below-range categories. In fact, criminal history, a guideline departure reason, consistently appears as one of the 4 most commonly cited reasons for the imposition of a below-range sentence under *Booker* in all 4 below-range categories.

Table 6 shows that the most commonly cited reasons post-*Booker* for the imposition of guideline downward departures citing guideline reasons are criminal history, general mitigating circumstances, family ties, and aberrant behavior. These

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<sup>298</sup> Above-range sentences follow the same decision protocol and are reported in identically defined categories but with an “upward” modifier.

reasons historically have been the most commonly cited reasons for downward departures.<sup>299</sup>

The most commonly cited reasons post-*Booker* for the imposition of guideline downward departures that also cite *Booker* are 18 U.S.C. § 3553(a), the presence of a variance, criminal history, family ties, and nature of the offense pursuant to 18 U.S.C. § 3553(a). See Table 7.

The most commonly cited reasons post-*Booker* for the imposition of a below-range sentence using *Booker* are 18 U.S.C. § 3553(a) generally, the presence of a variance, specific language from 18 U.S.C. § 3553(a), criminal history, and the nature and circumstances of the offense/history of the defendant pursuant to 18 U.S.C. § 3553(a)(1). As expected, cases in this category least employ guideline downward departure reasons. See Table 8.

As Table 9 indicates, insufficient information in the documentation by far accounted for the largest proportion of sentences categorized by the Commission as otherwise below-range. This category also included a combination of guideline departure grounds and other grounds as reasons for the imposition of the below-range sentence (e.g., criminal history and general mitigating circumstances). The lack of meaningful documentation in many cases makes assessment of the reasons for the imposition of a non-government-sponsored below-range sentence exceptionally difficult if not impossible. Universal use of the newly revised Statement of Reasons form should help in the collection of more detailed and meaningful information.<sup>300</sup>

A number of conclusions can be drawn from examining the reasons for the imposition of non-government-sponsored, below-range sentences. First, even in cases citing to or otherwise using *Booker*, the consideration of departure reasons remains prevalent. Although there is extensive reliance on reasons that are not guideline departure reasons, these often are used in combination with guideline departure reasons.

Second, the defendant's criminal history and to a lesser extent the defendant's family ties and circumstances frequently provide the basis for the imposition of non-government-sponsored, below-range sentences.

Third, while some courts cite only in general terms to *Booker* and/or the provisions of 18 U.S.C. § 3553(a) in the imposition of non-departure, below-range sentences, a number of cases make more specific reference to the particular purposes of sentencing that would, in the court's view, better be achieved by fashioning a below-range sentence.

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<sup>299</sup> See 2003 DEPARTURES REPORT, available at [www.usc.gov](http://www.usc.gov).

<sup>300</sup> See Statement of Reasons form, (AO245B (rev. 06/05)) in Appendix A.

**Table 6**  
**Reasons Given By Sentencing Courts**  
**for Departures Below the Guideline Range**

<b>Downward Departures with Guideline Reasons<sup>301</sup></b>	<b>Number</b>	<b>Percent</b>
Criminal history issues	662	34.6
(5K2.0) General aggravating or mitigating circumstances	299	15.6
(5H1.6) Family ties and responsibilities	181	9.4
(5K2.20) Aberrant behavior	159	8.3
(5H1.4) Physical condition	140	7.3
(5K2.13) Diminished capacity	86	4.5
(5H1.3) Mental and emotional conditions	69	3.6
(5H1.1) Age	65	3.4
(5K2.23) Discharge terms of imprisonment	43	2.2
(5K2.12) Coercion and duress	32	1.7
(5H1.11) Military record/charitable works/good deeds	26	1.4
(5K2.11) Lesser harm	24	1.3
5G1.3	23	1.2
(5K2.10) Victim conduct	17	0.9
(5H1.5) Previous employment record	14	0.7
(5H1.4) Drug dependence and alcohol abuse	13	0.7
(5K2.16) Voluntary disclosure	12	0.6
(5H1.6) Community ties	9	0.5
(5K2.22) Age or health of sex offenders	9	0.5
Loss issues	8	0.4
(5K2.2) Physical injury	4	0.2
(5K2.9) Criminal Purpose	3	0.2
(5K2.3) Extreme psychological injury	2	0.1
Other <sup>302</sup>	16	0.8
<b>Total</b>	<b>1,916</b>	<b>100.0</b>

<sup>301</sup> Of the 67,564 cases, 1,456 departed below the guideline range for a guideline reason. Departure reasons were available in 1,456 of these cases which cited 1,916 reasons for downward departure. Courts often provide multiple reasons for departure; consequently, the total number of downward departure reasons may exceed the number of cases with a downward departure.

<sup>302</sup> The “Other” category includes all reasons provided fewer than two times among relevant cases.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Table 7**  
**Reasons Given By Sentencing Courts**  
**for Departures Below the Guideline Range**

<b>Downward Departures with <i>Booker</i> Reasons<sup>303</sup></b>	<b>Number</b>	<b>Percent</b>
18 USC 3553(a)	270	12.8
Judge specifies presence of variance	220	10.4
Criminal History Issues	187	8.9
(5H1.6) Family ties and responsibilities	179	8.5
Nature & circumstances of offense/hist. of def. pursuant to 18 USC 3553 (a)(1)	117	5.6
(5K2.0) General Aggravating or Mitigating Circumstance	109	5.2
(5H1.4) Physical condition	91	4.3
Rehabilitation	91	4.3
Language from 18 USC 3553(a) statute	74	3.5
(5H1.1) Age	70	3.3
(5H1.3) Mental and Emotional Conditions	69	3.3
Reflect seriousness of offense/promote respect for law/just punishment	57	2.7
US v Booker/ US v Fanfan	53	2.5
Reduce disparity	49	2.3
(5K2.20) Aberrant Behavior	46	2.2
Afford adequate deterrence to criminal conduct	45	2.1
Reasonableness	41	1.9
(5H1.5) Previous Employment Record	40	1.9
Protect public from further crimes	34	1.6
(5K2.13) Diminished capacity	33	1.6
Provide defendant with educational/vocational training/medical care/etc.	33	1.6
Avoid unwarranted sentencing disparity among defendants	28	1.3
(5H1.11) Military Record/Charitable Works/Good Deeds	23	1.1
(5H1.4) Drug dependence and alcohol abuse	20	1.0
Advisory nature of the guidelines	20	1.0
Deterrence	20	1.0
(5H1.2) Educational and vocational skills	18	0.9
Adequate punishment to meet purposes of sentencing	15	0.7
(5H1.6) Community ties	9	0.4
(5K2.12) Coercion and duress	7	0.3
Provide restitution to any victims	7	0.3
(5K2.11) Lesser harm	5	0.2
(5K2.16) Voluntary disclosure	5	0.2
(5K2.23) Discharge terms of imprisonment	4	0.2
Incapacitation	4	0.2
5G1.3	3	0.1
Insufficient documentation provided on SOR to determine reason	3	0.1
(5K2.10) Victim Conduct	2	0.1
Loss issues	2	0.1
Other <sup>304</sup>	6	0.3
<b>Total</b>	<b>2,109</b>	<b>100.0</b>

<sup>303</sup> Of the 67,564 cases, 645 departed below the guideline range citing a *Booker* reason. Departure reasons were available in 645 of these cases which cited 2,109 reasons for downward departure. Courts often provide multiple reasons for departure; consequently, the total number of downward departure reasons may exceed the number of cases with a downward departure.

<sup>304</sup> The “Other” category includes all reasons provided fewer than two times among relevant cases.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Table 8**  
**Reasons Given By Sentencing Courts for**  
**Sentences Below the Guideline Range Citing *Booker***

<b>Below Range <i>Booker</i><sup>305</sup></b>	<b>Number</b>	<b>Percent</b>
18 USC 3553(a)	2,162	19.9
Judge specifies presence of variance	1,331	12.2
Language from 18 USC 3553(a) statute text	572	5.3
Criminal History issues	569	5.2
Nature and circumstances of offense/hist. of def. pursuant to 18 USC 3553(a)(1)	519	4.8
Reasonableness	361	3.3
US v Booker/US v Fanfan	339	3.1
Insufficient documentation provided on SOR to determine reason	306	2.8
Advisory nature of the guidelines	299	2.8
Reflect seriousness of offense/promote respect for law/just punishment	284	2.6
General Guideline Adequacy Issues	282	2.6
Reduce disparity	279	2.6
(5H1.6) Family Ties and Responsibilities	235	2.2
Afford adequate deterrence to criminal conduct	222	2.0
Adequate punishment to meet purposes of sentencing	190	1.8
Deterrence	180	1.7
Rehabilitation	180	1.7
Avoid unwarranted sentencing disparities among def.	173	1.6
Protect the public from further crimes	168	1.5
(5H1.1) Age	141	1.3
Mule/Role in the offense	127	1.2
Provide def. with education/vocational training/medical care/etc.	127	1.2
(5H1.5) Previous Employment Record	91	0.8
(5K2.0) General Aggravating or Mitigating Circumstance	88	0.8
Not 5K1.1 Cooperation without Motion	82	0.8
(5H1.4) Physical Condition	79	0.7
Cooperation-Motion unknown	70	0.6
(5H1.3) Mental and Emotional Conditions	67	0.6
Incapacitation	66	0.6
Restitution	60	0.6
Time Served	56	0.5
Def. positive background/good character	51	0.5
(5H1.4) Drug dependence and alcohol abuse	44	0.4
Lack of culpability/accountability of def	42	0.4
Acceptance of responsibility	40	0.4
(5K2.20) Aberrant behavior	38	0.4
Provide restitution to any victims	36	0.3
Sufficient punishment	36	0.3
Remorse	35	0.3
5H1.11 Military Record/Charitable Works/Good Deeds	28	0.3
Not representative of heartland	28	0.3
(5H1.6) Community Ties	27	0.3
Crack/Powder Cocaine Disparity	27	0.3
Loss Issues	26	0.2
Other <sup>306</sup>	715	6.6
<b>Total</b>	<b>10,878</b>	<b>100.0</b>

<sup>305</sup> Of the 67,564 cases, 3,850 were below the guideline range citing a *Booker* reason. Reasons were available in 3,850 of these cases which cited 10,878 reasons for below range sentences. Courts often provide multiple reasons for below range sentences; consequently, the total number of below range reasons may exceed the number of cases with sentences below the guideline range.

<sup>306</sup> The “Other” category includes all reasons provided twenty-five times or fewer among relevant cases.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Table 9**  
**Reasons Given By Sentencing Courts for**  
**Sentences Below the Guideline Range Citing *Booker***

<b>Otherwise Below Range<sup>307</sup></b>	<b>Number</b>	<b>Percent</b>
Insufficient documentation provided on SOR to determine reason	970	24.5
Criminal history issues	496	12.5
(5K2.0) General aggravating or mitigating circumstances	251	6.3
(5H1.6) Family ties and responsibilities	165	4.2
General guideline adequacy issues	97	2.5
(5H1.1) Age	90	2.3
Rehabilitation	84	2.1
Mule/role in the offense	78	2.0
Time Served	73	1.8
(5H1.4) Physical Condition	71	1.8
Reduce Disparity	63	1.6
Restitution	62	1.6
(5H1.3) Mental/Emotional Conditions	61	1.5
Cooperation – Motion Unknown	59	1.5
(5K2.20) Aberrant Behavior	57	1.4
(5H1.5) Previous Employment	53	1.3
Not Representative of Heartland	52	1.3
Acceptance of Responsibility	47	1.2
(Not 5K1.1) Cooperation without Motion	43	1.1
Deterrence	41	1.0
Adequate Punishment to meet Purposes of Sentencing	39	1.0
Cultural Assimilation	39	1.0
Reasonableness	39	1.0
Remorse	30	0.8
(5H1.4) Drug Dependence and Alcohol Abuse	28	0.7
Def. Positive Background/Good Character	28	0.7
5H1.11 – Military Record/Charitable Works/ Good Deeds	24	0.6
Lack of Culpability/Accountability of Def	22	0.6
Loss issues	22	0.6
Totality of Circumstances/Combination of Factors	22	0.6
Advisory nature of guidelines	20	0.5
Impact on Employment of Defendant/Others	20	0.5
(5K2.13) Diminished Capacity	18	0.5
Susceptibility/Prey to other inmates	17	0.4
Delay in Prosecution/Evidentiary Concerns	16	0.4
Statmin/Statmax	16	0.4
Aberrant Behavior/Offense Behavior was Isolated Incident	15	0.4
Child Abuse Syndrome	15	0.4
Currently Rec Punishment Under State/Fed Juris	15	0.4
(5H1.6) Community Ties	14	0.4
Low Likelihood or Recidivism	14	0.4
Mitigating Factors Regarding Firearms	14	0.4
(5H1.2) Educational and Vocational Skills	12	0.3
Interest of Justice	11	0.3
Other <sup>308</sup>	535	13.5
<b>Total</b>	<b>3,958</b>	<b>100.0</b>

<sup>307</sup> Of the 67,564 cases, 2,238 were otherwise below the guideline range. Reasons were available in 2,210 of these cases which cited 3,958 reasons for below range sentences. Courts often provide multiple reasons for below range sentences; consequently, the total number of below range reasons may exceed the number of cases with sentences below the guideline range.

<sup>308</sup> The “Other” category includes all reasons provided ten times or fewer among relevant cases.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

## **ANALYSIS OF COMMISSION SENTENCING DATA: REGIONAL AND DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES**

### **A. INTRODUCTION AND MAJOR FINDINGS**

This chapter details the results of the Commission’s data analyses of the impact of *Booker* with respect to regional and demographic differences in federal sentencing practices. In sum, these analyses yielded the following findings:

- The regional differences in sentencing practices that existed before *Booker* continue to exist. There are varying rates of sentencing in conformance with the guidelines reported by the twelve circuits. Consistent with the national trend, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*.
- Fifty-two of the 94 districts, or 55 percent, have rates of imposition of within-range sentences at or above the national average of 62.2 percent. Forty-two districts have rates of imposition of within-range sentences below the national average. In 34 of these 42 districts, the rates of imposition of government-sponsored, below-range sentences exceed the rates of imposition of other below-range sentences.
- Multivariate analysis conducted on post-*Booker* data reveals that male offenders continue to be associated with higher sentences than female offenders. Such an association is found every year from 1999 through the post-*Booker* period. Associations between demographic factors and sentence length should be viewed with caution because there are unmeasured factors, such as violent criminal history or bail decisions, statistically associated with demographic factors that the analysis may not take into account.
- Multivariate analysis conducted on post-*Booker* data reveals that black offenders are associated with sentences that are 4.9 percent higher than white offenders. Such an association was not found in the post-PROTECT Act period but did appear in 4 of the 7 time periods analyzed from 1999 through the post-*Booker* period.
- Multivariate analysis conducted on post-*Booker* data reveals that offenders of “other” races (mostly Native American offenders) are associated with sentences that are 10.8 percent higher than white offenders. This association also was found in 2 of the 7 time periods from 1999 through the post-*Booker* period.

- Multivariate analysis conducted on post-*Booker* data reveals that there is no statistical difference between the sentence length of Hispanic offenders and the sentence length of white offenders.

## **B. DIFFERENCES IN CIRCUIT AND DISTRICT SENTENCING PRACTICES**

Variation in rates of imposition of within-range and below-range sentences among different circuits and districts has been a long-standing feature of federal guidelines sentencing. These variations have been the subject of analysis and research by the Commission, other government agencies and commentators,<sup>309</sup> and by academic researchers.<sup>310</sup> This research suggests that downward departures may be contributing to regional differences in sentencing, but the reasons for variations in departure rates have been difficult to understand.

Previous Commission reports have found regional variations and explored some of their reasons. In 1998, the Commission reported significant variations among districts in the policies and practices governing use of USSG §5K1.1 departures based on offenders' substantial assistance in the prosecution of other persons.<sup>311</sup> The Commission's 2003 Departures Report showed general consistency across time in the districts reporting the highest and lowest rates of imposition of out-of-range sentences but substantial differences across districts. The composition of the caseload and the role of government-sponsored departures were shown to be important determinants of inter-district variations. The Commission's Fifteen Year Review discussed a variety of factors leading to disparity among districts.<sup>312</sup> Differences among the culture and practices of district courts were found to contribute to regional variation in departure rates more than differences among the circuits. That is, differences among districts *within* the circuits were more important than overall differences over time among the circuits.

Modified reporting practices implemented subsequent to the PROTECT Act permit further exploration of variations in rates of imposition of government-sponsored downward departures and non-government-sponsored, below-range sentences. This section uses the revised post-*Booker* categories to describe and compare district and circuit practices pre-PROTECT Act, post- PROTECT Act, and post-*Booker*.

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<sup>309</sup> William W. Mercer, *Assessing Compliance with the U. S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENT'G REP. 43 (2003); General Accounting Office, 2003.

<sup>310</sup> Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2003); Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027 (1997); Lida Farabee *Disparate Departures under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569 (1998).

<sup>311</sup> Linda Maxfield & John Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Policy and Practice* (January 1998).

<sup>312</sup> FIFTEEN YEAR REVIEW at 93-110.

## 1. Differences in Circuit Sentencing Practices

Circuit and district rates of imposition of within-range and out-of-range sentences have varied across both time and jurisdiction. The Commission examined circuit changes over the 4 most recent fiscal years and compared them to the post-*Booker* period.<sup>313</sup> Table 10 illustrates the result of the comparison. Rates of imposition of within-range sentences decreased for each of the twelve circuits from the post-PROTECT Act period to the post-*Booker* period. Those rates fell as little as 4.8 percentage points in the Eleventh Circuit, (from 74.7 % to 69.9 %) to as much as 14.3 percentage points in the First Circuit (from 79.6 % to 65.3 %).

With the exception of the DC Circuit, the rankings among circuits have remained relatively stable across time. Rates of imposition of within-range sentences in the post-*Booker* period vary from a low of 48.5 percent in the Ninth Circuit to a high of 72.0 percent in the Fifth Circuit. The ranges narrowed somewhat from about a 25-percentage point spread in Fiscal Year 2001 to an 18-percentage point spread in Fiscal Year 2003. Post-*Booker*, the ranges returned to rates more comparable to 2001 and 2002.

**Table 10**  
**Rates of Within-Range Sentences**  
**for Each Federal Judicial Circuit**

	<b>FY2001</b>	<b>FY2002</b>	<b>FY2003</b>	<b>FY2004 Pre-<i>Blakely</i></b>	<b>Post-<i>Booker</i> (1/12/05- 1/11/06)</b>
<b>DC Circuit</b>	74.6	59.9	64.6	59.2	52.5
<b>First Circuit</b>	73.3	75.7	77.3	79.6	65.3
<b>Second Circuit</b>	57.5	61.3	63.2	63.8	50.1
<b>Third Circuit</b>	60.2	58.9	62.3	62.6	52.1
<b>Fourth Circuit</b>	73.7	76.6	77.0	79.0	67.2
<b>Fifth Circuit</b>	69.1	71.0	73.7	80.2	72.0
<b>Sixth Circuit</b>	65.1	66.9	69.1	69.7	57.9
<b>Seventh Circuit</b>	71.0	69.3	72.5	75.4	63.5
<b>Eighth Circuit</b>	66.8	69.3	72.2	77.0	64.4
<b>Ninth Circuit</b>	50.1	48.8	59.6	61.8	48.5
<b>Tenth Circuit</b>	65.0	66.6	73.1	73.9	66.5
<b>Eleventh Circuit</b>	72.1	70.2	74.5	74.7	69.9

SOURCE: U.S. Sentencing Commission *Sourcebook of Federal Sentencing Statistics*, FY2001 through FY2003, U.S Sentencing Commission FY2004 Datafile USSCFY04, pre-*Blakely* only (10/1/03-6/23/04); Special Post-*Booker* coding project (data extracted February 22, 2006).

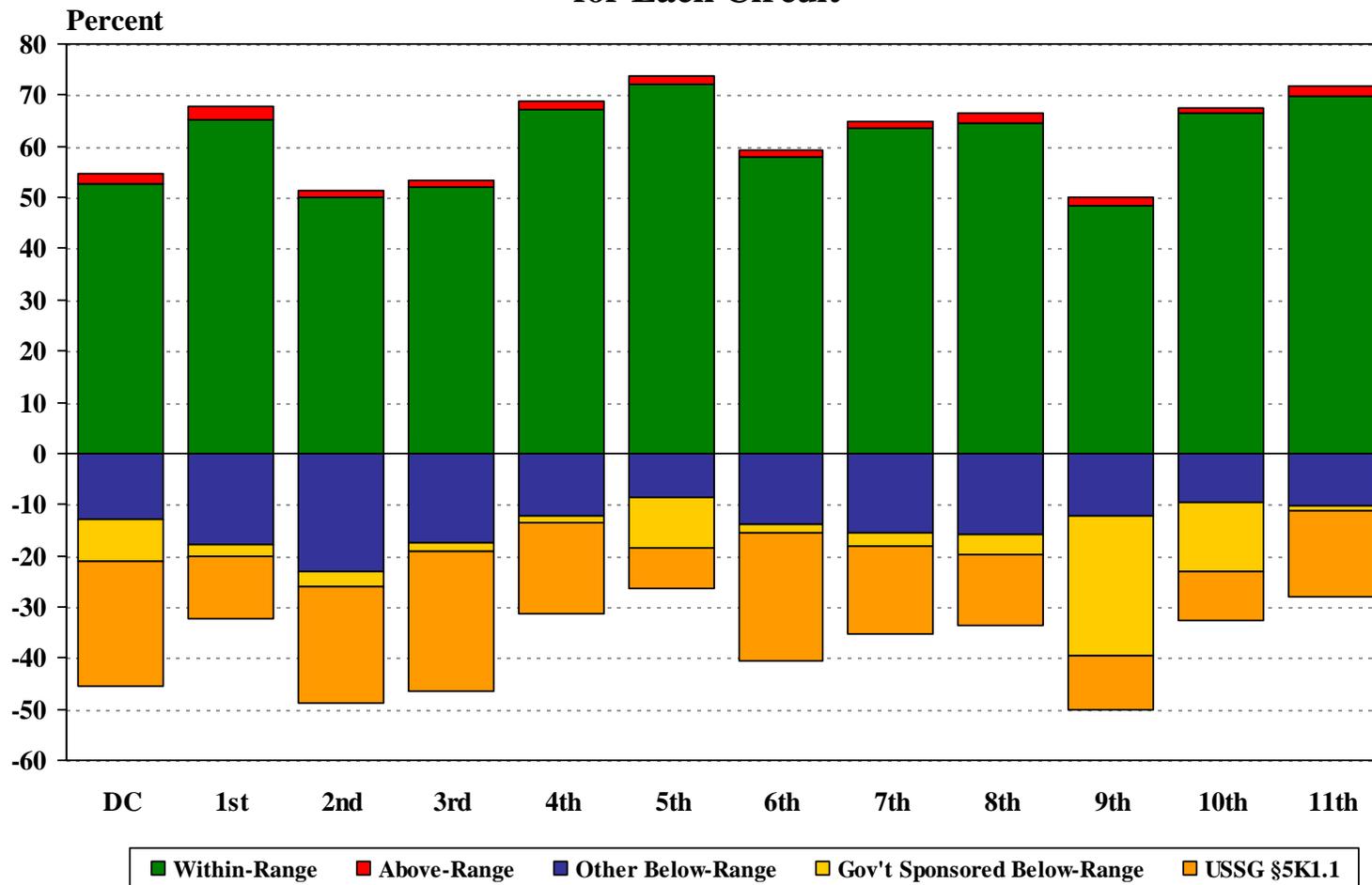
<sup>313</sup> See Appendix D, page D-10 (Guideline Application By Circuit).

Rates of imposition of within-range sentences depend on different combinations of the various types of out-of-range sentences. Circuits with similarly low rates of imposition of within-range sentences vary significantly in their rates of imposition of government-sponsored downward departures and other non-government-sponsored, below-range sentences. The Ninth Circuit reports the lowest rate of imposition of within-range sentences but also has by far the highest rate of imposition of government-sponsored, below-range sentences (27.5%) due to the large portion of fast track departures in several districts in that circuit. In contrast, the Third Circuit has the highest rates of imposition of USSG §5K1.1 departures (27.3%), low rates of imposition of other types of government-sponsored departures (1.7%), and higher rates of imposition of non-government-sponsored, below-range sentences (17.6%). Figure 9 displays the rate of imposition of within-range sentences and the rates of imposition of various types of out-of-range sentences for each circuit.<sup>314</sup>

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<sup>314</sup> Figure 9 depicts the rates of above-range sentences at the top of the figure (red lines). Within-range sentences for each circuit are in green, over the thick black line.

**Figure 9**  
**Position of Sentences Relative to the Guideline Range Post-Booker**  
**for Each Circuit**



SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extraction on February 22, 2006). See Appendix D (Guideline Application Trends, National and Circuit).

## 2. Differences in District Sentencing Practices

Two major findings in the Commission's 2003 Departures Report were that (1) most judicial districts have relatively low rates of imposition of non-government-sponsored, below-range sentences; and (2) the districts with the highest and lowest rates remain relatively stable over time.<sup>315</sup> Figure 10 shows the concentration of rates of imposition of non-government-sponsored, below-range sentences in the pre-PROTECT Act, post-PROTECT Act, and post-Booker time periods. For example, 34 districts had rates of imposition of below-range sentences between zero and 5 percent prior to the PROTECT Act. That number peaked at 57 districts following the PROTECT Act and has decreased to five districts post-Booker. Eighteen districts had rates of imposition of non-government-sponsored, below-range sentences greater than ten percent prior to the PROTECT Act. That number decreased to 12 districts following the PROTECT Act and increased to 54 post-Booker.

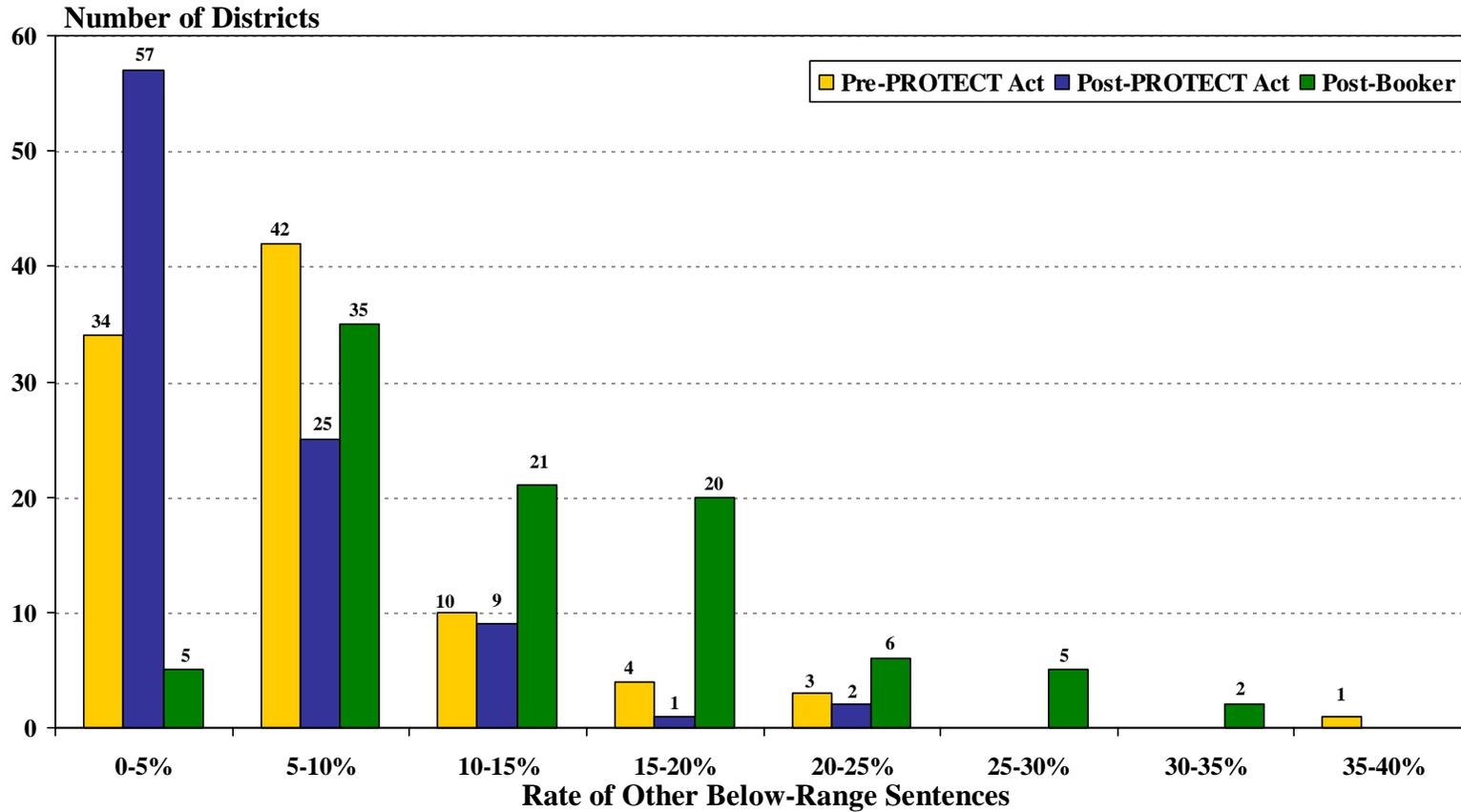
Data from the post-Booker period show a shift toward higher rates of imposition of non-government-sponsored, below-range sentences. As Figure 10 illustrates, the majority of districts remain in the lower rate categories overall. (*see* Figure 10) For example, 42.5 percent of the districts (40 of 94) had rates of imposition of non-government-sponsored, below-range sentences post-Booker at or below 10 percent (compared to 76 pre-PROTECT Act and 82 post-PROTECT Act in those two categories). A majority of the districts (76 of 94, or 80.9%) show rates of imposition of non-government-sponsored, below-range sentences of between 5 percent and 20 percent post-Booker.

As discussed earlier in this report, rates of imposition of government-sponsored departures are uniformly higher at each time period than are rates of imposition of non-government-sponsored, below-range sentences. The Commission compared the rates of imposition of government-sponsored departures (under USSG §§ 5K1.1 and 5K3.1 and other government-sponsored downward departures) among the 94 districts across the same three time periods. Figure 11 illustrates those comparisons.

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<sup>315</sup> *See* 2003 DEPARTURES REPORT at 34.

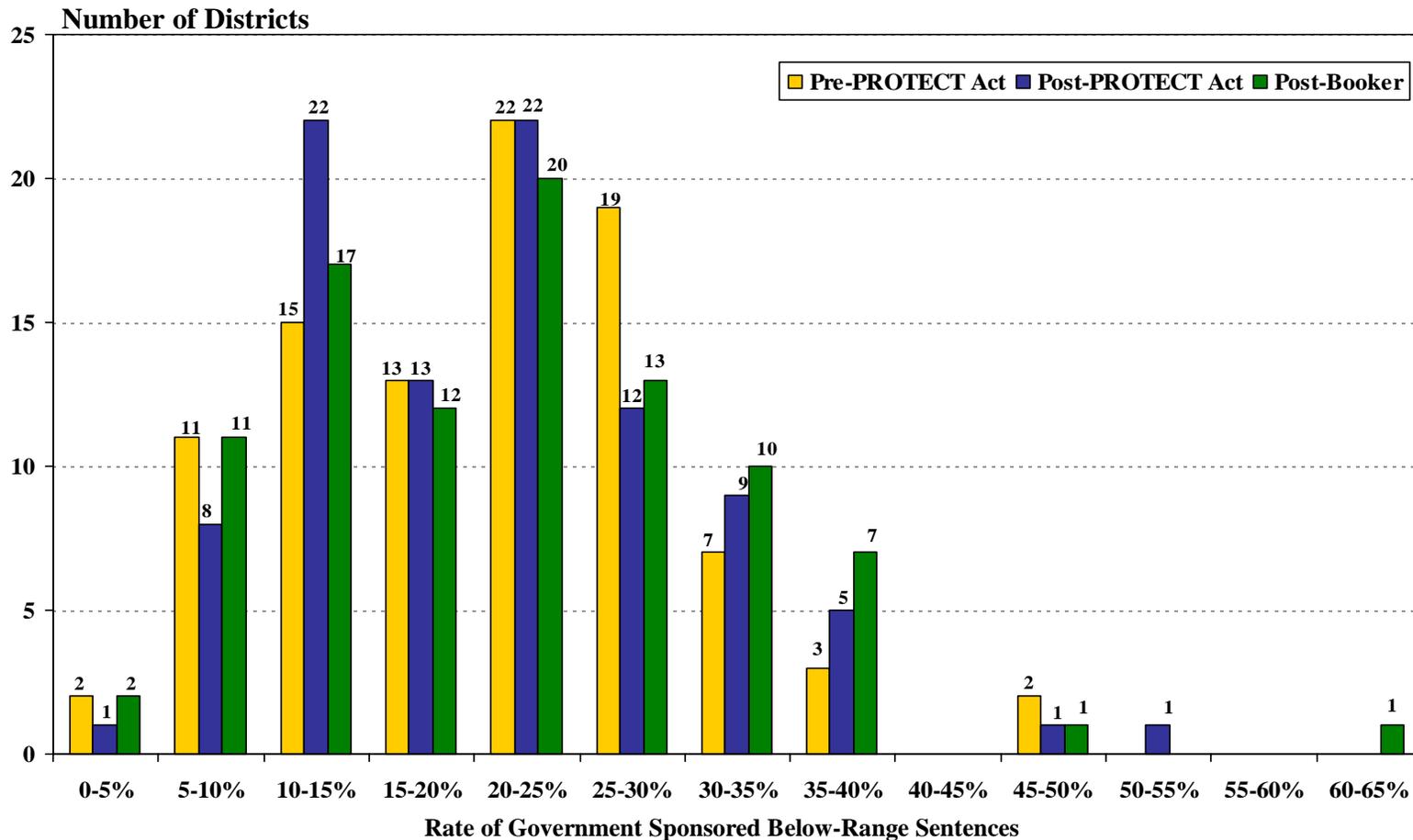
**Figure 10**  
**Rates of Other Below-Range Sentences Among Districts**  
**Pre-PROTECT Act, Post-PROTECT Act and Post-Booker**



Other Below-Range Sentences are defined as non-government sponsored downward departures for the pre-PROTECT Act (10/01/02 – 04/30/03) and post-PROTECT Act (05/01/03 – 06/24/04) data. For the post-Booker data (01/12/05 – 01/11/06), Other Below-Range Sentences include non-government sponsored downward departures, below-range citing *Booker* and otherwise below the range.

SOURCE: U.S. Sentencing Commission, 2006 *Booker* Report Datafiles.

**Figure 11**  
**Rates of Government Sponsored Downward Departures Among Districts**  
**Pre-PROTECT Act, Post-PROTECT Act and Post-Booker**



The data in this figure are from the following three time periods: Pre-PROTECT Act (10/01/02 – 04/30/03), Post-PROTECT Act (05/01/03 – 06/24/04) and Post-Booker (01/12/05 – 01/11/06). Government Sponsored Downward Departures include USSG §5K1.1 Departures, USSG §5K3.1 (EDP) Departures, and other government sponsored downward departures. See Appendix B for further information regarding the determination of sentencing categories.  
 SOURCE: U.S. Sentencing Commission, 2006 *Booker* Report Datafiles.

Table 11 further demonstrates that the high rates of imposition of below-range sentences primarily tend to be the result of government-sponsored downward departures or motions. Government-sponsored, below-range sentences account for 23.7 percent of all cases, and other below-range sentences account for 12.5 percent of all cases (3.2% downward departures and 9.3% *Booker* authority). Table 11 lists the 94 judicial districts in descending order of rates of imposition within-range sentences in the post-*Booker* period. Noteworthy is the fact that 55 percent (52 districts), of the 94 districts have rates of imposition of within-range sentences at or above the national average of 62.2 percent. The role of government-sponsored, below-range sentences is apparent, especially upon considering the remaining 42 districts that have rates of imposition of within-range sentences below the national average. In 34 of these 42 districts, rates of imposition of government-sponsored, below-range sentences are relatively high, ranging from 19.7 percent in the Northern District of California to 62.8 percent in the District of Arizona (which has an approved EDP or “fast track” program).

Table 12 lists the 94 federal judicial districts in descending order of imposition of non-government-sponsored, below-range sentences. Slightly more than half of the 94 districts (49 districts, or 52.1%) have overall rates of imposition of non-government-sponsored, below-range sentences less than the national average of 12.5 percent, with rates ranging from zero percent to 12.4 percent. Focusing on the remaining 45 districts with rates of imposition of non-government-sponsored, below-range sentences above the national average of 12.5 percent, there is approximately an even split between those with higher rates of imposition of government-sponsored, below-range sentences as follows. In 26 of these 45 districts (57.8%), the rates of imposition of government-sponsored, below-range sentences are greater than the rates of imposition of non-government-sponsored, below range sentences. The remaining 19 districts have greater rates of imposition of non-government-sponsored, below-range sentences.

Focusing specifically on rates of guideline conformance, Table 13 lists the 94 federal judicial districts in descending order of combined rates of imposition of within-range and government-sponsored, below-range sentences. Forty-seven of the 94 federal judicial districts have combined rates of imposition of within-range and government-sponsored, below-range sentences at or above the national average of 85.9 percent, ranging from 97.9 percent in the Eastern District of Oklahoma to 85.9 percent in the District of Kansas.

**Table 11**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Within-Range Sentences**  
**Post-Booker**

District	TOTAL	Within-Range		Gov't Sponsored Below-Range		Downward Departures		Below-Range <i>Booker</i>		Upward Departures		Above-Range <i>Booker</i>	
		n	%	n	%	n	%	n	%	n	%	n	%
<b>TOTAL</b>	<b>65,368</b>	<b>40,645</b>	<b>62.2</b>	<b>15,500</b>	<b>23.7</b>	<b>2,101</b>	<b>3.2</b>	<b>6,088</b>	<b>9.3</b>	<b>175</b>	<b>0.3</b>	<b>859</b>	<b>1.3</b>
Oklahoma Eastern	96	84	87.5	10	10.4	1	1.0	1	1.0	0	0.0	0	0.0
Virgin Islands	116	101	87.1	5	4.3	1	0.9	9	7.8	0	0.0	0	0.0
Wisconsin Western	185	159	85.9	8	4.3	3	1.6	13	7.0	0	0.0	2	1.1
Illinois Southern	288	241	83.7	15	5.2	9	3.1	18	6.3	2	0.7	3	1.0
Oklahoma Northern	204	168	82.4	23	11.3	0	0.0	8	3.9	1	0.5	4	2.0
West Virginia Northern	312	253	81.1	30	9.6	6	1.9	20	6.4	0	0.0	3	1.0
Mississippi Southern	333	270	81.1	32	9.6	7	2.1	16	4.8	0	0.0	8	2.4
California Central	876	707	80.7	54	6.2	29	3.3	83	9.5	0	0.0	3	0.3
Texas Eastern	739	593	80.2	84	11.4	16	2.2	34	4.6	1	0.1	11	1.5
Texas Western	5,154	4,078	79.1	616	12.0	87	1.7	299	5.8	6	0.1	68	1.3
Florida Southern	1,951	1,512	77.5	198	10.1	45	2.3	176	9.0	5	0.3	15	0.8
Montana	393	300	76.3	47	12.0	10	2.5	19	4.8	4	1.0	13	3.3
Puerto Rico	499	380	76.2	43	8.6	9	1.8	48	9.6	2	0.4	17	3.4
West Virginia Southern	301	229	76.1	35	11.6	9	3.0	21	7.0	2	0.7	5	1.7
Louisiana Eastern	335	254	75.8	46	13.7	7	2.1	18	5.4	3	0.9	7	2.1
North Carolina Middle	442	334	75.6	56	12.7	8	1.8	40	9.0	0	0.0	4	0.9
Virginia Eastern	1,367	1,030	75.3	94	6.9	25	1.8	182	13.3	5	0.4	31	2.3
Northern Mariana Islands	24	18	75.0	5	20.8	0	0.0	0	0.0	0	0.0	1	4.2
Texas Northern	915	684	74.8	108	11.8	13	1.4	63	6.9	2	0.2	45	4.9
South Dakota	422	311	73.7	27	6.4	14	3.3	45	10.7	9	2.1	16	3.8
Utah	914	664	72.6	101	11.1	43	4.7	99	10.8	0	0.0	7	0.8
Nevada	415	300	72.3	49	11.8	9	2.2	48	11.6	0	0.0	9	2.2
Oklahoma Western	220	159	72.3	19	8.6	6	2.7	25	11.4	0	0.0	11	5.0

**Table 11**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Within-Range Sentences**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within-Range</b>		<b>Gov't Sponsored Below-Range</b>		<b>Downward Departures</b>		<b>Below-Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
Maine	<b>233</b>	168	72.1	51	21.9	5	2.1	8	3.4	0	0.0	1	0.4
Florida Northern	<b>311</b>	223	71.7	58	18.6	4	1.3	16	5.1	3	1.0	7	2.3
Louisiana Western	<b>386</b>	276	71.5	35	9.1	9	2.3	46	11.9	1	0.3	19	4.9
South Carolina	<b>962</b>	682	70.9	166	17.3	25	2.6	80	8.3	4	0.4	5	0.5
Kentucky Western	<b>351</b>	249	70.9	74	21.1	8	2.3	20	5.7	0	0.0	0	0.0
Arkansas Western	<b>196</b>	139	70.9	40	20.4	4	2.0	12	6.1	0	0.0	1	0.5
Georgia Middle	<b>357</b>	252	70.6	75	21.0	0	0.0	21	5.9	1	0.3	8	2.2
Georgia Southern	<b>290</b>	202	69.7	38	13.1	14	4.8	14	4.8	4	1.4	18	6.2
Indiana Northern	<b>361</b>	251	69.5	86	23.8	9	2.5	13	3.6	0	0.0	2	0.6
Pennsylvania Western	<b>428</b>	297	69.4	54	12.6	23	5.4	48	11.2	0	0.0	6	1.4
North Dakota	<b>225</b>	155	68.9	52	23.1	5	2.2	11	4.9	1	0.4	1	0.4
Iowa Northern	<b>358</b>	246	68.7	50	14.0	6	1.7	37	10.3	3	0.8	16	4.5
Alabama Southern	<b>332</b>	226	68.1	74	22.3	7	2.1	20	6.0	0	0.0	5	1.5
Rhode Island	<b>127</b>	86	67.7	7	5.5	3	2.4	26	20.5	1	0.8	4	3.1
Arkansas Eastern	<b>252</b>	169	67.1	33	13.1	9	3.6	36	14.3	3	1.2	2	0.8
Missouri Eastern	<b>962</b>	643	66.8	182	18.9	40	4.2	86	8.9	1	0.1	10	1.0
Georgia Northern	<b>658</b>	437	66.4	107	16.3	35	5.3	68	10.3	4	0.6	7	1.1
Michigan Western	<b>402</b>	266	66.2	64	15.9	12	3.0	51	12.7	2	0.5	7	1.7
Missouri Western	<b>778</b>	514	66.1	147	18.9	8	1.0	94	12.1	0	0.0	15	1.9
Kansas	<b>622</b>	411	66.1	123	19.8	14	2.3	63	10.1	2	0.3	9	1.4
Florida Middle	<b>1,568</b>	1,028	65.6	365	23.3	49	3.1	104	6.6	2	0.1	20	1.3
New Mexico	<b>2,461</b>	1,607	65.3	711	28.9	50	2.0	83	3.4	1	0.0	9	0.4
Texas Southern	<b>6,430</b>	4,171	64.9	1,582	24.6	218	3.4	399	6.2	16	0.2	44	0.7
Nebraska	<b>810</b>	525	64.8	170	21.0	44	5.4	64	7.9	0	0.0	7	0.9
Delaware	<b>161</b>	104	64.6	14	8.7	13	8.1	30	18.6	0	0.0	0	0.0
Tennessee Eastern	<b>602</b>	389	64.6	149	24.8	5	0.8	50	8.3	0	0.0	9	1.5

**Table 11**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Within-Range Sentences**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within-Range</b>		<b>Gov't Sponsored Below-Range</b>		<b>Downward Departures</b>		<b>Below-Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
Indiana Southern	<b>301</b>	194	64.5	69	22.9	7	2.3	23	7.6	2	0.7	6	2.0
Wyoming	<b>204</b>	130	63.7	53	26.0	5	2.5	13	6.4	0	0.0	3	1.5
Louisiana Middle	<b>178</b>	111	62.4	46	25.8	1	0.6	8	4.5	2	1.1	10	5.6
Virginia Western	<b>621</b>	385	62.0	157	25.3	12	1.9	56	9.0	2	0.3	9	1.4
California Northern	<b>614</b>	378	61.6	121	19.7	23	3.7	82	13.4	0	0.0	10	1.6
Mississippi Northern	<b>192</b>	118	61.5	56	29.2	2	1.0	6	3.1	2	1.0	8	4.2
Alabama Northern	<b>423</b>	260	61.5	108	25.5	5	1.2	37	8.7	2	0.5	11	2.6
North Carolina Western	<b>567</b>	347	61.2	158	27.9	14	2.5	42	7.4	0	0.0	6	1.1
Tennessee Middle	<b>292</b>	178	61.0	63	21.6	11	3.8	37	12.7	1	0.3	2	0.7
New York Southern	<b>1,226</b>	742	60.5	187	15.3	63	5.1	227	18.5	1	0.1	6	0.5
Alabama Middle	<b>214</b>	129	60.3	74	34.6	2	0.9	7	3.3	1	0.5	1	0.5
Washington Eastern	<b>355</b>	209	58.9	71	20.0	10	2.8	53	14.9	2	0.6	10	2.8
Alaska	<b>197</b>	115	58.4	34	17.3	3	1.5	41	20.8	0	0.0	4	2.0
Ohio Northern	<b>978</b>	568	58.1	236	24.1	43	4.4	122	12.5	1	0.1	8	0.8
Illinois Central	<b>357</b>	207	58.0	78	21.8	12	3.4	56	15.7	1	0.3	3	0.8
Tennessee Western	<b>563</b>	324	57.5	150	26.6	13	2.3	65	11.5	3	0.5	8	1.4
Illinois Northern	<b>1,045</b>	600	57.4	251	24.0	50	4.8	134	12.8	2	0.2	8	0.8
New York Western	<b>562</b>	315	56.0	188	33.5	4	0.7	52	9.3	0	0.0	3	0.5
North Carolina Eastern	<b>652</b>	363	55.7	229	35.1	13	2.0	41	6.3	2	0.3	4	0.6
New Hampshire	<b>181</b>	100	55.2	59	32.6	7	3.9	10	5.5	0	0.0	5	2.8
California Southern	<b>2,130</b>	1,167	54.8	703	33.0	111	5.2	137	6.4	3	0.1	9	0.4
California Eastern	<b>893</b>	482	54.0	316	35.4	24	2.7	63	7.1	2	0.2	6	0.7
Oregon	<b>511</b>	276	54.0	113	22.1	21	4.1	93	18.2	1	0.2	7	1.4
New York Northern	<b>360</b>	191	53.1	114	31.7	20	5.6	32	8.9	0	0.0	3	0.8
Massachusetts	<b>444</b>	235	52.9	53	11.9	35	7.9	114	25.7	2	0.5	5	1.1
Guam	<b>121</b>	64	52.9	43	35.5	5	4.1	9	7.4	0	0.0	0	0.0

**Table 11**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Within-Range Sentences**  
**Post-Booker**

District	TOTAL	Within-Range		Gov't Sponsored Below-Range		Downward Departures		Below-Range Booker		Upward Departures		Above-Range Booker	
		n	%	n	%	n	%	n	%	n	%	n	%
Colorado	<b>612</b>	324	52.9	180	29.4	33	5.4	66	10.8	2	0.3	7	1.1
Michigan Eastern	<b>725</b>	382	52.7	215	29.7	30	4.1	89	12.3	1	0.1	8	1.1
Wisconsin Eastern	<b>367</b>	193	52.6	65	17.7	13	3.5	87	23.7	2	0.5	7	1.9
District of Columbia	<b>476</b>	250	52.5	154	32.4	13	2.7	49	10.3	1	0.2	9	1.9
Minnesota	<b>543</b>	282	51.9	103	19.0	30	5.5	125	23.0	0	0.0	3	0.6
New Jersey	<b>925</b>	478	51.7	293	31.7	41	4.4	103	11.1	1	0.1	9	1.0
Kentucky Eastern	<b>476</b>	241	50.6	187	39.3	4	0.8	30	6.3	0	0.0	14	2.9
Maryland	<b>647</b>	321	49.6	192	29.7	34	5.3	89	13.8	2	0.3	9	1.4
Ohio Southern	<b>596</b>	291	48.8	192	32.2	21	3.5	83	13.9	0	0.0	9	1.5
Vermont	<b>194</b>	94	48.5	69	35.6	14	7.2	17	8.8	0	0.0	0	0.0
Iowa Southern	<b>333</b>	160	48.0	70	21.0	9	2.7	88	26.4	0	0.0	6	1.8
Hawaii	<b>453</b>	217	47.9	142	31.3	17	3.8	69	15.2	0	0.0	8	1.8
Pennsylvania Middle	<b>582</b>	273	46.9	223	38.3	20	3.4	54	9.3	3	0.5	9	1.5
Connecticut	<b>380</b>	176	46.3	101	26.6	52	13.7	46	12.1	3	0.8	2	0.5
Pennsylvania Eastern	<b>915</b>	376	41.1	317	34.6	31	3.4	177	19.3	3	0.3	11	1.2
Idaho	<b>213</b>	82	38.5	97	45.5	9	4.2	23	10.8	0	0.0	2	0.9
Washington Western	<b>713</b>	272	38.1	264	37.0	26	3.6	143	20.1	0	0.0	8	1.1
New York Eastern	<b>1,167</b>	431	36.9	343	29.4	107	9.2	263	22.5	2	0.2	21	1.8
Arizona	<b>3,746</b>	1,069	28.5	2,351	62.8	105	2.8	142	3.8	32	0.9	47	1.3

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**Table 12**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Overall Below-Range Sentences**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within Range</b>		<b>Gov't Sponsored Below-Range</b>		<b>Downward Departures/Below Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
<b>TOTAL</b>	<b>65,368</b>	<b>40,645</b>	<b>62.2</b>	<b>15,500</b>	<b>23.7</b>	<b>8,189</b>	<b>12.5</b>	<b>175</b>	<b>0.3</b>	<b>859</b>	<b>1.3</b>
Massachusetts	444	235	52.9	53	11.9	149	33.6	2	0.5	5	1.1
New York Eastern	1,167	431	36.9	343	29.4	370	31.7	2	0.2	21	1.8
Iowa Southern	333	160	48.0	70	21.0	97	29.1	0	0.0	6	1.8
Minnesota	543	282	51.9	103	19.0	155	28.5	0	0.0	3	0.6
Wisconsin Eastern	367	193	52.6	65	17.7	100	27.2	2	0.5	7	1.9
Delaware	161	104	64.6	14	8.7	43	26.7	0	0.0	0	0.0
Connecticut	380	176	46.3	101	26.6	98	25.8	3	0.8	2	0.5
Washington Western	713	272	38.1	264	37.0	169	23.7	0	0.0	8	1.1
New York Southern	1,226	742	60.5	187	15.3	290	23.7	1	0.1	6	0.5
Rhode Island	127	86	67.7	7	5.5	29	22.8	1	0.8	4	3.1
Pennsylvania Eastern	915	376	41.1	317	34.6	208	22.7	3	0.3	11	1.2
Alaska	197	115	58.4	34	17.3	44	22.3	0	0.0	4	2.0
Oregon	511	276	54.0	113	22.1	114	22.3	1	0.2	7	1.4
Illinois Central	357	207	58.0	78	21.8	68	19.0	1	0.3	3	0.8
Maryland	647	321	49.6	192	29.7	123	19.0	2	0.3	9	1.4
Hawaii	453	217	47.9	142	31.3	86	19.0	0	0.0	8	1.8
Arkansas Eastern	252	169	67.1	33	13.1	45	17.9	3	1.2	2	0.8
Washington Eastern	355	209	58.9	71	20.0	63	17.7	2	0.6	10	2.8
Illinois Northern	1,045	600	57.4	251	24.0	184	17.6	2	0.2	8	0.8
Ohio Southern	596	291	48.8	192	32.2	104	17.4	0	0.0	9	1.5
California Northern	614	378	61.6	121	19.7	105	17.1	0	0.0	10	1.6
Ohio Northern	978	568	58.1	236	24.1	165	16.9	1	0.1	8	0.8
Pennsylvania Western	428	297	69.4	54	12.6	71	16.6	0	0.0	6	1.4

**Table 12**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Overall Below-Range Sentences**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within Range</b>		<b>Gov't Sponsored Below-Range</b>		<b>Downward Departures/Below Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
Tennessee Middle	<b>292</b>	178	61.0	63	21.6	48	16.4	1	0.3	2	0.7
Michigan Eastern	<b>725</b>	382	52.7	215	29.7	119	16.4	1	0.1	8	1.1
Colorado	<b>612</b>	324	52.9	180	29.4	99	16.2	2	0.3	7	1.1
Vermont	<b>194</b>	94	48.5	69	35.6	31	16.0	0	0.0	0	0.0
Michigan Western	<b>402</b>	266	66.2	64	15.9	63	15.7	2	0.5	7	1.7
Georgia Northern	<b>658</b>	437	66.4	107	16.3	103	15.7	4	0.6	7	1.1
New Jersey	<b>925</b>	478	51.7	293	31.7	144	15.6	1	0.1	9	1.0
Utah	<b>914</b>	664	72.6	101	11.1	142	15.5	0	0.0	7	0.8
Virginia Eastern	<b>1,367</b>	1,030	75.3	94	6.9	207	15.1	5	0.4	31	2.3
Idaho	<b>213</b>	82	38.5	97	45.5	32	15.0	0	0.0	2	0.9
New York Northern	<b>360</b>	191	53.1	114	31.7	52	14.4	0	0.0	3	0.8
Louisiana Western	<b>386</b>	276	71.5	35	9.1	55	14.2	1	0.3	19	4.9
Oklahoma Western	<b>220</b>	159	72.3	19	8.6	31	14.1	0	0.0	11	5.0
South Dakota	<b>422</b>	311	73.7	27	6.4	59	14.0	9	2.1	16	3.8
Tennessee Western	<b>563</b>	324	57.5	150	26.6	78	13.9	3	0.5	8	1.4
Nevada	<b>415</b>	300	72.3	49	11.8	57	13.7	0	0.0	9	2.2
Nebraska	<b>810</b>	525	64.8	170	21.0	108	13.3	0	0.0	7	0.9
Missouri Western	<b>778</b>	514	66.1	147	18.9	102	13.1	0	0.0	15	1.9
Missouri Eastern	<b>962</b>	643	66.8	182	18.9	126	13.1	1	0.1	10	1.0
District of Columbia	<b>476</b>	250	52.5	154	32.4	62	13.0	1	0.2	9	1.9
California Central	<b>876</b>	707	80.7	54	6.2	112	12.8	0	0.0	3	0.3
Pennsylvania Middle	<b>582</b>	273	46.9	223	38.3	74	12.7	3	0.5	9	1.5
Kansas	<b>622</b>	411	66.1	123	19.8	77	12.4	2	0.3	9	1.4
Iowa Northern	<b>358</b>	246	68.7	50	14.0	43	12.0	3	0.8	16	4.5
California Southern	<b>2,130</b>	1,167	54.8	703	33.0	248	11.6	3	0.1	9	0.4
Guam	<b>121</b>	64	52.9	43	35.5	14	11.6	0	0.0	0	0.0

**Table 12**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Overall Below-Range Sentences**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within Range</b>		<b>Gov't Sponsored Below-Range</b>		<b>Downward Departures/Below Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
Puerto Rico	<b>499</b>	380	76.2	43	8.6	57	11.4	2	0.4	17	3.4
Florida Southern	<b>1,951</b>	1,512	77.5	198	10.1	221	11.3	5	0.3	15	0.8
Virginia Western	<b>621</b>	385	62.0	157	25.3	68	11.0	2	0.3	9	1.4
South Carolina	<b>962</b>	682	70.9	166	17.3	105	10.9	4	0.4	5	0.5
North Carolina Middle	<b>442</b>	334	75.6	56	12.7	48	10.9	0	0.0	4	0.9
West Virginia Southern	<b>301</b>	229	76.1	35	11.6	30	10.0	2	0.7	5	1.7
Indiana Southern	<b>301</b>	194	64.5	69	22.9	30	10.0	2	0.7	6	2.0
New York Western	<b>562</b>	315	56.0	188	33.5	56	10.0	0	0.0	3	0.5
Alabama Northern	<b>423</b>	260	61.5	108	25.5	42	9.9	2	0.5	11	2.6
North Carolina Western	<b>567</b>	347	61.2	158	27.9	56	9.9	0	0.0	6	1.1
Florida Middle	<b>1,568</b>	1,028	65.6	365	23.3	153	9.8	2	0.1	20	1.3
California Eastern	<b>893</b>	482	54.0	316	35.4	87	9.7	2	0.2	6	0.7
Georgia Southern	<b>290</b>	202	69.7	38	13.1	28	9.7	4	1.4	18	6.2
Texas Southern	<b>6,430</b>	4,171	64.9	1,582	24.6	617	9.6	16	0.2	44	0.7
New Hampshire	<b>181</b>	100	55.2	59	32.6	17	9.4	0	0.0	5	2.8
Illinois Southern	<b>288</b>	241	83.7	15	5.2	27	9.4	2	0.7	3	1.0
Tennessee Eastern	<b>602</b>	389	64.6	149	24.8	55	9.1	0	0.0	9	1.5
Wyoming	<b>204</b>	130	63.7	53	26.0	18	8.8	0	0.0	3	1.5
Wisconsin Western	<b>185</b>	159	85.9	8	4.3	16	8.6	0	0.0	2	1.1
Virgin Islands	<b>116</b>	101	87.1	5	4.3	10	8.6	0	0.0	0	0.0
West Virginia Northern	<b>312</b>	253	81.1	30	9.6	26	8.3	0	0.0	3	1.0
Texas Northern	<b>915</b>	684	74.8	108	11.8	76	8.3	2	0.2	45	4.9
North Carolina Eastern	<b>652</b>	363	55.7	229	35.1	54	8.3	2	0.3	4	0.6
Arkansas Western	<b>196</b>	139	70.9	40	20.4	16	8.2	0	0.0	1	0.5
Alabama Southern	<b>332</b>	226	68.1	74	22.3	27	8.1	0	0.0	5	1.5
Kentucky Western	<b>351</b>	249	70.9	74	21.1	28	8.0	0	0.0	0	0.0

**Table 12**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Overall Below-Range Sentences**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within Range</b>		<b>Gov't Sponsored Below-Range</b>		<b>Downward Departures/Below Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
Texas Western	<b>5,154</b>	4,078	79.1	616	12.0	386	7.5	6	0.1	68	1.3
Louisiana Eastern	<b>335</b>	254	75.8	46	13.7	25	7.5	3	0.9	7	2.1
Montana	<b>393</b>	300	76.3	47	12.0	29	7.4	4	1.0	13	3.3
Kentucky Eastern	<b>476</b>	241	50.6	187	39.3	34	7.1	0	0.0	14	2.9
North Dakota	<b>225</b>	155	68.9	52	23.1	16	7.1	1	0.4	1	0.4
Mississippi Southern	<b>333</b>	270	81.1	32	9.6	23	6.9	0	0.0	8	2.4
Texas Eastern	<b>739</b>	593	80.2	84	11.4	50	6.8	1	0.1	11	1.5
Arizona	<b>3,746</b>	1,069	28.5	2,351	62.8	247	6.6	32	0.9	47	1.3
Florida Northern	<b>311</b>	223	71.7	58	18.6	20	6.4	3	1.0	7	2.3
Indiana Northern	<b>361</b>	251	69.5	86	23.8	22	6.1	0	0.0	2	0.6
Georgia Middle	<b>357</b>	252	70.6	75	21.0	21	5.9	1	0.3	8	2.2
Maine	<b>233</b>	168	72.1	51	21.9	13	5.6	0	0.0	1	0.4
New Mexico	<b>2,461</b>	1,607	65.3	711	28.9	133	5.4	1	0.0	9	0.4
Louisiana Middle	<b>178</b>	111	62.4	46	25.8	9	5.1	2	1.1	10	5.6
Alabama Middle	<b>214</b>	129	60.3	74	34.6	9	4.2	1	0.5	1	0.5
Mississippi Northern	<b>192</b>	118	61.5	56	29.2	8	4.2	2	1.0	8	4.2
Oklahoma Northern	<b>204</b>	168	82.4	23	11.3	8	3.9	1	0.5	4	2.0
Oklahoma Eastern	<b>96</b>	84	87.5	10	10.4	2	2.1	0	0.0	0	0.0
Northern Mariana Islands	<b>24</b>	18	75.0	5	20.8	0	0.0	0	0.0	1	4.2

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**Table 13**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Guideline Conformance**  
**Post-Booker**

District	TOTAL	Within-Range/ Government Sponsored		Downward Departures		Below-Range <i>Booker</i>		Upward Departures		Above-Range <i>Booker</i>	
		n	%	n	%	n	%	n	%	n	%
<b>TOTAL</b>	<b>65,368</b>	<b>56,145</b>	<b>85.9</b>	<b>2,101</b>	<b>3.2</b>	<b>6,088</b>	<b>9.3</b>	<b>175</b>	<b>0.3</b>	<b>859</b>	<b>1.3</b>
Oklahoma Eastern	96	94	97.9	1	1.0	1	1.0	0	0.0	0	0.0
Northern Mariana Islands	24	23	95.8	0	0.0	0	0.0	0	0.0	1	4.2
Alabama Middle	214	203	94.9	2	0.9	7	3.3	1	0.5	1	0.5
New Mexico	2,461	2,318	94.2	50	2.0	83	3.4	1	0.0	9	0.4
Maine	233	219	94.0	5	2.1	8	3.4	0	0.0	1	0.4
Oklahoma Northern	204	191	93.6	0	0.0	8	3.9	1	0.5	4	2.0
Indiana Northern	361	337	93.4	9	2.5	13	3.6	0	0.0	2	0.6
Kentucky Western	351	323	92.0	8	2.3	20	5.7	0	0.0	0	0.0
North Dakota	225	207	92.0	5	2.2	11	4.9	1	0.4	1	0.4
Texas Eastern	739	677	91.6	16	2.2	34	4.6	1	0.1	11	1.5
Georgia Middle	357	327	91.6	0	0.0	21	5.9	1	0.3	8	2.2
Virgin Islands	116	106	91.4	1	0.9	9	7.8	0	0.0	0	0.0
Arkansas Western	196	179	91.3	4	2.0	12	6.1	0	0.0	1	0.5
Arizona	3,746	3,420	91.3	105	2.8	142	3.8	32	0.9	47	1.3
Texas Western	5,154	4,694	91.1	87	1.7	299	5.8	6	0.1	68	1.3
North Carolina Eastern	652	592	90.8	13	2.0	41	6.3	2	0.3	4	0.6
West Virginia Northern	312	283	90.7	6	1.9	20	6.4	0	0.0	3	1.0
Mississippi Southern	333	302	90.7	7	2.1	16	4.8	0	0.0	8	2.4
Mississippi Northern	192	174	90.6	2	1.0	6	3.1	2	1.0	8	4.2
Alabama Southern	332	300	90.4	7	2.1	20	6.0	0	0.0	5	1.5
Florida Northern	311	281	90.4	4	1.3	16	5.1	3	1.0	7	2.3
Wisconsin Western	185	167	90.3	3	1.6	13	7.0	0	0.0	2	1.1
Kentucky Eastern	476	428	89.9	4	0.8	30	6.3	0	0.0	14	2.9

**Table 13**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Guideline Conformance**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within-Range/ Government Sponsored</b>		<b>Downward Departures</b>		<b>Below-Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
Wyoming	<b>204</b>	183	89.7	5	2.5	13	6.4	0	0.0	3	1.5
Louisiana Eastern	<b>335</b>	300	89.6	7	2.1	18	5.4	3	0.9	7	2.1
New York Western	<b>562</b>	503	89.5	4	0.7	52	9.3	0	0.0	3	0.5
Texas Southern	<b>6,430</b>	5,753	89.5	218	3.4	399	6.2	16	0.2	44	0.7
Tennessee Eastern	<b>602</b>	538	89.4	5	0.8	50	8.3	0	0.0	9	1.5
California Eastern	<b>893</b>	798	89.4	24	2.7	63	7.1	2	0.2	6	0.7
North Carolina Western	<b>567</b>	505	89.1	14	2.5	42	7.4	0	0.0	6	1.1
Illinois Southern	<b>288</b>	256	88.9	9	3.1	18	6.3	2	0.7	3	1.0
Florida Middle	<b>1,568</b>	1,393	88.8	49	3.1	104	6.6	2	0.1	20	1.3
Guam	<b>121</b>	107	88.4	5	4.1	9	7.4	0	0.0	0	0.0
Montana	<b>393</b>	347	88.3	10	2.5	19	4.8	4	1.0	13	3.3
North Carolina Middle	<b>442</b>	390	88.2	8	1.8	40	9.0	0	0.0	4	0.9
Louisiana Middle	<b>178</b>	157	88.2	1	0.6	8	4.5	2	1.1	10	5.6
South Carolina	<b>962</b>	848	88.1	25	2.6	80	8.3	4	0.4	5	0.5
New Hampshire	<b>181</b>	159	87.8	7	3.9	10	5.5	0	0.0	5	2.8
California Southern	<b>2,130</b>	1,870	87.8	111	5.2	137	6.4	3	0.1	9	0.4
West Virginia Southern	<b>301</b>	264	87.7	9	3.0	21	7.0	2	0.7	5	1.7
Florida Southern	<b>1,951</b>	1,710	87.6	45	2.3	176	9.0	5	0.3	15	0.8
Indiana Southern	<b>301</b>	263	87.4	7	2.3	23	7.6	2	0.7	6	2.0
Virginia Western	<b>621</b>	542	87.3	12	1.9	56	9.0	2	0.3	9	1.4
Alabama Northern	<b>423</b>	368	87.0	5	1.2	37	8.7	2	0.5	11	2.6
California Central	<b>876</b>	761	86.9	29	3.3	83	9.5	0	0.0	3	0.3
Texas Northern	<b>915</b>	792	86.6	13	1.4	63	6.9	2	0.2	45	4.9
Kansas	<b>622</b>	534	85.9	14	2.3	63	10.1	2	0.3	9	1.4
Nebraska	<b>810</b>	695	85.8	44	5.4	64	7.9	0	0.0	7	0.9
Missouri Eastern	<b>962</b>	825	85.8	40	4.2	86	8.9	1	0.1	10	1.0

**Table 13**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Guideline Conformance**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within-Range/ Government Sponsored</b>		<b>Downward Departures</b>		<b>Below-Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
Pennsylvania Middle	<b>582</b>	496	85.2	20	3.4	54	9.3	3	0.5	9	1.5
Missouri Western	<b>778</b>	661	85.0	8	1.0	94	12.1	0	0.0	15	1.9
District of Columbia	<b>476</b>	404	84.9	13	2.7	49	10.3	1	0.2	9	1.9
Puerto Rico	<b>499</b>	423	84.8	9	1.8	48	9.6	2	0.4	17	3.4
New York Northern	<b>360</b>	305	84.7	20	5.6	32	8.9	0	0.0	3	0.8
Tennessee Western	<b>563</b>	474	84.2	13	2.3	65	11.5	3	0.5	8	1.4
Nevada	<b>415</b>	349	84.1	9	2.2	48	11.6	0	0.0	9	2.2
Idaho	<b>213</b>	179	84.0	9	4.2	23	10.8	0	0.0	2	0.9
Vermont	<b>194</b>	163	84.0	14	7.2	17	8.8	0	0.0	0	0.0
Utah	<b>914</b>	765	83.7	43	4.7	99	10.8	0	0.0	7	0.8
New Jersey	<b>925</b>	771	83.4	41	4.4	103	11.1	1	0.1	9	1.0
Georgia Southern	<b>290</b>	240	82.8	14	4.8	14	4.8	4	1.4	18	6.2
Iowa Northern	<b>358</b>	296	82.7	6	1.7	37	10.3	3	0.8	16	4.5
Georgia Northern	<b>658</b>	544	82.7	35	5.3	68	10.3	4	0.6	7	1.1
Tennessee Middle	<b>292</b>	241	82.5	11	3.8	37	12.7	1	0.3	2	0.7
Colorado	<b>612</b>	504	82.4	33	5.4	66	10.8	2	0.3	7	1.1
Michigan Eastern	<b>725</b>	597	82.3	30	4.1	89	12.3	1	0.1	8	1.1
Virginia Eastern	<b>1,367</b>	1,124	82.2	25	1.8	182	13.3	5	0.4	31	2.3
Ohio Northern	<b>978</b>	804	82.2	43	4.4	122	12.5	1	0.1	8	0.8
Michigan Western	<b>402</b>	330	82.1	12	3.0	51	12.7	2	0.5	7	1.7
Pennsylvania Western	<b>428</b>	351	82.0	23	5.4	48	11.2	0	0.0	6	1.4
Illinois Northern	<b>1,045</b>	851	81.4	50	4.8	134	12.8	2	0.2	8	0.8
California Northern	<b>614</b>	499	81.3	23	3.7	82	13.4	0	0.0	10	1.6
Ohio Southern	<b>596</b>	483	81.0	21	3.5	83	13.9	0	0.0	9	1.5
Oklahoma Western	<b>220</b>	178	80.9	6	2.7	25	11.4	0	0.0	11	5.0
Louisiana Western	<b>386</b>	311	80.6	9	2.3	46	11.9	1	0.3	19	4.9

**Table 13**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Ordered by Decreasing Rates of Guideline Conformance**  
**Post-Booker**

<b>District</b>	<b>TOTAL</b>	<b>Within-Range/ Government Sponsored</b>		<b>Downward Departures</b>		<b>Below-Range Booker</b>		<b>Upward Departures</b>		<b>Above-Range Booker</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
Arkansas Eastern	<b>252</b>	202	80.2	9	3.6	36	14.3	3	1.2	2	0.8
South Dakota	<b>422</b>	338	80.1	14	3.3	45	10.7	9	2.1	16	3.8
Illinois Central	<b>357</b>	285	79.8	12	3.4	56	15.7	1	0.3	3	0.8
Maryland	<b>647</b>	513	79.3	34	5.3	89	13.8	2	0.3	9	1.4
Hawaii	<b>453</b>	359	79.2	17	3.8	69	15.2	0	0.0	8	1.8
Washington Eastern	<b>355</b>	280	78.9	10	2.8	53	14.9	2	0.6	10	2.8
Oregon	<b>511</b>	389	76.1	21	4.1	93	18.2	1	0.2	7	1.4
New York Southern	<b>1,226</b>	929	75.8	63	5.1	227	18.5	1	0.1	6	0.5
Pennsylvania Eastern	<b>915</b>	693	75.7	31	3.4	177	19.3	3	0.3	11	1.2
Alaska	<b>197</b>	149	75.6	3	1.5	41	20.8	0	0.0	4	2.0
Washington Western	<b>713</b>	536	75.2	26	3.6	143	20.1	0	0.0	8	1.1
Delaware	<b>161</b>	118	73.3	13	8.1	30	18.6	0	0.0	0	0.0
Rhode Island	<b>127</b>	93	73.2	3	2.4	26	20.5	1	0.8	4	3.1
Connecticut	<b>380</b>	277	72.9	52	13.7	46	12.1	3	0.8	2	0.5
Minnesota	<b>543</b>	385	70.9	30	5.5	125	23.0	0	0.0	3	0.6
Wisconsin Eastern	<b>367</b>	258	70.3	13	3.5	87	23.7	2	0.5	7	1.9
Iowa Southern	<b>333</b>	230	69.1	9	2.7	88	26.4	0	0.0	6	1.8
New York Eastern	<b>1,167</b>	774	66.3	107	9.2	263	22.5	2	0.2	21	1.8
Massachusetts	<b>444</b>	288	64.9	35	7.9	114	25.7	2	0.5	5	1.1

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; Table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

## C. DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES

### 1. Use of Multivariate Analysis

Much of Chapter 4 assessed *Booker's* impact on federal sentencing by comparing the *aggregate* rate of imposition of within-range sentences after *Booker* with such rates before *Booker*. This general approach is natural and sound—one need not attempt to classify each individual case to assess the impact of a policy change among a whole population of cases. The caveat that accompanies this type of analysis, however, is that one must be cautious in attributing any changes in the aggregate rates solely to *Booker* rather than to other changes that may have occurred at the same time.

Social scientists have developed a variety of statistical methods to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors.<sup>316</sup> The basic approach is to compare a rate or average before and after a policy change after accounting for the effects of other changes that occurred at the same time. Multivariate analysis is one such method. The purpose of conducting the multivariate analysis is to determine whether any sentencing changes were statistically significant after controlling for relevant factors, or variables, for which data are available. The methodologies associated with the multivariate analyses undertaken for this report are described in Appendix B.

Associations among some variables, especially demographic ones, and the sentencing outcome should be viewed with caution. Multivariate analysis can not measure all factors that may affect the sentence of an offender or the time an offender may spend in prison. Unmeasured factors in the analyses conducted may include, for example, violent criminal history<sup>317</sup> or the bail decision.<sup>318</sup> If these “unmeasured factors” were able to be included in the models, significance of demographic factors may change. To the extent that a demographic factor such as race or gender is associated with any unmeasured factors, the demographic factor may serve as a proxy for the unmeasured

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<sup>316</sup> These methods are sometimes called quasi-experimental or “Campbell and Stanley” designs, after a seminal monograph by Donald T. Campbell and Julian C. Stanley. See “*Experimental and Quasi-Experimental Designs for Research*” (1963).

<sup>317</sup> The presence of violent criminal history may lead the court to sentence higher in the prescribed range. The Commission’s datafile does not have information on the type of criminal history behavior. In 2002, the Commission created a datafile which took a 25 percent random sample of cases sentenced in Fiscal Year 2000. This datafile looked more closely at offender’s criminal conduct, including detailed information on the type of criminal history the offender had. Using this data (the Intensive Study Sample 2000, or ISS2000), it was found that 24.4 percent of white offenders had violent criminal history events, as did 43.7 percent of black offenders, 18.9 percent of Hispanic offenders, and 23.7 percent of “other” offenders.

<sup>318</sup> Offenders who are not given the opportunity to post bail, or may not be able to afford bail, are detained for the entire period before their sentencing. Thus, if an offender’s final sentencing range is 6-12 months, and the offender serves 10 months in prison before the final adjudication of the sentence, the court could sentence the offender to “time served,” and the sentence would be 10 months. An offender who was out on bail during this process may get a 6-month sentence for the same behavior, which the court may have wanted to give to the first offender if the bail circumstances were similar.

factors in the multivariate models.<sup>319</sup> If it were possible to include these unmeasured factors in the models, the statistical significance and impact of these demographic variables would likely change.

## 2. Results

Multivariate analysis was conducted to assess whether a number of demographic factors were associated with lesser or greater sentence lengths after *Booker*. Figure 12 shows the results of that analysis.

The multivariate analysis determined that demographic factors are associated with sentence length and their contribution to sentence lengths before and after *Booker* are identical. For example, studies conducted by the Commission before *Booker* concluded that the sentencing guidelines have not successfully eliminated an association between gender and sentencing outcome. In other words, before *Booker*, male offenders consistently were associated with higher sentences than female offenders. Sentences for male offenders were 17.0% higher than for female offenders post-PROTECT Act and 16.2% higher post-*Booker*. Multivariate analysis conducted on post-*Booker* data revealed, therefore, that male offenders continue to be associated with higher sentences than female offenders.

Likewise, Figure 12 shows that age and citizenship show similar degrees of association with sentence length before and after *Booker*. Offenders over 25 years of age were associated with sentences 10.3% lower than offenders under 25 years of age post-PROTECT Act, and with sentences 9.0% lower post-*Booker*. Non-U.S. citizens were associated with sentences 33.9% higher than U.S. citizens post-PROTECT Act and with sentences 35.7% higher post *Booker*.

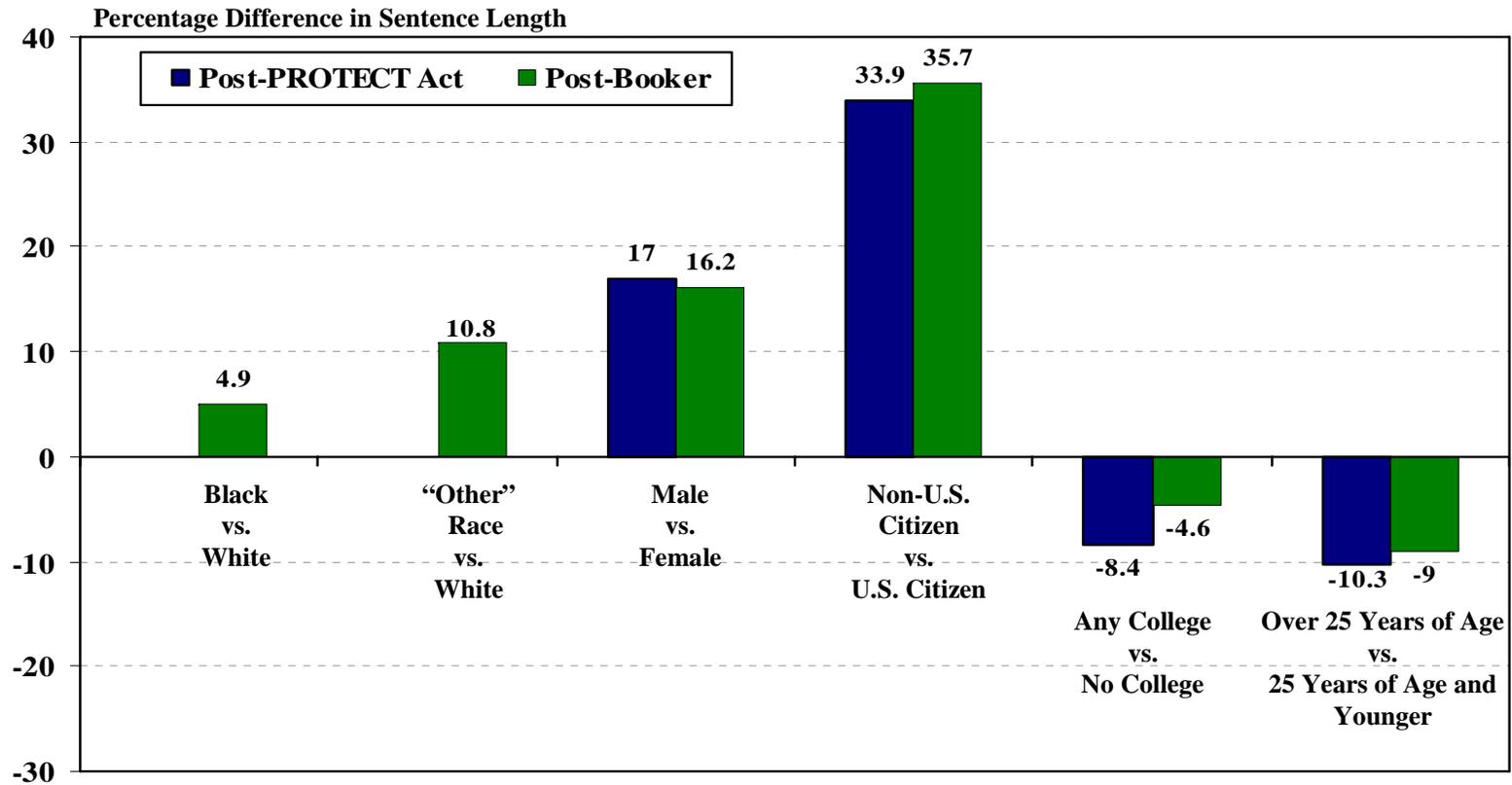
Education also showed a statistically significant association with sentence length both pre-*Booker* and post-*Booker*. Post-PROTECT Act, offenders who went to college had sentences on average 8.4 percent less those who did not go to college. Post-*Booker*, offenders who went to college had sentences on average 4.6 percent less than those who did not go to college.

As Figure 12 illustrates, there is a statistical association between the race of the offender and sentence length in the post-*Booker* population that was not present in the post-PROTECT Act population. Post-*Booker*, black offenders are associated with sentences that are 4.9 percent higher than white offenders, and “other” race offenders (mostly Native American offenders) are associated with sentences that are 10.8 percent higher than white offenders. Neither of these relationships was statistically significant in the post-PROTECT Act period. No difference was found between white and Hispanic offenders during either time period.

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<sup>319</sup> See Myrna S. Raeder, *Gender Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. No. 3 (Forthcoming 2006).

**Figure 12**  
**Differences in Sentence Length for Demographic Factors**  
**Results of Multivariate Analysis**  
**Post-PROTECT Act - Post-Booker**



No data point signifies that there was no statistical difference between the two groups. The data in this figure are from the Post-PROTECT Act (05/01/03 – 06/24/04) and Post-Booker (01/12/05 – 01/11/06) eras. Cases sentenced on or before January 11, 2006 were included in this figure. As of the data extraction date for the post-Booker datafile, the Commission had received, coded and edited 1,300 cases sentenced between January 1, 2006 and January 11, 2006.  
 SOURCE: U.S. Sentencing Commission, 2006 *Booker* Report Datafiles.

The Commission's Fifteen Year Review determined that year-to-year fluctuations in racial or ethnic variables are not uncommon. These fluctuations should not automatically be thought of as signs of disparity or discrimination.<sup>320</sup> Other social scientists have opined that "[t]hese relatively small effects may not be meaningful even though they are statistically significant...Any findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution."<sup>321</sup> This may be further demonstrated by examining the significant factors in the "drug" and "non-drug" populations (*see* Table B-1 in Appendix B for these results). Post-*Booker*, there was no statistical difference between black and white offenders' sentences in drug cases, but there was a difference post-PROTECT Act. Conversely, in non-drug cases, black and white offenders' sentences were statistically different post-*Booker* but not post-PROTECT Act.

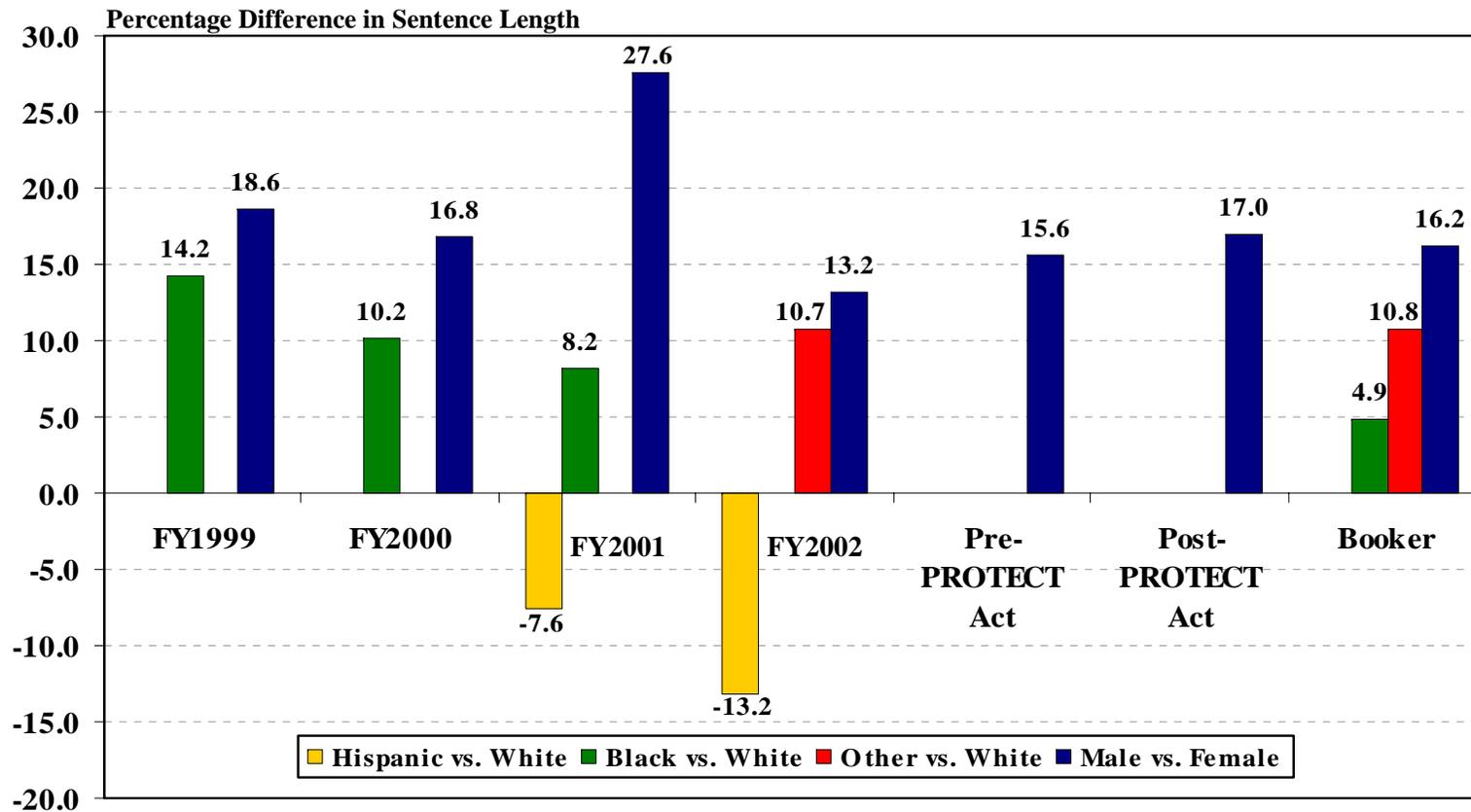
Figure 13 gives a year-by-year depiction of differences in sentencing lengths by race and gender from Fiscal Year 1999 through January 2006. Figure 13 graphically depicts the year-to-year fluctuations of the significance of race in the sentence decision, while also showing the stability of the gender association.

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<sup>320</sup> "Offense-to-offense and year to year fluctuations in racial and ethnic effects are difficult to reconcile with theories of enduring stereotypes, powerlessness, or overt discrimination..." *See* FIFTEEN YEAR REVIEW.

<sup>321</sup> McDonald, Douglas C. and Kenneth E. Carlson. 1993. *Sentencing in the Federal Courts: Does Race Matter?* U.S. Department of Justice, Bureau of Justice Statistics, Washington, D.C., p. 106.

**Figure 13**  
**Differences in Sentence Length by Race and Gender**  
**Results of Multivariate Analysis**  
**FY1999 – Post-Booker**



No data point signifies that there was no statistical difference between the two groups. Cases sentenced on or before January 11, 2006 were included in this figure. As of the data extraction date for the post-Booker datafile, the Commission had received, coded and edited 1,300 cases sentenced between January 1, 2006 and January, 11, 2006. SOURCE: U.S. Sentencing Commission, 1999-2003 Datafiles, USSCFY1999-USSCFY2003, and 2006 Booker Report Datafiles.

## **ANALYSIS OF COMMISSION DATA: IMPACT OF *BOOKER* ON SPECIFIC OFFENSE- AND OFFENDER- ISSUES**

### **A. INTRODUCTION**

Quite apart from the analyses in Chapter 4 of overall national sentencing trends, and the analyses in Chapter 5 of regional and demographic differences in sentencing practices, there are analyses that may prove useful to gauge whether *Booker* has impacted federal sentencing practices in several distinct areas. This chapter, therefore, focuses on assessing the impact of *Booker* with respect to more specific sentencing areas, such as particular types of offenses (*i.e.*, sex offenses and crack cocaine offenses), and particular categories of offenders (*i.e.*, first offenders and career offenders).

The analysis in this section focuses on specific sentencing issues and offender groups that are of perennial interest to the federal criminal justice community, or for which the issue of a *Booker* effect naturally arises. Specifically, this part of the analysis addresses changes in sentencing practices regarding the use of cooperation without a government motion as a reason for the imposition of a non-government-sponsored, below-range sentence, sex offenders, crack cocaine offenders, first offenders, career offenders, and the rate of imposition of below-range sentences based on early disposition programs or other “fast track” mechanisms.

### **B. FINDINGS**

Analyses of the impact of *Booker* with respect to specific sentencing issues yielded the following findings:

#### **1. Cooperation Reductions without a Government Motion**

- Non-government-sponsored, below-range sentences based on the defendant’s cooperation with authorities, *i.e.*, below-range sentences granted for substantial assistance without a government motion for such, occur post-*Booker*. Post-*Booker*, there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government-sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with authorities was the only reason cited. In 230 of these cases, it was one of a combination of reasons for the below-range sentence.

#### **2. Sex Offenses**

- The average length of sentences for cases sentenced under each of the criminal sexual abuse guidelines has remained fairly constant.

- The rate of imposition of below-range sentences declined for criminal sexual abuse cases post-PROTECT Act but increased slightly post-*Booker*. The rate of imposition of below-range sentences in criminal sexual abuse cases is below the rate for all cases post-*Booker*.
- The rate of imposition of below-range sentences for abusive sexual contact cases decreased following the PROTECT Act but increased post-*Booker*.
- The rate of imposition of below-range sentences for cases involving the sexual abuse of a minor decreased post-PROTECT Act but increased post-*Booker*. The increased rate post-*Booker* was less than what the rate had been pre-PROTECT Act.
- The rate of imposition of above-range sentences increased post-*Booker* for criminal sexual abuse offenses and abusive sexual contact offenses but declined for offenses involving the sexual abuse of a minor.
- The majority of below-range sentences in cases involving criminal sexual abuse are imposed for offenders with little or no criminal history.
- Consistent with the trend seen in the national post-*Booker* data for cases overall, the average length of sentences has increased for cases sentenced under the sexual exploitation, *i.e.*, child pornography, guidelines.
- The rate of imposition of below-range sentences for sexual exploitation offenses declined post-PROTECT Act but increased post-*Booker*.
- The rate of imposition of above-range sentences for cases involving production of child pornography decreased post-PROTECT Act but increased post-*Booker*. Above-range sentences have steadily increased for cases involving possession of child pornography.

### **3. Crack Cocaine Offenses**

- Courts do not often appear to be using *Booker* or the factors under 18 U.S.C. § 3353(a) to impose below-range sentences in crack cocaine cases. Courts do not often explicitly cite crack cocaine/powder cocaine sentencing disparity as a reason to impose below-range sentences in crack cocaine cases.

#### **4. First Offenders**

- The rate of imposition of below-range sentences for first offenders increased after *Booker*.
- The rate of imposition of above-range sentences for first offenders increased after *Booker*.
- The proportion of first offenders receiving prison sentences has remained essentially the same, as has the average length of sentences imposed.

#### **5. Career Offenders**

- The rate of imposition of below-range sentences for career offenders increased after *Booker*. The majority of the cases in which below-range sentences are being imposed for career offenders are drug trafficking cases.
- The average length of sentences imposed for career offenders has decreased after *Booker*. This continues the pattern that existed before *Booker*.

#### **6. Early Disposition Programs**

- Sentencing courts in districts without early disposition programs (EDP) report relatively low rates of imposition of below-range sentences. In its 2003 Departure Report, the Commission expressed concern that these districts increasingly might grant below-range sentences to reach outcomes for similarly-situated defendants similar to the outcomes that would be reached in EDP districts. The data do not reflect that these concerns generally have been realized. In districts without EDP, the data do not reflect widespread use of *Booker* to grant below-range sentences to reflect sentences available in EDP districts.

### **C. COOPERATION REDUCTIONS WITHOUT A GOVERNMENT MOTION**

The Department of Justice has expressed concern that courts would cite *Booker* to impose non-government-sponsored, below-range sentences based on the defendant's cooperation despite the absence of a government motion for a substantial assistance

departure under USSG §5K1.1.<sup>322</sup> Use of *Booker* in this fashion might reduce defendants' incentive for cooperating with the government. To address this concern, the Commission examined cases in the relevant time periods discussed throughout this chapter. The Commission specifically reviewed the reasons given for below-range sentences to determine the extent to which such sentences are imposed based on the defendant's cooperation with authorities in the absence of a government motion for a substantial assistance departure under USSG §5K1.

The findings in this section should be considered with one additional caveat in mind. In many cases, the statement of reasons may indicate that the court sentenced below the range for cooperation, but the form contains no indication whether the government filed a motion for substantial assistance. The Commission classifies those cases as "cooperation motion unknown." Pursuant to the revised coding methodology adopted after *Booker*, these cases fall into one of the non-government-sponsored, below-range categories.

Consistent with the analysis performed throughout this report, the Commission examined the 3 relevant time periods to identify non-government-sponsored, below-range sentences citing either "cooperation without a motion," "cooperation motion unknown," or "§5K1.1 substantial assistance without government motion" in the reasons cited by the court. In the pre-PROTECT Act period, courts cited these reasons in 17 cases (0.5%) out of 3,258 receiving a non-government-sponsored downward departure. In the post-PROTECT Act period, courts cited these reasons in 29 cases (0.7%) out of 4,137 receiving a non-government-sponsored downward departure. Finally, in the post-*Booker* period, courts cited these reasons in 258 cases (3.2%) out of 8,189 receiving a non-government-sponsored, below-range sentence. Therefore, the data indicate that the use of these reasons has increased post-*Booker*.

The Commission examined each of these 258 post-*Booker* cases in an attempt to ascertain whether the cases evidenced a discernable pattern, such as arising from particular districts or in particular types of cases. This examination revealed that 61 of the 94 federal judicial districts reported these reasons for the imposition of non-government-sponsored, below-range sentences post-*Booker*. Of these 61 districts, 14 reported only a single case citing one of these reasons. The greatest number reported by a single district (the Southern District of Texas) was 32 cases. That district accounted for 12.4 percent of all below-range sentences citing these reasons. Four other districts reported double-digit numbers of cases receiving a non-government-sponsored, below-range sentence for these reasons. In all, these five districts (the Eastern District of New York, the Eastern District of Pennsylvania, the District of Minnesota, the Southern District of Florida and the Southern District of Texas) account for 82 of the cases (or 31.8% of the total) (*See Appendix E-7*).

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<sup>322</sup> See *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Judiciary Comm.* 109<sup>th</sup> Cong. (2005) (Written Statement of Christopher Wray, Assistant Attorney General, U.S. Department of Justice).

In-depth examination of these cases also revealed that there is no discernable pattern among the offenses that receive a reduction for this reason. Eighteen different offense types (out of a total of 32 possible offense type classifications) included at least one case with a non-government-sponsored, below-range sentence citing these reasons. Of these, 4 offense types (drug trafficking, fraud, immigration, and firearms offenses) accounted for 85.7 percent of the cases; drug trafficking alone accounted for more than half (56.6%). Not surprisingly, these are 4 of the most frequently prosecuted types of cases. Interestingly, these 4 offense types also had the highest rates of imposition of government-sponsored, substantial assistance departures (USSG §5K1.1) post-*Booker*, accounting for 85.7 percent of all substantial assistance departures (See Appendix E-8)

Only 28 of the 258 cases (10.8%) cite one of these reasons as the only reason for the non-government-sponsored, below-range sentence. Of the 230 cases citing additional reasons for the below-range sentence, the other reasons cited by the court are similar to the reasons cited generally for downward departures and below-range sentences citing *Booker* (See Appendix E-9). Of the 258 cases citing one of these reasons as grounds for the below-range sentence, 114 cases fall into the category of “cooperation-motion unknown.” Conceivably, some of these cases might involve government-sponsored reductions. Absent better documentation, the Commission cannot make that determination.

The Commission compared the extent of the reductions below the applicable guideline range granted in this category of cases to the extent of reductions granted in cases in which the government filed a substantial assistance motion. The analysis revealed that the extent to which the sentence is below-range differs when the substantial assistance reduction is pursuant to a government motion, compared with cases in which there is no motion or the motion is unknown. In cases involving a government motion, the median percent decrease below the applicable guideline range is 50.0 percent, or a median of 28 months below the guideline sentence. By contrast, in cases in which the filing of a government motion is not reflected in the documents provided to the Commission, the median percent decrease is 35.1 percent or a median of 13 months below the guideline minimum.

The Commission also examined the proportion of cases with these departure reasons receiving imprisonment and the average length of the prison sentence. These results are reported in Table 14. Comparisons across the 3 time periods must be viewed cautiously because of the very small number of cases identified during the pre-PROTECT Act and post-PROTECT Act periods. Based on the limited data available, the proportion of offenders receiving imprisonment has declined post-*Booker* while the length of imprisonment for those receiving prison sentences has increased.

**Table 14**  
**Cases with Sentence Reduction for Cooperation Without A Motion**  
**Sentence Type and Length**

	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	17	94.1	79	30
<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	29	93.1	49	18
<b>Post-Booker (1/12/05-1/11/06)</b>	257	85.2	61	37

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

#### **D. SEX OFFENSES**

As indicated earlier in this chapter, a major impetus for enactment of the PROTECT Act was congressional concern that the rate of downward departures was too great to control and deter crime, particularly sex offenses against children. Beyond the desire to curb downward departures, there also was a strong congressional desire generally to stiffen penalties for sex offenses against children. A number of legislative changes and guideline amendments have increased punishment for these offenses in recent years.

For purposes of this section of the report, and to facilitate the analysis of the data, federal sex offenses are broken down into two categories: (1) criminal sexual abuse offenses and (2) sexual exploitation offenses. Criminal sexual abuse offenses include crimes such as rape, statutory rape, and inappropriate sexual contact offenses. The following guidelines comprise the offenses of criminal sexual abuse: Criminal Sexual Abuse—Rape (USSG §2A3.1), Criminal Sexual Abuse of a Minor—Statutory Rape (USSG §2A3.2), and Abusive Sexual Contact (USSG §2A3.4). Sexual exploitation offenses include crimes related to the production, trafficking, and possession of child pornography. The following guidelines comprise the offenses of sexual exploitation: Sexual Exploitation of a Minor—Production (USSG §2G2.1), Trafficking in Materials Involving the Sexual Exploitation of a Minor (USSG §2G2.2), and Possession of Materials Involving Sexual Exploitation of a Minor (USSG §2G2.4).

The analysis in this section evaluates the sentencing patterns for both criminal sexual abuse offenses and sexual exploitation offenses in light of a primary goal of the PROTECT Act: to curtail the imposition of below-range sentences in federal sex offenses.

Two factors warrant caution in the use of this analysis to draw conclusions about the effect of *Booker* on the sentencing of federal sex offenses.<sup>323</sup> First, numerous legislative changes (particularly statutorily prescribed mandatory minimum sentences) and amendments to the sex offense guidelines (e.g., increased base offense levels) have resulted in substantial sentence increases for these offenders.<sup>324</sup> Second, sex offenses account for a very small proportion of the federal caseload.<sup>325</sup> The number of offenders sentenced under each of these guidelines is quite small compared to the number of offenders sentenced under the five most commonly applied guidelines. Such small numbers of cases potentially distort both percentages and averages.

## 1. Criminal Sexual Abuse Offenses

Historically, criminal sexual abuse offenses have comprised a small proportion of the overall federal caseload. This trend continued in the post-*Booker* period with 309 cases sentenced under these guidelines comprising 0.5% of the overall caseload. In addition, this small group of offenders differs in composition from the overall federal caseload. Post-*Booker*, criminal sexual abuse offenses consist of a relatively large proportion of offenders in the “other” race category (primarily Native Americans, 62.1%, 39.5%, and 80.0% for USSG §§2A3.1, 2A3.2, and 2A3.4, respectively).<sup>326</sup> Native Americans comprise only 4.5 percent of the overall federal sentencing population. A large proportion of offenders sentenced for criminal sexual abuse offenses are in Criminal History Category I (69.0 percent, 76.1 percent, and 63.4 percent for USSG §§2A3.1, 2A3.2, and 2A3.4, respectively) compared to 46.4 percent for all post-*Booker* offenders.<sup>327</sup>

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<sup>323</sup> The use of caution in the interpretation of this data also is necessary because of the ambiguous status of the departure provisions of 18 U.S.C. § 3553(b)(2). Those provisions, curtailing the use of downward departures in sex offense cases, were added by the PROTECT Act. The *Booker* decision, however, excised the departure provisions of 18 U.S.C. § 3553(a) but, perhaps inadvertently, left intact the provisions of 18 U.S.C. § 3553(b). Post-*Booker* practices regarding the imposition of below-range sentences in sex offense cases may have been affected by this ambiguity, but the extent of such an effect, if any, cannot be measured by the data.

<sup>324</sup> The Commission undertook a comprehensive restructuring of the sexual exploitation guidelines effective November 1, 2004. Base offense levels were increased for USSG §§2A3.1, 2A3.4, 2G2.1 and 2G2.2. Specific offense characteristic enhancement levels were increased for USSG §§2A3.2(b)(1) and 2A3.2(b)(2) and new specific offense characteristics were created for USSG §§2G2.1(b)(2), (3) and (4) and 2G2.2(b)(1). Finally, a new guideline was created at USSG §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor) that increased sentences for offenders who travel across state lines to engage in illegal sexual conduct with a minor. These amendments accompanied the PROTECT Act’s enactment of a number of mandatory minimum penalties affecting offenses sentenced under USSG §§2G1.3, 2G2.1, and 2G2.2, and the creation of a specific offense characteristic for the number of images.

<sup>325</sup> Pre-PROTECT, post-PROTECT, and post-*Booker* the sex offense guidelines (USSG §§2A3.1, 2A3.2, 2A3.4, 2G2.1, 2G2.2, and 2G2.4) accounted for 1.4 percent, 1.5 percent, and 2.0 percent of the caseload, respectively.

<sup>326</sup> See Appendix E-10 through E-12 for complete demographic information.

<sup>327</sup> The proportion of Native Americans among these offenders in the past has influenced sentences because of jurisdictional differences in sentencing practices, specifically potential sentencing disparity based on different federal, state, and tribal punishments for similar offenses. See the Sentencing Commission’s *Report of the Native American Advisory Group* available on [www.ussc.gov](http://www.ussc.gov) for a discussion of the sentencing and disparity issues.

Sentencing patterns for criminal sexual abuse offenses were similar across the 3 time periods. As illustrated by Table 15, the average sentences for each of the 3 guidelines have remained fairly constant. Table 16 shows rates of imposition of non-government-sponsored, below-range sentences decreased for all three criminal sexual abuse guidelines following the PROTECT Act.

**Table 15<sup>328</sup>**  
**Sentence Type and Length for Selected Sex Offense Guidelines**

<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>Criminal Sexual Abuse (§2A3.1)</b>	67	97.0	149	121
<b>Sexual Abuse of a Minor (§2A3.2)</b>	96	93.8	43	33
<b>Abusive Sexual Contact (§2A3.4)</b>	25	88.0	27	18
<b>Exploitation of Minor (§2G2.1)</b>	53	98.1	146	126
<b>Traff. in Child Pornography (§2G2.2)</b>	163	93.9	65	51
<b>Possession of Child Pornography (§2G2.4)</b>	159	86.8	25	27
<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>Criminal Sexual Abuse (§2A3.1)</b>	195	100.0	144	120
<b>Sexual Abuse of a Minor (§2A3.2)</b>	166	98.8	49	37
<b>Abusive Sexual Contact (§2A3.4)</b>	38	92.1	32	24
<b>Exploitation of Minor (§2G2.1)</b>	117	100.0	162	135
<b>Traff. in Child Pornography (§2G2.2)</b>	368	96.7	63	51
<b>Possession of Child Pornography (§2G2.4)</b>	322	94.7	32	27
<b>Post-Booker (1/12/05-1/11/06)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>Criminal Sexual Abuse (§2A3.1)</b>	145	99.3	158	120
<b>Sexual Abuse of a Minor (§2A3.2)</b>	134	94.8	53	37
<b>Abusive Sexual Contact (§2A3.4)</b>	30	83.3	27	22
<b>Exploitation of Minor (§2G2.1)</b>	98	100.0	209	180
<b>Traff. in Child Pornography (§2G2.2)</b>	527	97.7	92	71
<b>Possession of Child Pornography (§2G2.4)</b>	396	93.4	42	30

As illustrated by Table 16, rates of imposition of below-range sentences for USSG §2A3.1 declined post-PROTECT Act but increased slightly post-*Booker*. The proportion of above-range sentences has nearly doubled for these offenses during the same time period (4.6% pre-PROTECT Act to 2.6% post-PROTECT Act to 9.0% post-*Booker*).

<sup>328</sup> Excludes cases missing information on primary sentencing guideline, sentence imposed and sentence length. Cases with zero months of prison ordered or missing or indeterminable information were excluded. The information in this table does not include any time of confinement as defined in USSG §5C1.1.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Table 16<sup>329</sup>**  
**Sentences Relative to Guideline Range for Selected Sex Offense Guidelines**

<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	<b>n</b>	<b>Percent Within /Gov't<sup>330</sup></b>	<b>Percent Upward Departure</b>	<b>Percent Downward Departure</b>	
<b>All Guidelines</b>	37,699	90.6	0.8	8.6	
<b>Criminal Sexual Abuse (§2A3.1)</b>	66	81.8	4.6	13.6	
<b>Sexual Abuse of a Minor (§2A3.2)</b>	93	77.4	6.5	16.1	
<b>Abusive Sexual Contact (§2A3.4)</b>	25	84.0	4.0	12.0	
<b>Exploitation of Minor (§2G2.1)</b>	53	81.1	15.1	3.8	
<b>Traff. in Child Porn. (§2G2.2)</b>	161	82.6	3.7	13.7	
<b>Poss. of Child Porn. (§2G2.4)</b>	152	73.7	1.3	25.0	
<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	<b>n</b>	<b>Percent Within /Gov't</b>	<b>Percent Upward Departure</b>	<b>Percent Downward Departure</b>	
<b>All Guidelines</b>	75,723	93.7	0.8	5.5	
<b>Criminal Sexual Abuse (§2A3.1)</b>	194	89.2	2.6	8.2	
<b>Sexual Abuse of a Minor (§2A3.2)</b>	164	93.3	5.5	1.2	
<b>Abusive Sexual Contact (§2A3.4)</b>	38	86.8	7.9	5.3	
<b>Exploitation of Minor (§2G2.1)</b>	112	92.0	6.2	1.8	
<b>Traff. in Child Porn. (§2G2.2)</b>	362	83.7	4.1	12.2	
<b>Poss. of Child Porn. (§2G2.4)</b>	316	84.5	3.2	12.3	
<b>Post-Booker (1/12/05-1/11/06)</b>	<b>n</b>	<b>Percent Within /Gov't</b>	<b>Percent Upward Departure</b>	<b>Percent Downward Departure</b>	<b>Percent Booker Authority</b>
<b>All Guidelines</b>	65,368	85.9	1.6	3.2	9.3
<b>Criminal Sexual Abuse (§2A3.1)</b>	144	81.9	9.0	2.1	6.9
<b>Sexual Abuse of a Minor (§2A3.2)</b>	130	83.1	4.6	3.1	9.2
<b>Abusive Sexual Contact (§2A3.4)</b>	30	70.0	16.7	3.3	10.0
<b>Exploitation of Minor (§2G2.1)</b>	97	74.2	14.4	1.0	10.3
<b>Traff. in Child Porn. (§2G2.2)</b>	520	78.2	2.7	5.4	13.7
<b>Poss. of Child Porn. (§2G2.4)</b>	387	69.5	4.1	5.4	20.9

After a substantial post-PROTECT Act decline, post-Booker rates of imposition of non-government-sponsored, below-range sentences for cases sentenced under USSG

<sup>329</sup> Missing information (departure status) reduces the total number of cases.

<sup>330</sup> The "Within/Gov't" category includes within range sentences and government-sponsored downward departures (Substantial Assistance under USSG §5K1.1, EDP under USSG § 5K3.1 and other government-sponsored downward departures). See Appendix B for further descriptions of these categories.

SOURCE: U.S. Sentencing Commission 2006 Booker Report Datafiles.

§2A3.2 (statutory rape) increased, but to rates below pre-PROTECT rates (16.1% pre-PROTECT Act to 1.2 % post-PROTECT Act to 12.3% post-*Booker*).

Rates of imposition of non-government-sponsored, below-range sentences for cases sentenced under USSG §2A3.4, the abusive sexual contact guideline, decreased following the PROTECT Act and increased post-*Booker* (12.0% pre-PROTECT Act to 5.3% post-PROTECT Act to 13.3% post-*Booker*). At the same time, above-range sentences have quadrupled from about four percent pre-PROTECT Act to 16.7 percent post-*Booker*.

Post-*Booker*, the majority of non-government-sponsored, below-range sentences are for offenders in these offense categories who have little or no criminal history. Table 17 shows that the overwhelming majority of these offenders are in Criminal History Category I, which also is the category of offenders with the largest number of below-range sentences.

**Table 17<sup>331</sup>**  
**Sentence Relative to the Guideline Range for Each Criminal History Category for**  
**Criminal Sexual Abuse Offenders**  
**Post-Booker**

**Criminal Sexual Abuse**  
**(USSG §2A3.1)**

CHC	Total	Within/Gov't <sup>332</sup>		Above Range		Down. Dep.		Booker	
		n	%	n	%	n	%	n	%
<b>Total</b>	144	118	81.9	13	9.0	3	2.1	10	6.9
<b>I</b>	99	84	84.8	8	8.1	2	2.0	5	5.0
<b>II</b>	22	18	81.8	1	4.5	1	4.5	2	9.1
<b>III</b>	6	3	50.0	1	16.7	0	0.0	2	33.3
<b>IV</b>	3	3	100.0	0	0.0	0	0.0	0	0.0
<b>V</b>	9	6	66.7	2	22.2	0	0.0	1	11.1
<b>VI</b>	5	4	80.0	1	20.0	0	0.0	0	0.0

**Sexual Abuse of a Minor**  
**(USSG §2A3.2)**

CHC	Total	Within/Gov't		Above Range		Down. Dep.		Booker	
		n	%	n	%	n	%	n	%
<b>Total</b>	130	108	83.1	6	4.6	4	3.1	12	9.2
<b>I</b>	99	82	82.8	3	3.0	2	2.0	12	12.1
<b>II</b>	15	14	93.3	0	0.0	1	6.7	0	0.0
<b>III</b>	4	3	75.0	0	0.0	1	25.0	0	0.0
<b>IV</b>	2	2	100.0	0	0.0	0	0.0	0	0.0
<b>V</b>	6	3	50.0	3	50.0	0	0.0	0	0.0
<b>VI</b>	4	4	100.0	0	0.0	0	0.0	0	0.0

**Abusive Sexual Contact**  
**(USSG §2A3.4)**

CHC	Total	Within/Gov't		Above Range		Down. Dep.		Booker	
		n	%	n	%	n	%	n	%
<b>Total</b>	30	21	70.0	5	16.7	1	3.3	3	10.0
<b>I</b>	19	15	78.9	2	10.5	1	5.3	1	5.3
<b>II</b>	6	3	50.0	2	33.3	0	0.0	1	16.7
<b>III</b>	4	2	50.0	1	25.0	0	0.0	1	25.0
<b>IV</b>	0	0	0.0	0	0.0	0	0.0	0	0.0
<b>V</b>	1	1	100.0	0	0.0	0	0.0	0	0.0
<b>VI</b>	0	0	0.0	0	0.0	0	0.0	0	0.0

<sup>331</sup> Missing information (departure status) reduces the total number of cases.

<sup>332</sup> The "Within/Gov't" category includes within range sentences and government-sponsored downward departures (Substantial Assistance under USSG §5K1.1, EDP under USSG § 5K3.1 and other government-sponsored downward departures). See Appendix B for further descriptions of these categories.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

## 2. Sexual Exploitation Offenses

Sexual exploitation offenses, similar to criminal sexual abuse offenses, also comprise a relatively small proportion of the federal caseload, accounting for 1.5 percent (1,021 cases) of the post-*Booker* cases. The composition of offenders sentenced for sexual exploitation is substantially different from the overall federal caseload. Post-*Booker*, offenders sentenced under these guidelines overwhelmingly were white (92.9%, 94.5%, and 91.9% of USSG §§2G2.1, 2G2.2, and 2G2.4, respectively), compared to the overall federal caseload, in which 28.8 percent of offenders were white.

The Commission examined average sentence lengths for each of the sexual exploitation guidelines. Consistent with the trend seen in the national post-*Booker* data, average sentences for these guidelines have increased. Table 15 shows the results of this examination. The Commission determined that the rates of imposition of non-government-sponsored, below-range sentences among these offenses have also increased substantially across the three time periods. See Table 16.

Rates of imposition of non-government-sponsored, below-range sentences for production offenses (USSG §2G2.1) decreased slightly following the PROTECT Act (from 3.8 % to 1.8%) and then increased post-*Booker* to 11.3 percent, a rate nearly three times the pre-PROTECT Act. During the same time period, rates of imposition of above-range sentences fell, but returned to rates close to pre-PROTECT Act rates (15.1% pre-PROTECT Act to 6.2% post-PROTECT Act to 14.4% post-*Booker*).

Rates of imposition of non-government-sponsored, below-range sentences for trafficking in child pornography (USSG §2G2.2) show an overall increase across the three time periods from 13.7 percent pre-PROTECT Act to 12.2 post-PROTECT Act to 19.1 percent post-*Booker*. Rates of imposition of above-range sentences have remained relatively constant.

Rates of imposition of non-government-sponsored, below-range sentences for possession of child pornography offenses (USSG §2G2.4) decreased following the PROTECT Act and returned post-*Booker* to rates that exceed pre-PROTECT Act rates (25.0% to 12.3% to 26.3%). Rates of imposition of above-range sentences increased steadily during the same time period from 1.3 percent pre-PROTECT Act to 3.2 percent post-PROTECT Act to 4.1 percent post-*Booker* offenders.

Table 18 shows that the criminal history for sexual exploitation offenders is similar to that demonstrated for criminal sexual abuse offenders. Specifically, the majority of offenders sentenced under each guideline are in Category I, and the majority of non-government-sponsored, below-range sentences are for these offenders with little or no criminal history. For example, approximately 83 percent of both trafficking (USSG §2G2.2) and possession (USSG §2G2.4) offenders are in criminal history category I, and those Category I offenders account for 92.9 percent and 94.1 percent of below-range sentences, respectively.

**Table 18<sup>333</sup>**  
**Sentence Relative to the Guideline Range for Each Criminal History Category for**  
**Sexual Exploitation Offenses**  
**Post-Booker**

**Exploitation of a Minor**  
**(USSG §2G2.1)**

CHC	Total	Within/Gov't <sup>334</sup>		Above Range		Down. Dep.		n	Booker %
		n	%	n	%	n	%		
<b>Total</b>	97	72	74.2	14	14.4	1	1.0	10	10.3
<b>I</b>	55	37	67.3	10	18.2	0	0.0	8	14.5
<b>II</b>	13	10	76.9	1	7.7	1	7.7	1	7.7
<b>III</b>	7	6	85.7	0	0.0	0	0.0	1	14.3
<b>IV</b>	6	4	66.7	2	33.3	0	0.0	0	0.0
<b>V</b>	8	7	87.5	1	12.5	0	0.0	0	0.0
<b>VI</b>	8	8	100.0	0	0.0	0	0.0	0	0.0

**Trafficking in Child Pornography**  
**(USSG §2G2.2)**

CHC	Total	Within/Gov't		Above Range		Down. Dep.		n	Booker %
		n	%	n	%	N	%		
<b>Total</b>	520	407	78.3	14	2.7	28	5.4	71	13.6
<b>I</b>	432	329	76.2	11	2.5	27	6.3	65	15.1
<b>II</b>	36	32	88.9	2	5.6	0	0.0	2	5.6
<b>III</b>	28	24	85.7	0	0.0	1	3.6	3	10.7
<b>IV</b>	11	10	90.9	1	9.1	0	0.0	0	0.0
<b>V</b>	10	9	90.0	0	0.0	0	0.0	1	10.0
<b>VI</b>	3	3	100.0	0	0.0	0	0.0	0	0.0

**Possession of Child Pornography**  
**(USSG §2G2.4)**

CHC	Total	Within/Gov't		Above Range		Down Dep.		n	Booker %
		n	%	n	%	n	%		
<b>Total</b>	387	269	69.5	16	4.1	21	5.4	81	20.9
<b>I</b>	322	213	66.2	13	4.0	21	6.5	75	23.3
<b>II</b>	28	23	82.1	2	7.1	0	0.0	3	10.7
<b>III</b>	18	15	83.3	0	0.0	0	0.0	3	16.7
<b>IV</b>	11	10	90.9	1	9.1	0	0.0	0	0.0
<b>V</b>	4	4	100.0	0	0.0	0	0.0	0	0.0
<b>VI</b>	4	4	100.0	0	0.0	0	0.0	0	0.0

<sup>333</sup> Missing information (departure status) reduces the total number of cases.

<sup>334</sup> The “Within/Gov’t” category includes within range sentences and government-sponsored downward departures (Substantial Assistance under USSG §5K1.1, EDP under USSG §5K3.1 and other government-sponsored downward departures). See Appendix B for further descriptions of these categories.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

While the rates of imposition of non-government-sponsored, below-range sentences have increased post-*Booker* for production, trafficking, and possession of child pornography offenses, the average and median sentences for these offenses also have increased from the post-PROTECT period. *See* Table 15. For example, the median sentence for production of child pornography has increased from 135 months to 180 months (average sentence has increased from 162 to 209 months), median sentences for trafficking have increased from 51 to 71 months (average increased from 63 to 92 months), and the median sentence for possession has increased from 27 to 30 months (average sentence has increased from 32 to 42 months).

Table 19 shows the distribution across the guideline range for sex offenses sentenced within-range. Less than half of within-range sentences are located at the bottom of the guideline range for four of the sex offense guidelines. Only child pornography trafficking cases (USSG §2G2.2) demonstrate a pattern similar to that reported for all offenses (*see* Table 3), with approximately 60 percent of within-range sentences at the bottom of the range. Possession offenses tend to cluster at the bottom of the range, with 74.5 percent of sentences at the guideline minimum.

**Table 19**  
**Position of Sentence Within the Guideline Range**  
**for Selected Sex Offense Guidelines and All Guidelines**  
**Post-Booker**

	Total	Guideline Minimum		Lower Half of Range		Midpoint of Range		Upper Half of Range		Guideline Maximum	
		n	%	n	%	n	%	n	%	n	%
<b>All Guidelines</b>	31,530	18,354	58.2	4,920	15.6	2,649	8.4	2,360	7.5	3,247	10.3
<b>Criminal Sexual Abuse (\$2A3.1)</b>	89	39	43.8	16	18.0	4	4.5	7	7.9	23	25.8
<b>Sexual Abuse of a Minor (\$2A3.2)</b>	71	32	45.1	7	9.9	5	7.0	7	9.9	20	28.2
<b>Abusive Sexual Contact (\$2A3.4)</b>	19	7	36.8	3	15.8	3	15.8	2	10.5	4	21.1
<b>Exploitation of Minor (\$2G2.1)</b>	36	12	33.3	8	22.2	2	5.6	3	8.3	11	30.6
<b>Trafficking in Child Pornography (\$2G2.2)</b>	295	174	59.0	40	13.6	14	4.8	23	7.8	44	14.9
<b>Possession of Child Pornography (\$2G2.4)</b>	196	146	74.5	12	6.1	15	7.7	3	1.5	20	10.2

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

## E. CRACK COCAINE OFFENSES

In 1986, Congress responded to a national sense of urgency surrounding penalties for crack cocaine and other controlled substances by enacting the Anti-Drug Abuse Act of 1986<sup>335</sup> (“the Act”), which created the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses generally. Concluding that crack cocaine offenses were more serious than powder cocaine offenses, Congress established significantly higher penalties for crack cocaine offenses. The Act differentiated between powder cocaine offenses and crack cocaine offenses by requiring 100 times less crack cocaine than powder cocaine to trigger five- and ten-year mandatory minimum penalties. The Commission responded to the Act by incorporating the statutory 100-to-1 drug quantity ratio into the guidelines. Because of the statutory and guideline differentiation between crack cocaine offenses and powder cocaine offenses, the within-range sentence based solely on drug quantity generally is three to over six times longer for crack cocaine offenses than for powder cocaine offenses.

Federal sentencing policy for cocaine offenses, particularly the 100-to-1 drug quantity ratio that distinguishes crack cocaine offenses from powder cocaine offenses, long has come under intense criticism from the criminal justice community. The Commission itself has recommended three times to Congress that the 100-to-1 drug quantity ratio be revisited.<sup>336</sup> In its 2002 cocaine report, the Commission found that: (1) the current penalties exaggerate the relative harmfulness of crack cocaine, (2) current penalties sweep too broadly and apply most often to lower level offenders, (3) current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and (4) the severity of current penalties mostly impacts minorities.<sup>337</sup>

The criticism of federal sentencing policy for crack cocaine offenses has continued post-*Booker*.<sup>338</sup> Some commentators have hypothesized that courts would use their expanded authority under *Booker* to fashion more non-government-sponsored, below-range sentences in crack cocaine cases. This analysis assesses empirically the validity of that hypothesis and also assesses whether the post-*Booker* data distinguish the sentencing of crack cocaine offenses in any other respect.

Sentencing practices regarding crack cocaine offenses generally have followed the same patterns described thus far and are consistent with those of the other major drug types across the pre-PROTECT Act, post-PROTECT Act, and post-*Booker* time periods. See Table 20. All five of the major drug types had overall decreases in within-range sentences across the three time periods primarily attributable to an increase in rates of

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<sup>335</sup> See Pub. L. 99–570, 100 Stat. 3207 (1986).

<sup>336</sup> The Commission submitted 3 reports to Congress on cocaine offenses: the 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, the 1997 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY and the 2002 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, which are available at <http://www.ussc.gov>.

<sup>337</sup> Commission, 2002 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at pp.v-viii.

<sup>338</sup> See, e.g., Ryan S. King and Marc Mauer, *Sentencing with Discretion: Crack Cocaine Sentencing After Booker*, The Sentencing Project, January 2006.

imposition non-government-sponsored, below-range rates, specifically non-government-sponsored, below-range cases citing *Booker* rather than downward departures. The largest percentage of below-range sentences were for crack cocaine and methamphetamine offenders, with rates of below-range sentences approximately twice as high post-*Booker* compared to pre-PROTECT Act (increase from 6.2% to 14.7% for crack cocaine and from 6.1% to 13.6% for methamphetamine). Rates of above-range sentences also have increased for all 5 drug types, ranging from 0.5 percent for methamphetamine offenses to 0.9 percent for marijuana offenses. These increases in rates for above-range sentences are lower than those reported for all offenses (1.6 %).

**Table 20<sup>339</sup>**  
**Sentences Relative to the Guideline Range**  
**for Selected Drug Types<sup>340</sup>**

<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>		<b>Percent Within /Gov't<sup>341</sup></b>	<b>Percent Upward Departure</b>	<b>Percent Downward Departure</b>	
	<b>n</b>				
<b>Powder Cocaine</b>	3,400	93.2	0.1	6.7	
<b>Crack Cocaine</b>	3,184	93.8	0.1	6.2	
<b>Heroin</b>	1,018	86.6	0.3	13.1	
<b>Marijuana</b>	3,279	92.3	0.3	7.4	
<b>Methamphetamine</b>	2,422	93.7	0.2	6.1	

<b>Post-PROTECT Act (5/1/03-6/24/04)</b>		<b>Percent Within /Gov't</b>	<b>Percent Upward Departure</b>	<b>Percent Downward Departure</b>	
	<b>n</b>				
<b>Powder Cocaine</b>	6,228	95.4	0.4	4.2	
<b>Crack Cocaine</b>	5,706	95.5	0.2	4.3	
<b>Heroin</b>	1,941	90.2	0.4	9.3	
<b>Marijuana</b>	7,016	95.7	0.2	4.1	
<b>Methamphetamine</b>	5,241	95.3	0.2	4.5	

<b>Post-Booker (1/12/05-1/11/06)</b>		<b>Percent Within /Gov't</b>	<b>Percent Upward Departure</b>	<b>Percent Downward Departure</b>	<b>Percent Booker Authority</b>
	<b>n</b>				
<b>Powder Cocaine</b>	5,263	88.6	0.6	2.6	8.2
<b>Crack Cocaine</b>	5,112	84.8	0.6	3.4	11.3
<b>Heroin</b>	1,593	78.7	0.8	5.4	15.1
<b>Marijuana</b>	5,317	89.8	0.9	2.9	6.5
<b>Methamphetamine</b>	4,636	86.0	0.5	2.6	11.0

<sup>339</sup> Missing information (departure status) reduces the total number of cases.

<sup>340</sup> Cases sentenced for drug trafficking under USSG §§2D1.1 and 2D1.2 are included in the table.

<sup>341</sup> The “Within/Gov’t” category includes within range sentences and government-sponsored downward departures (Substantial Assistance under USSG §5K1.1, EDP under USSG §5K3.1 and other government-sponsored downward departures). See Appendix B for further descriptions of these categories.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

Focusing specifically on the post-*Booker* era, the Commission examined the percentage of crack cocaine cases sentenced in conformance with the guidelines. Table 20 shows that 84.8 percent of crack cocaine cases were sentenced in conformance with the guidelines (including government-sponsored departures). This rate is comparable to the overall national rate of 85.9 percent. Comparison of post-*Booker* data on crack cocaine sentences with post-*Booker* data on all drugs shows that crack cocaine offenses are sentenced in conformance with the guidelines at about the same rate as all other drug types (ranging from 78.7 percent for heroin to 89.8 percent for marijuana).

The Commission's earlier findings on national trends in sentence lengths were replicated in the analysis of drug cases. Table 21 shows that the pattern of increased below-range sentences is accompanied by an increase in average sentence for all drug offenses, except crack cocaine (which did not change). The average sentence increased for four of the five major drug types across the three time periods, ranging from eight months for marijuana offenders to one month for crack cocaine offenders.

**Table 21**  
**Sentence Type and Length for Selected Drug Types<sup>342</sup>**

<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>Powder Cocaine</b>	3,513	95.8	81	60
<b>Crack Cocaine</b>	3,240	99.0	123	100
<b>Heroin</b>	1,070	97.8	62	46
<b>Marijuana</b>	3,406	92.4	37	24
<b>Methamphetamine</b>	2,493	98.0	95	75

<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>Powder Cocaine</b>	6,332	97.0	83	60
<b>Crack Cocaine</b>	5,761	98.9	127	110
<b>Heroin</b>	1,976	97.9	66	46
<b>Marijuana</b>	7,173	94.9	41	27
<b>Methamphetamine</b>	5,320	98.3	101	80

<b>Post-Booker (1/12/05-1/11/06)</b>	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>	<b>Median Sentence</b>
<b>Powder Cocaine</b>	5,342	97.6	86	64
<b>Crack Cocaine</b>	5,176	98.6	124	108
<b>Heroin</b>	1,619	96.2	66	48
<b>Marijuana</b>	5,389	94.1	45	30
<b>Methamphetamine</b>	4,748	98.4	97	78

These data suggest that, for the most part post-*Booker*, the courts have made limited use of *Booker* to fashion non-government-sponsored, below-range sentences in crack cocaine cases. As the data illustrate, much of the post-*Booker* adjustment in federal sentencing practices with respect to crack cocaine cases is similar to practices for the other major drug types.

The Commission then examined each of the 610 post-*Booker* crack cocaine cases in which the court imposed a non-government-sponsored, below-range sentence using *Booker*. The purpose of the examination was to study the reasons cited by the court to ascertain whether the crack cocaine/cocaine powder disparity was a driving factor for

<sup>342</sup> Cases sentenced for drug trafficking under USSG §§2D1.1 and 2D1.2 are included in this table.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

these sentences. Thirty-five of the cases cited a reason that clearly indicated the sentencing court's discontent with the 100:1 drug quantity ratio (*e.g.*, reference was made that specifically stated the crack/cocaine disparity). These 35 reasons account for 0.7 percent of the total number of crack cocaine cases in the post-*Booker* universe of cases. Four judicial districts —the Eastern District of New York, the Middle District of North Carolina, the District of Columbia, and the District of Connecticut — report 3 or more of these sentences. The same 4 districts reported nearly half (16 of the 35) of the cases in which reasons specifically stated disagreement with the ratio. An additional 73 reasons given for these non-government-sponsored, below-range sentences suggested disparity but did not clearly cite the drug quantity ratio issue.<sup>343</sup> This analysis indicates that courts infrequently are using *Booker* to impose non-government-sponsored, below-range sentences on this basis.

#### **F. FIRST OFFENDERS AND CAREER OFFENDERS**

As stated in the Introductory Commentary to Chapter Four of the Guidelines Manual, consideration of a defendant's criminal history is directly relevant to the achievement of the purposes of sentencing set forth in the SRA.<sup>344</sup> In promulgating guidelines to account for an offender's criminal history, the Commission long ago recognized that “[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment” in order better to achieve the purposes of sentencing.<sup>345</sup> The Commission also recognized, however, that the criminal history score computed under the guidelines' criminal history rules sometimes may not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism and that departures from the computed criminal history category may be appropriate in some cases.<sup>346</sup>

Gauging the seriousness of the defendant's criminal history and the likelihood of recidivism is difficult, but it is of continuing interest to the Commission, the courts, and others in the federal criminal justice community.<sup>347</sup> As indicated in chapter 4, issues associated with accounting for the defendant's criminal history provide the most frequent bases for imposition of non-government-sponsored, below-range sentences.

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<sup>343</sup> The 35 reasons clearly referenced the crack-powder cocaine ratio. The remaining 73 reasons made reference to general guideline adequacy issues, reduction of disparity (without elaboration), statutory minimum or maximum, and drug quantity (without further elaboration). These reasons, in the context of below-range sentences for crack cocaine offenses, may indicate a drug quantity ratio dispute, but do not state it as plainly as the 35 others.

<sup>344</sup> *Guidelines Manual*, Ch.4, intro.comment (2005).

<sup>345</sup> *Id.*

<sup>346</sup> *Guidelines Manual*, §4A1.3 provides departure mechanisms in such cases.

<sup>347</sup> The Commission has released three of a series of reports on recidivism and the federal sentencing guidelines. The first report, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES, and the second report, RECIDIVISM AND THE “FIRST OFFENDER” were issued in May 2004. The third report, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE, was issued in January 2005. All three reports are available at [www.ussc.gov](http://www.ussc.gov).

This analysis focuses on whether *Booker* has had any effect on the imposition of non-government-sponsored, below-range sentences for two criminal history categories: “first offenders” and “career offenders.”

## 1. First Offenders

The Commission published an analysis of issues associated with first offenders in its May 2004 report on “Recidivism and the ‘First Offender.’” For purposes of the analysis conducted for this report, first offenders are defined as those with no prior contact with the criminal justice system whatsoever. This category includes only offenders without any criminal record reported in the presentence report.<sup>348</sup>

Table 22 provides information on sentence position relative to the guideline range for first offenders. The rate of the imposition of non-government-sponsored, below-range sentences decreased from the pre-PROTECT Act period to the post-PROTECT Act period from 9.8 percent to 6.1 percent. Post-*Booker*, the rate of the imposition of non-government-sponsored, below-range sentences increased to a total of 15.2 percent (3.6% citing downward departures and 11.6% under *Booker*). Though accounting for a small number of cases, the proportion of sentences above the guideline range steadily increased across these 3 time periods from 0.7 percent pre-PROTECT Act to 0.8 percent post-PROTECT Act to 1.2 percent post-*Booker*.

**Table 22**  
**First Offenders**  
**Sentences Relative to the Guideline Range**

	Within /Gov't <sup>349</sup>		Upward Departure		Downward Departure		<i>Booker</i>	
	n	%	n	%	n	%	n	%
<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	8,945	89.5	68	0.7	975	9.8	-	-
<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	18,573	93.1	155	0.8	1,210	6.1	-	-
<b>Post-Booker (1/12/05-1/11/06)</b>	13,072	83.6	186	1.2	563	3.6	1,816	11.6

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

<sup>348</sup> Defined as offenders with no sentencing that qualify for criminal history points, as well as no other events, such as arrests, that are not included in the criminal history score.

<sup>349</sup> The “Within/Gov’t” category includes within range sentences and government-sponsored downward departures (Substantial Assistance under USSG §5K1.1, EDP under USSG §5K3.1 and other government-sponsored downward departures). See Appendix B for further descriptions of these categories.

Despite the increased rates of imposition of non-government-sponsored, below-range sentences for first offenders, sentence severity has increased across the three time periods as shown in Table 23. The proportion of first offenders receiving a prison sentence has steadily increased during these three time periods, from 76.2 percent pre-PROTECT Act to 76.7 percent post-PROTECT Act to 79.0 percent post-*Booker*. The average prison sentence has remained stable (average prison sentence 37 months pre-PROTECT Act and 39 months post-PROTECT Act and post-*Booker*).

**Table 23**  
**First Offenders**  
**Sentence Type and Length**

	<b>n</b>	<b>Percent Prison</b>	<b>Average Sentence</b>
<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	10,430	76.2	37
<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	20,462	76.7	39
<b>Post-<i>Booker</i> (1/12/05-1/11/06)</b>	15,967	79.0	39

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

This analysis examined the distribution of first offenders among the 94 judicial districts, various offense types, and receipt of a mitigating role reduction pursuant to USSG §3B1.2. In all but three districts (Northern District of Mississippi, the District of the Mariana Islands, and the Middle District of Alabama), at least one first offender received a non-government-sponsored, below-range sentence. The rate of imposition of downward departures ranged from zero to 19.5 percent, and the rate of imposition of non-government-sponsored, below-range sentences under *Booker* ranged from zero to 30.6 percent. Non-government-sponsored, below-range sentences for first offenders generally were distributed evenly across the districts.

The majority of districts accounted for less than 1.0 percent of the first offenders receiving a non-government-sponsored, below-range sentence. Seventy-one districts each accounted for less than 1.0 percent of downward departures, and 64 districts each accounted for less than 1.0 percent of below-range sentences under *Booker*. Typically, the rate of imposition of non-government-sponsored, below-range sentences citing *Booker* exceeded the downward departure rate (85 of the 94 districts). In 5 districts, the rates of the 2 forms of below-range sentences were the same and in four districts, the downward departure rate was greater than the below-range rate citing *Booker* (see Appendix E-13).

The Commission then examined the proportion of downward departures and below-range sentences citing *Booker* among first offenders for each offense type. The

results of the analysis are presented in Appendix E-14. The Commission classifies federal offenses into 32 offense types, and first offenders were represented in each of these 32 categories. In 3 of these offense type categories (kidnapping, arson, and prison offenses), offenders received neither a downward departure nor a below-range sentence citing *Booker*.

Rates of imposition of non-government-sponsored, below-range sentences generally are proportional to the number of cases in each offense type category. For example, 38.0 percent (5,941 of the total 15,633) of first offenders were convicted of drug trafficking. First offender drug traffickers account for 35.3 percent (199 of the 563 total) of the downward departures and 35.7 percent (648 of the total 1,815) of the non-government-sponsored, below-range sentences citing *Booker*. Immigration offenses account for proportionally fewer non-government-sponsored, below-range sentences than their proportion in the population of first offenders. While immigration offenses account for 16.6 percent of first offenders overall, they account for 10.5 percent of the downward departures and 7.8 percent of the non-government-sponsored, below-range sentences citing *Booker*. Among the remaining offense types, those with the highest rates of either type of below-range sentence involve small numbers of cases. The highest rate of imposition of downward departures for first offenders is in murder offenses (15.0%) but includes only 3 offenders. The highest rate of imposition of non-government-sponsored, below-range sentences citing *Booker* is in Burglary/Breaking and Entering offenses (44.4%), involving only 4 offenders (*See* Appendix E-14).

Table 24 shows rates of imposition of non-government-sponsored, below-range sentences for first offenders based on mitigating role status pursuant to USSG §3B1.2.<sup>350</sup> Reflecting previous findings, rates of imposition of non-government-sponsored, below-range sentences citing *Booker* are higher than rates of downward departure. In addition, Table 24 shows an apparent relationship between mitigating role reductions and non-government-sponsored, below-range sentences for first offenders. Combining both types of below-range rates, 27.2 percent of first offenders receiving a reduction for minimal role in the offense (a 4 level reduction) were sentenced below-range. The effect for offenders receiving minimal role reductions is greater than for those receiving minor role (2 level) reductions and those that did not receive a reduction under USSG §3B1.2. Those rates were 12.0 percent and 15.6 percent, respectively.

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<sup>350</sup> Pursuant to USSG §3B1.2, offenders are eligible for offense level decreases based on their role in the offense as follows: “(a) If the defendant was a minimal participant...decrease by 4 levels. (b) If the defendant was a minor participant...decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels.” *See Guidelines Manual*, USSG §3B1.2 (2005).

**Table 24**  
**First Offenders**  
**Sentences Relative to Guideline Range**  
**for Each Mitigating Role (USSG §3B1.2) Category**  
**Post-Booker**

Mitigating Role	TOTAL	Within-Range		Above Range		Below-Range					
		n	%	n	%	Gov't Sponsored		Downward Departure		Booker	
						n	%	n	%	n	%
<b>TOTAL</b>	<b>15,072</b>	<b>8,885</b>	<b>59.0</b>	<b>185</b>	<b>1.2</b>	<b>3,647</b>	<b>24.2</b>	<b>560</b>	<b>3.7</b>	<b>1,795</b>	<b>11.9</b>
<b>Minimal Participant (-4)</b>	626	270	43.1	1	0.2	185	29.6	52	8.3	118	18.9
<b>Less than Minimal participant (-3)</b>	191	111	58.1	0	0.0	39	20.4	7	3.7	34	17.8
<b>Minor participant (-2)</b>	1,946	1,049	53.9	5	0.3	659	33.9	75	3.9	158	8.1
<b>No mitigating role reduction (no adj.)</b>	12,309	7,455	60.6	179	1.5	2,764	22.5	426	3.5	1,485	12.1

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

Table 25 presents demographic information for first offenders post-*Booker*. The table compares all first offenders to those receiving a non-government-sponsored, below-range sentence. A smaller proportion of non-citizens and Hispanic offenders received below-range sentences compared to their representation in the first offender population as a whole. This is consistent with the finding of a lower rate of imposition of non-government-sponsored, below-range sentences among immigration offenses (which primarily involve Hispanic, non-citizen offenders).

**Table 25**  
**First Offenders**  
**Selected Demographic Information**  
**Post-Booker**

	<u>All First Offenders</u>		<u>First Offenders with Downward Depart/Booker</u>	
	Number	Percent	Number	Percent
<b>Gender</b>				
Male	12,243	76.9	1,737	73.1
Female	3,672	23.1	640	26.9
Missing	90	-	2	-
<b>Race</b>				
White	5,267	33.8	1,028	43.6
Black	2,069	13.3	360	15.3
Hispanic	7,146	45.9	784	33.3
Other	1,103	7.1	186	7.9
Missing	420	-	21	-
<b>Citizenship</b>				
U.S. Citizen	8,834	56.7	1,661	70.4
Non-Citizen	6,736	43.3	698	29.6
Missing	435	-	20	-

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

## 2. Career Offenders

The Commission undertook an analysis of all defendants who met the guideline definition of career offender<sup>351</sup> and for whom the career offender guideline, USSG §4B1.1, had an impact on the final sentence.<sup>352</sup> The Commission’s analysis revealed that,

<sup>351</sup> For purposes of the guidelines, “[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” A career offender’s criminal history category in every case shall be Category VI and a career offender may also receive an offense level increase if the otherwise applicable offense level is lower than the offense levels in the table in USSG §4B1.1. *See Guidelines Manual*, USSG §4B1.1 (2005).

<sup>352</sup> For purposes of this analysis, USSG §4B1.1 was considered to have had an impact on the final sentence if the defendant’s offense level increased due to application of the table in USSG §4B1.1 or if the defendant had a criminal history category of less than category VI prior to application of the guideline. As a result, approximately 99 percent of defendants sentenced under USSG §4B1.1 qualified as career offenders for purposes of the analysis.

similar to patterns for first offenders, rates of imposition of within-range sentences for career offenders were fairly consistent in pre-PROTECT Act (89.4% within-range) and post-PROTECT Act (92.1% within-range) time periods but noticeably declined post-*Booker* (77.9% within-range). Table 26 provides information for within-range and below-range sentences for career offenders.

The analysis summarized in Table 26 also shows the rate of imposition of non-government-sponsored, below-range sentences during the relevant time period. The pre-PROTECT Act rate was 10.0 percent, decreasing post-PROTECT Act to 7.3 percent. The rate then increased in the post-*Booker* period to 21.5 percent.

**Table 26**  
**Career Offenders**  
**Sentences Relative to the Guideline Range**

	<u>Within</u> <u>/Gov't</u> <sup>353</sup>		<u>Upward</u> <u>Departure</u>		<u>Downward</u> <u>Departure</u>		<u>Booker</u>	
	n	%	n	%	n	%	n	%
<b>Pre-PROTECT Act</b> <b>(10/1/02-4/30/03)</b>	930	89.4	6	0.6	104	10.0	-	-
<b>Post-PROTECT Act</b> <b>(5/1/03-6/24/04)</b>	1,991	92.1	13	0.6	158	7.3	-	-
<b>Post-Booker</b> <b>(1/12/05-1/11/06)</b>	1,589	77.9	14	0.7	136	6.7	301	14.8

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

Subsequent to *Booker*, 93 districts reported career offender sentencings (only the District of the Virgin Islands did not sentence a career offender). Many of the districts report a small number of career offenders (*e.g.*, 28 of the 93 districts had fewer than 10 career offenders). In 14 of the 93 career offender districts, there are no reported non-government-sponsored, below-range sentences (either downward departures or other below-range sentences) for the career offenders. While the national-level data indicate that the rate of imposition of downward departures is less than the rate of imposition of other below-range sentences (6.7% versus 14.8%), in 15 districts the reverse was true. In these districts, rates of downward departure for career offenders exceeded the rates of other below-range sentences. Additionally, five districts had identical rates of both types of below-range sentences. The highest rate of downward departure among career offenders was 44.4 percent; however, this involved only four cases. Likewise, the

<sup>353</sup> The “Within/Gov’t” category includes within range sentences and government-sponsored downward departures (Substantial Assistance under USSG §5K1.1, EDP under USSG §5K3.1 and other government-sponsored downward departures). See Appendix B for further descriptions of these categories.

highest rate of other below-range sentences was 45.5 percent but involved only five cases. (See Appendix E-15).

Post-Booker career offenders were identified in 18 of the 32 offense types reported by the Commission (See Appendix E-16). Two-thirds (12) of these offense types reported below-range sentences for career offenders. Three offense types account for nearly all (91.9%) cases involving career offenders (drug trafficking 71.8%, robbery 10.9%, and firearms offenses 9.2%) and nearly all the below-range sentences (a total of 94.0% ) (See Appendix E-17). Among these three offense types, the proportion of the total number of below-range cases corresponds to the proportion of cases accounted for by these offenses. That is, drug trafficking accounts for 71.8 percent of the career offender cases and 74.3 percent of all downward departures and 73.1 percent of other below-range sentences among the career offender cases. The robbery cases account for a greater proportion of non-government-sponsored, below-range sentences than downward departures. Firearms offenses account for a greater proportion of downward departures than other below-range sentences. Combining both types of below-range sentences, robbery and firearms offenses each account for 10.3 percent of all below-range sentences, similar to the proportion of cases accounted for by each.

Drug trafficking offenses accounted for about three-quarters of the career offender cases and below-range sentences. Table 27 shows the position of sentence relative to the guideline range for career offenders sentenced for drug trafficking. Rates of imposition of below-range sentences are highest for government-sponsored downward departures, followed by other below-range sentences, and then downward departures. As previously demonstrated (with the exception of the “other” drug category comprised of a very small number of cases), other below-range sentences occur at a greater rate than downward departures. Rates of combined types of non-government-sponsored, below-range sentences (downward departures and other below-range sentences), are similar across the five major drug types, ranging from 18.9 percent for powder cocaine to 28.4 percent for heroin. Government-sponsored, below-range sentences also are granted at a rate higher than the combined non-government-sponsored, below-range rate.

**Table 27**  
**Career Offenders**  
**Sentence Relative to the Guideline Range for Selected Drug Types**  
**Post-Booker**

Offense Type	TOTAL	Within-Range		Upward Departure		Gov't Sponsored		Downward Departure		Booker	
		n	%	n	%	n	%	n	%	n	%
<b>TOTAL</b>	<b>1,585</b>	<b>642</b>	<b>40.5</b>	<b>7</b>	<b>0.4</b>	<b>583</b>	<b>36.8</b>	<b>108</b>	<b>6.8</b>	<b>245</b>	<b>15.5</b>
<b>Powder Cocaine</b>	302	103	34.1	0	0.0	142	47.0	10	3.3	47	15.6
<b>Crack Cocaine</b>	781	337	43.2	2	0.3	261	33.4	56	7.2	125	16.0
<b>Heroin</b>	106	40	37.7	0	0.0	36	34.0	8	7.6	22	20.8
<b>Marijuana</b>	170	71	41.8	4	2.4	66	38.8	10	5.9	19	11.2
<b>Methamphetamine</b>	183	69	37.7	1	0.6	66	36.1	18	9.8	29	15.9
<b>Other</b>	43	22	51.2	0	0.0	12	27.9	6	14.0	3	7.0

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

Table 28 shows that the overwhelming majority of career offenders (over 99.0%) receive a sentence of imprisonment. Deviating from the national patterns for average sentences, the average sentences for career offenders were similar during the pre-PROTECT Act and post-PROTECT Act periods, but dropped slightly post-*Booker*.

**Table 28**  
**Career Offenders**  
**Sentence Type and Length**

	n	Percent Prison	Average Sentence
<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	1,068	99.7%	190
<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	2,188	99.8%	189
<b>Post-Booker (1/12/05-1/11/06)</b>	2,082	99.9%	180

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

The Commission analyzed the extent of decrease below the guideline minimum of non-government-sponsored, below-range sentences for career offenders for the post-PROTECT Act and post-*Booker* periods. The results of this analysis are detailed in Table 29. At both points in time, the median proportional reduction in sentence (as well

as the median reduction in months) is greater in cases receiving a government-sponsored substantial assistance departure under USSG §5K1.1. The extent of the proportional reduction for both substantial assistance departures and non-government-sponsored, below-range reductions increases between the post-PROTECT Act period and the post-Booker period.

**Table 29**  
**Career Offender**  
**Degree of Decrease Below Guideline Minimum**

	<u>USSG §5K1.1</u>			<u>Downward Departures</u>			<u>Booker</u>		
	<u>n</u>	<u>Med Mths</u>	<u>Med %</u>	<u>n</u>	<u>Med Mths</u>	<u>Med %</u>	<u>n</u>	<u>Med Mths</u>	<u>Med %</u>
<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	600	87	39.8	147	59	28.2	-	-	-
<b>Post-Booker (1/12/05-1/11/06)</b>	529	94	42.4	130	67	33.4	288	67	30.5

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

Examination of the reasons for non-government-sponsored, below-range sentences indicates that the reason most often cited is criminal history, a guideline downward departure reason. Criminal history is the most frequently cited reason in downward departure cases and the second most often cited reason in below-range cases citing *Booker*.

#### **G. EARLY DISPOSITION PROGRAMS AND OTHER “FAST TRACK” SENTENCING PRACTICES**

Prior to 2003, fast track procedures varied throughout the districts, but generally entailed (1) the government’s use of expedited procedures (mostly involving the waiver of certain procedural rights by the defendant) in order to facilitate the handling of large volumes of particular types of immigration and drug cases; and (2) a concomitant reduction in the defendant’s sentence through the provision of a below-range sentence.

In 2003, fast track procedures were formalized as early disposition programs (EDPs) pursuant to a directive to the Commission in section 401(m)(2)(B) of the PROTECT Act. That section required the Commission to promulgate “a policy statement authorizing a downward departure of not more than four levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.” Pursuant to that directive, the Commission promulgated USSG §5K3.1, which provides, upon motion of the

government, for a departure of not more than four offense levels pursuant to an early disposition program.

The PROTECT Act also required that the Attorney General approve all early disposition programs. According to the most recent information provided to the Commission by the Department of Justice,<sup>354</sup> the Attorney General has approved early disposition programs in 16 federal judicial districts, leaving 78 districts without such programs. Presumptively, early disposition programs are used to the exclusion of less formal, and less standardized, “fast track” procedures that previously had been used in many districts.

In its 2003 Departures Report, the Commission expressed the concern that “sentencing courts in districts without early disposition programs, particularly those in districts that adjoin districts with such programs, may feel pressured to employ other measures – downward departures in particular – to reach similar sentencing outcomes for similarly situated defendants.”<sup>355</sup> Since then, some courts have expressed the same concern, *i.e.*, that non-government-sponsored, below-range sentences would be used in districts without these programs in an effort to avoid disparity among similarly-situated defendants.<sup>356</sup>

Analysis conducted for this report<sup>357</sup> indicates that this concern has not been realized generally. One reason is that immigration cases account for only a fraction of the cases sentenced in the 78 districts that do not have early disposition programs. In all, these districts account for 3.6 percent (2,456 cases) of the overall post-*Booker* caseload. Of these 78 districts, only four have sentenced greater than 100 immigration cases<sup>358</sup> post-*Booker*. The District of Utah sentenced 204 immigration cases (or 21.4% of its post-*Booker* caseload). The Northern District of Texas sentenced 172 immigration cases (or

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<sup>354</sup> U.S. Department of Justice. *Report on the Department of Justice’s Fast Track Programs*. Washington, D.C (2005) See Appendix E-18 for the list of districts cited in the report with approved EDP programs.

<sup>355</sup> *Id.* at p. 67.

<sup>356</sup> *United States v. Medrano-Duran*, 386 F. Supp. 2d 943 (N.D. Ill. 2005) (unpub.) (discussing the disparity in sentence that occurs in illegal reentry case between jurisdictions with fast track programs and those that do not have such programs: departing by three offense levels based on the average of the departures given in districts with early disposition programs); *United States v. Santos*, 406 F. Supp. 2d 320 (S.D.N.Y. 2005) (imposing a non-Guidelines sentence in an illegal reentry case, because of sentencing disparity created by fast track programs, because the Guidelines sentence double-counted the defendant’s nonviolent drug offenses, and because of the delay in taking the defendant into federal custody); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E.D. Wis. 2005) (stating that because fast track programs in border districts for illegal reentry offenses are creating serious sentencing disparities, it may be appropriate in some cases for a sentencing court to exercise its discretion under *Booker* to minimize the sentencing disparity that fast track programs create); *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728 (E.D. Va. 2005) (deviating from the Guidelines in an illegal reentry case where the defendant’s sentence was enhanced based on a crime of violence; after considering the § 3553(a) factors, deviating, in large part, based on the absence of a fast track program in the district). *Cf. United States v. Perez-Chavez*, No. 05-CR-00003PGC, 2005 U.S. Dist. Lexis 9252 (D. Utah May 16, 2005) (explaining why it is inappropriate to deviate from the Guidelines range based on the absence of a fast-track program).

<sup>357</sup> The analysis in this section was not undertaken with respect to any district with an approved Early Disposition Program. The analysis was not intended to evaluate the operation of those programs.

<sup>358</sup> Cases with USSG §2L1.1 or USSG §2L1.2 as the primary sentencing guideline.

18.8% of its post-*Booker* caseload). The Middle District of Florida sentenced 162 immigration cases (or 10.3% of its post-*Booker* caseload). The Southern District of New York sentenced 106 immigration cases (or 8.3% of its post-*Booker* caseload).

With respect to these 4 districts, all but one, the Southern District of New York, had rates of imposition of non-government-sponsored, below-range sentences using *Booker* in immigration cases that were less than the overall national average of 9.3 percent. In the Middle District of Florida, the rate of imposition of an otherwise below-range sentence is 7.4 percent. In the District of Utah, the rate of imposition of an otherwise below-range sentence is 6.9 percent. In the Northern District of Texas, the rate of imposition of an otherwise below-range sentence is 1.7 percent.

Of the 297 immigration sentences otherwise below-range in the 78 districts without early disposition programs, 707 reasons were cited.<sup>359</sup> The most commonly cited reasons for below-range sentences were 18 U.S.C. § 3553(a) language (cited 93 times) and specification of a variance (cited 73 times). Insufficient documentation to provide a reason occurred in 57 of the cases. Disparity due to the nonexistence of an early disposition program was cited only 10 times. Cultural assimilation, a reason frequently cited for fast track departures prior to implementation of USSG §5K3.1, was specifically cited only 25 times, the twenty-first most commonly cited reason.

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<sup>359</sup> The number of cited reasons is greater than the number of cases because courts often cite more than one reason in a case.

## CONCLUSION

The Commission intends to continue its outreach and training efforts and to regularly release updated, real-time data on rates of imposition of within-range and out-of-range sentences, types of sentences imposed, average sentence lengths, the reasons judges report for sentencing outside the guidelines system, and the results of sentencing appeals. Uniform and complete statements of reasons and timely reporting to the Commission by the district courts can provide valuable feedback to Congress, the Commission, the courts, and all others in the federal criminal justice community regarding the long-term impact of *Booker* on the federal sentencing system. This report is an important part of the Commission's efforts to inform careful consideration of the evolving post-*Booker* federal sentencing system.

# **APPENDIX A**

DEFENDANT:  
CASE NUMBER:  
DISTRICT:

**STATEMENT OF REASONS**  
(Not for Public Disclosure)

**I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT**

- A  **The court adopts the presentence investigation report without change.**
- B  **The court adopts the presentence investigation report with the following changes.**  
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)  
(Use page 4 if necessary.)
- 1  Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level, or specific offense characteristics):
- 2  Chapter Three of the U.S.S.G. Manual determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):
- 3  Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):
- 4  Additional Comments or Findings (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):
- C  **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

**II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)**

- A  No count of conviction carries a mandatory minimum sentence.
- B  Mandatory minimum sentence imposed.
- C  One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on
- findings of fact in this case
  - substantial assistance (18 U.S.C. § 3553(e))
  - the statutory safety valve (18 U.S.C. § 3553(f))

**III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):**

Total Offense Level: \_\_\_\_\_  
Criminal History Category: \_\_\_\_\_  
Imprisonment Range: \_\_\_\_\_ to \_\_\_\_\_ months  
Supervised Release Range: \_\_\_\_\_ to \_\_\_\_\_ years  
Fine Range: \$ \_\_\_\_\_ to \$ \_\_\_\_\_  
 Fine waived or below the guideline range because of inability to pay.

DEFENDANT:  
CASE NUMBER:  
DISTRICT:

**STATEMENT OF REASONS**  
(Not for Public Disclosure)

**IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)**

- A  The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.
- B  The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.  
(Use page 4 if necessary.)
- C  The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.  
(Also complete Section V.)
- D  The court imposed a sentence outside the advisory sentencing guideline system. (Also complete Section VI.)

**V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)**

**A The sentence imposed departs (Check only one.):**

- below the advisory guideline range  
 above the advisory guideline range

**B Departure based on (Check all that apply.):**

**1 Plea Agreement (Check all that apply and check reason(s) below.):**

- 5K1.1 plea agreement based on the defendant's substantial assistance  
 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program  
 binding plea agreement for departure accepted by the court  
 plea agreement for departure, which the court finds to be reasonable  
 plea agreement that states that the government will not oppose a defense departure motion.

**2 Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):**

- 5K1.1 government motion based on the defendant's substantial assistance  
 5K3.1 government motion based on Early Disposition or "Fast-track" program  
 government motion for departure  
 defense motion for departure to which the government did not object  
 defense motion for departure to which the government objected

**3 Other**

- Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

**C Reason(s) for Departure (Check all that apply other than 5K1.1 or 5K3.1.)**

- |  |  |   |
|--|--|---|
| <input type="checkbox"/> 4A1.3 Criminal History Inadequacy                         | <input type="checkbox"/> 5K2.1 Death                             | <input type="checkbox"/> 5K2.11 Lesser Harm                         |
| <input type="checkbox"/> 5H1.1 Age   | <input type="checkbox"/> 5K2.2 Physical Injury                   | <input type="checkbox"/> 5K2.12 Coercion and Duress                 |
| <input type="checkbox"/> 5H1.2 Education and Vocational Skills                     | <input type="checkbox"/> 5K2.3 Extreme Psychological Injury      | <input type="checkbox"/> 5K2.13 Diminished Capacity                 |
| <input type="checkbox"/> 5H1.3 Mental and Emotional Condition                      | <input type="checkbox"/> 5K2.4 Abduction or Unlawful Restraint   | <input type="checkbox"/> 5K2.14 Public Welfare                      |
| <input type="checkbox"/> 5H1.4 Physical Condition                                  | <input type="checkbox"/> 5K2.5 Property Damage or Loss           | <input type="checkbox"/> 5K2.16 Voluntary Disclosure of Offense     |
| <input type="checkbox"/> 5H1.5 Employment Record                                   | <input type="checkbox"/> 5K2.6 Weapon or Dangerous Weapon        | <input type="checkbox"/> 5K2.17 High-Capacity, Semiautomatic Weapon |
| <input type="checkbox"/> 5H1.6 Family Ties and Responsibilities                    | <input type="checkbox"/> 5K2.7 Disruption of Government Function | <input type="checkbox"/> 5K2.18 Violent Street Gang                 |
| <input type="checkbox"/> 5H1.11 Military Record, Charitable Service,<br>Good Works | <input type="checkbox"/> 5K2.8 Extreme Conduct                   | <input type="checkbox"/> 5K2.20 Aberrant Behavior                   |
| <input type="checkbox"/> 5K2.0 Aggravating or Mitigating Circumstances             | <input type="checkbox"/> 5K2.9 Criminal Purpose                  | <input type="checkbox"/> 5K2.21 Dismissed and Uncharged Conduct     |
|  | <input type="checkbox"/> 5K2.10 Victim's Conduct                 | <input type="checkbox"/> 5K2.22 Age or Health of Sex Offenders      |
|  |  | <input type="checkbox"/> 5K2.23 Discharged Terms of Imprisonment    |

**D Explain the facts justifying the departure. (Use page 4 if necessary.)**

DEFENDANT:  
CASE NUMBER:  
DISTRICT:

**STATEMENT OF REASONS**  
(Not for Public Disclosure)

**VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM**

(Check all that apply.)

**A The sentence imposed is (Check only one.):**

- below the advisory guideline range
- above the advisory guideline range

**B Sentence imposed pursuant to (Check all that apply.):**

**1 Plea Agreement (Check all that apply and check reason(s) below.):**

- binding plea agreement for a sentence outside the advisory guideline system accepted by the court
- plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable
- plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

**2 Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):**

- government motion for a sentence outside of the advisory guideline system
- defense motion for a sentence outside of the advisory guideline system to which the government did not object
- defense motion for a sentence outside of the advisory guideline system to which the government objected

**3 Other**

- Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

**C Reason(s) for Sentence Outside the Advisory Guideline System (Check all that apply.)**

- the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
- to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

**D Explain the facts justifying a sentence outside the advisory guideline system. (Use page 4 if necessary.)**

DEFENDANT:  
CASE NUMBER:  
DISTRICT:

**STATEMENT OF REASONS**  
(Not for Public Disclosure)

**VII COURT DETERMINATIONS OF RESTITUTION**

- A  Restitution Not Applicable.
- B Total Amount of Restitution: \_\_\_\_\_
- C Restitution not ordered (Check only one.):
- 1  For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
  - 2  For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
  - 3  For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
  - 4  Restitution is not ordered for other reasons. (Explain.)
- D  Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

**VII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)**

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: \_\_\_\_\_

Defendant's Date of Birth: \_\_\_\_\_

Defendant's Residence Address: \_\_\_\_\_

Defendant's Mailing Address: \_\_\_\_\_

Date of Imposition of Judgment

Signature of Judge

Name and Title of Judge

Date Signed \_\_\_\_\_

# **APPENDIX B**

## APPENDIX B

### METHODOLOGY FOR DATA COLLECTION AND ANALYSIS

#### A. DATA COLLECTION

The Commission maintains a comprehensive, computerized data collection system that forms the basis for its clearinghouse of federal sentencing information.<sup>360</sup> The Commission relies upon this database for its ongoing monitoring and evaluation of the guidelines, for many of its research projects, and for responding to the hundreds of data requests received from Congress and other criminal justice entities each year. For each case sentenced under the guidelines, the Commission routinely collects more than 250 pieces of information, including defendant demographics, statutes of conviction, sentencing guideline applications, and sentences imposed.<sup>361</sup>

The PROTECT Act established new statutory documentation requirements aimed at improving the Commission's ability to collect and report complete and accurate sentencing data. Section 401(h) of the PROTECT Act, entitled "Improved Data Collection," amended 28 U.S.C. § 994(w) to state:

The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include -

- (A) the judgment and commitment order;
- (B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);
- (C) any plea agreement;
- (D) the indictment or other charging document;
- (E) the presentence report; and
- (F) any other information as the Commission finds appropriate.<sup>362</sup>

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<sup>360</sup> See 28 U.S.C. § 995(a)(14)-(15) (2003).

<sup>361</sup> See 2003 DEPARTURE REPORT at 25.

<sup>362</sup> Section 994(w) previously did not contain a 30-day deadline for submission of the documents and did not impose a duty on the Chief Judge of each district to ensure compliance with this section. Additionally,

The PROTECT Act also amended 18 U.S.C. § 3553(c) to require the sentencing court, if imposing a sentence outside the prescribed guidelines range, to state “the specific reason” for departing from the guidelines “with specificity in the written order of judgment and commitment.”

On September 22, 2003, in response to the PROTECT Act, the Judicial Conference of the United States adopted a more detailed Statement of Reasons form intended to enhance the sentencing court’s ability to provide additional specificity in that document. The statutory requirements enacted by Congress and the courts’ responses to them were intended to enhance the Commission’s ability to collect and report complete sentencing data.<sup>363</sup> In addition, the greater specificity in the Statement of Reasons was expected to provide the Commission with more useful feedback from the courts regarding the operation of the guidelines.

*Booker* presented new challenges to the Commission’s data collection efforts. Courts were now directed to consider all the 18 U.S.C. § 3553(a) factors in fashioning an appropriate sentence. The existing Statement of Reasons form had been tailored to capture information in a mandatory guideline regime. It did not provide a suitable format for reporting information about sentences outside the guideline range, which were not based upon reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statement or commentary of the Guidelines Manual. Following the *Booker* decision, as noted in Chapter 2, the Judicial Conference adopted a revised Statement of Reasons form created in consultation with the Commission. The revised form, approved in June, 2005, is designed to encapsulate the changes in the sentencing guideline system wrought by *Booker*. The new form includes greater detail so that the courts can better describe the type of and reason for an out of range sentence under the advisory system and the government’s role, if any, in the imposition of the sentence.<sup>364</sup>

The Commission encourages all districts to use the standardized form. Uniformity in the method of reporting sentencing information will augment the completeness and accuracy of the Commission’s sentencing data, which are directly dependent on the documentation the Commission receives from the sentencing courts.

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the only document specifically required by statute to be submitted to the Commission prior to the PROTECT Act was a “written report of the sentence.” Other documents were submitted to the Commission pursuant to a longstanding Memorandum of Understanding between the Administrative Office of the United States Courts and the Commission. *See* 2003 DEPARTURE REPORT at 24, n.65. The judicial districts generally are highly compliant with document submission requirements. In Fiscal Year 2003, for example, the Commission received the Statement of Reasons in 90 percent of cases. *See* Commission, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 3. Although the Commission has not yet completed the process of accounting for missing documentation for the Fiscal Year 2005, the Commission has, as of the date of this report, received the Statement of Reasons for Fiscal Year 2005 in 96 percent of the cases submitted to the Commission.

<sup>363</sup> 2003 DEPARTURE REPORT at 29.

<sup>364</sup> For the six-month period preceding adoption of the new form, courts used the old form, modified it, or created their own. This lack of uniformity in reporting sentencing data impacted the Commission’s collection efforts and led to the decision to revise the coding methodology. Those revisions are discussed *supra*.

The PROTECT Act, *Blakely* and *Booker* decisions each had an impact on federal sentencing practices. To control for these developments when analyzing the impact of *Booker* on the federal sentencing system, the Commission selected cases for analysis that were sentenced during specific time periods relative to each respective development. The analysis in Chapter 3 compares data from Fiscal Year 2003 sentenced prior to the implementation of the PROTECT Act, Fiscal Year 2004 prior to the *Blakely* decision, and Fiscal Years 2005 and 2006 following the *Booker* decision.

The Fiscal Year 2003 pre-PROTECT Act data file consists of all cases received and coded by the Commission that were sentenced between October 1, 2002 and April 30, 2003, the effective date of the PROTECT Act. This data, consisting of a total of 40,917 cases, enable analysis of sentences prior to the implementation of the PROTECT Act, which primarily focused on downward departures from the sentencing guidelines and provide a comparison point of sentencing practices before changes in departure application.

The Commission historically has conducted extensive quality control checks to ensure the accuracy of its data. The Fiscal Year 2003 data file is the first Commission data file for which additional “departure checks” were employed, making it the best data file to use for comparisons of out of range sentences. Every case in which the court has indicated a non-substantial assistance departure has been reviewed to verify the accuracy of departure status, departure reasons, the sentence imposed, the applicable guideline range, and any statutory penalties that trumped the applicable guideline range.

The post-PROTECT Act time period used for purposes of this analysis is the period from May 1, 2003 (the date after the enactment of the PROTECT Act) through June 24, 2004 (the day of issuance of the *Blakely* decision by the Supreme Court). Accordingly, the post-PROTECT Act datafile consists of an aggregation of the Commission’s Fiscal Year 2003 and Fiscal Year 2004 datafiles consisting of the 81,206 offenders sentenced from May 1, 2003 through June 24, 2004. As explained in Chapter 1, information on sentences imposed after issuance of the *Blakely* decision but before issuance of the *Booker* decision is not included in this analysis.

The Fiscal Year 2005 and 2006 post-*Booker* data file consists of all cases received and coded by the Commission that were sentenced between January 12, 2005 and January 11, 2006. The Commission continues to collect the same information for the post-*Booker* data with some necessary modifications. In the post-*Booker* sentencing era, sentencing documentation includes terminology associated with the advisory nature of the sentencing guidelines (*e.g.*, “variance”). In an effort accurately to capture and report these changes, the Commission refined its coding procedures regarding sentences outside the guideline range. As explained in further detail below, post-*Booker* data collection and reporting of out of range sentences includes a larger number of categories designed to capture the nuances of sentencing that have developed under the advisory system.

## B. DATA ANALYSIS

### 1. Analysis of Below-range Sentences

The reporting of below-range sentences changed following the *Booker* decision. This change necessitated a significant revision of the Commission's collection and reporting of sentences relative to the guideline range. Because of the broader sentencing authority created by *Booker*, guideline downward departures are no longer the single mechanism by which courts can craft below-the-range sentences when appropriate. The Commission revised its long-established coding protocols to better and more accurately reflect the new sentencing patterns and documentation that emerged in the post-*Booker* era.

Following the PROTECT Act, but prior to the *Booker* decision non-government sponsored below-the-range sentences were classified as "other downward departures."<sup>365</sup> This departure category consisted of any sentence the court indicated as a downward departure on the Statement of Reasons form regardless of the position of the sentence relative to the final guideline range. Documentation of below-the-range sentences reported on the Statement of Reasons forms began to differ significantly following the *Booker* decision. In lieu of reporting guideline downward departures with departure reasons, some courts provided Statements of Reasons that:

- Indicated a downward (or upward) departure citing *Booker* (or a variety of terms originating in the decision) as one or more of the reasons.
- Indicated variances with or without guideline or *Booker* reasons.
- Provided reasons for below (or above) range sentences without any categorization of the sentence in relation to the guideline range.

The Commission revised its departure coding scheme to accurately collect and report these documentation changes. Prior to *Booker*, collection of this information involved a single step: assessment of the departure status (within range, upward departure, other downward departure, substantial assistance downward departure pursuant to USSG §5K1.1, downward departure pursuant to early disposition program pursuant to USSG §5K3.1, or other government sponsored downward departure) as indicated on the Statement of Reasons. This classification solely was determined by the information on the Statement of Reasons.<sup>366</sup>

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<sup>365</sup> Government sponsored downward departures were first coded by the Commission in the Fiscal Year 2003 datafile and include: §5K1.1 (substantial assistance), §5K3.1 (early disposition program), or departures with reasons citing government involvement in the departure (*e.g.*, savings to the government). A list of reasons comprising government sponsored downward departures can be found in Table 25 in the 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS.

<sup>366</sup> Downward departures strictly reflected the court's designation of a non-government sponsored downward departure on the SOR. In a small proportion of sentences, this classification rule resulted in anomalous categorizations. For example, if an SOR indicated a downward departure but the sentence on

Following *Booker*, collecting this information is a two step process of: 1) assessing the location of the sentence in relation to the final sentencing guideline range (within, above, or below) and 2) determining the reason for any above- or below-the-range sentence. Once an out of range sentence is identified, the appropriate category is selected from the following list:

- Downward Departure/Guideline Reason:<sup>367</sup> All cases with imposed sentence below-the-range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*.
- Downward Departure/*Booker* Reason: All cases with imposed sentence below-the-range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, and additionally mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence below-the-range.
- Below-the-range *Booker*: All cases with imposed sentences below-the-range mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence below-the-range.
- Otherwise below-the-range: Cases with imposed sentences below-the-range that do not fall into the three previous categories. Based on the information submitted on the Statement of Reasons, these cases cannot be classified as a guideline departure, or as a sentence below-the-range pursuant to *Booker*/18 U.S.C. § 3553. This category includes cases which cited departure reasons that are not affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reasons for the sentence below-the-range.

This new classification scheme provides more detailed information about sentences in relation to their applicable guideline ranges. However, the new classification has limitations. The reasons for below-the-range sentence are more easily identified using the classification scheme, but there is no way to discern from the data whether, in cases of below-the-range cases citing *Booker*, whether or not the court would have sentenced the same offender to the same sentence under the departure authority that existed with the mandatory guideline system.

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the Judgement and Commitment Order was within the guideline range, the sentence was classified as a downward departure. Such incongruous findings typically were excluded from departure analyses.

<sup>367</sup> Above range sentences follow the same decision protocol and are reported in identically defined categories but with an “upward” modifier.

Because *Booker* effects primarily occur in the category of non-government sponsored below-the-range sentences, some of the other categories have been combined to simplify the presentation of the analysis. Within range sentences and government sponsored downward departures (§5K1.1, §5K3.1, and other government sponsored downward departures) are combined into a single category to better demonstrate the changes in upward departures and non-government sponsored below-the-range sentences.

The four subcategories of non-government sponsored below-the-range sentences in the post-*Booker* data also are combined to facilitate the presentation of some results. Both downward departure categories (downward departures citing the guidelines, downward departures citing *Booker*) are sometimes combined into a single downward departure category. These two categories both specifically indicate use of a guideline downward departure in formulating the appropriate sentence. Irrespective of the reasons given for the departures, the language suggests that the court is acting under guideline departure authority.

The other two below-range categories, below the range citing *Booker* and otherwise below-range sentences sometimes are combined into a *Booker* category. These cases are combined because the court either affirmatively indicates a variance from the guidelines or fails to indicate under which specific sentencing authority the below-the-range sentence is imposed.<sup>368</sup>

In order to facilitate presentation of still other findings, the four below-range categories sometimes are combined and identified as departure plus *Booker*. Historically upward departures have been rare in federal sentencings, accounting for approximately one percent of sentences. Due to their small numbers, all above range sentences are combined, regardless of which (if any) sentencing authority is invoked.

The coding protocols used post-*Booker* follow.

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<sup>368</sup> These categories are defined in the coding protocol that follows.

**DEPARTURE AND VARIANCE CATEGORY DESCRIPTIONS  
FOR THE COMMISSION AFTER JANUARY 12, 2005 DECISION ON  
*UNITED STATES v. BOOKER* .**

***Introduction***

This document was prepared to describe the various outside the range categories used in the data releases produced by the Commission since the *Booker* decision on January 12, 2005. The first section of the document discusses how the different types of data are reported in the 12 different sentencing categories and the second section discusses how some scenarios are coded on the Commission 's datafile (note that there is not a perfect match between the coding and the reporting for some types of cases).

**Within Range**  
**(BOOKER CATEGORY 0)**

- Cases where the sentence is within BOTH the guideline range AND the statutory range AS WELL AS meeting the zone requirements REGARDLESS of the departure/variance status marked on the Statement of Reasons (“SOR”).
  - SOR says “Within Range”, the SOR indicates the final guideline range is 51-63 months, the statutory range is 60-480 months, and the sentence is 60 months
  - SOR says “Departure of 1 level for §5K3.1/EDP” and the final guideline range is 18-24 months and the statutory range is 0-240 months and the sentence is 18 months (the rationale here is that the pre-departure range is 18-24 months and the post-departure range is 15-21 and the sentence falls within both the pre- and post-departure ranges so the departure had no discernable effect. Therefore, the Commission considers these cases as within range).
- 18 U.S.C. § 924(c) cases within the statutory range (the rationale is that §2K2.4 says to use the statutory range).
  - Example is statutory minimum of 60 months and sentence of 60 months
- 8 U.S.C. §1325 cases with 24 months statutory maximum and no guideline calculation where the sentence is equal to the statutory maximum (the rationale for this is that if the guideline had been present in the case file the calculation would be trumped by the 24 month statutory maximum so a sentence equal to the statutory maximum would have been within the trumped range).
- Cases with sentence missing or indeterminable but SOR says “Within Range”
  - No judgment and commitment order (“J&C”) received or page with sentence is missing but SOR says “Within Range.”
  - J&C says “Time Served” and there is no presentence report (“PSR”) to determine the exact amount of time served or PSR is unclear about amount of time served but SOR says “Within Range.”
- Time Served Instances
  - Cases where time served is greater than the guideline range - all of the sentence must be time already served (the rationale for this is that often an offender is in custody for example 8 months prior to being sentenced and then if their guideline range is 0-6 months then the judge is not intentionally sentencing the offender above the guideline range so we call these within range).
  - Cases where sentence is reported as “time served” on the J&C and the amount of time served cannot be determined (usually when the PSR is waived or missing). and the guideline range is 0-6 months (the rationale for this is that even if we cannot determine the amount of time served the

offender is not actually required to serve any time since the range is 0-6 so we say it is in range).

\* Note that sentences with partial months are rounded (if fraction of a month is .5 or higher than the sentence is rounded up - ex. If judge gives a time served sentence and the PSR reports that the offender has been in custody 169 days the Commission codes this as 5 months and 19 days and this will be rounded up to 6 months). If the rounded sentence is within range then the Commission considers this sentence within range (ex. In the above example the sentence is rounded to 6 months and if the range was 6-12 months then the sentence of 169 days would be considered within range).

### **Upward Departure from the Guideline Range** **(BOOKER CATEGORY 1)**

- Cases which are marked as departures only [i.e. cannot also have any variance information marked on the SOR] AND have ONLY a guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* or multiple approved guideline reasons
  - ex. Departure indicated on SOR and only reason is §5K2.8
  - ex. Departure indicated on SOR and reasons are §5K2.8 and Criminal History Adequacy
  - See list of guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, *infra* at p. B-18.
- Note that the SOR must use the word “departure” or “adjustment” for any outside of the range sentence to be considered a departure.

### **Upward Departure with Booker/18 U.S.C. § 3553** **(BOOKER CATEGORY 2)**

- Cases which are marked as upward departures AND have ONLY an guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (or multiple approved guideline reasons) AS WELL AS 1 or more reasons specifically (and only) citing *Booker*-related language
- Scenario 1: SOR only checks/indicates departure
  - ex. 2 reasons for departure: §5K2.8 (Extreme conduct) and *Booker*
  - ex. 1 reason for departure: §5K2.8 (Extreme conduct) and in the “Reasons for Departure” section, the SOR says that the court applied the principals of 18 U.S.C. § 3553(a) in determining the offender’s sentence (the rationale is that this example has 1 guideline departure reason limited to, and affirmatively and specifically identified in the provisions, policy

statements, or commentary of the federal *Guidelines Manual* and since 18 U.S.C. § 3553(a) is discussed also, it is coded as the 2<sup>nd</sup> departure reason and since it is considered a *Booker* cite the case is now in the “both” category)

- Scenario 2: SOR indicates BOTH a departure and a variance
  - ex. Departure with 1 guideline reason (ex. §5K2.8) and variance with 1 *Booker*-related reason (ex. 18 U.S.C. § 3553)
- Note that the SOR must use the word “departure” or “adjustment” for any outside of the range sentence to be considered a departure. The Commission considers all other phrasing (ex. “Outside the range”, “Above the Range”, “Outside the guideline system”, “Variance”, “Deviation”, “Excursion”, etc.) as variances. If multiple terms are used (ex. The SOR indicates it is departing for §5K2.8 and also says additionally the court is giving a sentence outside the guideline system to protect the public from future crimes of the offender), then the case is recorded as both a departure and a variance.
- See list of guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and for list of *Booker*-related reasons, *infra* at p. B-18.

**Above the Range with Booker/18 U.S.C. § 3553**  
**(BOOKER CATEGORY 3)**

- Variances/Outside Guideline System is specified on the SOR and only *Booker*-related reason(s) specified
  - SOR checks variance/outside system
    - Variance with 1 *Booker*-related reason (ex. 18 U.S.C. § 3553)
    - Variance with multiple *Booker*-related reasons (ex. Deterrence and Reasonableness)
    - Only a variance specified and no other reason provided.
- Departure is not specified and neither is a variance but at least one reason provided on the SOR for being outside the range is *Booker*-related
  - SOR says the sentence is “outside the guideline range” and the reason is “Advisory nature of the guidelines”. Note that if the SOR does not indicate if the sentence is above or below the range the coder makes that determination based on logical criteria (*i.e.*, if the sentence actually above the range then it is coded as above the range and vice-versa).

**All remaining Cases Above the Guideline Range**  
**(BOOKER CATEGORY 4)**

- All other scenarios involving sentences outside of the guideline range not previously described in one of the other above the range categories fall into this category.
  - Cases with no reason provided for being outside of the range
    - SOR says “No departure” but the sentence is above the guideline range
    - SOR says “Departure” but fails to provide any reason for the departure. Note that this also includes cases that say “As stated on record” or “See Transcript/Exhibit” and then fail to provide these additional documents to the Commission for determination of departure reason.
    - SOR does not specify a variance, however, indicates the sentence is above the range but fails to provide any reason for why the sentence is outside of the range. Note that this also includes cases that say “As stated on record” or “See Transcript/Exhibit” and then fail to provide these additional documents to the Commission.
  - Only a departure is specified and SOR cites 1 or more reasons which are not guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*
    - ex. Only reason cited is *Booker*-related (ex. Reasonableness)
    - departure with guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. §5K2.8) and miscellaneous reason (ex. Lack of Remorse)
  - Both a departure and variance are specified on the SOR and 1 or more departure reasons are not guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* or 1 or more variance reasons are non-*Booker*-related reasons
    - ex. Departure specified with miscellaneous reason (ex. Defendant exhibited no remorse for his actions) and variance specified with *Booker*-related reason (ex. 18 U.S.C. § 3553)
    - ex. Departure specified with guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. §5K2.8) and variance specified with non-*Booker* related reason which may be guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* or miscellaneous reason (ex. Criminal History Under-represents Seriousness)
  - Only a variance specified and 1 or more non-*Booker*-related reasons are provided on the SOR
    - ex. Variance specified and reason provided is an guideline reason limited to, and affirmatively and specifically identified in the

- provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. §5K2.8 (Extreme Conduct))
- ex. Variance specified with *Booker*-related reason (ex. Language from 18 U.S.C. § 3553a cited) and 1 guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. §5K2.8 (Extreme Conduct))
  - ex. Variance specified and 1 miscellaneous reason cited (not a guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* or *Booker*-related reason) (ex. “The court varies because the defendant exhibited no remorse for his actions.”)
  - Upward departures or variances that are marked as being initiated by the government on the SOR
    - ex. Upward Departure or variance indicated on SOR due to plea agreement entered into pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure.

**§5K1.1 Substantial Assistance Departures**  
**(BOOKER CATEGORY 5)**

- All departures or variances if §5K1.1 is one of the reasons listed
  - ex. Departure/variance is marked on SOR and only reason is §5K1.1
  - ex. Departure/variance is marked and one reason is §5K1.1 and another reason is a guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. Family Ties)
  - ex. Departure/variance is marked and one reason is §5K1.1 and 2<sup>nd</sup> reason is another government sponsored reason (ex. §5K3.1/EDP)
  - ex. Departure is marked on SOR and only reason is §5K1.1 and a variance is also marked with a *Booker*-related reason (ex. Reasonableness)
  - Departure is marked on SOR and only reason is §5K1.1 and a variance is also marked with a miscellaneous reason (ex. “As stated on Record” and no other explanation or explanatory documentation (ex. transcript) is provided)

**§5K3.1/Early Disposition Program**  
**(BOOKER CATEGORY 6)**

- All departures or variances involving §5K3.1 even if another reason is present or if a variance was also documented
  - ex. Departure/variance is marked on SOR and only reason is §5K3.1
  - ex. Departure/variance is marked and one reason is §5K3.1 and another reason is a guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. Family Ties)
  - ex. Departure/variance is marked and one reason is §5K3.1 and 2<sup>nd</sup> reason is another government sponsored reason (ex. Binding Plea Agreement)
  - ex. Departure is marked on SOR and only reason is §5K3.1 and a variance is also marked with a *Booker*-related reason (ex. Reasonableness)
  - Departure is marked on SOR and only reason is §5K3.1 and a variance is also marked with a miscellaneous reason (ex. “As stated on Record” and no other explanation or explanatory documentation (ex. transcript) is provided)

**Government Sponsored Below the Range**  
**(BOOKER CATEGORY 7)**

- All government sponsored below range sentences even if another non-government sponsored reason is also present or if a variance was also documented
  - ex. Departure/variance is marked on SOR and only reason is government sponsored (ex. Binding Plea Agreement)
  - ex. Departure/variance is marked and one reason is government sponsored

(ex. Early Plea) and another reason is a guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. Family Ties)

- ex. Departure/variance is marked and one reason is government sponsored (ex. Savings to the Government) and 2<sup>nd</sup> reason is another government sponsored reason (ex. Binding Plea Agreement)
  - ex. Departure is marked on SOR and only reason is government sponsored (ex. Waiver of Indictment) and a variance is also marked with a *Booker*-related reason (ex. Reasonableness)
  - ex. Departure is marked on SOR and only reason is government sponsored (ex. Waiver of Appeal) and a variance is also marked with a miscellaneous reason (ex. “As stated on Record” and no other explanation or explanatory documentation (ex. transcript) is provided)
  - ex. Departure or variance is marked, any reason is given, AND the SOR indicates that the reason is based on a plea agreement or was a government motion either via the check-boxes in Part V/VI, B on the AO245B (12/03-06/05) forms or in writing on other SOR forms
- See Table 25 of the Commission’s yearly *Sourcebook of Federal Sentencing Statistics* for a complete list of government sponsored reasons. Note that districts that specify “Fast-Track” without specifying the official EDP/§5K3.1 designation on the SOR are included in this government sponsored category, not in the EDP/§5K3.1 category.

**Downward Departure from the Guideline Range**  
**(BOOKER CATEGORY 8)**

- Cases which are marked as departures only [i.e. cannot also have any variance information marked on the SOR] AND have ONLY a guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* or multiple guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*
  - ex. Departure is marked on SOR and only reason is §5K2.13
  - ex. Departure is marked on SOR and reasons are Family Ties and Aberrant Behavior
  - See list of guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, *infra* at B-18.
- Note that the SOR must use the word “departure” or “adjustment” for any outside of the range sentence to be considered a departure.

- - **Downward Departure with *Booker*/18 U.S.C. § 3553**  
**(*BOOKER* CATEGORY 9)**

- Cases which are marked as a downward departure AND have ONLY a guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (or multiple guideline reasons) AS WELL AS 1 or more reasons specifically (and only) citing *Booker*-related reasons
- Scenario 1: SOR only checks/indicates departure
  - ex. 2 reasons for departure: Family Ties and *Booker*
  - ex. 1 reason for departure: Aberrant Behavior and in the “Reasons for Departure” section, the SOR says that the court applied the principals of 18 U.S.C. § 3553(a) in determining the offender's sentence (the rationale is that this example has 1 guideline departure reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and since 18 U.S.C. § 3553(a) is discussed also, it is coded as the 2<sup>nd</sup> departure reason and since it is considered a *Booker* cite the case is now in the “both” category)
- Scenario 2: SOR indicates BOTH a departure and a variance
  - ex. Departure with 1 guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. Criminal History Adequacy) and variance with 1 *Booker*-related reason (ex. 18 U.S.C. § 3553)
- Note that the SOR must use the word “departure” or “adjustment” for any outside of the range sentence to be considered a departure. The Commission considers all other phrasing (ex. “Outside the range”, “Below the Range”, “Outside the guideline system”, “Variance”, “Deviation”, “Excursion”, etc.) as variances. If multiple terms are used (ex. The SOR indicates it is departing for §5K2.13 and also says additionally the court is giving a sentence outside the guideline system to achieve just punishment), then the case is recorded as both a departure and a variance.
- See list of guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and for list of *Booker*-related reasons, *infra* at B-21.

**Below the Range with *Booker*/18 U.S.C. § 3553  
(*BOOKER* CATEGORY 10)**

- Variances/Outside Guideline System is specified on the SOR and only *Booker*-related reason(s) specified
  - SOR checks variance/outside system
    - Variance with 1 *Booker*-related reason (ex. 18 U.S.C. § 3553)
    - Variance with multiple *Booker*-related reasons (ex. Rehabilitation and Reasonableness)
      - Variance specified and no other reason provided.
- Departure is not specified and neither is a variance but the reason provided on the SOR for being out side the range is *Booker*-related
  - SOR says the sentence is “outside the guideline range” and the reason is “Advisory nature of the guidelines”. Note that if the SOR does not indicate if the sentence is above or below the range the coder makes that determination based on logical criteria (i.e. if the sentence actually below the range then it is coded as below the range and vice-versa).

**All remaining Cases Below the Guideline Range  
(*BOOKER* CATEGORY 11)**

- All other scenarios involving sentences below the guideline range not previously described in one of the other below the range categories fall into this category.
  - Cases with no reason provided for being outside of the range
    - SOR says “No departure” but the sentence is below the guideline range.
    - SOR says “Departure” but fails to provide any reason for the departure. Note that this also includes cases that say “As stated on record” or “See Transcript/Exhibit” and then fail to provide these additional documents to the Commission for determination of departure reason.
    - SOR does not specify a variance, however, indicates the sentence is below the range but fails to provide any reason for why the sentence is outside of the range. Note that this also includes cases that say “As stated on record” or “See Transcript/Exhibit” and then fail to provide these additional documents to the Commission.
  - Only a departure is specified and SOR cites 1 or more reasons which are not guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*
    - ex. Only reason cited is *Booker*-related (ex. Reasonableness)
    - departure with guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. Diminished

Capacity) and miscellaneous reason (ex. Lost job is punishment enough)

- Both a departure and variance are specified on the SOR and 1 or more departure reasons are not guideline reasons limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* or 1 or more variance reasons are non-*Booker*-related reasons
  - ex. Departure specified with miscellaneous reason (ex. Childhood abuse) and variance specified with *Booker*-related reason (ex. 18 U.S.C. § 3553)
  - ex. Departure specified with guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. Family Ties) and variance specified with non-*Booker* related reason which may be guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. Criminal History Under-represents Seriousness) or miscellaneous reason (ex. Childhood Abuse)
- Variance specified and 1 or more non-*Booker*-related reasons are provided on the SOR
  - ex. Variance specified and reason provided is a guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. “Court varies because of Family Ties”)
  - ex. Variance specified with -related reason (ex. Language from 18 U.S.C. § 3553(a) cited) and 1 guideline reason limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* (ex. Aberrant Behavior)
  - ex. Variance specified and 1 miscellaneous reason cited (not an approved guideline reason or *Booker*-related reason) (ex. “Court varies due to defendant’s positive background/good character”.)

#### **Missing/Indeterminable**

#### **(NOT REPORTED IN ANY *BOOKER* CATEGORY)**

- Sentence is outside the guideline or statutory range in PSR and SOR is not received
- Class A Misdemeanors for which there were no analogous guidelines applied in the PSR or SOR
- Sentence is missing (J&C not received at all or sentence information missing from J&C) and SOR does not specifically say sentence is “Within Range” (i.e. SOR is

not received or SOR is blank/unclear/does not indicate if sentence is within range)

- No guideline range is determinable due to missing documents (ex. Both PSR and SOR are not received).
- Sentence is “Time Served” and the amount of time served cannot be determined (the PSR is not received or does not clearly delineate the amount of time served) AND the sentencing range is greater than 0-6 months AND the SOR does not indicate if the sentence is within/outside the guideline range.
- Cases with logical criteria issues between the sentence and reported departure/variance status (ex. cases where the sentence is below the range but the SOR reports it as being an upward departure or variance).

### **Guideline Departure Reasons**

(limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*)

- (10) §5G1.3 - Convictions on related counts
- (11) §5H1.1 - Age
- (12) §5H1.2 - Educational and vocational skills
- (13) §5H1.3 - Mental and emotional conditions
- (14) §5H1.4 - Physical condition
- (15) §5H1.4 - Drug dependence and alcohol abuse
- (16) §5H1.5 - Previous employment record
- (17) §5H1.6 - Family ties and responsibilities
- (18) §5H1.6 - Community ties
- (22) §5K2.0 - Several persons injured
- (23) §5K2.1 - Death
- (24) §5K2.2 - Physical injury
- (25) §5K2.3 - Extreme psychological injury
- (26) §5K2.4 - Abduction or unlawful restraint
- (27) §5K2.5 - Property damage or loss
- (28) §5K2.6 - Weapons and dangerous instrumentalities
- (29) §5K2.7 - Disruption of governmental function
- (30) §5K2.8 - Extreme conduct
- (31) §5K2.9 - Criminal purpose
- (32) §5K2.10 - Victim's conduct
- (33) §5K2.11 - Lesser harm
- (34) §5K2.12 - Coercion and duress
- (35) §5K2.13 - Diminished capacity
- (36) §5K2.14 - Public welfare
- (41) §4A1.3 - Criminal history adequacy (Explain)
- (42) §5K2.17 - High-capacity semiautomatic firearm

- (43) §5K2.18 - Violent street gang
- (44) §5K2.20 - Aberrant behavior
- (45) §5K2.21 - Dismissed and uncharged conduct
- (46) §5K2.22 - Age or health sex offenders
- (47) §5K2.23 - Discharge terms of imprisonment
- (100) §2A1.1 - Death not caused intentionally
- (101) §§2A2.1, 2A2.2 - Degree of injury falls between two categories
- (103) §2A3.2 - Criminal sex act for commercial purpose
- (105) §2A6.1 - factors not incorporated into guideline
- (106) §2B1.3 - Monetary value does not reflect extent of harm
- (108) §2B3.1 - Intended to murder the victim
- (110) §2C1.1 - Systematic or persuasive corruption of governmental function
- (111) §2D1.1 - Unusually high drug purity
- (112) §2D1.1 - Unusually high drug amount
- (114) §2D1.5 - Sanctioned use of violence in enterprise
- (118) §2F1.1 - Loss substantially exceeds maximum from loss table
- (119) §2F1.1 - Dollar loss overstates seriousness of offense
- (120) §2F1.1 - Fraudulent statements could be covered by more specific statute
- (121) §2G1.1 - Offense did not involve profit nor physical force or coercion
- (124) §2H2.1 - Corrupting a public official/bodily injury/property damage
- (125) §2L1.1 - Large number of aliens
- (126) §2L1.1 - Dangerous or inhumane treatment
- (127) §§2L2.2, 2L2.4 - Deported on one or more prior occasions
- (128) §§2M3.1, 2M3.7, 2M3.9 - Revelation causes little or no harm
- (131) §§2M5.1, 2M5.2 - Extreme threat to national security
- (132) §§2M5.1, 2M5.2 - Extreme volume of commerce involved
- (134) §§2M5.1, 2M5.2 - Extreme number of multiple occurrences
- (137) §§2N2.1, 2Q1.2 - Negligence involved
- (139) §§2Q1.2, 2Q1.3 - Harm resulting from emission, release, or discharge
- (140) §§2Q1.2, 2Q1.3 - Harm resulting from quantity and nature of substance or pollutant
- (141) §§2Q1.2, 2Q1.3 - Harm resulting from duration of event
- (142) §§2Q1.2, 2Q1.3 - Harm resulting from risk
- (143) §§2Q1.2, 2Q1.3 - Nature of risk
- (144) §§2Q1.2, 2Q1.3 - Number of people at risk
- (145) §§2Q1.2, 2Q1.3 - Nature of contamination
- (146) §§2Q1.2, 2Q1.3 - Similar conduct by civil adjudication
- (147) §§2Q1.2, 2Q1.3 - Failure to comply with administrative order
- (148) §2T1.6 - Tax evasion and embezzlement
- (151) §§2T3.1, 2T3.2 - Importation of drugs, obscene matter, firearms, pelts of endangered species
- (152) §2T3.1 - Duties may not adequately reflect harm
- (200) §3A1.2 - Exceptionally high level victim
- (201) §3C1.1 - Further obstruction of justice
- (250) §3D1.4 - Offenses significantly more than 5 units

(300) §4A1.3 - Pattern of conduct  
(302) §4A1.3 - Related cases  
(304) General adequacy of criminal history; does not reflect seriousness of criminal history  
(305) §4A1.3 - Outside applicable time period, but similar misconduct  
(306) §4A1.3 - Outside applicable time period, but substantial portion of income  
(307) §4A1.3 - Significance or similarity of past conduct  
(309) Criminal history category over-represents defendant's involvement  
(703) §5K2.0 - General aggravating or mitigating circumstances  
(711) §5G1.3  
(721) §5H1.11 - Military record/charitable service/good works  
(801) §8C4.2 - Risk of death or bodily injury  
(825) §5K2.16 - Voluntary disclosure

- Additionally, the SAS code looks through the text fields associated with the "Other" codes for the following terms: "2B1", "2G2", "5C1", and "5H1".

### ***Booker-related Reasons***

- (1) Nature and circumstance of offense and history and characteristics of defendant pursuant to 18 U.S.C. § 3553(a)(1)
- (2) Reflect the seriousness of the offense, to promote respect for the law and just punishment
- (3) Afford adequate deterrence to criminal conduct
- (4) Protect the public from further crimes of the defendant
- (5) Provide the defendant with education or vocational training, medical care, or other
- (6) Avoid unwarranted sentencing disparities among defendants
- (7) Provide restitution to any victims of the offense
- (654) Adequate punishment to meet the purposes of sentencing
- (655) Deterrence
- (657) Reduce disparity
- (662) Put sentence in line with co-defendants (i.e. reduce disparity among co-defendants)
- (676) Rehabilitation
- (678) Incapacitation
- (712) Advisory nature of the guidelines
- (713) Judge specifies presence of variance/deviation
- (714) DOES NOT EXIST IN ORACLE AT THIS TIME
- (750) Reasonableness
- (760) *US v Booker/ US v Fanfan*
- (761) 18 U.S.C. § 3553(a)
- (762) Language from the 18 U.S.C. § 3553(a) statute text
  - Additionally, the SAS code looks through the text fields associated with the "Other" codes for the following terms: "*BOOKER*", "*REASONABLE*", "*ADVISORY*", "*3553*", and "*DISCRETIONARY*" and assigns these reasons as *Booker-related* reasons.
  - If the SAS code finds "*3553E*" then it does not assign the text as a *Booker-related* reason.

## **B. DETAILS OF THE MULTIVARIATE ANALYSES**

### **1. Data used for the analyses**

The Commission analyzed three populations for the multivariate regression analyses. The first population is comprised of 34,758 cases (14,446 drug cases sentenced under §2D1.1 and 20,312 non-drug cases). These cases were sentenced between October 1, 2002 (the beginning of fiscal year 2003) and April 30, 2003 (the date of the enactment of the Protect Act). This population will be referred to as “pre-PROTECT Act.”

The second, the post- PROTECT Act population, is comprised of 68,376 cases (27,402 drug cases and 40,974 non-drug) sentenced between May 1, 2003 (the day after the enactment of the Protect Act) and June 24, 2004 (the date of the *Blakely* decision).<sup>369</sup>

The final population is comprised of 67,654 cases (22,855 drug cases and 35,839 non-drug) sentenced between January 12, 2005 (the date of the *Booker* decision) and January 11, 2006 (one year after the *Booker* decision). This population will be referred to as “post-*Booker*.”

### **2. Variables used for the analyses**

The multiple regression analysis attempts to statistically control for certain factors in order to measure the effect of others. Models involving the length of the sentence imposed use the logarithm of the sentence imposed,<sup>370</sup> including any alternative confinement imposed.<sup>371</sup> The decision to treat alternative confinement the same as imprisonment is based on the fact that the guideline sentencing Table is a “confinement Table” as opposed to an “imprisonment Table.” Offenders sentenced in Zones A, B, and C may have their sentences satisfied under the guidelines with sentences of probation, imprisonment, alternatives or a combination of imprisonment or alternatives. Thus, models that simply use the prison sentence imposed may underestimate the length of the confinement imposed and make some sentences appear out of range by not accounting for relevant alternatives.

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<sup>369</sup> As discussed in earlier chapters, *Blakely* caused some confusion in the federal sentencing community that resulted in inconsistent guideline application and sentencing. Because of these inconsistencies, data collected during that period is incompatible with the rest of the fiscal year.

<sup>370</sup> As suggested in literature. See Spohn, Cassia, *Sentencing Decisions in Three U.S. District Courts: Testing the Assumption of Uniformity in the Federal Sentencing Process*. (Paper presented at the 2004 Annual Meeting of the American Society of Criminology in Nashville, TN) (2004).

<sup>371</sup> Sentences of zero months were assigned a sentence of .01 months (the logarithm of zero is not mathematically possible).

The “presumptive sentence” model<sup>372</sup> includes several major assumptions and decision points. One of the major decisions in this model is where to set the “presumptive sentence.” When dealing with federal sentencing data, the assumption in the “presumptive sentence” model is that courts use the bottom of the sentencing range as the “starting point” when determining the final sentence. This assumption is based on historical Commission data.<sup>373</sup> All statutory and mandatory minimums are taken into account when calculating the presumptive sentence.

The independent (or predictor) variables used in these models may be classified into guideline relevant (or case characteristics) and demographic factors. The guideline relevant characteristics included in the models were: the logarithm of the guideline minimum (including any statutory minimums), the type of offense (violent, sexual, drug, immigration, white collar, and “other”<sup>374</sup>), whether the offender received a safety valve adjustment, the number of criminal history points, whether the offender was convicted of an 18 U.S.C. § 924(c) offense, whether the offender received a specific offense characteristic (SOC) enhancement for use of a weapon, departure status (upward, downward - government initiated, downward - court initiated, §5K1.1 substantial assistance departure, or none), whether the offender went to trial, whether the offender had a mandatory minimum sentence, whether the Career Offender<sup>375</sup> enhancement applied, whether the Armed Career Criminal<sup>376</sup> enhancement applied, and role in the offense (mitigating role, aggravating role or none). Analyses involving only drug cases included controls for the type of drug involved in the case (cocaine, crack, heroin, marijuana, methamphetamine, and other).

Most guideline relevant factors are also incorporated in the calculation of the guideline minimum, the exceptions are the departure status, and whether the offender went to trial.<sup>377</sup> Inclusion of these factors in the model with presumptive sentence allows a measure of their weight in determining the sentence beyond the weight they are given in the guidelines. For example, consider two offenders with a guideline minimum of 63 months, but one has a weapon involved in his offense and the other receives a mitigating

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<sup>372</sup> A discussion of the “presumptive sentence model” may be found in Paul J. Hofer and Kevin R. Blackwell *What Are We Learning from Multiple Regression Studies of Federal Sentencing Decisions* (Paper presented at the American Society of Criminology Meeting, Atlanta, GA) (2002). Available from the authors; Rodney L. Engen and Randy R. Gainey. *Modeling the Effects of Legally Relevant and Extralegal Factors Under Sentencing Guidelines: The Rules Have Changed*, *CRIMINOLOGY* 38(4): 1207 (2000).

<sup>373</sup> <sup>4</sup> In the “Post-Booker” population, 57.1 percent of the cases that were sentenced within the guideline range were sentenced at the bottom of the range. For the “Post-Protect Act” cases, 58.3 percent were sentenced at the bottom of the range.

<sup>374</sup> The type of offenses were classified by the guideline that controlled the guideline calculation. Details as to how each guideline was classified are included in Appendix C.

<sup>375</sup> See *Guideline Manual*, §4B1.1.

<sup>376</sup> See *Guideline Manual*, §4B1.4.

<sup>377</sup> An argument may be made that the “acceptance of responsibility” adjustment may be a proxy for going to trial. In the Post-Booker time period, 96.9 percent of those who pled received an acceptance of responsibility adjustment, and conversely 94.3 percent of those who went to trial did not receive this adjustment.

role adjustment. It would not be surprising if the offender with a weapon received a higher sentence even though the presumptive sentences and guideline ranges for both offenders are the same. Judges may weigh the presence of a weapon or a mitigating role somewhat differently than the guidelines. By including these factors in the model, a sense of the importance the court places in these factors in the final determination of the sentence may be inferred.

Demographic variables include; race of the offender (White, Black, Hispanic, or Other), whether the offender was over 25 years of age, whether the offender attended college, gender of the offender, and whether the offender was a non-United States citizen.

The discrete decision analyses used several outcome (or dependent) variables depending on the analysis. The “departure decision” analyses involved the use of the different types of departure: upward, downward - government initiated, downward - court initiated and substantial assistance departure. The post-*Booker* analysis also modeled the decision of the court as to whether a “variance” was used or a “guidelines based departure” was used. Analysis of the decision whether to imprison or not (the “in/out” decision”) used a dichotomous variable with two categories: 1) whether the offender was sentenced to a prison term or 2) sentenced to an alternative or straight probation.<sup>378</sup>

### **3. Methodologies and results**

The sentence length analyses were performed using ordinal least squares (OLS) analysis. Statistical significance was determined at  $p < 0.01$ . The variables used in the analysis were as follows:

Length of sentence imposed: The independent variable for these analyses used the sentence imposed, including all alternative confinement included. This logarithm of this variable was used, with all sentences of zero months given the value of 0.01 months as the logarithm of zero is not mathematically possible. Life sentences were given the value of 470 months, and all values greater than 470 were given a value of 470 months. The variable used from the data files was SENSPLT0.

The independent variables were:

Guideline minimum: The minimum sentence in months, without the use of a departure, the offender was subject to, taking into account all guideline, statutory and mandatory minimums. The logarithm of this variable was used, with all minimums of zero months

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<sup>378</sup> The independent variables for these analyses were identical to the ones used in the sentence length models except that the guideline minimum in months was used (not the logarithm), for the “in/out” decision, the zone the offender’s sentencing range was under was added, and for the departure decision, departure status was not included as an independent variable.

given the value of 0.1 months as the logarithm of zero is not mathematically possible. Minimums of life in prison were recoded as 470 months. The variable GLMIN was used.

Violent offense: Offenders whose guideline sentence was controlled by the following guidelines were considered violent offenders: Chapter Two Part K offenders (“Offenses involving Public Safety”), §§2A1.1-2A1.5, 2A2.1-2A2.4, 2A4.1-2A4.2, 2A5.1-2A5.3, 2A6.1, 2A6.2, 2E1.3, 2E1.4, 2E2.1, 2B3.1, 2B3.2, and 2B3.3. The variable used from the data file for this and all other variables involving offense type was GDLNEHI.

Sexual offense: Offenders whose guideline sentence was controlled by the following guidelines: §§2A3.1-2A3.4, 2G1.1-2G1.3, and 2G2.1-2G2.5.

Drug trafficking offense: Offenders whose guideline sentence was controlled by the following guidelines: §§2D1.1, 2D1.2, 2D1.3, 2D1.11, and 2D1.12.

Other drug offenses: Offenders whose guideline sentence was controlled by the following guidelines: §§2D1.5-2D1.10, 2D2.1-2D2.3, 2D3.1, and 2D3.2.

White collar offenses: Offenders whose guideline sentence was controlled by the following guidelines: §§2B1.1, 2B1.6, 2B4.1, 2B5.1, 2B5.3, 2F1.1, 2F1.2, 2R1.1, Chapter Two Part S offenses (“Money Laundering and Monetary Transaction Reporting”) and Chapter Two Part T offenses (“Offenses Involving Taxation”).

Immigration offenses: Offenders whose guideline sentence was controlled by offenses in Chapter Two Part L (“Offenses Involving Immigration, Naturalization and Passports”).

Other type offenses: Offenders whose guideline sentence was controlled by offenses not in the violent, sexual, drug trafficking, other drug offenses, white collar offenses, and immigration offenses.

Criminal History Points: The number of criminal history points assigned to the offender. The variable used from the data file was SORCHPT.

Conviction for 18 U.S.C. § 924(c): Conviction by the court under this statute carries a consecutive mandatory minimum. The variable from the data file is IS924C.

Weapon enhancement: The application of an enhancement for use or possession of a weapon during the offense. The variable from the data files is WEAPSOC.

Mandatory minimum application: If the statutory minimum for the offense was greater than zero, a mandatory minimum applies in the case. The variable STATMIN was used

Career offender applied: Whether the offender was subject to the enhanced criminal history level and offense level under §4B1.1. The variable CAROFFAP was used.

Armed career criminal application: Whether the offender was subject to the enhanced criminal history level and offense level under §4B1.4. The variable ACCAP was used.

Departure status: Post-*Booker* the variable from the data file used was *Booker*CAT3 and pre-*Booker* the variables were DEPART AND DEPART\_D. Some recoding was done for post-*Booker* variables. Upward departures were coded yes if the values were “upward departure - guideline reason,” “upward departure - guideline and 18 U.S.C. § 3553 (3553) reason,” “above range with *Booker* and 3553 reason,” and “other above range.”

Downward - court initiated were coded yes if the values were “downward departure - guideline reason,” downward departure - guideline and 3553 reason,” “below range with *Booker* and 3553 reason,” and “other below range.” “Variances” were values of “below range with *Booker* and 3553 reason,” and “other below range.” Finally, government initiated downward departures were yes for “early disposition/§5K3.1” and “government sponsored - below range.” In the post-Protect Act population, there are 265 cases that were sentenced below the guideline minimum and were not classified as downward departures because the documentation stated that these cases were sentenced “within range.” It was decided to re-code these cases as “downward departure - court initiated.” In the post-*Booker* population, these cases were already considered as “downward variances.” Also, in the same population, there were an additional 371 cases whose documentation listed the case as “within range” and yet were sentenced above the guideline maximum. These cases were re-coded to be “upward departures.”

Safety valve: The application of safety valve under §5C1.2 (Limitation of Applicability of Statutory Minimum Sentences in Certain Cases). The variable SAFETY was used.

Trial: The variable NEWCNVTN was used.

Mitigating role: Court determination that the offender had a minor or minimal role in the offense according to §3B1.2 in the guidelines manual. The variable MITROLHI was used.

Aggravating role: Court determination that the offender had an aggravating role in the offense according to §3B1.1 in the guidelines manual. The variable AGGROLHI was used.

Race of offender: The variable NEWRACE was used.

Age of offender: This was recoded as a dichotomous variable, separated those who were 25 years of age and younger from those older than 25 years of age. The variable AGE was used.

Educational attainment: This was recoded into those offenders who attended college for any period of time and those who never attended college. The variable EDUCATN was used.

Male: The variable MONSEX was used.

Citizenship: The variable NEWCIT was used.

There were also analysis on non-drug and drug cases separately. The non-drug population was analyzed with the same variables as the overall model. The drug population was analyzed with the same variables, with the exception that offense type was not controlled for, but rather the type of drug involved in the offense was.

Type of drug: The major type of drug which controlled the guideline sentence was used. This is important when multiple drugs were involved in the case. The categories used were cocaine, crack, heroin, marijuana, methamphetamine, and “other” drugs. The variable COMBDRG2 was used.

The model was a “restricted” model. The parameter estimate of the log of the guideline minimum was set to have a value of 1.0. This was done so that the true measure of the effects that go into the calculation of the guideline minimum could be measured. The value of this variable without the restriction was always close to one (a typical value was .99998).

The results of this analysis were then transformed into percent of the sentence affected by the variable. Table C-1 shows the result of all the models for selected variables. Here is an example of a printout using this model:

Regression model  
Booker

The REG Procedure  
Model: MODEL1  
Dependent Variable: logsplit

NOTE: Restrictions have been applied to parameter estimates.

Analysis of Variance

F Value	Source Pr > F	DF	Sum of Squares	Mean Square
3459.60	Model <.0001	27	200729	7434.39525
	Error	58492	125695	2.14892
	Corrected Total	58519	326423	
0.6149		Root MSE	1.46592	R-Square
0.6148		Dependent Mean	2.91494	Adj R-Sq
		Coeff Var	50.28988	

Parameter Estimates

Standardized >  t	Variable Estimate	DF	Parameter Estimate	Standard Error	t Value	Pr
<.0001	Intercept	1	0.20217	0.02994	6.75	
<.0001	logmin	1	1.00000	0	Infty	
<.0001	violent	1	-0.11441	0.02350	-4.87	
<.0001	sexual	1	-0.18311	0.04330	-4.23	
<.0001	drug	1	0.84297	0.06711	12.56	
<.0001	immigration	1	0.33534	0.02607	12.86	
<.0001	othtype	1	-0.18464	0.03625	-5.09	
<.0001	whitecoll	1	-0.10210	0.02409	-4.24	
<.0001	sorchpt	1	-0.00568	0.00130	-4.36	
<.0001		1	-0.01334			

0.9738	is924c	1	-0.00114	0.03470	-0.03
	-0.00009129				
0.2989	weapsoc	1	0.02733	0.02631	1.04
	0.00279				
<.0001	valve	1	-0.12634	0.02310	-5.47
	-0.01821				
0.0387	accap	1	0.13662	0.06610	2.07
	0.00571				
<.0001	caroffap	1	0.26763	0.03588	7.46
	0.02057				
<.0001	upward	1	0.86295	0.04798	17.99
	0.04660				
<.0001	downgovt	1	-1.15026	0.02215	-51.94
	-0.14485				
<.0001	downcourt	1	-1.32362	0.01856	-71.32
	-0.18964				
<.0001	subasst	1	-1.65665	0.01820	-91.00
	-0.25359				
<.0001	mandmin	1	0.12396	0.01982	6.25
	0.02414				
0.2190	newcnvtn	1	-0.03380	0.02750	-1.23
	-0.00327				
<.0001	mitigate	1	-0.20673	0.02290	-9.03
	-0.02541				
0.2254	aggravate	1	0.03490	0.02879	1.21
	0.00321				
0.0054	black	1	0.04764	0.01714	2.78
	0.00878				
0.2625	hisp	1	-0.02193	0.01957	-1.12
	-0.00455				
0.0008	other	1	0.10254	0.03052	3.36
	0.00914				
<.0001	agedummy	1	-0.11866	0.01555	-7.63
	-0.02020				
0.0036	educ	1	-0.04746	0.01631	-2.91
	-0.00821				
<.0001	male	1	0.14974	0.01892	7.92
	0.02156				
<.0001	newcit	1	0.30543	0.01923	15.88
	0.06101				
<.0001*	RESTRICT	-1	-60238	636.09510	-94.70
	.				

distribution. \* Probability computed using beta

**Table B-1**  
**SENTENCE LENGTH MODELS**  
**GUIDELINE RELEVANT CHARACTERISTICS**  
**Post-PROTECT Act and Post-Booker**

Variable	Post-Booker			Post-PROTECT ACT		
	All controls	Drug cases	Non-drug cases	All controls	Drug cases	Non-drug cases
	PERCENT DIFF	PERCENT DIFF	PERCENT DIFF	PERCENT DIFF	PERCENT DIFF	PERCENT DIFF
<b>Offense Type (reference category = Drug Trafficking offenses)<sup>16</sup></b>						
Violent	-10.8	NA	NS	-9.5	NA	NS
Sexual	-16.7	NA	NS	-20.5	NA	-14.3
Other Drug	132.3	REFERENCE	NA	367.7	REFERENCE	NA
Drug Trafficking	REFERENCE	-64.9	NA	REFERENCE	-81.2	NA
Immigration	39.8	NA	42.0	43.0	NA	43.9
White Collar	-9.7	NA	NS	NS	NA	NS
Other Type	-16.9	NA	REFERENCE	-12.4	NA	REFERENCE
<b>Criminal History</b>						
Criminal History Points	-0.6	1.3	-1.4	-1.5	0.6	-2.5
Career Offender application	30.7	NS	51.4	30.4	NS	45.6
Armed Career Criminal	NS	NS	34.5	NS	NS	40.5
<b>Departure Status (reference category = No departure)</b>						
Upward	137.0	193.8	251.2	383.8	804.3	270.3
Down - Government	-68.3	-44.6	-74.4	-66.8	-51.2	-71.7
Substantial Assistance	-80.9	-67.2	-90.4	-79.9	-65.6	-90.1
Down - Court	-73.4	-48.2	-81.7	-73.0	-52.6	-80.0
<b>Role in the offense (No role in the offense)</b>						
Mitigating role	-18.7	-14.6	-27.3	-15.1	-12.8	-14.8
Aggravating role	NS	NS	NS	NS	NS	NS
<b>Case Characteristics</b>						
Trial (Plea)	NS	NS	NS	-10.6	NS	-11.5
18 U.S.C. § 924(c) conviction	NS	NS	NS	NS	NS	NS
Weapon SOC	NS	NS	NS	NS	NS	NS
Mandatory Minimum applied	13.2	12.4	NS	6.0	NS	NS
Safety valve	-11.9	NS	NA	-17.8	-9.1	NA

<sup>16</sup>The reference group for the “Non-drug model” are the “other offenses.”

**Table B-1 (cont.)**

**SENTENCE LENGTH MODELS  
DRUG TYPE AND DEMOGRAPHIC CHARACTERISTICS  
Post-PROTECT Act and Post-Booker**

Variable	Post-Booker			Post-PROTECT ACT		
	All controls	Drug cases	Non-drug cases	All controls	Drug cases	Non-drug cases
	PERCENT DIFF	PERCENT DIFF	PERCENT DIFF	PERCENT DIFF	PERCENT DIFF	PERCENT DIFF
<b>Drug Type (reference category = Marijuana)</b>						
Cocaine	NS	NS	NA	NS	-13.4	NA
Crack	NS	NS	NA	NS	-12.7	NA
Heroin	NS	NS	NA	NS	-16.9	NA
Methamphetamine	NS	9.5	NA	NS	NS	NA
Other drugs	NS	12.4	NA	NS	-25.5	NA
<b>Race of offender (Reference category = White offender)</b>						
Black	4.9	NS	9.2	NS	10.3	NS
Hispanic	NS	9.3	NS	NS	13.3	-7.9
Other	10.8	14.6	NS	NS	NS	NS
<b>Other Demographic Characteristics</b>						
Over 25 years of age	-11.2	NS	-15.3	-10.9	-4.1	-14.6
College attendance	-4.6	NS	NS	-8.4	-6.6	-7.7
Male (Female)	16.2	29.9	11.0	17.0	28.6	12.2
Non-citizen (U.S. Citizen)	35.7	8.3	70.0	33.9	16.0	61.3

The decision to depart used many of the same variables as in the OLS analysis. A “logistic regression” was used to analyze these data. The dependent variable was the type of departure that was being studied (upward, downward - government initiated, downward - court initiated, and substantial assistance). The post-*Booker* population was also analyzed by separating out “variance” and guideline based downward departures from the downward departure - court initiated category. The guideline minimum was used for this analysis, and the value was not transformed via logarithms (and values of zero were kept as such).

Finally, there are cases in which the statutory minimum and the guideline minimum are above zero months and they are equal. Unless the offender has been granted a departure for substantial assistance or given a “Safety valve” in a drug case, the court is unable to give a downward departure in the case as they are restricted by the statutory minimum. These cases were excluded from the analyses. The same logic is used in excluding cases in the upward departure analyses of the statutory maximum and the guideline maximum are equal.

An example of the output from one of these logistic regression analyses follows: Table C-2 gives a synopsis of the information obtained from these analyses:

Down - Court  
Overall - 2005

The LOGISTIC Procedure

Model Information

WORK.DEPARTBooker  
Data Set  
Response Variable                   downcourt  
Number of Response Levels         2  
Number of Observations            55952  
Model                                binary logit  
Optimization Technique             Fisher's  
scoring

Response Profile

Ordered Value	downcourt	Total Frequency
1	1	7711
2	0	48241

Probability modeled is downcourt=1.

NOTE: 168 observations were deleted due to missing values for the response or explanatory variables.

Model Convergence Status

Convergence criterion (GCONV=1E-8)  
satisfied.

Model Fit Statistics

Criterion	Intercept Only	Intercept and Covariates
AIC	44872.857	43891.721
SC	44881.789	44115.027
-2 Log L	44870.857	43841.721

Down - Court  
Overall - 2005

The LOGISTIC Procedure

Testing Global Null Hypothesis: BETA=0

ChiSq                   Test                   Chi-Square                   DF                   Pr >

<.0001	Likelihood Ratio	1029.1364	24
<.0001	Score	1099.2309	24
<.0001	Wald	1040.6394	24

Analysis of Maximum Likelihood Estimates

Pr > ChiSq	Parameter	DF	Estimate	Standard Error	Wald Chi-Square
<.0001	Intercept	1	-1.6999	0.0761	498.8788
<.0001	glmin	1	0.00296	0.000252	137.6426
<.0001	violent	1	0.1473	0.0710	4.3039
0.0380	sexual	1	0.2250	0.0968	5.4046
0.0201	drugtraff	1	0.0517	0.0723	0.5115
0.4745	immigration	1	-0.0497	0.0753	0.4361
0.5090	drug	1	-0.9181	0.1965	21.8383
<.0001	whitecoll	1	0.1337	0.0681	3.8560
0.0496	sorchpt	1	-0.0283	0.00291	94.9416
<.0001	is924c	1	-0.2359	0.0738	10.2089
0.0014	weapsoc	1	-0.1413	0.0541	6.8298
0.0090	valve	1	-0.0438	0.0487	0.8100
0.3681	accap	1	0.1456	0.1407	1.0707
0.3008	caroffap	1	0.3689	0.0674	29.9799
<.0001	mandmin	1	-0.2369	0.0446	28.1849
<.0001	newcnvtn	1	0.5682	0.0479	140.6541
<.0001	mitigate	1	0.1387	0.0464	8.9536
0.0028	aggravate	1	-0.2825	0.0594	22.5972
<.0001	black	1	-0.1289	0.0336	14.7441
0.0001	hisp	1	-0.2564	0.0397	41.7453
<.0001	other	1	-0.0856	0.0586	2.1335
0.1441	agedummy	1	0.0466	0.0327	2.0255
0.1547					

<.0001	educ	1	0.1581	0.0313	25.5151
<.0001	male	1	-0.1655	0.0362	20.8655
0.0054	newcit	1	-0.1116	0.0401	7.7518

Odds Ratio Estimates

Limits	Effect	Point Estimate	95% Wald Confidence
1.003	glmin	1.003	1.002
1.332	violent	1.159	1.008
1.514	sexual	1.252	1.036
1.213	drugtraff	1.053	0.914
1.103	immigration	0.951	0.821
0.587	drug	0.399	0.272
1.306	whitecoll	1.143	1.000
0.978	sorchpt	0.972	0.967
0.913	is924c	0.790	0.683
0.965	weapsoc	0.868	0.781
1.053	valve	0.957	0.870
1.524	accap	1.157	0.878
1.650	caroffap	1.446	1.267
0.861	mandmin	0.789	0.723
1.939	newcnvtn	1.765	1.607
1.258	mitigate	1.149	1.049
0.847	aggravate	0.754	0.671
0.939	black	0.879	0.823
0.836	hisp	0.774	0.716
1.030	other	0.918	0.818
1.117	agedummy	1.048	0.983

1.245	educ	1.171	1.102
0.910	male	0.847	0.789
0.968	newcit	0.894	0.827

Responses Association of Predicted Probabilities and Observed

0.220	Percent Concordant	60.3	Somers' D
0.223	Percent Discordant	38.3	Gamma
0.052	Percent Tied	1.4	Tau-a
0.610	Pairs	371986351	c

**Table B-2  
DEPARTURE DECISION  
Post-Booker**

Variable	Variances and Departures Grouped				Separated - Court	
	Court	Government	§5K1.1	Upward	Variance	Departure
	ODDS RATIO	ODDS RATIO	ODDS RATIO	ODDS RATIO	ODDS RATIO	ODDS RATIO
<b>Offense Type (reference category = Other offenses)</b>						
Violent	NS	-1.431	-1.645	1.618	NS	NS
Sexual	NS	NS	-9.434	5.596	NS	NS
Drug Trafficking	NS	NS	NS	NS	NS	NS
Other Drug	-2.506	-10.752	-2.398	2.462	-2.024	-5.917
Immigration	NS	3.106	-3.597	NS	NS	NS
White Collar	NS	-1.656	NS	NS	NS	NS
<b>Role in the offense (No role in the offense)</b>						
Mitigating role	1.149	1.619	1.452	-3.731	NS	1.253
Aggravating role	-1.326	-1.389	1.202	NS	-1.244	-1.553
<b>Case Characteristics</b>						
Guideline Minimum	1.003	1.005	1.007	-1.006	1.003	NS
Safety valve	NS	1.793	-1.143	-2.012	NS	NS
Mandatory Minimum applied	-1.267	-3.236	1.893	NS	NS	-1.595
Trial (Plea)	1.765	-8.621	-83.333	2.860	1.797	1.378
18 U.S.C. § 924(c) conviction	-1.266	NS	-1.658	2.355	-1.272	NS
Weapon SOC	-1.152	-1.435	-1.160	2.021	NS	NS
<b>Criminal History</b>						
Criminal History Points	-1.029	1.021	-1.038	1.073	-1.037	NS
Career Offender applied	1.446	NS	-1.406	NS	1.273	1.853
Armed Career Criminal	NS	NS	NS	NS	NS	NS
<b>Race of offender (Reference category = White offender)</b>						
Black	-1.138	-1.595	-1.294	NS	-1.110	NS
Hispanic	-1.292	1.802	-1.890	NS	-1.284	-1.250
Other	NS	NS	NS	1.430	NS	NS
<b>Other Demographic Characteristics</b>						
Over 25 years of age	NS	-1.195	1.131	NS	NS	NS
College attendance	1.171	-1.206	1.255	NS	1.217	NS
Male (Female)	-1.181	NS	-1.305	NS	NS	-1.437
Non-citizen (U.S. Citizen)	-1.118	1.761	-1.451	NS	-1.166	NS

**Table B-2 (cont.)  
DEPARTURE DECISION  
Post-PROTECT Act**

Variable	Court	Government	5K1.1	Upward
	ODDS RATIO	ODDS RATIO	ODDS RATIO	ODDS RATIO
<b>Offense Type (reference category = Other offenses)</b>				
Violent	NS	NS	-1.613	NS
Sexual	NS	NS	-7.752	2.585
Drug Trafficking	NS	1.612	1.176	-4.504
Other Drug	-3.379	-5.848	-2.778	5.072
Immigration	NS	5.864	-3.096	-3.058
White Collar	NS	NS	-1.211	NS
<b>Role in the offense (No role in the offense)</b>				
Mitigating role	1.815	1.738	NS	NS
Aggravating role	-1.418	NS	NS	NS
<b>Case Characteristics</b>				
Guideline Minimum	1.002	1.005	1.007	NS
Safety valve	-1.292	1.787	NS	-2.024
Mandatory Minimum applied	NS	-3.125	1.612	NS
Trial (Plea)	1.209	-14.084	-47.619	2.406
18 U.S.C. §924(c) conviction	-1.350	NS	-1.631	2.725
Weapon SOC	-1.337	-1.426	NS	1.545
<b>Criminal History</b>				
Criminal History Points	NS	NS	-1.043	1.037
Career Offender applied	NS	-1.767	-1.245	NS
Armed Career Criminal	NS	3.957	NS	NS
<b>Race of offender (Reference category = White offender)</b>				
Black	-1.300	-2.150	-1.353	NS
Hispanic	-1.161	1.903	-1.730	NS
Other	NS	NS	-1.179	1.622
<b>Other Demographic Characteristics</b>				
Over 25 years of age	1.110	NS	1.127	NS
College attendance	1.188	-1.203	1.265	NS
Male (Female)	-1.357	1.250	-1.346	NS
Non-citizen (U.S. Citizen)	NS	1.181	-1.637	1.424

Finally, the question of whether the decision to imprison has been affected by the *Booker* decision. The same variables and techniques that were used in the departure decision were used. The dependent variable for this case was the variable that represents whether the offender went to prison or not (PRISDUM). Also, a variable was added that controlled for the zone the offender's sentencing range fell within. The guideline manual gives instructions as to the types of sentences and alternatives that are available to the court depending on the zone the offender falls within (see §5C1.1). For example, offenders in Zone D are not to receive alternative sentences or probation without a downward departure. This may affect the decision to imprison and thus was controlled for.

# APPENDIX C

## Appendix C

### SUMMARY OF THE PUBLIC HEARING TESTIMONY

The witnesses at the Commission's 2005 public hearing from the Judiciary included the Honorable Thomas F. Hogan, the Chief Judge of the United States District Court for the District of Columbia and a member of the United States Judicial Conference Executive Committee; the Honorable Lawrence Piersol, Chief Judge of the District of South Dakota and President of the Federal Judges Association; the Honorable Paul G. Cassell, United States District Judge for the District of Utah; the Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin; and the Honorable Richard P. Kopf, United States District Judge for the District of Nebraska.

The representatives of the advocacy groups included Mary Price, General Counsel for Families against Mandatory Minimums, and Collene Thompson Campbell from Memory of Victims Everywhere. Professors Paul Rosenzweig and Douglas Berman presented the academic viewpoint. The next panel included participants from groups studying the impact of *Booker* on the federal sentencing system: Bruce Fein, Esq., Bruce Fein & Associates Professor Steven Saltzburg, a representative of the American Bar Association, and Daniel Collins, a former Department of Justice attorney. Jon Sands, the Federal Public Defender for the District of Arizona and chair of the Federal Defender Sentencing Guidelines Committee, Carmen Hernandez, second vice-president for the National Association of Criminal Defense Lawyers, and Amy Baron-Evans, co-chair of the Commission's Practitioners Advisory Group, testified for the defense bar. Robert McCampbell, the United States Attorney for the Western District of Oklahoma and chair of the Attorney General Advisory Subcommittee on Sentencing presented the view from law enforcement. The witnesses testified about the topics listed in the headings below.

**1. What changes, if any, to the federal statutes, federal sentencing guidelines, or the Federal Rules of Criminal Procedure are needed to clarify sentencing procedures and standards in the wake of the *Booker* decision?**

Almost all of the witnesses who addressed this question in their testimony concurred that there was no compelling need for any legislative changes, at least in the short term, in the wake of *Booker*. “[T]here is no need to rush in to fix federal sentencing. While the current advisory guideline system is not ideal, it’s eminently workable in this interim period. As you undertake the job of recommending to Congress what sentencing ought to look like, you can do so secure in the competence of the courts to impose and to review sentences.”<sup>379</sup>

One witness opined that “the advisory guidelines system created by the Supreme Court is a fully functioning system. By this I mean that the Court’s conversion of a

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<sup>379</sup> USSC February 2005 Public Hearing (Testimony of Mary Price, General Counsel, Families Against Mandatory Minimums) at 70, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_15th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_15th.pdf).

mandatory sentencing guidelines system into an advisory one does not somehow render the new system incomplete.”<sup>380</sup>

Even though the decision, and its predecessor in *Blakely* leave many important questions unanswered – not the least of which is how an appellate standard of “reasonableness” is to be interpreted and enforced – the Court’s advisory-guidelines remedy is ready to wear, even though some ongoing alterations will be necessary to make it fit comfortable. Moreover, Congress’ potential objection to the content of the system or the manner in which it was created does not mean that the system itself is non-operational. Early calls from some quarters of Capitol Hill and elsewhere in Washington for an immediate legislative response that would reinstate a mandatory guideline system appear to be unwarranted by practical need...

Rash action could be unfortunate and unnecessary and I join in the many voices that have urged Congress to take time to study the system that the Court has created in *Booker*. The best way to do this, of course, is to allow the United States Sentencing Commission to continue its historical mandate of study and assessment, already embraced in the post-*Booker* era, to determine how the federal courts are applying the new rule.<sup>381</sup>

The representatives of the defense bar offered no proposed legislative changes to clarify sentencing procedures and standards.<sup>382</sup> The American Bar Association suggested no proposed changes.<sup>383</sup> Members of the judiciary likewise concurred that the system created by the *Booker* decision could work without any legislative intervention.<sup>384</sup>

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<sup>380</sup> USSC February 2005 Public Hearing (Written Testimony of Daniel F. Wilhelm, Director, State Sentencing And Corrections Program, Vera Institute of Justice) at 2, [http://www.ussc.gov/hearings/02\\_15\\_05/wilhelm\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/wilhelm_testimony.pdf).

<sup>381</sup> *Id.*

<sup>382</sup> USSC February 2005 Public Hearing (Written Testimony of Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee) at 2, [http://www.ussc.gov/hearings/02\\_15\\_05/Sands\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Sands_testimony.pdf); (Written Testimony of Amy Baron-Evans, Co-Chair, Practitioners’ Advisory Group) at 2, [http://www.ussc.gov/hearings/02\\_15\\_05/Baron-Evans\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Baron-Evans_testimony.pdf); (Testimony of Carmen Hernandez, Second Vice-President, National Association of Criminal Defense Lawyers, at 105) [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf).

<sup>383</sup> USSC February 2005 Public Hearing (Written Testimony of Stephen A. Saltzburg) at 1, [http://www.ussc.gov/hearings/02\\_15\\_05/Saltzburg\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Saltzburg_testimony.pdf); (Testimony of Stephen A. Saltzburg) at 58, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_15th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_15th.pdf). (“I don’t think it’s necessary for Congress to step in.”).

<sup>384</sup> See USSC February 2005 Public Hearing (Testimony of the Honorable Lawrence Piersol, Chief Judge of the District of South Dakota) at 23, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_15th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_15th.pdf) (“I don’t believe any statutory or guideline changes are necessary at this time.”); (Written Testimony of the Honorable Lynn S. Adelman, United States District Judge, Eastern District of Wisconsin) at 10, [http://www.ussc.gov/hearings/02\\_15\\_05/Adelman\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Adelman_testimony.pdf).

One witness, however, offered a proposal for legislative change recommending that “Congress should enact legislation declaring specific and general deterrence as the primary objectives in sentencing, and rehabilitation and retribution of secondary or tertiary concern.”<sup>385</sup> The proposed legislation should include a provision that “the Federal Sentencing Guidelines should be considered as informative in determining what sentence would best achieve the deterrence goal.”<sup>386</sup> The law would permit the court to substitute the deterrence objective with the rehabilitation or retribution objective, in the exceptional case.<sup>387</sup>

Several witnesses offered proposals for guidelines changes that the Commission could make in the wake of *Booker*.<sup>388</sup> Some related to procedural matters. For example, one witness suggested that the Commission should devise terminology for describing sentences that fall outside of the guideline (*e.g.* variance). Then, the Commission should require courts as a procedural matter to first look to departures, and only if the departure methodology does not produce an appropriate sentence, consider variances using the 3553(a) factors.<sup>389</sup>

Several witnesses agreed that some procedural reforms relating to notice of sentencing issues might be in order.<sup>390</sup> “I think this Commission should make procedures ... a key consideration because among the variation we may see in the wake of *Booker* may actually turn on different applications of sentencing procedure rather than different substantive judgments.”<sup>391</sup> At the very minimum, the Commission should clarify that the prior notice requirements for going outside the range, either through a departure or a variance, are still in effect. “Courts should give prior notice to the parties that such a course is being contemplated.” The defense bar also expressed concerns that defendants do not receive sufficient notice prior to entering into plea agreements regarding the applicable sentencing enhancements.<sup>392</sup> “[A]mong the procedural focus points going forward, I think, [should be] concerns about fair notice.”<sup>393</sup> “The Commission should closely examine persistent complains [sic] that the guidelines sentencing process fails to

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<sup>385</sup> USSC February 2005 Public Hearing (Written Testimony of Bruce Fein) at 2, [http://www.ussc.gov/hearings/02\\_15\\_05/Fein-testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Fein-testimony.pdf).

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 3.

<sup>388</sup> USSC February 2005 Public Hearing (Testimony of Douglas A. Berman) at 108-10, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_15th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_15th.pdf); (Written Testimony of Daniel P. Collins) at 8, [http://www.ussc.gov/hearings/02\\_15\\_05/Collins\\_Testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Collins_Testimony.pdf); (Testimony of Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee) at 116-17, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf); (Written Testimony of the Honorable Paul G. Cassell, United States District Judge, District of Utah) at 37-40, [http://www.ussc.gov/hearings/02\\_15\\_05/cassell\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/cassell_testimony.pdf).

<sup>389</sup> Cassell, *supra* note 385 at 37-40.

<sup>390</sup> Berman, *supra* note 385 at 108-09; Collins, *supra* note 385 at 8; Sands, *supra* note 379 at 116-17.

<sup>391</sup> Berman, *supra* note 385 at 108.

<sup>392</sup> Sands, *supra* note 379 at 66; Berman, *supra* note 385 at 108-09.

<sup>393</sup> Berman, *supra* note 385 at 108-09.

provide defendants fair notice and lacks transparency concerning the facts and factors which can impact a defendant's sentence."<sup>394</sup>

One procedural matter about which the witnesses offered conflicting opinions was the applicable burden of proof at sentencing. "I think the Commission should clarify that a preponderance of the evidence standard is the appropriate standard for sentences. That was the Commission's view before, and there's no reason to change now that the guidelines are purely advisory..."<sup>395</sup> Another suggestion involved using a continuum for the standard of proof at sentencing. A preponderance standard should apply when the adjustments are within a few levels; a clear and convincing standard should apply when the adjustments are four levels or more. It was also suggested that the beyond a reasonable doubt standard ought to apply when there is a cross-reference to a different offense.<sup>396</sup> Yet another witness argued that there is "significant merit in the contention that the Constitution's Due Process Clause should be understood to require that facts which can lead to enhanced sentence be established beyond a reasonable doubt."<sup>397</sup>

A number of other suggestions involved substantive changes to the guidelines. Those included re-emphasizing that certain factors are forbidden considerations and listing cooperation with the federal government as a forbidden factor for varying or departing downward, absent a government motion.<sup>398</sup> One judge proposed that the Commission should provide greater explanation for its policy statements on offender characteristics and departures, reasoning that this would help the judiciary understand why a particular factor should be given more or less weight in the advisory guidelines scheme.<sup>399</sup> The same judge suggested that the Commission change all of its policy statements to guidelines.<sup>400</sup> He expressed the belief that these changes would not violate *Booker* in any way and were important because "judges are going to pay considerable attention to what the Commission has to say over the next year or so."<sup>401</sup>

Another witness suggested that the Commission should issue a policy statement relating to reasonableness, providing some guidance to help shape the reasonableness inquiry. The witness believed that it would be useful for the Commission to do so, even if the statement is not binding on the courts, because the Commission is "still charged by statute as the entity that is to set federal sentencing policy under the implementation of the Sentencing Reform Act."<sup>402</sup> The policy statement could include a directive that a sentence within the range is conclusively deemed to be reasonable.<sup>403</sup> "I think that the

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<sup>394</sup> USSC February 2005 Public Hearing (Written Testimony of Douglas A. Berman) at 8, [http://www.ussc.gov/hearings/02\\_15\\_05/Berman\\_testimony%20\(2-15\).pdf](http://www.ussc.gov/hearings/02_15_05/Berman_testimony%20(2-15).pdf).

<sup>395</sup> USSC February 2005 Public Hearing (Testimony of the Honorable Paul G. Cassell, United States District Judge, District of Utah) at 35.

<sup>396</sup> Sands, *supra* note 379 at 117-18.

<sup>397</sup> Berman, *supra* note 385 at 8.

<sup>398</sup> Cassell, *supra* note 383 at 28; Saltzburg, *supra* note 380 at 2.

<sup>399</sup> Cassell, *supra* note 383 at 31-33.

<sup>400</sup> *Id.* at 36-37.

<sup>401</sup> Cassell, *supra* note 383 at 63.

<sup>402</sup> Collins, *supra* note 385 at 6-7.

<sup>403</sup> USSC February 2005 Public Hearing (Testimony of Daniel P. Collins) at 64, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf).

creation of a safe harbor that a sentence within the range is reasonable without more, is not in any sense a requirement to stay in the safe harbor, because sentences outside that safe harbor will also be reasonable, and therefore, I don't think it backs into the *Booker* problem in the same way that it would if the Commission tried to establish firm lines beyond which courts could not go."<sup>404</sup> The Commission could also consider requiring a specific articulation of grounds for going outside of the guidelines range, either in a departure or in a variance. That requirement would be consonant with 18 U.S.C. § 3553, which, in its existing form, still requires an explicit articulation for sentences that are outside the range. The requirement would also allow appellate courts to vacate sentences outside the range for which adequate explanation has not been given.<sup>405</sup>

Another member of the judiciary suggested that the Commission should examine post-*Booker* sentences to ascertain whether there are situations where the courts consistently decide to vary because the guidelines do not really work. Such guidelines would be ripe for Commission attention.<sup>406</sup> Finally, the defense bar suggested that the Commission reexamine relevant conduct, urge early discovery of facts through policy statements, and change or alter the presentence report. Several of these suggestions also included possible changes to the Federal Rules of Criminal Procedure. Although the Commission has no jurisdiction over rules changes, a request was made that it recommend the proposed changes to the Federal Rules Advisory Committee.<sup>407</sup>

**2. To what extent are courts required to “consider” or “take into account” the federal sentencing guidelines in imposing a sentence? Should this be clarified through legislation and, if so, how?**

**a. Weight to be given the guidelines**

The testimony at the public hearing revealed two schools of thought regarding the extent to which courts must take the guidelines into account in imposing sentence. The first school of thought accords substantial weight to the guidelines.<sup>408</sup> This viewpoint was first espoused by Judge Cassell in *United States v. Wilson*.<sup>409</sup> Proponents of this

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<sup>404</sup> *Id.* It should be noted that other witnesses thought that any attempt to define a sentence within the range as presumptively reasonable would violate *Booker*. See Sands, *supra* note 379 at 3; Baron-Evans, *supra* note 377 at 3. As discussed in Chapter 2, *infra*, Commission action in this area is not required because the circuit courts are addressing and resolving this issue.

<sup>405</sup> Collins, *supra* note 379 at 64.

<sup>406</sup> USSC February 2005 Public Hearing (Testimony of the Honorable Lynn S. Adelman, United States District Judge, Eastern District of Wisconsin) at 49, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_15th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_15th.pdf).

<sup>407</sup> Baron-Evans, *supra* note 377 at 4-5.

<sup>408</sup> See generally Cassell, *supra* note 383; (Prepared Testimony of the Honorable Richard G. Kopf, United States District Judge, District of Nebraska), [http://www.ussc.gov/hearings/02\\_15\\_05/Kopf\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Kopf_testimony.pdf); (Written Testimony of Paul Rosenzweig, Senior Legal Research Fellow, The Heritage Foundation), [http://www.ussc.gov/hearings/02\\_15\\_05/Rosenzweig-testimony.PDF](http://www.ussc.gov/hearings/02_15_05/Rosenzweig-testimony.PDF); (Written Testimony of Robert McCampbell, United States Attorney for the Western District of Oklahoma and Chair of the Attorney General Advisory Subcommittee on Sentencing), [http://www.ussc.gov/hearings/02\\_15\\_05/mccampbell-testimony.pdf](http://www.ussc.gov/hearings/02_15_05/mccampbell-testimony.pdf).

<sup>409</sup> 350 F.Supp.2d 910 (D. Utah 2005); see also *U.S. v. Wanning*, 354 F.Supp.2d 1056 (D. Neb. 2005).

approach reason that even as modified by *Booker*, the SRA continues to direct that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth”<sup>410</sup> in the SRA. Those purposes are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>411</sup>

As stated in *United States v. Wanning*,<sup>412</sup> “[t]he Guidelines and their ranges were explicitly crafted by the Sentencing Commission at the direction of Congress to implement the statutory purposes of sentencing.” Inherent in the process established for guideline promulgation<sup>413</sup> is the harmonization of all of the sentencing goals in a way satisfactory to Congress.<sup>414</sup> The continuing consultation between Congress and the Commission suggests that great weight should be accorded to the guidelines. More simply stated, this means:

Congress' creation of the Commission and subsequent approval of the Commission's Guidelines provide strong reason for believing that Guidelines sentences satisfy the congressionally-mandated purposes of punishment. It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve the underlying congressional purposes. The more likely conclusion is that the Guidelines reflect precisely what Congress believes is the punishment that will achieve its purposes in passing criminal statutes.<sup>415</sup>

“Particularly when it comes to predictive judgments, federal courts as a rule give Congress and the agencies it creates, substantial deference. Under *Booker* or otherwise, there is no reason to withhold that customary respect from the advisory Guidelines.”<sup>416</sup> Further, “judges lack the ability to construct an entirely new unified theory that harmonizes in a rational way the sentencing goals articulated by Congress” and

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<sup>410</sup> 18 U.S.C. § 3553(a) (emphasis added).

<sup>411</sup> *Id.*

<sup>412</sup> *Wanning*, 354 F.Supp.2d at 1060.

<sup>413</sup> See 28 U.S.C. § 994.

<sup>414</sup> Kopf, *supra* note 405 at 1.

<sup>415</sup> *Wilson*, 350 F.Supp.2d at 915. See also Cassell, *supra* note 385 at 4.

<sup>416</sup> Kopf, *supra* note 403 at 1

“Congress is the only body that has constitutional legitimacy to state and then implement (through the Commission it created) sentencing goals.”<sup>417</sup>

The opposing viewpoint was offered by Judge Adelman in *United States v. Ranum*.<sup>418</sup> “Based on the statutory scheme that remains after *Booker*’s excision of 3553(b), I think the guidelines should be given the same weight as the other factors set forth in 3553(a).”<sup>419</sup> Section 3553 cites seven factors, and says that the court shall consider these factors. Included among the factors are the guideline range and the Commission’s policy statements. There is, however, nothing in that statute, as modified by *Booker*, that says any one factor as a general principle is entitled to more weight than others.<sup>420</sup>

The proponents of this line of thinking dispute the premise that the guidelines take into account all of the factors in 18 U.S.C. § 3553(a) factors. They reason that when the *Booker* Court directed sentencing courts to consider the guidelines, but allowed them to “tailor the sentence in light of other statutory concerns,” the Court recognized that the guidelines do not take into consideration all of the 3553(a) factors.<sup>421</sup> Otherwise, the Court would not have used this language.<sup>422</sup> In fact, the guidelines advise courts not to consider all of the 3553(a) factors.

For example, 3553(a) directs courts to consider “the history and characteristics of a defendant.” Now, how you can square that with statements in the guidelines that you’re not allowed to look at history, or age, or education, or mental condition, or drug or alcohol dependence, or employment, or family ties or responsibilities, or civic and military ties? It seems to me that no matter how you kind of try to fudge that, 3553(a) says something different.<sup>423</sup>

Moreover, section “3553(a) contains no suggestion that any factor be accorded more weight than any other and states that ‘in determining the particular sentence to be imposed,’ courts ‘shall consider’ the factors listed in the statute.”<sup>424</sup> The use of the word “shall” prohibits the courts from turning the responsibility to consider those factors over to some other entity.

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<sup>417</sup> *Id.*

<sup>418</sup> 353 F.Supp.2d 984 (E.D.Wis. 2005).

<sup>419</sup> Adelman, *supra* note 403 at 42-43.

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 43, citing *Booker*, 543 U.S. at 245-46.

<sup>422</sup> Adelman, *supra* note 403 at 43. *See also* Hernandez, *supra* note 379 at 106, (“Indeed, with all due respect to Judge Cassell, who has once again, I believe, served a very necessary and important function by explaining his views and providing a jumping-off point for discussion, giving strong weight to the guidelines is not appropriate.”).

<sup>423</sup> Adelman, *supra* note 403 at 44.

<sup>424</sup> *Id.* at 45, citing 18 U.S.C. § 3553 (a).

Other parts of 3553(a) reinforce the conclusion that the sentencing judge, not any other person or entity, including this Commission, is responsible for weighing the statutory factors. Under the statute, it is the judge who has to consider the nature and circumstances of the offense. It's the judge who has to consider the history and characteristics of the defendant. It's the judge who has to determine the particular sentence to be imposed and to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing.<sup>425</sup>

Thus, the proponents of this view of the weight to be accorded to the guidelines in the advisory guideline system assert that “whether or not th[e] Commission considered certain factors in crafting the guidelines, to comply with *Booker* and with 3553(a), the judge has to independently consider them.”<sup>426</sup> Similarly, whether or not Congress incorporated the purposes of sentencing into the guidelines, the clear statutory command of section 3553(a) is that the court has to consider all those factors.<sup>427</sup> Section “3553(a) creates a process by which individual judges sentence individual defendants ... The Sentencing Commission can do many, many good things, but it cannot perform that function. This is so because the Commission has no knowledge of the individual being sentenced, or of the particulars of the offense that he committed.”<sup>428</sup>

**b. Legislative clarification of weight to be given the sentencing guidelines**

The several witnesses who addressed this question asserted that “congressional enactment [regarding the weight to be given guidelines] could be seen as interfering with the voluntary nature of the guidelines and of reinstating a mandatory system that is constitutionally suspect.”<sup>429</sup> Moreover, the courts of appeals will soon have resolved that issue as a matter of statutory construction on a *de novo* standard of review.<sup>430</sup>

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<sup>425</sup> *Id.* at 45-46.

<sup>426</sup> *Id.* at 46.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 46-47.

<sup>429</sup> Saltzburg, *supra* note 380 at 3, Hernandez, *supra* note 379 at 106; Sands, *supra* note 379 at 2 (“[A]ny attempt to impose legislative requirements as to the weight to be accorded the Guidelines in relation to the goals and other factors set forth in section 3553(a) would run the risk of being interpreted as mandatory and thus unconstitutional.”); Baron-Evans, *supra* note 379 at 2 (“There is no need to legislatively clarify the extent to which the guideline range must be considered or taken into account, and such legislation would run a serious risk of unconstitutionality.”).

<sup>430</sup> Hernandez, *supra* note 379 at 106.

**3. What type of analysis should courts use for imposing sentences outside of the guideline sentencing range?**

Testimony provided at the hearing in response to this question was consistent with testimony given about the weight to be accorded to the sentencing guidelines. Advocates of according substantial weight suggested using the departure methodology first, and then considering whether to vary from the sentence in light of the congressionally-prescribed purposes of sentencing.<sup>431</sup>

Proponents of the theory that all of the section 3553(a) factors, including the sentencing guidelines, receive equal weight suggested that the courts need not cite factors that take the case outside the heartland but only must explain why the sentence imposed was necessary and reasonable in light of all the relevant factors. This analysis would be similar to that historically performed in revocation of probation or supervised release cases.<sup>432</sup> “A sentence outside the range can occur either because the standards for a departure set forth in the guideline manual are met, or because the sentence resulting from application of the guideline manual produces a sentence that is greater than necessary or insufficient to achieve the purposes of sentencing for a reason rooted in § 3553 (a) and the facts of the case.”<sup>433</sup> “We expect that in most cases, the advisory Guidelines sentence will be sufficient but not greater than necessary to achieve the statutory purposes of sentencing.”<sup>434</sup>

**4. How will review by appellate courts for “unreasonableness” work in practice? Should a sentence within the guideline sentencing range be considered “presumptively reasonable?” How should sentences outside of the guideline range be reviewed, and should appellate review vary depending on whether the sentence outside of the guideline sentencing range was based on a departure basis specifically identified in the *Guidelines Manual* or pursuant to *Booker*?**

At least one witness foresaw no significant challenge to the use of a reasonableness standard of review. “The courts deal regularly with applying the concept of reasonableness and need no legislation or regulation to perform that task.”<sup>435</sup> “Reasonableness review should be the standard to be applied to each sentence, no matter whether it is an advisory guidelines sentence, a guidelines departure, or a variance from the advisory guidelines. A reasonableness review would, for example, find a sentence based upon a sentencing factor which Congress had indicated should not be a sentencing factor, such as race or socioeconomic status, to be an unreasonable sentence.”<sup>436</sup>

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<sup>431</sup> Cassell, *supra* note 385 at 20, Saltzburg, *supra* note 380 at 3.

<sup>432</sup> Adelman, *supra* note 381 at 6-8.

<sup>433</sup> Baron-Evans, *supra* note 379 at 3.

<sup>434</sup> *Id.* at 4.

<sup>435</sup> USSC February 2005 Public Hearing (Written Testimony of the Honorable Lawrence Piersol, Chief Judge of the District of South Dakota) at 5, [http://www.ussc.gov/hearings/02\\_15\\_05/Piersol\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Piersol_testimony.pdf); Adelman, *supra* note 381 at 8-9.

<sup>436</sup> Piersol, *supra* note 432 at 5.

Others suggested that the body of law relating to revocation sentences would instruct the inquiry. In those cases, sentences outside the range are not presumptively unreasonable. Nor does the appellate court consider whether such sentences were supported by policy statements adopted by the Commission.<sup>437</sup> Rather, the question is whether the sentences were “reasoned and reasonable.”<sup>438</sup>

Certain witnesses suggested that a guidelines sentence should not be considered presumptively reasonable because to do so would make the guideline impermissibly mandatory.<sup>439</sup> Nevertheless they conceded that “when the data is collected, the number of instances in which an appellate court finds a sentence within a properly calculated guidelines range to be unreasonable will be few or none.”<sup>440</sup>

Others offered a different opinion about the appealability of sentences within the applicable guidelines range. They asserted that sentences within the guideline range are not only presumptively reasonable, but they are not subject to appeal. Section 3742(a) of title 18, United States Code, remains unchanged by the *Booker* decision. That section allows defendants to appeal sentences above the guidelines range but makes no provisions for appeals of a sentence within or below the guidelines range. Likewise, 18 U.S.C. § 3742(b) allows the government to appeal a sentence below the guidelines range but not a sentence within or above. Congress intended to provide limited appellate review and this interpretation of the current state of events comports with that understanding.<sup>441</sup>

**5. Do the appellate review provisions of 18 U.S.C. § 3742 need to be amended in light of *Booker* and, if so, how? Might Congress, consistent with *Booker*, establish standards for appellate review of sentences different from the “reasonableness” standard discussed by the remedial majority? Might *de novo* review of sentences outside the recommended guideline range be re-established?**

The Commission heard different viewpoints regarding amendment of the appellate provisions of 18 U.S.C. § 3742. One witness suggested that “any changes to section 3742 to alter the standard adopted by the *Booker* remedial majority might run afoul of the *Booker* merits majority. A stricter standard of review for sentences outside the guidelines, for example, runs the risk of making the guidelines presumptive, much as they were before *Blakely* and *Booker*.”<sup>442</sup>

The opposing viewpoint suggested that “[t]he ‘reasonableness’ standard of review embraced by Justice Breyer in his remedial opinion stands on a statutory, not a

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<sup>437</sup> Adelman, *supra* note 381 at 9.

<sup>438</sup> *Id.* at 6-9.

<sup>439</sup> Sands, *supra* note 379 at 3; Baron-Evans, *supra* note 379 at 3.

<sup>440</sup> Baron-Evans *supra* note 379 at 6.

<sup>441</sup> McCampbell, *supra* note 405 at 18-19; Rosenzweig, *supra* note 405 at 10, *But see* developing case law addressing this issue discussed, *supra*, in Chapter 2.

<sup>442</sup> Adelman, *supra* note 381 at 9.

constitutional, plane. Thus, Congress may amend the standard by simple legislation.”<sup>443</sup> Professor Saltzburg was of the opinion that “Congress may adopt any standard of review that does not tie trial judges’ hands to such an extent that it makes an advisory system mandatory (without other necessary changes.)”<sup>444</sup> Recognizing that “[a]rguments will be made ... that a *de novo* standard of review reinstates a mandatory guideline system,” he dismissed the argument as illogical. “Unless appellate courts declare that guideline sentences will be imposed in all cases, the system is not mandatory.”<sup>445</sup>

A contrary opinion was offered that after *Booker*, sentences within the guidelines wear no greater trappings of legality than sentences without. To establish *de novo* review for only the former thus would seem contrary to that principle because the sentences endorsed by the guidelines would enjoy a legal premium. The advocates of this viewpoint suggested that Congress should consider amending the appellate review provisions of 18 U.S.C. § 3742 to establish an abuse of discretion standard.<sup>446</sup> Members of this group further suggest that the abuse of discretion standard should pivot on the overarching deterrence objective of sentencing.<sup>447</sup> Advocates of reinstating the *de novo* standard argued that a rigorous and consistent appellate standard is essential to any guideline system because it will be an important means for the parties to obtain consistent sentencing.<sup>448</sup>

One final point raised about appellate review was that Congress expressly intended that the review be limited, pointing out that 18 U.S.C. § 3742(a) (and its parallel subsection (b)) allows for appeals only in a limited number of circumstances. “Reflecting on the text of the statute, even after excision, I am not sure that either party may appeal a sentence imposed within a properly calculated range. And that seems to me a reasonable rule – as it will enhance the presumptively reasonable nature of the guidelines themselves and concomitantly provide for an incentive for district courts not to vary their sentences from the guidelines too readily.”<sup>449</sup>

**6. Will *Booker* adversely affect the ability of prosecutors to reach plea agreements or obtain other forms of defendant cooperation? How is USSG §5K1.1 (Substantial Assistance) affected? How are “fast track” programs and USSG §5K3.1 (Early Disposition Programs) affected? Is there any impact on USSG §3E1.1 (Acceptance of Responsibility), particularly with respect to the third offense level reduction?**

Those witnesses from the judiciary and the defense bar who offered comments about post-*Booker* plea bargaining and cooperation did not believe that *Booker* would

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<sup>443</sup> Fein, *supra* note 382 at 2.

<sup>444</sup> Saltzburg, *supra* note 380 at 4.

<sup>445</sup> *Id.* at 4-5.

<sup>446</sup> Fein, *supra* note 382 at 3; Saltzburg, *supra* note 380 at 4-5.

<sup>447</sup> Fein, *supra* note 382 at 3.

<sup>448</sup> McCampbell, *supra* note 405 at 19-20; Collins, *supra* note 385 at 3.

<sup>449</sup> Rosenzweig, *supra* note 405 at 9. As discussed, *supra*, in Chapter 2, under the *Booker* guidelines system, courts are not limiting review, nor dismissing cases sentenced within the properly calculated range for lack of jurisdiction.

alter plea bargaining practice or decrease the number of cooperators.<sup>450</sup> “While a defendant might believe that his odds of obtaining a lower sentence have improved, a prosecutor can also more credibly threaten the prospect of a sentence above them. Thus, defendants will still have a strong incentive to satisfy the government that they are providing substantial assistance.”<sup>451</sup>

Other witnesses, including a representative of the Department of Justice, expressed concerns that *Booker* would diminish the leverage of the prosecutor in plea bargaining.<sup>452</sup> One witness stated that the decision was too recent to make confident projections about the magnitude of the diminishment.<sup>453</sup> Another witness expressed the belief that there will be a “reduced incentive for defendants to enter early plea agreements or cooperation agreements with the government, since the defendants may request and obtain the same benefit from the court without such an agreement.”<sup>454</sup> He opined that this reduced incentive would have a “grave effect on Department’s ability to prosecute a wide variety of cases or to obtain timely information.”<sup>455</sup>

Most of the witnesses thought that “fast track” and early disposition programs would continue to work without any problem.<sup>456</sup> One judge recognized, however, that non-fast track courts may exercise their discretion to impose a lower sentence to reduce the disparity created by such programs.<sup>457</sup> Likewise, the system would have no discernable impact on USSG §3E1.1, but courts may recognize varying “gradations of ‘reductions’ for acceptance.”<sup>458</sup>

**7. Under the principles of *Booker*, may Congress prohibit judges from considering certain factors at sentencing? What factors, if any, would be appropriate to prohibit from consideration? After *Booker*, may courts consider factors that are currently prohibited from consideration under the federal sentencing guidelines?**

All the witnesses who commented on this question uniformly concurred that *Booker* on its face does not prevent Congress from prohibiting consideration of particular factors at sentencing.<sup>459</sup> They agreed that Congress should prohibit certain factors, and under no circumstances should such factors be considered when fashioning a sentence

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<sup>450</sup> Adelman, *supra* note 381 at 9; Sands, *supra* note 379 at 3-4; Baron-Evans, *supra* note 379 at 8.

<sup>451</sup> Baron-Evans, *supra* note 377 at 8.

<sup>452</sup> Fein, *supra* note 380 at 3; McCampbell, *supra* note 403 at 16.

<sup>453</sup> Fein, *supra* note 380 at 3.

<sup>454</sup> McCampbell, *supra* note 403 at 16.

<sup>455</sup> *Id.* at 17.

<sup>456</sup> Fein, *supra* note 380 at 5. These programs are designed to facilitate early pleas in certain categories of cases (usually immigration) in districts with large caseloads. The programs must be approved by the Attorney General.

<sup>457</sup> Adelman, *supra* note 381 at 9-10.

<sup>458</sup> *Id.* at 10.

<sup>459</sup> See Piersol, *supra* note 432 at 5; Cassell, *supra* note 383 at 30-34; Rosenzweig, *supra* note 405 at 12; Fein, *supra* note 382 at 4; Saltzburg, *supra* note 380 at 5-6; Sands, *supra* note 379 at 4; Baron-Evans, *supra* note 379 at 9, McCampbell, *supra* note 405 at 16.

under 18 U.S.C. § 3553(a).<sup>460</sup> Moreover, some suggested that a variance should never be granted on the basis of a factor already prohibited by Congress.<sup>461</sup> The disagreement between these witnesses concerns those factors that constitutionally could be prohibited by Congress. Some argued that only the select set of constitutional invidious factors could be the subject of a complete bar by Congress.<sup>462</sup> They asserted that Congress cannot prohibit consideration of all offender characteristics now discouraged or declare that the guidelines already reflect all of the considerations in section. To do so would have the impact of making the guidelines mandatory and thus violative of the Sixth Amendment.<sup>463</sup>

Others suggested that Congress constitutionally could enact legislation barring factors beyond those now prohibited by statute and the guidelines. Examples offered included prohibiting a substantial assistance departure or prohibiting the award of the one-level reduction for acceptance of responsibility without a government motion.<sup>464</sup> At least one witness urged Congress to adopt a system that prohibits consideration of certain factors improper to consider or which would create sentencing disparity based upon inappropriate characteristics of the defendant.<sup>465</sup> Another opined that “[s]entencing to achieve deterrence is too fact-specific to warrant a statute declaring in advance that a particular fact shall never be considered.”<sup>466</sup>

Some witnesses urged that the Commission strongly caution against the use of these prohibited factors because of clear congressional commands.<sup>467</sup> Others expressed the hope that developing appellate court jurisprudence would establish that sentences based on these factors would receive less deference than others. Many agreed that “*Booker* permits federal judges to consider factors prohibited by the Federal Sentencing Guidelines as long as they consult the prohibition in imposing sentences.”<sup>468</sup>

## **8. Under what conditions, if any, have advisory sentencing guidelines proven effective in the states? What commendations or criticisms have been voiced about the operation of advisory guideline systems?**

Various witnesses suggested that advisory (voluntary) guidelines systems may work almost as effectively as their mandatory counterparts in achieving more uniform sentences.<sup>469</sup>

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<sup>460</sup> *Id.*

<sup>461</sup> Piersol, *supra* note 432 at 2.

<sup>462</sup> Sands, *supra* note 379 at 4; Baron-Evans, *supra* note 379 at 10. Those factors are “race, sex, national origin, creed, religion and socio-economic status.” See 28 U.S.C. § 994 (e).

<sup>463</sup> Baron-Evans, *supra* note 379 at 9.

<sup>464</sup> Saltzburg, *supra* note 380 at 6.

<sup>465</sup> McCampbell, *supra* note 405 at 16.

<sup>466</sup> Fein, *supra* note 380 at 4.

<sup>467</sup> Cassell, *supra* note 385 at 29-31; Rosenzweig, *supra* note 405 at 12.

<sup>468</sup> Fein, *supra* note 382 at 4; see also Sands, *supra* note 379 at 4; Adelman, *supra* note 381 at 4-5.

<sup>469</sup> See generally (Written Statement of Kim S. Hunt, Ph. D, Executive Director, District of Columbia Sentencing Commission), [http://www.ussc.gov/hearings/02\\_15\\_05/Hunt\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Hunt_testimony.pdf); Wilhelm, *supra* note 375 at 2, [http://www.ussc.gov/hearings/02\\_15\\_05/wilhelm\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/wilhelm_testimony.pdf); (Testimony of Bruce Fein)

[T]he corresponding voluntary guidelines in Virginia, Pennsylvania, and Minnesota were followed in 77.4%, 88% and 75% of the cases respectively. Mandatory guidelines in Kansas, Washington, and North Carolina commanded adherence in 87.6%, 90.4%, and 81% of the cases respectively. These comparisons suggest that voluntary guidelines may work almost as effectively as their mandatory counterparts in achieving more uniform sentences, although the details of each scheme are unique.<sup>470</sup>

Common missions inform the states' sentencing guidelines scheme, whether presumptive or voluntary, and those missions are comparable to the principles that guided implementation of the federal guidelines system: a desire to eliminate unwarranted disparities and to promote proportionality among sentences.<sup>471</sup>

The representatives of the state sentencing commissions reported that a large part of the success of advisory guideline systems stem from the judges' belief that the underlying system is just.<sup>472</sup> Because sentences are based on historical sentencing practices, these time-served patterns reflect the heartland of just sentences for offenses.<sup>473</sup> The role of judges in formulating the guidelines in some jurisdictions may also contribute to their success.<sup>474</sup>

These witnesses quantify successful systems as those with compliance rates at or near 80%.<sup>475</sup> They list various reasons for commending the systems. Advisory guidelines are less rigid than mandatory systems. These systems allow a judge more room to structure a sentence to fit the varying circumstances of an individual case. They make it easier for the sentencing commission to adjust sentencing ranges in the future to account for important sentencing factors as needed and to address any unanticipated consequences of a major shift in sentencing practice.<sup>476</sup>

Several factors associated with successful advisory guidelines "include transparency, superior information gathering and analysis, effective dialogue and clear

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at 3, [http://www.ussc.gov/hearings/02\\_15\\_05/Fein-testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Fein-testimony.pdf). See also Kim Hunt and Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENTENCING REP. 233 (April 2005).

<sup>470</sup> Fein, *supra* note 382 at 4.

<sup>471</sup> USSC February 2005 Public Hearing (Testimony of Daniel F. Wilhelm, Director, State Sentencing And Corrections Program, Vera Institute of Justice) at 13, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf).

<sup>472</sup> Wilhelm, *supra* note 468 at 46; (Written Testimony of Mark H. Bergstrom, Executive Director, The Pennsylvania Commission on Sentencing) at 4, [http://www.ussc.gov/hearings/02\\_15\\_05/bergstrom-testimony.pdf](http://www.ussc.gov/hearings/02_15_05/bergstrom-testimony.pdf).

<sup>473</sup> Wilhelm, *supra* note 468 at 46. See Bergstrom, *supra* note 469 at 1, [http://www.ussc.gov/hearings/02\\_15\\_05/bergstrom-testimony.pdf](http://www.ussc.gov/hearings/02_15_05/bergstrom-testimony.pdf).

<sup>474</sup> Saltzburg, *supra* note 380 at 6.

<sup>475</sup> Hunt, *supra* note 466 at 3.

<sup>476</sup> *Id.* at 1-2.

goals and feedback.”<sup>477</sup> The term “transparency” apparently relates to the courts’ reporting requirements. “[T]he Pennsylvania system is probably the most transparent system in the country in which each judge’s compliance rate is reported. It stands to reason that judges would be more inclined to comply with voluntary guidelines if compliance rates are transparent and readily available, and that when they don’t comply, they will provide a useful reason for understanding what was unique about that case that led them outside the guideline range.”<sup>478</sup> The witnesses’ experience also proved that some rigor in the form of procedural requirements that judges must follow helps to promote compliance with advisory guidelines. States that require the judges to calculate the guidelines report higher compliance rates than states with no procedural requirements.<sup>479</sup> Those procedures may include a statutory requirement that the court calculate the guidelines, a commission rule requiring calculation of the guidelines, and/or completion of sentencing forms to justify the sentence. Compliance in states where judges are not subject to any procedural requirements has been poor.<sup>480</sup> The witnesses also opined that “the presence of an engaged sentencing commission, with capacity to study and measure data nimbly as an objective and regularly recurring basis for policy recommendations, is essential to the ultimate substantive and political legitimacy of sentencing policy.”<sup>481</sup>

“One limitation of advisory guidelines systems to date is that despite high compliance rates, without appellate review there is no remedy for the outlier, a judge who gives a highly atypical sentence for a typical case.”<sup>482</sup> The remaining criticisms of advisory guidelines came from federal practitioners, rather than from the state commission representatives. Thus, these criticisms were not drawn from any state court experience but from early observations made of the *Booker* advisory system. They suggest that disparity may increase in a voluntary system<sup>483</sup> and argue that there is a culture of compliance in state systems that will not exist in the federal system because “it casts a wide net over far flung geographical areas, with diverse legal cultures.”<sup>484</sup> They assert that courts will adopt different sentencing procedures, resulting in inconsistent form and substance.<sup>485</sup> Courts will veto policy decisions made by the Commission and consider prohibited factors.<sup>486</sup> Finally, an advisory system provides reduced incentives for early plea or cooperation.<sup>487</sup> Members of the defense bar noted that sentences in the federal system appear to be increasing in length.<sup>488</sup>

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<sup>477</sup> *Id.* at 4.

<sup>478</sup> USSC February 2005 Public Hearing (Testimony of Kim S. Hunt, Ph. D, Executive Director, District of Columbia Sentencing Commission) at 9-10, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf).

<sup>479</sup> Wilhelm, *supra* note 377 at 4

<sup>480</sup> Wilhelm, *supra* note 468 at 19.

<sup>481</sup> Wilhelm, *supra* note 377 at 4; Hunt, *supra* note 466 at 4.

<sup>482</sup> Hunt, *supra* note 466 at 4.

<sup>483</sup> McCampbell, *supra* note 405 at 9.

<sup>484</sup> *Id.* at 10.

<sup>485</sup> *Id.*

<sup>486</sup> *Id.* at 13-16.

<sup>487</sup> *Id.* at 16-18; *see also* Fein, *supra* note 382 at 3.

<sup>488</sup> Hernandez, *supra* note 379 at 114.

**9. How do states with advisory guidelines ensure that their guidelines are adequately considered? Do the states provide for appellate review and, if so, what is the standard of review and how does such review work in practice? Are sentences within the guideline sentencing range considered presumptively reasonable? Does compliance with state advisory guidelines vary depending on the width of the guideline sentencing ranges? How, if at all, does the accountability of judges to the legislature, the public, or their peers affect compliance with state advisory guidelines?**

As noted above, the states with advisory systems have vastly different procedural requirements. Nevertheless, the witnesses reported that the more rigor imposed procedurally, the better the compliance rate.<sup>489</sup> Indeed, one witness opined that *Booker*'s requirement that courts consider the guidelines created the type of rigorous procedural step that would encourage compliance with the guidelines.<sup>490</sup> "It may be reasonable to conclude that the process of considering applicable guidelines and formulating a written explanation for departures helps build awareness of what the guidelines require and may help inculcate a sense of fealty to the application of the guidelines in most circumstances."<sup>491</sup> With the exception of Pennsylvania, none of the state systems discussed with the Commission have an appellate review process.<sup>492</sup> Thus, the appellate review established by *Booker* may also serve to strengthen compliance with the guidelines.<sup>493</sup>

The witness from Pennsylvania cited a recent Superior Court opinion to explain how the Pennsylvania standard of review operated.<sup>494</sup> In that case, the court stated

It is perceived by many ...that the extension of discretion to the sentencing court has resulted in a situation where the sentencing court is free to impose any sentence within the limits allowed by law, as long as it states its reasons for doing so upon the record. The corollary to this premise suggests that as long as the court states its reason for departing from the guidelines on the record, the Superior Court is duty-bound to affirm, regardless of whether or not reasons stated are viewed as reasonable or as justifying the departure. This is simply not so.<sup>495</sup>

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<sup>489</sup> Wilhelm, *supra* note 458 at 18-19; Hunt, *supra* note 466 at 10.

<sup>490</sup> Wilhelm, *supra* note 458 at 19.

<sup>491</sup> *Id.* at 18.

<sup>492</sup> Wilhelm, *supra* note 458 at 19; Hunt, *supra* note 456 at 10; (Testimony of Mark H. Bergstrom, Executive Director, The Pennsylvania Commission on Sentencing) at 25-30, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf).

<sup>493</sup> Wilhelm, *supra* note 377 at 4.

<sup>494</sup> Bergstrom, *supra* note 469 at 3, *citing Commonwealth v. Walls*, 846 A.2d 152, 158 (Pa. Super., 2004).

<sup>495</sup> *Id.*

The witness went on to describe the Pennsylvania standard of review, which appears to be remarkably similar to the reasonableness review created by *Booker*.

In determining whether a sentence is unreasonable, the appellate court shall have regard for:

- 1) the nature and circumstances of the offense and history and characteristics of the defendant;
- 2) the opportunity of the sentencing court to observe the defendant, including any presentence investigation;
- 3) the findings upon which the sentence was based; and
- 4) the guidelines promulgated by the Commission.<sup>496</sup>

Judges' compliance rates are reported in Pennsylvania and the percentage rate of compliance is relatively high.<sup>497</sup> This reporting procedure may be a contributing factor. One witness mentioned that the "[s]ome observers have posited that accountability of judges in Virginia to the legislature might affect compliance with state advisory guidelines."<sup>498</sup> "Still, anecdotal evidence from Virginia suggests that very few judges are not returned to the bench and judge-specific sentencing data is not regularly provided to the legislature or the public."<sup>499</sup> Instead, it was suggested that "the judges in Virginia comply with the guidelines because they believe that recommended sentences are fair, just and proportionate."<sup>500</sup> No other witness reported that either accountability to the legislature or the public created greater compliance. Rather, compliance was attributed to the judges' satisfaction that the system was just and fair.<sup>501</sup>

**10. What recommendations, if any, do you have for changes to the federal sentencing system in either the short term or long term in light of *Booker*?**

During the two day hearing, the Commission heard testimony about possible responses to the *Booker* decision. One recurring theme that most participants espoused was a "wait and see" approach to federal sentencing reform following *Booker*. "[I]t is too early to measure accurately the impact of the decision because courts of appeals are just beginning to render decisions interpreting the Supreme Court case, and district courts are just beginning to resentence defendants."<sup>502</sup> "I share the consensus view that it would be wise for Congress and this Commission to hold off making substantial changes to the

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<sup>496</sup> *Id.* at 4.

<sup>497</sup> Hunt, *supra* note 475 at 9-10.

<sup>498</sup> Wilhelm, *supra* note 377 at 3.

<sup>499</sup> *Id.*

<sup>500</sup> *Id.* Mr. Wilhelm offered the observation that the same could not always be said for judges in the federal system.

<sup>501</sup> Wilhelm, *supra* note 458 at 46.

<sup>502</sup> USSC February 2005 Public Hearing (Prepared Testimony of the Honorable Thomas F. Hogan, Chief Judge, District of Columbia and Member, Judicial Conference Executive Committee) at 2-3, [http://www.ussc.gov/hearings/02\\_15\\_05/Hogan-testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Hogan-testimony.pdf); *see also* Kopf, *supra* note 405 at 1.

federal sentencing system until we can observe and analyze how the Supreme Court’s Booker remedy actually operates in lower courts.”<sup>503</sup> “This is not a time to tinker around the edges of reform or rush to adopt measures designed to just meet, or worse, to avoid constitutional requirements. We urge you to embrace this opportunity to help Congress critically examine federal sentencing”<sup>504</sup> “Booker is a chance to test how advisory guidelines work, and to what extent the federal courts will rely on the Commission in fashioning their own sentences. The Commission should not support or propose legislative solutions for problems that may not exist.”<sup>505</sup>

Among the many reasons offered in support of a slow and considered response to *Booker* was the following:

The last point I just want to reiterate is the sort of go-slow attitude is not only important, . . . , as a policy matter but as a pure litigation matter. The circuits are proving to us yet again how complicated life becomes when you change an intricate, detailed system. And I think any significant change – rapid, slow, whatever you want to say they are – are going to have enormous transition costs, years and years of litigation to work out. One of the things that you all can do effectively is start mapping out a plan for incremental changes, helping Congress see that maybe amendments are going to be a more efficient way to make some of the changes that are [inaudible] necessary than broad legislation.<sup>506</sup>

Various organizations publicly urged Congress to let the *Booker* advisory system work for period of time. The Federal Judges Association board of directors unanimously adopted the following resolution:

The board of directors of the Federal Judges Association has resolved that the position of the FJA should be to ask Congress to allow the present situation time to work, and only if it does not ultimately work to the satisfaction of Congress, should Congress then proceed, in consultation with the courts, academics, the Justice Department, the United States Sentencing Commission, and other interested parties, to fashion some changes.<sup>507</sup>

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<sup>503</sup> Berman, *supra* note 385 at 13.

<sup>504</sup> USSC February 2005 Public Hearing (Written Testimony of Mary Price, General Counsel, Families Against Mandatory Minimums (FAMM)) at 2, [http://www.ussc.gov/hearings/02\\_15\\_05/price\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/price_testimony.pdf).

<sup>505</sup> Sands, *supra* note 379 at 4; Baron-Evans, *supra* note 379 at 10; Adelman, *supra* note 403 at 48; Wilhelm, *supra* note 458 at 15.

<sup>506</sup> Berman, *supra* note 385 at 112-13.

<sup>507</sup> Piersol, *supra* note 380 at 16-17.

Likewise, the National Association of Criminal Defense Lawyers and the American Bar Association adopted similar resolutions.<sup>508</sup>

The main three recommendations in response to *Booker* offered by the witnesses were maintaining advisory guidelines in some form, topless guidelines, and simplified guidelines designed for jury factfinding.

Proponents of maintaining the advisory guideline system, either in the form created by the *Booker* decision or a form altered by either Congressional or Commission action, asserted the belief that *Booker* provides a nearly perfect system.<sup>509</sup> A member of the North Carolina Sentencing Commission observed that the “new advisory system fashioned by Justice Breyer preserves this Commission’s dedicated 17-year odyssey toward the creation of just and fair sentencing reform. This new system, I believe, if allowed to flourish, will promote uniformity, while at the same time diminishing the occasional irrational results required by any mandatory guideline system.”<sup>510</sup> Those advocating for federal advisory guidelines echoed the commendations made by the state commissioners about their advisory systems. “Advisory guidelines are helpful to judges and to the parties. They provide a thorough review of many but not all considerations, an indication of what is generally being done in other cases, and an indication of congressional intent.”<sup>511</sup> “I don’t think you can find a judge who has done any significant amount of sentencing who does not have an instance where justice was not served by mandatory guidelines.”<sup>512</sup> Still others opine that restoring federal judges to a meaningful role in the sentencing process is tremendously important.

*Booker* enables judges to treat people being sentenced as they should be treated, as individuals, and to craft sentences that are appropriate to them. Insofar as is possible, a sentencing system should not force judges to impose sentences that they don’t believe in. It might be said that *Booker* constitutes a recognition of the irreducible need for individualized judgment and humanity in sentencing.<sup>513</sup>

Moreover, fairness in sentencing requires considerations of many factors, not just reduction of disparities.<sup>514</sup> *Booker* creates the opportunity for a real dialogue between judges and the Commission.<sup>515</sup>

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<sup>508</sup> Hernandez, *supra* note 379 at 105; Saltzburg *supra* note 378 at 55.

<sup>509</sup> Piersol, *supra* note 381 at 18; Adelman, *supra* note 403 at 37; Saltzburg *supra* note 380 at 59.

<sup>510</sup> USSC February 2005 Public Hearing (Testimony of Lyle Yurko, North Carolina Sentencing Commission) at 30-31, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf); *see also* Kim H. Hunt and Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENT REP. 233, 239 (2005) (“We predict that advisory guidelines can be a success in the federal system.”).

<sup>511</sup> Piersol, *supra* note 381 at 18.

<sup>512</sup> *Id.* at 21-22.

<sup>513</sup> Adelman, *supra* note 403 at 42.

<sup>514</sup> *Id.* at 37.

<sup>515</sup> *Id.* at 39.

The proponents of advisory guidelines offer several reasons why the system will work effectively in federal courts. “First of all, judges have operated under the guidelines for a very long time, and to a considerable extent have internalized guideline thinking. Judges are not going to give up this way of thinking just because the guidelines are advisory...”<sup>516</sup> “Secondly, *Booker* directs judges to consider the guidelines, and judges most assuredly are going to follow that. Third, the fact that sentences are reviewable for reasonableness, and if the history of departures is any guide... the fact that sentences are reviewable for reasonableness will cause judges to think carefully about the sentences they impose, and to explain in detail any sentence that they believe that the government or the defendant is going to seriously question.”<sup>517</sup>

The Commission also heard the contrary viewpoint. “There are inherent problems in an advisory guideline scheme, and those problems are not going to change over time.”<sup>518</sup> Those problems included increased disparity, less control by the prosecutors over plea bargaining and substantial assistance, different procedures and policy decisions made by the Commission being rejected. One of the victim advocates made a strong argument for the need to have “fair and reasonable, but realistic and tough, sentencing guidelines [in] place and followed.”<sup>519</sup> She reminded them that “it would be helpful to this Commission’s work to recall the reasons for mandatory sentencing guidelines in the past. It was a judiciary that was unaccountable and out of step with the American people.”<sup>520</sup>

Finally, the long-term vitality of advisory guidelines depends greatly upon the efficacy of the reasonableness review.

The provision for reasonableness review will either prove to be nothing at all, in which case we will have a *de facto* every decision is reasonable, and judges will routinely affirm on some abuse of discretion standard that is a review standard in theory and not in practice, or will actually have some real bite and the courts of appeals will wind up instituting reasonableness reviews that have some real structure and meaning. But if they actually have some real structure and meaning and become legally constraining on district court judges, then they will become, in effect, mandatory rules respecting the discretion of judges and will run right back into the *Blakely/Booker* core remedial problem.<sup>521</sup>

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<sup>516</sup> *Id.*

<sup>517</sup> *Id.* at 40.

<sup>518</sup> McCampbell, *supra* note 405 at 138.

<sup>519</sup> USSC February 2005 Public Hearing (Testimony of Collene (Thompson) Campbell) at 86, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf).

<sup>520</sup> *Id.*

<sup>521</sup> Rosenzweig, *supra* note 405 at 86.

Professor Frank Bowman introduced the concept of “topless” or “soft-top” guidelines as an immediate, short-term response to *Blakely*.<sup>522</sup> The proposal involves raising the top of every guideline range to the statutory maximum, which will make the system compliant with *Apprendi*. After the decision in *Booker*, he has advocated more sweeping reform for the long term to address “structural problems” with the federal guideline system.<sup>523</sup> Notwithstanding Professor Bowman’s disavowal of the topless guidelines proposal, others still advocate this as the best system to resolve the upheaval created by the *Blakely* and *Booker* decisions. “My recommendation to Congress is that it act to restore the system most nearly as it was before *Booker* with the least changes possible. The easiest way to do that is what has been popularly called ‘the Bowman fix...’”<sup>524</sup> This would require legislative action to eliminate the 25% percent rule.<sup>525</sup> Establishing guideline minimums does not require jury factfinding,<sup>526</sup> so the judges could continue to make the necessary factual determinations to compute the guideline offense level. Proponents of this solution also advocate a return to the *de novo* standard of review excised by the Supreme Court as part of its *Booker* remedy.<sup>527</sup>

Opponents of this proposal include members of the judiciary, academics, the defense bar and even state sentencing commissioners.<sup>528</sup> Asserting that “the ‘Bowman fix’ is no fix at all,” all warn that this fix would likely be declared unconstitutional, resulting in continued upheaval in federal sentencing law.<sup>529</sup>

The witnesses discussed one other proposal with the Commission but did not offer any detailed description. The proposal centers around simplified guidelines, allowing for jury factfinding of any facts that would increase the sentence. The American Bar Association testified that it supported some version of this proposal, as did witnesses from the defense bar. Distinct variations on the plan have been proposed by academics, the American Bar Association and other interested groups.<sup>530</sup> Because the specifics of these proposals were not developed at the hearing, the Commission heard no testimony about any criticisms of these plans.

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<sup>522</sup> Frank O. Bowman, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004).

<sup>523</sup> Frank O. Bowman, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 COLUMBIA L. REV. 1315 (2005).

<sup>524</sup> Collins, *supra* note 383 at 62.

<sup>525</sup> See 28 U.S.C. § 994 (b)(2).

<sup>526</sup> See *Harris, supra*, discussed in Chapter 1.

<sup>527</sup> Collins, *supra* note 385 at 62.

<sup>528</sup> Piersol, *supra* note 379 at 20-21; Yurko, *supra* note 379 at 33; Saltzburg *supra* note 380 at 74-75; (Testimony of Amy Baron-Evans, Co-Chair, Practitioners’ Advisory Group) at 99, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_16th.pdf).

<sup>529</sup> USSC February 2005 Public Hearing (Testimony of The Honorable Lawrence Piersol) at 20-21, [http://www.ussc.gov/hearings/02\\_15\\_05/Transcript\\_15th.pdf](http://www.ussc.gov/hearings/02_15_05/Transcript_15th.pdf); Baron-Evans, *supra* note 525 at 122.

<sup>530</sup> See Frank O. Bowman, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 COLUMBIA L. REV. 1315 (2005) American Bar Association, Criminal Justice Section, *Report on Booker and Recommendation* (reprinted in 17 FED. SENT. REP. 335, 2005); Constitution Project’s Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (reprinted in 17 FED. SENT. REP. 341 (2005)).

The final point made by most witnesses at the hearing was the critical role played by the Commission in informing the debate through the data collection process. “First of all, you must gather accurate information of what the courts as a whole are doing in sentencing after *Booker* rather than having a few unusual results color the debate about what, if anything, should be done after *Booker* – in other words, what the outliers control.”<sup>531</sup> “There will always be outlier cases. In a system that processes 60,000 cases, I would be concerned if there weren’t the occasional ugly case. Among the things to recognize, of course, is an ugly case at the district court level may not stay an ugly case. Appellate review oftentimes will fix that.”<sup>532</sup> “Importantly, the challenges for this Commission are not only in collecting and disseminating data, but describing effectively and accurately this variance, non-guidelines sentencing idea... And without effective coding and analysis of the amount of the variance and its nature, there will be a misimpression of what judges are doing out there.”<sup>533</sup> The witnesses counseled the Commission to play an active role in shaping the ongoing debate about the federal sentencing system.

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<sup>531</sup> Piersol, *supra* note 381 at 19.

<sup>532</sup> Berman, *supra* note 385 at 111.

<sup>533</sup> *Id.* at 111-12.

# **APPENDIX D**



U.S. SENTENCING COMMISSION  
SPECIAL POST-BOOKER CODING PROJECT  
CASES SENTENCED ONE YEAR SINCE

*U.S. v. BOOKER*

DATA EXTRACTION DATE: FEBRUARY 22, 2006

# CONTENTS

	page
<b>NATIONAL DATA</b>	
Comparison of Sentence Imposed And Position Relative to the Post-Booker Guideline Range .....	D-4
Most Frequently Applied Guidelines: Comparison of Sentence Imposed And Position Relative to the Guideline Range .....	D-5
Offenders Sentenced for Each Chapter Two Guideline .....	D-6
<b>CIRCUIT AND DISTRICT DATA</b>	
Guideline Offenders in Each Circuit and District .....	D-8
Guideline Application Trends: National and Circuit .....	D-10
<b>SENTENCE LENGTHS – MOST FREQUENTLY APPLIED GUIDELINES</b>	
Distribution of Offenders Receiving Sentencing Options .....	D-15
Average and Median Sentence Imposed: Fiscal Years 2000-2001 .....	D-16
Average and Median Sentence Imposed: Fiscal Years 2002-2003 .....	D-17
Average and Median Sentence Imposed: Pre-Blakely 2004 and Post-Booker ..	D-18

## **DEGREE OF DEPARTURE AND VARIANCE**

Departure and Variance Rate by Each Circuit and District . . . . .	D-19
Substantial Assistance Departures in Each Primary Offense Category . . . . .	D-22
Govt Sponsored Downward Departures in Each Primary Offense Category . . . . .	D-23
Other Downward Departures in Each Primary Offense Category . . . . .	D-24
Otherwise Below Guideline Range in Each Primary Offense Category . . . . .	D-25
Upward Departures in Each Primary Offense Category . . . . .	D-26
Otherwise Above Guideline Range in Each Primary Offense Category . . . . .	D-27

**NATIONAL COMPARISON OF SENTENCE IMPOSED AND  
POSITION RELATIVE TO THE GUIDELINE RANGE**

Cases Sentenced One Year Since *U.S. v. Booker* with Data Available to USSC on February 22, 2006

	N	%
<b>TOTAL</b> <sup>1</sup>	<b>65,368</b>	<b>100.0</b>
<b>WITHIN GUIDELINE RANGE</b>	<b>40,645</b>	<b>62.2</b>
<b>DEPARTURE ABOVE GUIDELINE RANGE</b>	<b>175</b>	<b>0.3</b>
Upward Departure from the Guideline Range <sup>2</sup>	127	0.2
Upward Departure with <i>Booker</i> /18 U.S.C. § 3553 <sup>3</sup>	48	0.1
<b>OTHERWISE ABOVE THE GUIDELINE RANGE</b>	<b>859</b>	<b>1.3</b>
Above the Range with <i>Booker</i> /18 U.S.C. § 3553 <sup>4</sup>	426	0.6
All Remaining Cases Above the Guideline Range <sup>5</sup>	433	0.7
<b>GOVERNMENT SPONSORED BELOW RANGE</b>	<b>15,500</b>	<b>23.7</b>
§5K1.1 Substantial Assistance Departure	9,402	14.4
§5K3.1 Early Disposition Program Departure	4,366	6.7
Government-Sponsored Departure <sup>6</sup>	1,732	2.6
<b>DEPARTURE BELOW GUIDELINE RANGE</b>	<b>2,101</b>	<b>3.2</b>
Downward Departure from the Guideline Range <sup>2</sup>	1,456	2.2
Downward Departure with <i>Booker</i> /18 U.S.C. § 3553 <sup>3</sup>	645	1.0
<b>OTHERWISE BELOW THE GUIDELINE RANGE</b>	<b>6,088</b>	<b>9.3</b>
Below the Range with <i>Booker</i> /18 U.S.C. § 3553 <sup>4</sup>	3,850	5.9
All Remaining Cases Below the Guideline Range <sup>5</sup>	2,238	3.4

<sup>1</sup>This table reflects the 67,564 cases sentenced one year since *U.S. v. Booker* (January 12, 2005 through January 11, 2006) with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by February 23, 2006. Of this total, there are 2,196 cases excluded for one of two general reasons. Some excluded cases involve certain Class A misdemeanors or other offenses which do not reference a sentencing guideline. Other excluded cases have information missing from the submitted documents that prevents the comparison of the sentence and the guideline range. As missing documents are received, subsequent U.S. Sentencing Commission data releases will incorporate the new information.

<sup>2</sup>All cases with imposed sentences outside of the guideline range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*.

<sup>3</sup>All cases with imposed sentences outside of the guideline range citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, and additionally mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range.

<sup>4</sup>All cases with imposed sentences outside of the guideline range mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range.

<sup>5</sup>Cases with imposed sentences outside of the guideline range that do not fall into the three previous categories. Based on the information submitted on the Statement of Reasons, these cases cannot be classified as a guideline departure, or as a sentence outside the guideline range pursuant to *Booker*/18 U.S.C. § 3553. This category includes cases which cite departure reasons that are not affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reason for the sentence outside of the guideline range.

<sup>6</sup>Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, Special Post-*Booker* Coding Project, (data extraction on February 22, 2006; table prepared on February 23, 2006). Summary numbers may not add up to their component parts due to rounding

**MOST FREQUENTLY APPLIED GUIDELINES: COMPARISON OF SENTENCE IMPOSED  
AND POSITION RELATIVE TO THE GUIDELINE RANGE**

**Cases Sentenced One Year Since *US v. Booker* with Data Available to USSC on February 22, 2006**

	<b>Four Most Frequently Applied Primary Guidelines</b>									
	<b>All Cases</b>		<b>§2D1.1 Drug Trafficking</b>		<b>§2L1.2 Unlawful Entry</b>		<b>§2K2.1 Firearms</b>		<b>§2B1.1 Theft and Fraud</b>	
	N	%	N	%	N	%	N	%	N	%
<b>TOTAL<sup>1</sup></b>	<b>65,368</b>	<b>100.0</b>	<b>22,496</b>	<b>100.0</b>	<b>10,205</b>	<b>100.0</b>	<b>6,423</b>	<b>100.0</b>	<b>6,737</b>	<b>100.0</b>
<b>WITHIN GUIDELINE RANGE</b>	<b>40,645</b>	<b>62.2</b>	<b>12,122</b>	<b>53.9</b>	<b>5,905</b>	<b>57.9</b>	<b>4,508</b>	<b>70.2</b>	<b>4,773</b>	<b>70.8</b>
<b>DEPARTURE ABOVE GUIDELINE</b>	<b>175</b>	<b>0.3</b>	<b>18</b>	<b>0.1</b>	<b>16</b>	<b>0.2</b>	<b>25</b>	<b>0.4</b>	<b>21</b>	<b>0.3</b>
Upward Departure from the Guideline Range <sup>2</sup>	127	0.2	15	0.1	10	0.1	20	0.3	13	0.2
Upward Departure with Booker/18 USC §3553 <sup>3</sup>	48	0.1	3	0.0	6	0.1	5	0.1	8	0.1
<b>OTHERWISE ABOVE THE RANGE</b>	<b>859</b>	<b>1.3</b>	<b>124</b>	<b>0.6</b>	<b>89</b>	<b>0.9</b>	<b>130</b>	<b>2.0</b>	<b>168</b>	<b>2.5</b>
Above the Range with Booker/18 USC §3553 <sup>4</sup>	426	0.6	58	0.3	53	0.5	62	1.0	86	1.3
All Remaining Cases Above the Guideline Range <sup>5</sup>	433	0.7	66	0.3	36	0.4	68	1.1	82	1.2
<b>GOVERNMENT BELOW GUIDELINE</b>	<b>15,500</b>	<b>23.7</b>	<b>7,356</b>	<b>32.7</b>	<b>3,228</b>	<b>31.6</b>	<b>788</b>	<b>12.3</b>	<b>813</b>	<b>12.1</b>
§5K1.1 Substantial Assistance Departure	9,402	14.4	5,817	25.9	65	0.6	598	9.3	703	10.4
§5K3.1 Early Disposition Program Departure	4,366	6.7	948	4.2	2,835	27.8	36	0.6	10	0.2
Government-Sponsored Departure <sup>6</sup>	1,732	2.6	591	2.6	328	3.2	154	2.4	100	1.5
<b>DEPARTURE BELOW GUIDELINE</b>	<b>2,101</b>	<b>3.2</b>	<b>697</b>	<b>3.1</b>	<b>322</b>	<b>3.2</b>	<b>262</b>	<b>4.1</b>	<b>236</b>	<b>3.5</b>
Downward Departure from the Guideline Range <sup>2</sup>	1,456	2.2	478	2.1	250	2.5	169	2.6	158	2.3
Downward Departure with Booker/18 USC §3553 <sup>3</sup>	645	1.0	219	1.0	72	0.7	93	1.5	78	1.2
<b>OTHERWISE BELOW THE RANGE</b>	<b>6,088</b>	<b>9.3</b>	<b>2,179</b>	<b>9.7</b>	<b>645</b>	<b>6.3</b>	<b>710</b>	<b>11.1</b>	<b>726</b>	<b>10.8</b>
Below the Range with Booker/18 USC §3553 <sup>4</sup>	3,850	5.9	1,450	6.5	397	3.9	462	7.2	413	6.1
All Remaining Cases Below the Guideline Range <sup>5</sup>	2,238	3.4	729	3.2	248	2.4	248	3.9	313	4.7

<sup>1</sup>This table reflects the 67,564 cases sentenced one year since the U.S. v. Booker (January 12, 2005 through January 11, 2006), with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by February 22, 2006. Of this total, there are 2,196 cases excluded for one of two general reasons. Some excluded cases involve certain Class A misdemeanors or other offenses which do not reference a sentencing guideline. Other excluded cases have information missing from the submitted documents that prevents the comparison of the sentence and the guideline range. As missing documents are received, subsequent U.S. Sentencing Commission data releases will incorporate the new information.

<sup>2</sup>All cases with imposed sentences outside of the guideline range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*.

<sup>3</sup>All cases with imposed sentences outside of the guideline range citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, and additionally mentioning either *US v. Booker*, 18 USC §3553, or related factors as a reason for a sentence outside of the guideline range.

<sup>4</sup>All cases with imposed sentences outside of the guideline range mentioning only *US v. Booker*, 18 USC §3553, or related factors as a reason for a sentence outside of the guideline range.

<sup>5</sup>Cases with imposed sentences outside of the guideline range that do not fall into the three previous categories. Based on the information submitted on the Statement of Reasons, these cases cannot be classified as a guideline departure, or as a sentence outside the guideline range pursuant to Booker/18 USC §3553. This category includes cases which cite departure reasons that are *not* affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reason for the sentence outside of the guideline range.

<sup>6</sup>Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, (data extraction on February 22, 2006; table prepared on February 23, 2006). Cases with multiple guideline calculations are classified by the guideline with the highest offense level. Summary numbers may not add up to their component parts due to rounding.

**OFFENDERS SENTENCED FOR EACH CHAPTER TWO GUIDELINE<sup>1</sup>**  
**Cases Sentenced One Year Since U.S. v. Booker with Data Available to USSC on February 22, 2006**

Guideline	As Primary Guideline		As Any Guideline		Guideline	As Primary Guideline		As Any Guideline	
	n	%	n	%		n	%	n	%
2A1.1	151	0.2	161	0.2	2D1.7	14	0.0	16	0.0
2A1.2	34	0.1	38	0.1	2D1.8	58	0.1	98	0.1
2A1.3	20	0.0	20	0.0	2D1.9	0	0.0	0	0.0
2A1.4	32	0.1	33	0.0	2D1.10	21	0.0	22	0.0
2A1.5	18	0.0	40	0.1	2D1.11	172	0.3	191	0.3
2A2.1	54	0.1	82	0.1	2D1.12	26	0.0	40	0.1
2A2.2	340	0.5	386	0.6	2D1.13	0	0.0	0	0.0
2A2.3	33	0.1	38	0.1	2D2.1	366	0.6	453	0.7
2A2.4	131	0.2	151	0.2	2D2.2	45	0.1	53	0.1
2A3.1	145	0.2	151	0.2	2D2.3	1	0.0	1	0.0
2A3.2	134	0.2	156	0.2	2D3.1	3	0.0	3	0.0
2A3.3	6	0.0	6	0.0	2D3.2	0	0.0	0	0.0
2A3.4	30	0.0	41	0.1	2D3.3	0	0.0	0	0.0
2A4.1	55	0.1	74	0.1	2D3.4	0	0.0	0	0.0
2A4.2	1	0.0	1	0.0	2D3.5	0	0.0	0	0.0
2A5.1	0	0.0	1	0.0	2E1.1	30	0.0	100	0.1
2A5.2	11	0.0	12	0.0	2E1.2	14	0.0	78	0.1
2A5.3	0	0.0	0	0.0	2E1.3	0	0.0	27	0.0
2A6.1	149	0.2	157	0.2	2E1.4	12	0.0	18	0.0
2A6.2	6	0.0	14	0.0	2E1.5	0	0.0	0	0.0
2B1.1	6,880	11.0	7,496	11.0	2E2.1	28	0.0	35	0.1
2B1.2	0	0.0	0	0.0	2E3.1	103	0.2	123	0.2
2B1.3	5	0.0	5	0.0	2E3.2	0	0.0	0	0.0
2B1.4	10	0.0	10	0.0	2E3.3	0	0.0	0	0.0
2B1.5	14	0.0	15	0.0	2E4.1	24	0.0	31	0.0
2B2.1	65	0.1	77	0.1	2E5.1	11	0.0	15	0.0
2B2.2	0	0.0	0	0.0	2E5.2	0	0.0	0	0.0
2B2.3	3	0.0	3	0.0	2E5.3	3	0.0	9	0.0
2B3.1	1,782	2.8	1,900	2.8	2E5.4	0	0.0	0	0.0
2B3.2	48	0.1	74	0.1	2E5.5	0	0.0	0	0.0
2B3.3	13	0.0	18	0.0	2E5.6	0	0.0	0	0.0
2B4.1	57	0.1	59	0.1	2F1.1	1,162	1.9	1,230	1.8
2B5.1	518	0.8	552	0.8	2F1.2	5	0.0	6	0.0
2B5.2	0	0.0	0	0.0	2G1.1	64	0.1	111	0.2
2B5.3	131	0.2	142	0.2	2G1.2	1	0.0	1	0.0
2B5.4	0	0.0	0	0.0	2G1.3	70	0.1	75	0.1
2B6.1	14	0.0	14	0.0	2G2.1	98	0.2	116	0.2
2C1.1	217	0.3	239	0.4	2G2.2	527	0.8	549	0.8
2C1.2	24	0.0	24	0.0	2G2.3	0	0.0	0	0.0
2C1.3	11	0.0	11	0.0	2G2.4	396	0.6	438	0.6
2C1.4	2	0.0	2	0.0	2G2.5	1	0.0	1	0.0
2C1.5	0	0.0	0	0.0	2G3.1	13	0.0	18	0.0
2C1.6	0	0.0	0	0.0	2G3.2	0	0.0	0	0.0
2C1.7	33	0.1	39	0.1	2H1.1	48	0.1	54	0.1
2C1.8	2	0.0	3	0.0	2H1.2	0	0.0	0	0.0
2D1.1	22,911	36.5	24,003	35.2	2H1.3	0	0.0	0	0.0
2D1.2	333	0.5	347	0.5	2H1.4	0	0.0	0	0.0
2D1.3	0	0.0	0	0.0	2H1.5	0	0.0	0	0.0
2D1.4	0	0.0	0	0.0	2H2.1	8	0.0	8	0.0
2D1.5	22	0.0	27	0.0	2H3.1	10	0.0	13	0.0
2D1.6	33	0.1	166	0.2	2H3.2	3	0.0	3	0.0

(continued)

Guideline	As Primary Guideline		As Any Guideline		Guideline	As Primary Guideline		As Any Guideline	
	n	%	n	%		n	%	n	%
2H3.3	10	0.0	14	0.0	2M4.1	0	0.0	0	0.0
2H4.1	7	0.0	7	0.0	2M5.1	8	0.0	9	0.0
2H4.2	0	0.0	0	0.0	2M5.2	27	0.0	29	0.0
2J1.1	0	0.0	26	0.0	2M5.3	6	0.0	9	0.0
2J1.2	118	0.2	160	0.2	2M6.1	13	0.0	13	0.0
2J1.3	65	0.1	90	0.1	2M6.2	1	0.0	1	0.0
2J1.4	15	0.0	28	0.0	2N1.1	2	0.0	2	0.0
2J1.5	2	0.0	2	0.0	2N1.2	2	0.0	2	0.0
2J1.6	49	0.1	63	0.1	2N1.3	0	0.0	0	0.0
2J1.7	131	0.2	138	0.2	2N2.1	32	0.1	58	0.1
2J1.8	0	0.0	0	0.0	2N3.1	1	0.0	3	0.0
2J1.9	0	0.0	0	0.0	2P1.1	217	0.3	240	0.4
2K1.1	4	0.0	5	0.0	2P1.2	78	0.1	102	0.1
2K1.2	0	0.0	0	0.0	2P1.3	14	0.0	14	0.0
2K1.3	45	0.1	48	0.1	2P1.4	0	0.0	0	0.0
2K1.4	58	0.1	80	0.1	2Q1.1	0	0.0	0	0.0
2K1.5	13	0.0	13	0.0	2Q1.2	43	0.1	45	0.1
2K1.6	1	0.0	1	0.0	2Q1.3	40	0.1	40	0.1
2K1.7	0	0.0	0	0.0	2Q1.4	0	0.0	0	0.0
2K2.1	6,478	10.3	6,859	10.1	2Q1.5	0	0.0	0	0.0
2K2.2	0	0.0	0	0.0	2Q1.6	0	0.0	0	0.0
2K2.3	0	0.0	0	0.0	2Q2.1	101	0.2	104	0.2
2K2.4	1	0.0	1	0.0	2Q2.2	0	0.0	0	0.0
2K2.5	12	0.0	14	0.0	2R1.1	18	0.0	20	0.0
2K2.6	2	0.0	4	0.0	2S1.1	949	1.5	1,037	1.5
2K3.1	0	0.0	0	0.0	2S1.2	20	0.0	27	0.0
2L1.1	3,081	4.9	3,163	4.6	2S1.3	261	0.4	291	0.4
2L1.2	10,313	16.4	10,444	15.3	2S1.4	0	0.0	0	0.0
2L1.3	0	0.0	0	0.0	2T1.1	491	0.8	603	0.9
2L2.1	370	0.6	400	0.6	2T1.2	0	0.0	0	0.0
2L2.2	1,011	1.6	1,068	1.6	2T1.3	1	0.0	1	0.0
2L2.3	0	0.0	0	0.0	2T1.4	111	0.2	123	0.2
2L2.4	0	0.0	0	0.0	2T1.5	0	0.0	0	0.0
2L2.5	0	0.0	0	0.0	2T1.6	10	0.0	11	0.0
2M1.1	1	0.0	1	0.0	2T1.7	0	0.0	0	0.0
2M2.1	0	0.0	0	0.0	2T1.8	0	0.0	0	0.0
2M2.2	0	0.0	0	0.0	2T1.9	23	0.0	36	0.1
2M2.3	0	0.0	0	0.0	2T2.1	0	0.0	1	0.0
2M2.4	0	0.0	0	0.0	2T2.2	0	0.0	0	0.0
2M3.1	0	0.0	0	0.0	2T3.1	32	0.1	37	0.1
2M3.2	0	0.0	0	0.0	2T3.2	0	0.0	0	0.0
2M3.3	1	0.0	1	0.0	2T4.1	0	0.0	0	0.0
2M3.4	0	0.0	0	0.0	2X1.1	128	0.2	1,290	1.9
2M3.5	0	0.0	0	0.0	2X2.1	0	0.0	49	0.1
2M3.6	0	0.0	0	0.0	2X3.1	103	0.2	120	0.2
2M3.7	0	0.0	0	0.0	2X4.1	430	0.7	444	0.7
2M3.8	0	0.0	0	0.0	2X5.1	0	0.0	47	0.1
2M3.9	0	0.0	0	0.0					
<b>Total number of guidelines applied:</b>						<b>68,162</b>			
<b>Number of cases with at least one guideline applied:</b>						<b>62,765</b>			

<sup>1</sup>Of the 67,564 cases, 4,799 were excluded due to missing guideline applied. The total for any guideline can exceed that for primary guideline because a case can have several guidelines applied, but only one primary guideline.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**GUIDELINE OFFENDERS IN EACH CIRCUIT AND DISTRICT<sup>1</sup>**

**Cases Sentenced One Year Since U.S. v. Booker with Data Available to USSC on February 22, 2006**

<b>CIRCUIT</b>			<b>CIRCUIT</b>		
District	Number	Percent	District	Number	Percent
<b>TOTAL</b>	<b>67,564</b>	<b>100.0</b>			
<b>D.C. CIRCUIT</b>	<b>485</b>	<b>0.7</b>	<b>FIFTH CIRCUIT</b>	<b>14,755</b>	<b>21.8</b>
District of Columbia	485	0.7	Louisiana		
			Eastern	338	0.5
<b>FIRST CIRCUIT</b>	<b>1,528</b>	<b>2.3</b>	Middle	178	0.3
Maine	236	0.3	Western	391	0.6
Massachusetts	467	0.7	Mississippi		
New Hampshire	181	0.3	Northern	192	0.3
Puerto Rico	512	0.8	Southern	342	0.5
Rhode Island	132	0.2	Texas		
			Eastern	740	1.1
<b>SECOND CIRCUIT</b>	<b>3,973</b>	<b>5.9</b>	Northern	917	1.4
Connecticut	385	0.6	Southern	6,447	9.5
New York			Western	5,210	7.7
Eastern	1,170	1.7	<b>SIXTH CIRCUIT</b>	<b>5,118</b>	<b>7.6</b>
Northern	363	0.5	Kentucky		
Southern	1,271	1.9	Eastern	489	0.7
Western	590	0.9	Western	375	0.6
Vermont	194	0.3	Michigan		
			Eastern	730	1.1
<b>THIRD CIRCUIT</b>	<b>3,174</b>	<b>4.7</b>	Western	403	0.6
Delaware	161	0.2	Ohio		
New Jersey	947	1.4	Northern	985	1.5
Pennsylvania			Southern	618	0.9
Eastern	936	1.4	Tennessee		
Middle	583	0.9	Eastern	618	0.9
Western	430	0.6	Middle	323	0.5
Virgin Islands	117	0.2	Western	577	0.9
			<b>SEVENTH CIRCUIT</b>	<b>2,940</b>	<b>4.4</b>
<b>FOURTH CIRCUIT</b>	<b>6,178</b>	<b>9.1</b>	Illinois		
Maryland	675	1.0	Central	366	0.5
North Carolina			Northern	1,058	1.6
Eastern	657	1.0	Southern	289	0.4
Middle	443	0.7	Indiana		
Western	571	0.8	Northern	368	0.5
South Carolina	991	1.5	Southern	305	0.5
Virginia			Wisconsin		
Eastern	1,594	2.4	Eastern	367	0.5
Western	624	0.9	Western	187	0.3
West Virginia					
Northern	316	0.5			
Southern	307	0.5			

(continued)

<b>CIRCUIT</b>			<b>CIRCUIT</b>		
District	Number	Percent	District	Number	Percent
<b>EIGHTH CIRCUIT</b>	<b>4,920</b>	<b>7.3</b>	<b>TENTH CIRCUIT</b>	<b>5,449</b>	<b>8.1</b>
Arkansas			Colorado	630	0.9
Eastern	264	0.4	Kansas	624	0.9
Western	198	0.3	New Mexico	2,489	3.7
Iowa			Oklahoma		
Northern	359	0.5	Eastern	96	0.1
Southern	334	0.5	Northern	204	0.3
Minnesota	549	0.8	Western	248	0.4
Missouri			Utah	953	1.4
Eastern	972	1.4	Wyoming	205	0.3
Western	783	1.2			
Nebraska	811	1.2	<b>ELEVENTH CIRCUIT</b>	<b>6,391</b>	<b>9.5</b>
North Dakota	227	0.3	Alabama		
South Dakota	423	0.6	Middle	215	0.3
			Northern	436	0.6
<b>NINTH CIRCUIT</b>	<b>12,653</b>	<b>18.7</b>	Southern	333	0.5
Alaska	202	0.3	Florida		
Arizona	3,895	5.8	Middle	1,575	2.3
California			Northern	317	0.5
Central	1,450	2.1	Southern	2,067	3.1
Eastern	899	1.3	Georgia		
Northern	631	0.9	Middle	418	0.6
Southern	2,270	3.4	Northern	682	1.0
Guam	124	0.2	Southern	348	0.5
Hawaii	457	0.7			
Idaho	216	0.3			
Montana	397	0.6			
Nevada	427	0.6			
Northern Mariana Islands	25	0.0			
Oregon	533	0.8			
Washington					
Eastern	361	0.5			
Western	766	1.1			

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

## Guideline Application Trends, National and Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06<sup>1</sup>  
(Post-Booker data extracted February 22, 2006)

### NATIONAL

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	64.0%	65.0%	69.4%	72.2%	62.2%
Upward Departures	0.6%	0.8%	0.8%	0.8%	0.3% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.3% <sup>3</sup>
Substantial Assistance Departures	17.1%	17.4%	15.9%	15.5%	14.4%
Other Gov't Sponsored Departures	—	—	6.3% <sup>4</sup>	6.4%	9.3% <sup>4</sup>
Other Downward Departures	18.3% <sup>5</sup>	16.8% <sup>5</sup>	7.5%	5.2%	3.2% <sup>2</sup>
Otherwise Below Range	—	—	—	—	9.3% <sup>3</sup>

### DC CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	74.6%	59.9%	64.6%	59.2%	52.5%
Upward Departures	0.4%	0.5%	0.2%	1.0%	0.2% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.9% <sup>3</sup>
Substantial Assistance Departures	13.8%	31.1%	26.4%	31.3%	24.2%
Other Gov't Sponsored Departures	—	—	4.4% <sup>4</sup>	3.9%	8.2% <sup>4</sup>
Other Downward Departures	11.2% <sup>5</sup>	8.5% <sup>5</sup>	4.4%	4.7%	2.7% <sup>2</sup>
Otherwise Below Range	—	—	—	—	10.3% <sup>3</sup>

### FIRST CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	73.3%	75.7%	77.3%	79.6%	65.3%
Upward Departures	0.4%	0.6%	0.7%	0.9%	0.3% <sup>2</sup>
Otherwise Above Range	—	—	—	—	2.2% <sup>3</sup>
Substantial Assistance Departures	14.6%	14.4%	13.5%	13.8%	12.3%
Other Gov't Sponsored Departures	—	—	0.7% <sup>4</sup>	0.5%	2.1% <sup>4</sup>
Other Downward Departures	11.7% <sup>5</sup>	9.3% <sup>5</sup>	7.8%	5.2%	4.0% <sup>2</sup>
Otherwise Below Range	—	—	—	—	13.9% <sup>3</sup>

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## Guideline Application Trends, National and Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06<sup>1</sup>

### SECOND CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	57.5%	61.3%	63.2%	63.8%	50.1%
Upward Departures	0.4%	0.6%	0.5%	0.9%	0.2% <sup>2</sup>
Otherwise Above Range	—	—	—	—	0.9% <sup>3</sup>
Substantial Assistance Departures	21.7%	19.0%	17.5%	19.2%	22.7%
Other Gov't Sponsored Departures	—	—	2.8% <sup>4</sup>	2.5%	3.0% <sup>4</sup>
Other Downward Departures	20.4% <sup>5</sup>	19.1% <sup>5</sup>	16.0%	13.6%	6.7% <sup>2</sup>
Otherwise Below Range	—	—	—	—	16.4% <sup>3</sup>

### THIRD CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	60.2%	58.9%	62.3%	62.6%	52.1%
Upward Departures	0.5%	0.9%	0.9%	0.6%	0.2% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.1% <sup>3</sup>
Substantial Assistance Departures	30.6%	32.3%	28.8%	30.3%	27.3%
Other Gov't Sponsored Departures	—	—	0.6% <sup>4</sup>	0.8%	1.7% <sup>4</sup>
Other Downward Departures	8.8% <sup>5</sup>	7.9% <sup>5</sup>	7.4%	5.8%	4.1% <sup>2</sup>
Otherwise Below Range	—	—	—	—	13.5% <sup>3</sup>

### FOURTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	73.7%	76.6%	77.0%	79.0%	67.2%
Upward Departures	0.9%	0.7%	0.6%	1.0%	0.3% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.3% <sup>3</sup>
Substantial Assistance Departures	20.2%	18.6%	18.3%	16.7%	17.8%
Other Gov't Sponsored Departures	—	—	0.3% <sup>4</sup>	0.3%	1.3% <sup>4</sup>
Other Downward Departures	5.2% <sup>5</sup>	4.2% <sup>5</sup>	3.8%	3.0%	2.5% <sup>2</sup>
Otherwise Below Range	—	—	—	—	9.7% <sup>3</sup>

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## Guideline Application, National and Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06<sup>1</sup>

### FIFTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	69.1%	71.0%	73.7%	80.2%	72.0%
Upward Departures	0.5%	0.9%	0.9%	0.8%	0.2% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.5% <sup>3</sup>
Substantial Assistance Departures	12.3%	13.4%	12.5%	10.3%	7.8%
Other Gov't Sponsored Departures	—	—	5.4% <sup>4</sup>	5.2%	9.9% <sup>4</sup>
Other Downward Departures	18.1% <sup>5</sup>	14.7% <sup>5</sup>	7.5%	3.5%	2.5% <sup>2</sup>
Otherwise Below Range	—	—	—	—	6.1% <sup>3</sup>

### SIXTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	65.1%	66.9%	69.1%	69.7%	57.9%
Upward Departures	0.5%	0.8%	0.4%	0.5%	0.2% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.3% <sup>3</sup>
Substantial Assistance Departures	27.2%	26.0%	24.6%	24.3%	25.0%
Other Gov't Sponsored Departures	—	—	0.5% <sup>4</sup>	0.4%	1.6% <sup>4</sup>
Other Downward Departures	7.3% <sup>5</sup>	6.3% <sup>5</sup>	5.3%	5.1%	3.0% <sup>2</sup>
Otherwise Below Range	—	—	—	—	11.0% <sup>3</sup>

### SEVENTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	71.0%	69.3%	72.5%	75.4%	63.5%
Upward Departures	1.0%	0.8%	1.0%	1.3%	0.3% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.1% <sup>3</sup>
Substantial Assistance Departures	21.2%	21.8%	21.2%	19.0%	17.2%
Other Gov't Sponsored Departures	—	—	0.8% <sup>4</sup>	0.8%	2.6% <sup>4</sup>
Other Downward Departures	6.9% <sup>5</sup>	8.1% <sup>5</sup>	4.5%	3.6%	3.6% <sup>2</sup>
Otherwise Below Range	—	—	—	—	11.9% <sup>3</sup>

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## Guideline Application Trends By Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06<sup>1</sup>

### EIGHTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	66.8%	69.3%	72.2%	77.0%	64.4%
Upward Departures	0.7%	1.2%	1.1%	0.9%	0.4% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.6% <sup>3</sup>
Substantial Assistance Departures	22.0%	18.9%	17.6%	15.3%	14.0%
Other Gov't Sponsored Departures	—	—	2.0% <sup>4</sup>	2.1%	3.9% <sup>4</sup>
Other Downward Departures	10.5% <sup>5</sup>	10.7% <sup>5</sup>	7.1%	4.7%	3.5% <sup>2</sup>
Otherwise Below Range	—	—	—	—	12.3% <sup>3</sup>

### NINTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	50.1%	48.8%	59.6%	61.8%	48.5%
Upward Departures	0.4%	0.7%	1.1%	0.8%	0.4% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.2% <sup>3</sup>
Substantial Assistance Departures	10.7%	11.8%	10.2%	10.6%	10.4%
Other Gov't Sponsored Departures	—	—	19.2% <sup>4</sup>	20.4%	27.5% <sup>4</sup>
Other Downward Departures	38.7% <sup>5</sup>	38.7% <sup>5</sup>	9.9%	6.5%	3.5% <sup>2</sup>
Otherwise Below Range	—	—	—	—	8.6% <sup>3</sup>

### TENTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	65.0%	66.6%	73.1%	73.9%	66.5%
Upward Departures	0.7%	0.6%	0.6%	0.7%	0.1% <sup>2</sup>
Otherwise Above Range	—	—	—	—	0.9% <sup>3</sup>
Substantial Assistance Departures	11.0%	11.0%	9.4%	10.3%	9.3%
Other Gov't Sponsored Departures	—	—	11.4% <sup>4</sup>	10.7%	13.6% <sup>4</sup>
Other Downward Departures	23.3% <sup>5</sup>	21.9% <sup>5</sup>	5.5%	4.5%	2.9% <sup>2</sup>
Otherwise Below Range	—	—	—	—	6.7% <sup>3</sup>

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## Guideline Application Trends By Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06<sup>1</sup>

### ELEVENTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	72.1%	70.2%	74.5%	74.7%	69.9%
Upward Departures	0.6%	0.7%	0.8%	0.8%	0.4% <sup>2</sup>
Otherwise Above Range	—	—	—	—	1.5% <sup>3</sup>
Substantial Assistance Departures	19.9%	22.4%	19.9%	21.0%	17.1%
Other Gov't Sponsored Departures	—	—	0.3% <sup>4</sup>	0.2%	0.9% <sup>4</sup>
Other Downward Departures	7.5% <sup>5</sup>	6.7% <sup>5</sup>	4.5%	3.3%	2.6% <sup>2</sup>
Otherwise Below Range	—	—	—	—	7.6% <sup>3</sup>

<sup>1</sup>In 2003, the Commission augmented its data coding procedures to determine the proportion of non-substantial assistance downward departures that were sponsored by the government. Data prior to 2003 does not distinguish non-substantial assistance government initiated downward departures from other downward departures. In this table, data from FY2001 and 2002 on “Other Downward Departures” combines both government sponsored and non-government sponsored downward departures. For FY2003 and FY2004, the “Other Downward Departures” data distinguishes departures that were sponsored by the government from those not sponsored by the government. For example, using the national data, 6.3% of downward departures were government sponsored and 7.5% were other downward departures; the combination of these values (13.8%) is directly comparable to the data for “Other Downward Departures” from the preceding years. For FY2004, this table reflects only cases sentenced prior to the *Blakely v Washington* decision on June 24, 2004. For FY2005-06, this table reflects cases sentenced one year since the *U.S. v Booker* (January 12, 2005 through January 11, 2006), with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by February 22, 2006. In these cases, a further distinction is made among below guideline range sentences. The data report three categories of below range sentences: those sponsored by the government; those not sponsored by the government and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*; and those mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range. Cases citing both reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and mentioning *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors are included in the “Other Downward Departures” category.

<sup>2</sup>Includes cases with imposed sentences outside of the guideline range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and all cases with imposed sentences outside of the guideline range citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, and additionally mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range.

<sup>3</sup>Includes cases with imposed sentences outside of the guideline range mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range and all cases with imposed sentences outside of the guideline range that do not fall into the previous category. This category includes cases which cite departure reasons that are *not* affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reason for the sentence outside of the guideline range.

<sup>4</sup>Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant. Note that §5K3.1 (Early Disposition Program) cases are included in this category.

<sup>5</sup>Includes cases in which the below range sentence was sponsored by the government and those not sponsored by the government. Prior to FY2003, the Commission did not code this distinction.

SOURCE: U.S. Sentencing Commission *Sourcebook of Federal Sentencing*, FY2001 through FY2003, Table 26; U.S. Sentencing Commission 2004 Fiscal Year Data File, USSCFY04, Pre-Blakely Only Cases (October 1, 2003 through June 24, 2004); Special Post-Booker Coding Project, (data extracted February 22, 2006; table prepared February 23, 2006). Percents may not sum to 100 percent due to rounding.

**Distribution of Offenders Receiving Sentencing Options for the Most Frequently Applied Guidelines**  
 FY 2000-2003, Pre-Blakely FY 2004, and Post-Booker FY 2005-2006 (data extracted February 22, 2006)

	FY 2000		FY 2001		FY 2002		FY 2003		Pre-Blakely FY 2004		Post-Booker FY2005-06	
	N	%	N	%	N	%	N	%	N	%	N	%
<b>Drug Trafficking §2D1.1<sup>1</sup></b>	21,715	100.0	22,608	100.0	24,013	100.0	23,833	100.0	16,955	100.0	22,446	100.0
Prison only <sup>2</sup>	20,422	94.0	21,143	93.5	22,407	93.3	22,455	94.2	16,081	94.9	21,218	94.5
Prison plus confinement conditions <sup>3</sup>	430	2.0	469	2.1	515	2.1	402	1.7	337	2.0	485	2.2
Probation plus confinement conditions <sup>4</sup>	379	1.7	488	2.2	465	1.9	469	2.0	227	1.3	320	1.4
Probation only <sup>5</sup>	484	2.2	508	2.2	626	2.6	507	2.1	310	1.8	423	1.9
<b>Immigration Unlawful Entry §2L1.2<sup>1</sup></b>	6,341	100.0	5,946	100.0	6,993	100.0	9,167	100.0	7,058	100.0	10,232	100.0
Prison only <sup>2</sup>	6,291	99.2	5,901	99.2	6,952	99.4	9,132	99.6	7,032	99.6	10,160	99.3
Prison plus confinement conditions <sup>3</sup>	10	0.2	14	0.2	7	0.1	11	0.1	10	0.1	19	0.2
Probation plus confinement conditions <sup>4</sup>	1	0.0	1	0.0	0	0.0	2	0.0	0	0.0	2	0.0
Probation only <sup>5</sup>	39	0.6	30	0.5	34	0.5	22	0.2	16	0.2	51	0.5
<b>Firearms §2K2.1<sup>1</sup></b>	2,997	100.0	3,629	100.0	4,173	100.0	5,425	100.0	4,782	100.0	6,266	100.0
Prison only <sup>2</sup>	2,604	86.9	3,177	87.5	3,680	88.2	4,779	88.1	4,292	89.8	5,625	89.8
Prison plus confinement conditions <sup>3</sup>	104	3.5	141	3.9	158	3.8	174	3.2	128	2.7	188	3.0
Probation plus confinement conditions <sup>4</sup>	147	4.9	155	4.3	139	3.3	224	4.1	160	3.4	228	3.6
Probation only <sup>5</sup>	142	4.7	156	4.3	196	4.7	248	4.6	202	4.2	225	3.6
<b>Theft/Fraud §2B1.1 or §2F1.1<sup>1</sup></b>	9,015	100.0	8,768	100.0	9,243	100.0	9,606	100.0	6,909	100.0	7,781	100.0
Prison only <sup>2</sup>	4,253	47.2	4,339	49.5	4,531	49.0	4,803	50.0	3,574	51.7	4,186	53.8
Prison plus confinement conditions <sup>3</sup>	1,077	11.9	1,053	12.0	959	10.4	840	8.7	629	9.1	716	9.2
Probation plus confinement conditions <sup>4</sup>	1,540	17.1	1,481	16.9	1,421	15.4	1,463	15.2	997	14.4	995	12.8
Probation only <sup>5</sup>	2,145	23.8	1,895	21.6	2,332	25.2	2,500	26.0	1,709	24.7	1,884	24.2

<sup>1</sup>Sections report only cases with one single guideline application using the indicated guideline. Cases receiving only monetary sentences are excluded.

<sup>2</sup>Prison only cases receive straight prison time.

<sup>3</sup>Prison plus confinement cases receive a combination of prison time and alternative confinement time as defined in USSG §5C1.1.

<sup>4</sup>Probation plus confinement cases receive, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

<sup>5</sup>Probation only cases receive straight probation time.

SOURCE: U.S. Sentencing Commission, 2000-2003 Fiscal Year Datafiles, USSCFY00-USSCFY03; 2004 Fiscal Year Datafile, USSCFY04, Pre-Blakely Only Cases (October 1, 2003 through June 24, 2004); Special Post-Booker Coding Project with cases sentenced one year since *U.S. v. Booker*, January 12, 2005 through January 11, 2006 (data extraction on February 22, 2006; table prepared February 23, 2006). Numbers may not sum to 100 percent due to rounding.

# Average and Median Sentence Imposed<sup>1</sup> for the Most Frequently Applied Guidelines

Fiscal Year 2000 and Fiscal Year 2001

	Fiscal Year 2000				Fiscal Year 2001			
	Average Months	Median Months	GL Median <sup>2</sup>	N	Average Months	Median Months	GL Median <sup>2</sup>	N
<b>All Cases (one guideline computation)<sup>3</sup></b>	<b>50</b>	<b>30</b>		<b>51,342</b>	<b>50</b>	<b>30</b>		<b>51,809</b>
<b>Drug Trafficking §2D1.1<sup>4</sup></b>	<b>72</b>	<b>50</b>	<b>60</b>	<b>21,715</b>	<b>70</b>	<b>48</b>	<b>60</b>	<b>22,608</b>
Prison only <sup>5</sup>	74	57	63	20,422	72	51	60	21,143
Prison plus confinement conditions <sup>6</sup>	21	10	21	430	29	10	18	469
Probation plus confinement conditions <sup>7</sup>	6	6	12	379	6	6	12	488
Probation only <sup>8</sup>	0	0	—	484	0	0	—	508
<b>Immigration Unlawful Entry §2L1.2<sup>4</sup></b>	<b>36</b>	<b>33</b>	<b>46</b>	<b>6,341</b>	<b>35</b>	<b>30</b>	<b>46</b>	<b>5,946</b>
Prison only <sup>5</sup>	36	33	33	6,291	35	30	46	5,901
Prison plus confinement conditions <sup>6</sup>	21	10	10	10	20	10	12	14
Probation plus confinement conditions <sup>7</sup>	—	—	—	1	—	—	—	1
Probation only <sup>8</sup>	0	0	—	39	0	0	—	30
<b>Firearms §2K2.1<sup>4</sup></b>	<b>53</b>	<b>37</b>	<b>37</b>	<b>2,997</b>	<b>52</b>	<b>37</b>	<b>37</b>	<b>3,629</b>
Prison only <sup>5</sup>	57	37	41	2,604	56	40	41	3,177
Prison plus confinement conditions <sup>6</sup>	23	10	12	104	22	10	15	141
Probation plus confinement conditions <sup>7</sup>	7	6	12	147	6	6	12	155
Probation only <sup>8</sup>	0	0	—	142	0	0	—	156
<b>Theft/Fraud §2B1.1 or §2F1.1<sup>4</sup></b>	<b>14</b>	<b>10</b>	<b>10</b>	<b>9,015</b>	<b>15</b>	<b>10</b>	<b>12</b>	<b>8,768</b>
Prison only <sup>5</sup>	19	15	15	4,253	20	15	15	4,339
Prison plus confinement conditions <sup>6</sup>	9	8	8	1,077	9	8	8	1,053
Probation plus confinement conditions <sup>7</sup>	5	6	6	1,540	5	6	6	1,481
Probation only <sup>8</sup>	0	0	—	2,145	0	0	—	1,895

<sup>1</sup>Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

<sup>2</sup>For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

<sup>3</sup>All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The “All Cases” row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

<sup>4</sup>Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

<sup>5</sup>Prison only sentence categories report straight prison time.

<sup>6</sup>Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

<sup>7</sup>Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

<sup>8</sup>Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

SOURCE: U.S. Sentencing Commission, 2000 and 2001 Fiscal Year Datafiles, USSCFY00 and USSCFY01.

# Average and Median Sentence Imposed<sup>1</sup> for the Most Frequently Applied Guidelines

Fiscal Year 2002 and Fiscal Year 2003

	Fiscal Year 2002				Fiscal Year 2003			
	Average Months	Median Months	GL Median <sup>2</sup>	N	Average Months	Median Months	GL Median <sup>2</sup>	N
<b>All Cases (one guideline computation)<sup>3</sup></b>	<b>51</b>	<b>30</b>		<b>55,856</b>	<b>52</b>	<b>30</b>		<b>60,786</b>
<b>Drug Trafficking §2D1.1<sup>4</sup></b>	<b>71</b>	<b>51</b>	<b>60</b>	<b>24,013</b>	<b>77</b>	<b>57</b>	<b>63</b>	<b>23,833</b>
Prison only <sup>5</sup>	74	57	57	22,407	79	60	70	22,455
Prison plus confinement conditions <sup>6</sup>	22	10	10	515	20	10	15	402
Probation plus confinement conditions <sup>7</sup>	6	6	6	465	6	6	12	469
Probation only <sup>8</sup>	0	0	—	626	0	0	—	507
<b>Immigration Unlawful Entry §2L1.2<sup>4</sup></b>	<b>30</b>	<b>27</b>	<b>30</b>	<b>6,993</b>	<b>28</b>	<b>24</b>	<b>27</b>	<b>9,167</b>
Prison only <sup>5</sup>	30	27	30	6,952	28	24	27	9,132
Prison plus confinement conditions <sup>6</sup>	20	10	10	7	22	10	10	11
Probation plus confinement conditions <sup>7</sup>	—	—	—	0	—	—	—	2
Probation only <sup>8</sup>	0	0	—	34	0	0	—	22
<b>Firearms §2K2.1<sup>4</sup></b>	<b>53</b>	<b>37</b>	<b>37</b>	<b>4,173</b>	<b>56</b>	<b>37</b>	<b>37</b>	<b>5,425</b>
Prison only <sup>5</sup>	57	37	37	3,680	59	41	41	4,779
Prison plus confinement conditions <sup>6</sup>	18	10	12	158	21	10	12	174
Probation plus confinement conditions <sup>7</sup>	6	6	12	139	6	6	12	224
Probation only <sup>8</sup>	0	0	—	196	0	0	—	248
<b>Theft/Fraud §2B1.1 or §2F1.1<sup>4</sup></b>	<b>16</b>	<b>10</b>	<b>12</b>	<b>9,243</b>	<b>16</b>	<b>12</b>	<b>12</b>	<b>9,606</b>
Prison only <sup>5</sup>	20	15	15	4,531	21	16	18	4,803
Prison plus confinement conditions <sup>6</sup>	9	10	10	959	9	10	10	840
Probation plus confinement conditions <sup>7</sup>	6	6	6	1,421	6	6	6	1,463
Probation only <sup>8</sup>	0	0	—	2,332	0	0	—	2,500

<sup>1</sup>Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

<sup>2</sup>For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

<sup>3</sup>All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The “All Cases” row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

<sup>4</sup>Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

<sup>5</sup>Prison only sentence categories report straight prison time.

<sup>6</sup>Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

<sup>7</sup>Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

<sup>8</sup>Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

SOURCE: U.S. Sentencing Commission, 2002 and 2003 Fiscal Year Datafiles, USSCFY02 and USSCFY03.

## Average and Median Sentence Imposed<sup>1</sup> for the Most Frequently Applied Guidelines

Pre-Blakely FY 2004 and Post-Booker FY 2005-2006 (data extracted February 22, 2006)

	Pre-Blakely FY 2004				Post-Booker FY2005-06			
	Average Months	Median Months	GL Median <sup>2</sup>	N	Average Months	Median Months	GL Median <sup>2</sup>	N
<b>All Cases (one guideline computation)<sup>3</sup></b>	<b>56</b>	<b>33</b>		<b>44,895</b>	<b>55</b>	<b>33</b>		<b>60,314</b>
<b>Drug Trafficking §2D1.1<sup>4</sup></b>	<b>83</b>	<b>60</b>	<b>70</b>	<b>16,955</b>	<b>83</b>	<b>60</b>	<b>70</b>	<b>22,446</b>
Prison only <sup>5</sup>	86	60	70	16,081	86	63	78	21,218
Prison plus confinement conditions <sup>6</sup>	22	10	12	337	19	10	21	485
Probation plus confinement conditions <sup>7</sup>	6	6	12	227	6	6	14	320
Probation only <sup>8</sup>	0	0	—	310	0	0	—	423
<b>Immigration Unlawful Entry §2L1.2<sup>4</sup></b>	<b>29</b>	<b>24</b>	<b>24</b>	<b>7,058</b>	<b>27</b>	<b>24</b>	<b>24</b>	<b>10,232</b>
Prison only <sup>5</sup>	29	24	24	7,032	27	24	24	10,160
Prison plus confinement conditions <sup>6</sup>	40	34	29	10	15	10	15	19
Probation plus confinement conditions <sup>7</sup>	—	—	—	0	—	—	—	2
Probation only <sup>8</sup>	0	0	—	16	0	0	—	51
<b>Firearms §2K2.1<sup>4</sup></b>	<b>59</b>	<b>40</b>	<b>41</b>	<b>4,782</b>	<b>58</b>	<b>37</b>	<b>37</b>	<b>6,266</b>
Prison only <sup>5</sup>	63	42	46	4,292	61	41	41	5,625
Prison plus confinement conditions <sup>6</sup>	21	10	10	128	26	10	12	188
Probation plus confinement conditions <sup>7</sup>	6	6	10	160	7	6	12	228
Probation only <sup>8</sup>	0	0	—	202	0	0	—	225
<b>Theft/Fraud §2B1.1 or §2F1.1<sup>4</sup></b>	<b>19</b>	<b>12</b>	<b>12</b>	<b>6,909</b>	<b>21</b>	<b>12</b>	<b>15</b>	<b>7,781</b>
Prison only <sup>5</sup>	25	18	18	3,574	26	18	21	4,186
Prison plus confinement conditions <sup>6</sup>	9	10	10	629	10	10	10	716
Probation plus confinement conditions <sup>7</sup>	6	6	6	997	6	6	6	995
Probation only <sup>8</sup>	0	0	—	1,709	0	0	—	1,884

<sup>1</sup>Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

<sup>2</sup>For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

<sup>3</sup>All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The “All Cases” row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

<sup>4</sup>Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

<sup>5</sup>Prison only sentence categories report straight prison time.

<sup>6</sup>Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

<sup>7</sup>Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

<sup>8</sup>Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

SOURCE: U.S. Sentencing Commission, 2004 Fiscal Year Datafile, USSCFY04 Pre-Blakely Only Cases (October 1, 2003 through June 24, 2004); Special Post-Booker Coding Project with cases sentenced one year since U.S. v. Booker, January 12, 2005 through January 11, 2006 (data extraction on February 22, 2006; table prepared February 23, 2006).

**POST-BOOKER DEPARTURE/VARIANCE RATE BY CIRCUIT AND DISTRICT<sup>1</sup>**  
**Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on February 22, 2006**

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE		DEPARTURES BELOW THE GUIDELINE RANGE		OTHERWISE BELOW THE GUIDELINE RANGE		DEPARTURES ABOVE THE GUIDELINE RANGE		OTHERWISE ABOVE THE GUIDELINE RANGE	
				%		%		%		%		%	
<b>TOTAL</b>	<b>65,368</b>	<b>40,645</b>	<b>62.2</b>	<b>15,500</b>	<b>23.7</b>	<b>2,101</b>	<b>3.2</b>	<b>6,088</b>	<b>9.3</b>	<b>175</b>	<b>0.3</b>	<b>859</b>	<b>1.3</b>
<b>D.C. CIRCUIT</b>	<b>476</b>	<b>250</b>	<b>52.5</b>	<b>154</b>	<b>32.4</b>	<b>13</b>	<b>2.7</b>	<b>49</b>	<b>10.3</b>	<b>1</b>	<b>0.2</b>	<b>9</b>	<b>1.9</b>
District of Columbia	476	250	52.5	154	32.4	13	2.7	49	10.3	1	0.2	9	1.9
<b>FIRST CIRCUIT</b>	<b>1,484</b>	<b>969</b>	<b>65.3</b>	<b>213</b>	<b>14.4</b>	<b>59</b>	<b>4.0</b>	<b>206</b>	<b>13.9</b>	<b>5</b>	<b>0.3</b>	<b>32</b>	<b>2.2</b>
Maine	233	168	72.1	51	21.9	5	2.1	8	3.4	0	0.0	1	0.4
Massachusetts	444	235	52.9	53	11.9	35	7.9	114	25.7	2	0.5	5	1.1
New Hampshire	181	100	55.2	59	32.6	7	3.9	10	5.5	0	0.0	5	2.8
Puerto Rico	499	380	76.2	43	8.6	9	1.8	48	9.6	2	0.4	17	3.4
Rhode Island	127	86	67.7	7	5.5	3	2.4	26	20.5	1	0.8	4	3.1
<b>SECOND CIRCUIT</b>	<b>3,889</b>	<b>1,949</b>	<b>50.1</b>	<b>1,002</b>	<b>25.8</b>	<b>260</b>	<b>6.7</b>	<b>637</b>	<b>16.4</b>	<b>6</b>	<b>0.2</b>	<b>35</b>	<b>0.9</b>
Connecticut	380	176	46.3	101	26.6	52	13.7	46	12.1	3	0.8	2	0.5
New York													
Eastern	1,167	431	36.9	343	29.4	107	9.2	263	22.5	2	0.2	21	1.8
Northern	360	191	53.1	114	31.7	20	5.6	32	8.9	0	0.0	3	0.8
Southern	1,226	742	60.5	187	15.3	63	5.1	227	18.5	1	0.1	6	0.5
Western	562	315	56.0	188	33.5	4	0.7	52	9.3	0	0.0	3	0.5
Vermont	194	94	48.5	69	35.6	14	7.2	17	8.8	0	0.0	0	0.0
<b>THIRD CIRCUIT</b>	<b>3,127</b>	<b>1,629</b>	<b>52.1</b>	<b>906</b>	<b>29.0</b>	<b>129</b>	<b>4.1</b>	<b>421</b>	<b>13.5</b>	<b>7</b>	<b>0.2</b>	<b>35</b>	<b>1.1</b>
Delaware	161	104	64.6	14	8.7	13	8.1	30	18.6	0	0.0	0	0.0
New Jersey	925	478	51.7	293	31.7	41	4.4	103	11.1	1	0.1	9	1.0
Pennsylvania													
Eastern	915	376	41.1	317	34.6	31	3.4	177	19.3	3	0.3	11	1.2
Middle	582	273	46.9	223	38.3	20	3.4	54	9.3	3	0.5	9	1.5
Western	428	297	69.4	54	12.6	23	5.4	48	11.2	0	0.0	6	1.4
Virgin Islands	116	101	87.1	5	4.3	1	0.9	9	7.8	0	0.0	0	0.0
<b>FOURTH CIRCUIT</b>	<b>5,871</b>	<b>3,944</b>	<b>67.2</b>	<b>1,117</b>	<b>19.0</b>	<b>146</b>	<b>2.5</b>	<b>571</b>	<b>9.7</b>	<b>17</b>	<b>0.3</b>	<b>76</b>	<b>1.3</b>
Maryland	647	321	49.6	192	29.7	34	5.3	89	13.8	2	0.3	9	1.4
North Carolina													
Eastern	652	363	55.7	229	35.1	13	2.0	41	6.3	2	0.3	4	0.6
Middle	442	334	75.6	56	12.7	8	1.8	40	9.0	0	0.0	4	0.9
Western	567	347	61.2	158	27.9	14	2.5	42	7.4	0	0.0	6	1.1
South Carolina	962	682	70.9	166	17.3	25	2.6	80	8.3	4	0.4	5	0.5
Virginia													
Eastern	1,367	1,030	75.3	94	6.9	25	1.8	182	13.3	5	0.4	31	2.3
Western	621	385	62.0	157	25.3	12	1.9	56	9.0	2	0.3	9	1.4
West Virginia													
Northern	312	253	81.1	30	9.6	6	1.9	20	6.4	0	0.0	3	1.0
Southern	301	229	76.1	35	11.6	9	3.0	21	7.0	2	0.7	5	1.7

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE		DEPARTURES BELOW THE GUIDELINE RANGE		OTHERWISE BELOW THE GUIDELINE RANGE		DEPARTURES ABOVE THE GUIDELINE RANGE		OTHERWISE ABOVE THE GUIDELINE RANGE	
				%		%		%		%		%	
<b>FIFTH CIRCUIT</b>	<b>14,662</b>	<b>10,555</b>	<b>72.0</b>	<b>2,605</b>	<b>17.8</b>	<b>360</b>	<b>2.5</b>	<b>889</b>	<b>6.1</b>	<b>33</b>	<b>0.2</b>	<b>220</b>	<b>1.5</b>
Louisiana													
Eastern	335	254	75.8	46	13.7	7	2.1	18	5.4	3	0.9	7	2.1
Middle	178	111	62.4	46	25.8	1	0.6	8	4.5	2	1.1	10	5.6
Western	386	276	71.5	35	9.1	9	2.3	46	11.9	1	0.3	19	4.9
Mississippi													
Northern	192	118	61.5	56	29.2	2	1.0	6	3.1	2	1.0	8	4.2
Southern	333	270	81.1	32	9.6	7	2.1	16	4.8	0	0.0	8	2.4
Texas													
Eastern	739	593	80.2	84	11.4	16	2.2	34	4.6	1	0.1	11	1.5
Northern	915	684	74.8	108	11.8	13	1.4	63	6.9	2	0.2	45	4.9
Southern	6,430	4,171	64.9	1,582	24.6	218	3.4	399	6.2	16	0.2	44	0.7
Western	5,154	4,078	79.1	616	12.0	87	1.7	299	5.8	6	0.1	68	1.3
<b>SIXTH CIRCUIT</b>	<b>4,985</b>	<b>2,888</b>	<b>57.9</b>	<b>1,330</b>	<b>26.7</b>	<b>147</b>	<b>2.9</b>	<b>547</b>	<b>11.0</b>	<b>8</b>	<b>0.2</b>	<b>65</b>	<b>1.3</b>
Kentucky													
Eastern	476	241	50.6	187	39.3	4	0.8	30	6.3	0	0.0	14	2.9
Western	351	249	70.9	74	21.1	8	2.3	20	5.7	0	0.0	0	0.0
Michigan													
Eastern	725	382	52.7	215	29.7	30	4.1	89	12.3	1	0.1	8	1.1
Western	402	266	66.2	64	15.9	12	3.0	51	12.7	2	0.5	7	1.7
Ohio													
Northern	978	568	58.1	236	24.1	43	4.4	122	12.5	1	0.1	8	0.8
Southern	596	291	48.8	192	32.2	21	3.5	83	13.9	0	0.0	9	1.5
Tennessee													
Eastern	602	389	64.6	149	24.8	5	0.8	50	8.3	0	0.0	9	1.5
Middle	292	178	61.0	63	21.6	11	3.8	37	12.7	1	0.3	2	0.7
Western	563	324	57.5	150	26.6	13	2.3	65	11.5	3	0.5	8	1.4
<b>SEVENTH CIRCUIT</b>	<b>2,904</b>	<b>1,845</b>	<b>63.5</b>	<b>572</b>	<b>19.7</b>	<b>103</b>	<b>3.5</b>	<b>344</b>	<b>11.8</b>	<b>9</b>	<b>0.3</b>	<b>31</b>	<b>1.1</b>
Illinois													
Central	357	207	58.0	78	21.8	12	3.4	56	15.7	1	0.3	3	0.8
Northern	1,045	600	57.4	251	24.0	50	4.8	134	12.8	2	0.2	8	0.8
Southern	288	241	83.7	15	5.2	9	3.1	18	6.3	2	0.7	3	1.0
Indiana													
Northern	361	251	69.5	86	23.8	9	2.5	13	3.6	0	0.0	2	0.6
Southern	301	194	64.5	69	22.9	7	2.3	23	7.6	2	0.7	6	2.0
Wisconsin													
Eastern	367	193	52.6	65	17.7	13	3.5	87	23.7	2	0.5	7	1.9
Western	185	159	85.9	8	4.3	3	1.6	13	7.0	0	0.0	2	1.1
<b>EIGHTH CIRCUIT</b>	<b>4,879</b>	<b>3,144</b>	<b>64.4</b>	<b>874</b>	<b>17.9</b>	<b>169</b>	<b>3.5</b>	<b>598</b>	<b>12.3</b>	<b>17</b>	<b>0.3</b>	<b>77</b>	<b>1.6</b>
Arkansas													
Eastern	252	169	67.1	33	13.1	9	3.6	36	14.3	3	1.2	2	0.8
Western	196	139	70.9	40	20.4	4	2.0	12	6.1	0	0.0	1	0.5
Iowa													
Northern	358	246	68.7	50	14.0	6	1.7	37	10.3	3	0.8	16	4.5
Southern	333	160	48.0	70	21.0	9	2.7	88	26.4	0	0.0	6	1.8
Minnesota	543	282	51.9	103	19.0	30	5.5	125	23.0	0	0.0	3	0.6
Missouri													
Eastern	962	643	66.8	182	18.9	40	4.2	86	8.9	1	0.1	10	1.0
Western	778	514	66.1	147	18.9	8	1.0	94	12.1	0	0.0	15	1.9
Nebraska	810	525	64.8	170	21.0	44	5.4	64	7.9	0	0.0	7	0.9
North Dakota	225	155	68.9	52	23.1	5	2.2	11	4.9	1	0.4	1	0.4
South Dakota	422	311	73.7	27	6.4	14	3.3	45	10.7	9	2.1	16	3.8

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE		DEPARTURES BELOW THE GUIDELINE RANGE		OTHERWISE BELOW THE GUIDELINE RANGE		DEPARTURES ABOVE THE GUIDELINE RANGE		OTHERWISE ABOVE THE GUIDELINE RANGE	
			%		%		%		%		%		%
<b>NINTH CIRCUIT</b>	<b>11,654</b>	<b>5,656</b>	<b>48.5</b>	<b>4,410</b>	<b>37.8</b>	<b>402</b>	<b>3.4</b>	<b>1,005</b>	<b>8.6</b>	<b>44</b>	<b>0.4</b>	<b>137</b>	<b>1.2</b>
Alaska	197	115	58.4	34	17.3	3	1.5	41	20.8	0	0.0	4	2.0
Arizona	3,746	1,069	28.5	2,351	62.8	105	2.8	142	3.8	32	0.9	47	1.3
California													
Central	876	707	80.7	54	6.2	29	3.3	83	9.5	0	0.0	3	0.3
Eastern	893	482	54.0	316	35.4	24	2.7	63	7.1	2	0.2	6	0.7
Northern	614	378	61.6	121	19.7	23	3.7	82	13.4	0	0.0	10	1.6
Southern	2,130	1,167	54.8	703	33.0	111	5.2	137	6.4	3	0.1	9	0.4
Guam	121	64	52.9	43	35.5	5	4.1	9	7.4	0	0.0	0	0.0
Hawaii	453	217	47.9	142	31.3	17	3.8	69	15.2	0	0.0	8	1.8
Idaho	213	82	38.5	97	45.5	9	4.2	23	10.8	0	0.0	2	0.9
Montana	393	300	76.3	47	12.0	10	2.5	19	4.8	4	1.0	13	3.3
Nevada	415	300	72.3	49	11.8	9	2.2	48	11.6	0	0.0	9	2.2
Northern Mariana Islands	24	18	75.0	5	20.8	0	0.0	0	0.0	0	0.0	1	4.2
Oregon	511	276	54.0	113	22.1	21	4.1	93	18.2	1	0.2	7	1.4
Washington													
Eastern	355	209	58.9	71	20.0	10	2.8	53	14.9	2	0.6	10	2.8
Western	713	272	38.1	264	37.0	26	3.6	143	20.1	0	0.0	8	1.1
<b>TENTH CIRCUIT</b>	<b>5,333</b>	<b>3,547</b>	<b>66.5</b>	<b>1,220</b>	<b>22.9</b>	<b>152</b>	<b>2.9</b>	<b>358</b>	<b>6.7</b>	<b>6</b>	<b>0.1</b>	<b>50</b>	<b>0.9</b>
Colorado	612	324	52.9	180	29.4	33	5.4	66	10.8	2	0.3	7	1.1
Kansas	622	411	66.1	123	19.8	14	2.3	63	10.1	2	0.3	9	1.4
New Mexico	2,461	1,607	65.3	711	28.9	50	2.0	83	3.4	1	0.0	9	0.4
Oklahoma													
Eastern	96	84	87.5	10	10.4	1	1.0	1	1.0	0	0.0	0	0.0
Northern	204	168	82.4	23	11.3	0	0.0	8	3.9	1	0.5	4	2.0
Western	220	159	72.3	19	8.6	6	2.7	25	11.4	0	0.0	11	5.0
Utah	914	664	72.6	101	11.1	43	4.7	99	10.8	0	0.0	7	0.8
Wyoming	204	130	63.7	53	26.0	5	2.5	13	6.4	0	0.0	3	1.5
<b>ELEVENTH CIRCUIT</b>	<b>6,104</b>	<b>4,269</b>	<b>69.9</b>	<b>1,097</b>	<b>18.0</b>	<b>161</b>	<b>2.6</b>	<b>463</b>	<b>7.6</b>	<b>22</b>	<b>0.4</b>	<b>92</b>	<b>1.5</b>
Alabama													
Middle	214	129	60.3	74	34.6	2	0.9	7	3.3	1	0.5	1	0.5
Northern	423	260	61.5	108	25.5	5	1.2	37	8.7	2	0.5	11	2.6
Southern	332	226	68.1	74	22.3	7	2.1	20	6.0	0	0.0	5	1.5
Florida													
Middle	1,568	1,028	65.6	365	23.3	49	3.1	104	6.6	2	0.1	20	1.3
Northern	311	223	71.7	58	18.6	4	1.3	16	5.1	3	1.0	7	2.3
Southern	1,951	1,512	77.5	198	10.1	45	2.3	176	9.0	5	0.3	15	0.8
Georgia													
Middle	357	252	70.6	75	21.0	0	0.0	21	5.9	1	0.3	8	2.2
Northern	658	437	66.4	107	16.3	35	5.3	68	10.3	4	0.6	7	1.1
Southern	290	202	69.7	38	13.1	14	4.8	14	4.8	4	1.4	18	6.2

<sup>1</sup>Of the 67,564 cases, 123 cases with no analogous guidelines were excluded from the table. Of the remaining 67,441 cases, 2,196 were excluded due to missing departure or variance information.

Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**SUBSTANTIAL ASSISTANCE CASES: DEGREE OF DEPARTURE  
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY<sup>1</sup>**

**Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on February 22, 2006**

PRIMARY OFFENSE	n	Median Sentence in Months <sup>2</sup>	DEGREE OF DECREASE FOR SUBSTANTIAL ASSISTANCE	
			Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
<b>TOTAL</b>	<b>9,000</b>	<b>36.0</b>	<b>28.0</b>	<b>49.9</b>
Murder	10	126.0	180.0	69.3
Manslaughter	0	--	--	--
Kidnapping/Hostage Taking	4	114.5	115.5	47.1
Sexual Abuse	6	34.5	18.5	35.4
Assault	11	42.0	18.0	31.4
Robbery	166	51.0	31.5	35.8
Arson	10	35.0	22.5	49.0
Drugs - Trafficking	5,754	50.0	39.0	45.8
Drugs - Communication Facility	63	2.9	18.0	87.5
Drugs - Simple Possession	10	25.3	10.0	40.7
Firearms	770	36.5	24.0	46.8
Burglary/B&E	1	--	--	--
Auto Theft	12	16.5	18.0	46.9
Larceny	117	5.0	10.0	66.7
Fraud	904	2.8	12.0	90.0
Embezzlement	15	0.0	12.0	100.0
Forgery/Counterfeiting	78	1.0	10.0	92.5
Bribery	52	6.0	15.5	77.5
Tax	81	0.0	10.0	100.0
Money Laundering	215	12.0	22.0	63.5
Racketeering/Extortion	153	30.0	30.0	51.1
Gambling/Lottery	16	0.0	8.0	100.0
Civil Rights	8	14.0	11.5	40.4
Immigration	284	8.3	9.0	50.0
Pornography/Prostitution	45	47.0	25.0	33.3
Prison Offenses	9	2.0	6.0	66.7
Administration of Justice Offenses	122	0.0	12.0	100.0
Environmental/Wildlife	13	0.0	10.0	100.0
National Defense	6	8.5	18.0	80.9
Antitrust	10	5.0	10.0	66.7
Food & Drug	6	0.0	12.0	99.9
Other Miscellaneous Offenses	49	2.0	15.0	86.7

<sup>1</sup>Of the 67,564 cases, 9,402 received a substantial assistance departure. Of these, 9,061 had complete guideline application information. An additional 37 cases were excluded due to several logical criteria. Of the remaining 9,024 cases, 24 were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (24).

<sup>2</sup>Cases with guideline minimums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**GOVERNMENT SPONSORED DOWNWARD DEPARTURE CASES: DEGREE OF DEPARTURE FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY<sup>1</sup>**

**Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on February 22, 2006**

PRIMARY OFFENSE	n	Median Sentence in Months <sup>2</sup>	DEGREE OF DECREASE FOR GOVERNMENT SPONSORED DOWNWARD DEPARTURE <sup>3</sup>	
			Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
<b>TOTAL</b>	<b>5,810</b>	<b>24.0</b>	<b>9.0</b>	<b>27.3</b>
<b>Murder</b>	3	57.0	40.0	41.0
<b>Manslaughter</b>	0	--	--	--
<b>Kidnapping/Hostage Taking</b>	1	--	--	--
<b>Sexual Abuse</b>	25	60.0	21.9	35.8
<b>Assault</b>	31	19.9	12.0	40.5
<b>Robbery</b>	24	73.5	22.0	25.4
<b>Arson</b>	2	--	--	--
<b>Drugs - Trafficking</b>	1,462	24.0	10.0	33.3
<b>Drugs - Communication Facility</b>	10	11.6	29.4	71.7
<b>Drugs - Simple Possession</b>	0	--	--	--
<b>Firearms</b>	213	30.0	12.0	26.2
<b>Burglary/B&amp;E</b>	1	--	--	--
<b>Auto Theft</b>	1	--	--	--
<b>Larceny</b>	24	0.0	10.0	99.9
<b>Fraud</b>	107	6.0	10.0	59.9
<b>Embezzlement</b>	8	0.0	9.0	99.4
<b>Forgery/Counterfeiting</b>	17	6.8	10.0	50.2
<b>Bribery</b>	8	5.0	9.5	65.8
<b>Tax</b>	13	5.0	10.0	66.7
<b>Money Laundering</b>	30	14.0	7.5	50.3
<b>Racketeering/Extortion</b>	31	41.0	6.0	19.3
<b>Gambling/Lottery</b>	5	0.0	10.0	100.0
<b>Civil Rights</b>	0	--	--	--
<b>Immigration</b>	3,681	24.0	7.0	25.0
<b>Pornography/Prostitution</b>	30	41.0	17.0	23.7
<b>Prison Offenses</b>	8	10.5	5.5	31.9
<b>Administration of Justice Offenses</b>	34	10.0	9.6	47.5
<b>Environmental/Wildlife</b>	4	5.0	7.5	58.3
<b>National Defense</b>	4	24.0	22.0	56.6
<b>Antitrust</b>	1	--	--	--
<b>Food &amp; Drug</b>	3	16.0	12.0	23.3
<b>Other Miscellaneous Offenses</b>	29	0.0	12.0	100.0

<sup>1</sup>Of the 67,564 cases, 6,098 received a government sponsored downward departure. Of these, 5,867 had complete guideline application information. An additional 45 cases were excluded due to several logical criteria. Of the remaining 5,822 cases, 12 were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (12).

<sup>2</sup>Cases with guideline minimums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**OTHER DOWNWARD DEPARTURE CASES: DEGREE OF DEPARTURE  
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY<sup>1</sup>**

**Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on February 22, 2006**

PRIMARY OFFENSE	n	Median Sentence in Months <sup>2</sup>	DEGREE OF DECREASE FOR OTHER DOWNWARD DEPARTURE <sup>3</sup>	
			Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
<b>TOTAL</b>	<b>1,978</b>	<b>22.0</b>	<b>12.0</b>	<b>34.8</b>
<b>Murder</b>	3	70.0	27.0	27.8
<b>Manslaughter</b>	4	24.0	11.0	26.8
<b>Kidnapping/Hostage Taking</b>	0	--	--	--
<b>Sexual Abuse</b>	9	18.0	9.0	19.6
<b>Assault</b>	30	12.0	11.0	50.0
<b>Robbery</b>	63	51.0	20.0	25.8
<b>Arson</b>	1	--	--	--
<b>Drugs - Trafficking</b>	655	60.0	17.0	27.5
<b>Drugs - Communication Facility</b>	9	12.0	18.0	50.0
<b>Drugs - Simple Possession</b>	3	12.0	22.0	67.5
<b>Firearms</b>	274	22.5	11.0	34.7
<b>Burglary/B&amp;E</b>	1	--	--	--
<b>Auto Theft</b>	1	--	--	--
<b>Larceny</b>	46	0.0	7.5	100.0
<b>Fraud</b>	202	1.0	10.0	93.4
<b>Embezzlement</b>	18	2.5	9.0	84.2
<b>Forgery/Counterfeiting</b>	23	3.0	10.0	85.7
<b>Bribery</b>	4	0.0	7.0	100.0
<b>Tax</b>	38	0.0	10.0	100.0
<b>Money Laundering</b>	28	12.5	10.5	48.5
<b>Racketeering/Extortion</b>	18	24.0	12.0	34.6
<b>Gambling/Lottery</b>	2	--	--	--
<b>Civil Rights</b>	2	--	--	--
<b>Immigration</b>	408	24.0	9.0	27.2
<b>Pornography/Prostitution</b>	51	18.0	21.0	48.1
<b>Prison Offenses</b>	8	21.0	5.0	22.4
<b>Administration of Justice Offenses</b>	45	0.1	10.0	98.7
<b>Environmental/Wildlife</b>	2	--	--	--
<b>National Defense</b>	2	--	--	--
<b>Antitrust</b>	1	--	--	--
<b>Food &amp; Drug</b>	0	--	--	--
<b>Other Miscellaneous Offenses</b>	27	1.0	10.0	96.7

<sup>1</sup>Of the 67,564 cases, 2,101 received an other downward departure. Of these, 1,982 had complete guideline application information. An additional one cases were excluded due to several logical criteria. Of the remaining 1,981 cases, three were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (3).

<sup>2</sup>Cases with guideline minimums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**OTHERWISE BELOW GUIDELINE RANGE CASES: DEGREE OF VARIANCE  
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY<sup>1</sup>**

**Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on February 22, 2006**

PRIMARY OFFENSE	n	DEGREE OF DECREASE FOR OTHERWISE BELOW GUIDELINE RANGE <sup>3</sup>		
		Median Sentence in Months <sup>2</sup>	Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
<b>TOTAL</b>	<b>5,656</b>	<b>26.0</b>	<b>12.0</b>	<b>33.6</b>
Murder	9	97.0	24.5	20.2
Manslaughter	3	20.0	10.0	33.3
Kidnapping/Hostage Taking	2	--	--	--
Sexual Abuse	30	35.0	18.0	33.3
Assault	45	12.0	9.0	44.4
Robbery	127	52.0	15.0	20.5
Arson	2	--	--	--
Drugs - Trafficking	2,065	60.0	19.0	27.0
Drugs - Communication Facility	50	13.0	10.5	36.3
Drugs - Simple Possession	14	10.4	8.1	55.5
Firearms	809	30.0	12.0	29.4
Burglary/B&E	7	6.0	6.0	52.4
Auto Theft	6	30.0	7.0	28.2
Larceny	131	0.0	6.0	100.0
Fraud	646	5.0	9.0	67.5
Embezzlement	65	0.0	8.0	99.6
Forgery/Counterfeiting	84	2.3	8.0	80.6
Bribery	25	0.0	10.0	100.0
Tax	120	1.0	10.0	87.5
Money Laundering	124	14.0	12.0	51.4
Racketeering/Extortion	54	45.0	18.0	36.8
Gambling/Lottery	8	0.0	6.0	100.0
Civil Rights	7	28.0	14.5	33.7
Immigration	851	19.0	9.0	33.2
Pornography/Prostitution	161	26.0	17.0	35.1
Prison Offenses	22	13.0	8.0	40.6
Administration of Justice Offenses	93	6.0	10.0	66.7
Environmental/Wildlife	17	0.0	6.0	100.0
National Defense	3	24.0	22.0	51.4
Antitrust	0	--	--	--
Food & Drug	3	5.0	7.0	58.3
Other Miscellaneous Offenses	73	0.0	10.0	100.0

<sup>1</sup>Of the 67,564 cases, 6,088 were otherwise below the guideline range and did not cite reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal Guidelines Manual. Of these, 5,678 had complete guideline application information. An additional eight cases were excluded due to several logical criteria. Of the remaining 5,670 cases, 14 were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (14).

<sup>2</sup>Cases with guideline minimums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**UPWARD DEPARTURE CASES: DEGREE OF DEPARTURE  
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY<sup>1</sup>**

**Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on February 22, 2006**

PRIMARY OFFENSE	n	Median Sentence in Months <sup>2</sup>	DEGREE OF INCREASE FOR UPWARD DEPARTURE <sup>3</sup>	
			Median Increase in Months From Guideline Maximum	Median Percent Increase From Guideline Maximum
<b>TOTAL</b>	<b>168</b>	<b>60.0</b>	<b>14.0</b>	<b>33.3</b>
Murder	3	228.0	105.0	77.8
Manslaughter	4	96.0	18.0	23.1
Kidnapping/Hostage Taking	0	--	--	--
Sexual Abuse	4	145.5	58.5	56.5
Assault	7	63.0	12.0	72.8
Robbery	3	150.0	35.0	31.4
Arson	0	--	--	--
Drugs - Trafficking	20	42.0	7.5	21.1
Drugs - Communication Facility	0	--	--	--
Drugs - Simple Possession	2	--	--	--
Firearms	31	78.0	21.0	25.0
Burglary/B&E	1	--	--	--
Auto Theft	0	--	--	--
Larceny	2	--	--	--
Fraud	23	48.0	14.0	47.4
Embezzlement	0	--	--	--
Forgery/Counterfeiting	4	48.0	22.0	120.8
Bribery	0	--	--	--
Tax	0	--	--	--
Money Laundering	0	--	--	--
Racketeering/Extortion	1	--	--	--
Gambling/Lottery	0	--	--	--
Civil Rights	0	--	--	--
Immigration	43	18.0	6.0	26.3
Pornography/Prostitution	13	180.0	63.0	58.7
Prison Offenses	1	--	--	--
Administration of Justice Offenses	4	24.0	6.0	50.0
Environmental/Wildlife	0	--	--	--
National Defense	0	--	--	--
Antitrust	0	--	--	--
Food & Drug	0	--	--	--
Other Miscellaneous Offenses	2	--	--	--

<sup>1</sup>Of the 67,564 cases, 175 received an upward departure. Of these, 170 had complete guideline application information. An additional one case was excluded due to several logical criteria. Of the remaining 169 cases, one was excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (1).

<sup>2</sup>Cases with guideline maximums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

**OTHERWISE ABOVE GUIDELINE RANGE CASES: DEGREE OF VARIANCE  
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY<sup>1</sup>**

**Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on February 22, 2006**

**DEGREE OF INCREASE  
FOR OTHERWISE ABOVE  
GUIDELINE RANGE<sup>3</sup>**

<b>PRIMARY OFFENSE</b>	<b>n</b>	<b>Median Sentence in Months<sup>2</sup></b>	<b>Median Increase in Months From Guideline Maximum</b>	<b>Median Percent Increase From Guideline Maximum</b>
<b>TOTAL</b>	<b>761</b>	<b>59.0</b>	<b>14.0</b>	<b>37.9</b>
<b>Murder</b>	6	234.0	56.0	32.1
<b>Manslaughter</b>	4	56.5	14.5	32.7
<b>Kidnapping/Hostage Taking</b>	0	--	--	--
<b>Sexual Abuse</b>	18	196.0	37.5	33.7
<b>Assault</b>	28	60.0	25.5	45.6
<b>Robbery</b>	18	174.0	33.5	31.0
<b>Arson</b>	3	84.0	13.0	50.0
<b>Drugs - Trafficking</b>	107	80.0	20.0	35.7
<b>Drugs - Communication Facility</b>	4	29.1	2.1	21.0
<b>Drugs - Simple Possession</b>	13	12.0	6.0	100.0
<b>Firearms</b>	132	75.0	16.0	32.4
<b>Burglary/B&amp;E</b>	0	--	--	--
<b>Auto Theft</b>	4	78.0	37.5	95.2
<b>Larceny</b>	34	30.0	10.0	71.4
<b>Fraud</b>	125	45.0	9.0	33.3
<b>Embezzlement</b>	3	36.0	12.0	46.3
<b>Forgery/Counterfeiting</b>	15	57.0	14.0	73.2
<b>Bribery</b>	0	--	--	--
<b>Tax</b>	6	36.0	9.0	38.1
<b>Money Laundering</b>	11	108.0	15.9	37.9
<b>Racketeering/Extortion</b>	15	84.0	15.0	24.1
<b>Gambling/Lottery</b>	0	--	--	--
<b>Civil Rights</b>	0	--	--	--
<b>Immigration</b>	143	36.0	8.0	37.0
<b>Pornography/Prostitution</b>	38	120.0	33.0	40.6
<b>Prison Offenses</b>	7	40.0	7.0	21.2
<b>Administration of Justice Offenses</b>	14	28.5	8.0	60.7
<b>Environmental/Wildlife</b>	1	--	--	--
<b>National Defense</b>	0	--	--	--
<b>Antitrust</b>	0	--	--	--
<b>Food &amp; Drug</b>	0	--	--	--
<b>Other Miscellaneous Offenses</b>	12	24.0	9.5	50.0

<sup>1</sup>Of the 67,564 cases, 859 were otherwise below the guideline range and did not cite reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal Guidelines Manual. Of these, 788 had complete guideline application information. An additional 27 cases were excluded due to several logical criteria. Of the remaining 761 cases, zero were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (0).

<sup>2</sup>Cases with guideline maximums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted February 22, 2006; table prepared February 23, 2006). Summary numbers may not add up to their component parts due to rounding.

# **APPENDIX E**

## Appendix E-1<sup>1</sup>

### Sentences Relative to the Guideline Range for All Cases and Selected Guidelines

<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>	<b>n</b>	<b>Within/ Gov't<sup>2</sup></b>	<b>% Upward Departure</b>	<b>% Downward Departure</b>	
All Guidelines	37,699	90.6	0.8	8.6	
Theft/Fraud (§2B1.1)	3,910	93.4	0.8	5.8	
Drug Trafficking (§2D1.1)	14,169	92.6	0.2	7.3	
Firearms (§2K2.1)	3,121	88.8	1.0	10.2	
Immigration (§2L1.1)	1,268	86.4	0.5	13.1	
Unlawful Entry (§2L1.2)	5,066	88.0	0.4	11.6	

<b>Post-PROTECT Act (5/1/03-6/24/04)</b>	<b>n</b>	<b>Within/ Gov't</b>	<b>% Upward Departure</b>	<b>% Downward Departure</b>	
All Guidelines	75,723	93.7	0.8	5.5	
Theft/Fraud (§2B1.1)	8,463	94.0	0.9	5.1	
Drug Trafficking (§2D1.1)	27,399	95.1	0.2	4.7	
Firearms (§2K2.1)	7,384	92.3	1.3	6.5	
Immigration (§2L1.1)	2,516	92.8	0.6	6.6	
Unlawful Entry (§2L1.2)	11,069	93.3	0.3	6.4	

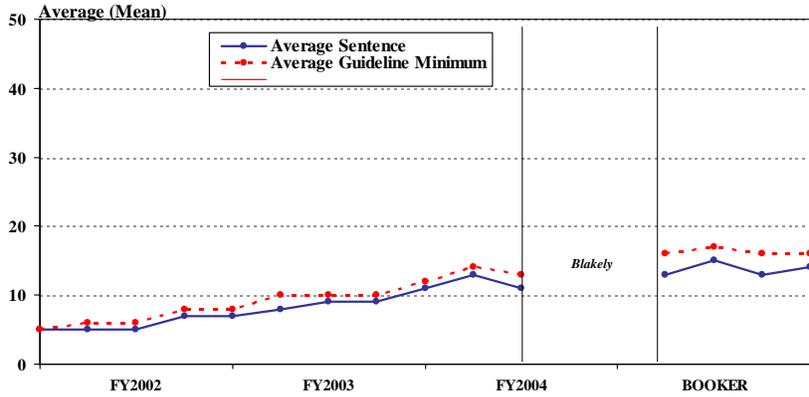
<b>Post-Booker (1/12/05-1/11/06)</b>	<b>n</b>	<b>Within/ Gov't</b>	<b>% Upward Departure</b>	<b>% Downward Departure</b>	<b>% Booker</b>
All Guidelines	65,368	85.9	1.6	3.2	9.3
Theft/Fraud (§2B1.1)	6,597	83.0	2.8	3.5	10.7
Drug Trafficking (§2D1.1)	22,828	86.5	0.7	3.1	9.7
Firearms (§2K2.1)	6,423	82.5	2.4	4.1	11.1
Immigration (§2L1.1)	3,023	88.5	2.4	2.9	6.2
Unlawful Entry (§2L1.2)	10,205	89.5	1.0	3.2	6.3

<sup>1</sup> Missing information (departure status) reduces the total number of cases.

<sup>2</sup> The “Within/Gov’t” category includes within range sentences and government sponsored downward departures (Substantial Assistance under USSG §5K1.1, EDP under USSG § 5K3.1 and other government-sponsored downward departures). See Appendix C for further descriptions of these categories.

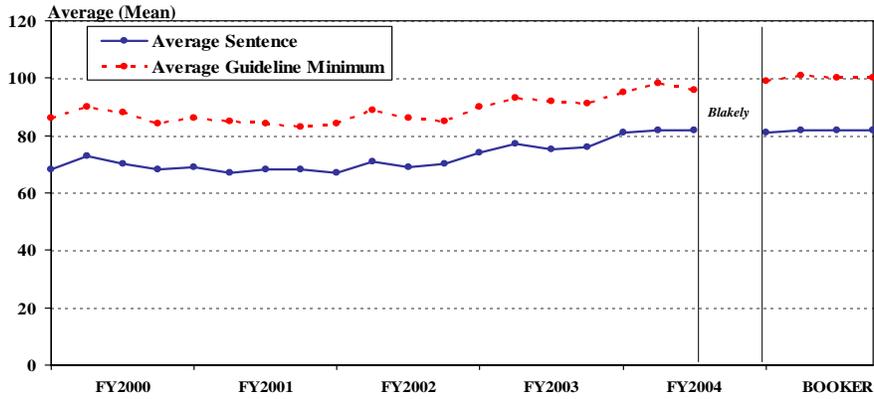
SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-2**  
**Average Sentence Imposed and Average Guideline Minimum**  
**Quarterly Data for §2B1.1 Offenders**  
**FY2002 – Post-Booker**



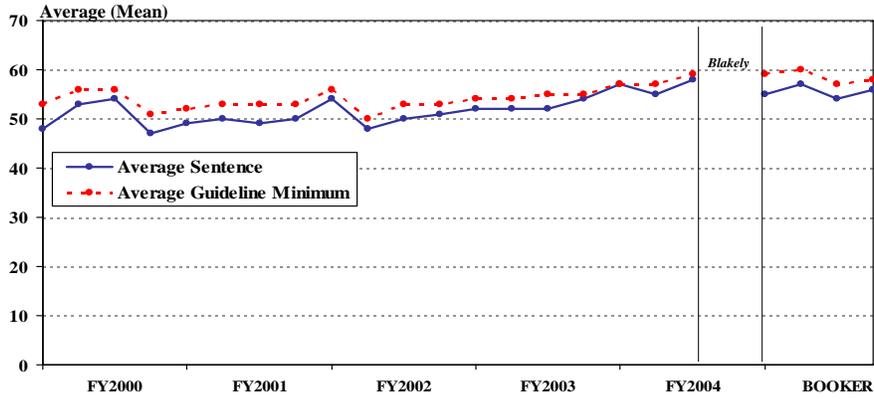
Cases with guideline minimums of life or probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively. Guideline minimums account for applicable statutory mandatory penalties. Only cases with a single guideline computation were included.  
 Cases sentenced on or before December 31, 2005 (last full quarter of post-Booker data) were included in this figure.  
 SOURCE: U.S. Sentencing Commission 2002-2003 Datafiles, USSCFY2002-USSCFY2003, 2006 Booker Report Datafiles.

**Appendix E-3**  
**Average Sentence Imposed and Average Guideline Minimum**  
**Quarterly Data for §2D1.1 Offenders**  
**FY2000 – Post-Booker**



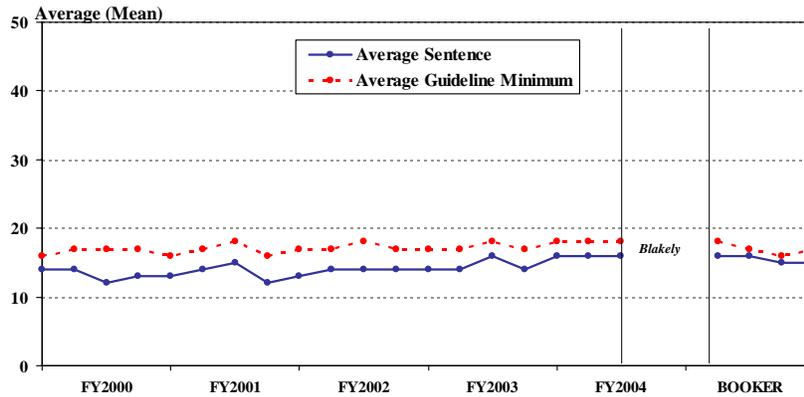
Cases with guideline minimums of life or probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively. Guideline minimums account for applicable statutory mandatory penalties. Also includes §2D1.2 offenders. Only cases with a single guideline computation were included.  
 Cases sentenced on or before December 31, 2005 (last full quarter of post-Booker data) were included in this figure.  
 SOURCE: U.S. Sentencing Commission 2000-2003 Datafiles, USSCFY2000-USSCFY2003, 2006 Booker Report Datafiles.

**Appendix E-4**  
**Average Sentence Imposed and Average Guideline Minimum**  
**Quarterly Data for §2K2.1 Offenders**  
**FY2000 – Post-Booker**



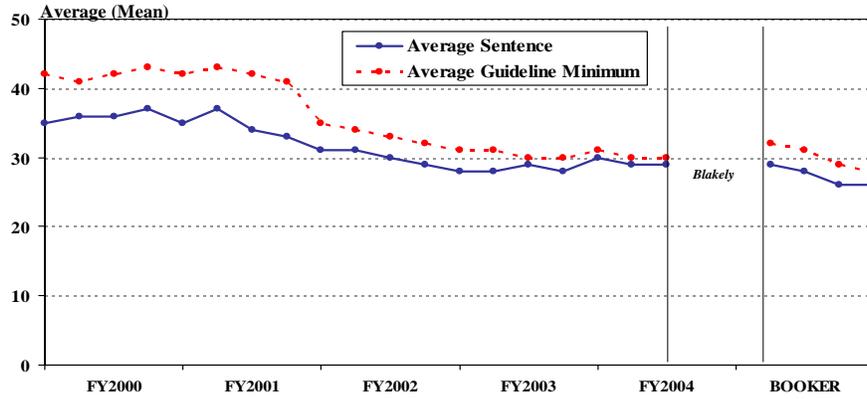
Cases with guideline minimums of life or probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively. Guideline minimums account for applicable statutory mandatory penalties. Only cases with a single guideline computation were included.  
 Cases sentenced on or before December 31, 2005 (last full quarter of post-Booker data) were included in this figure.  
 SOURCE: U.S. Sentencing Commission 2000-2003 Datafiles, USSCFY2000-USSCFY2003, 2006 Booker Report Datafiles.

**Appendix E-5**  
**Average Sentence Imposed and Average Guideline Minimum**  
**Quarterly Data for §2L1.1 Offenders**  
**FY2000 – Post-Booker**



Cases with guideline minimums of life or probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively. Guideline minimums account for applicable statutory mandatory penalties. Only cases with a single guideline computation were included.  
 Cases sentenced on or before December 31, 2005 (last full quarter of post-Booker data) were included in this figure.  
 SOURCE: U.S. Sentencing Commission 2000-2003 Datafiles, USSCFY2000-USSCFY2003, 2006 Booker Report Datafiles.

**Appendix E-6**  
**Average Sentence Imposed and Average Guideline Minimum**  
**Quarterly Data for §2L1.2 Offenders**  
**FY2000 – Post-Booker**



Cases with guideline minimums of life or probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively. Guideline minimums account for applicable statutory mandatory penalties. Only cases with a single guideline computation were included.

Cases sentenced on or before December 31, 2005 (last full quarter of post-Booker data) were included in this figure.

SOURCE: U.S. Sentencing Commission 2000-2003 Datafiles, USSCFY2000-USSCFY2003, 2006 Booker Report Datafiles.

**Appendix E-7**  
**Cases with Sentence Reductions**  
**for Cooperation Without A Motion in Each Federal Judicial District**  
**Post-Booker**

<b>CIRCUIT</b> District	<b>TOTAL</b>	<b>Cooperation Without Motion</b>	
		<b>n</b>	<b>%</b>
<b>TOTAL</b>	<b>9,660</b>	<b>258</b>	<b>100.0</b>
<b>DC CIRCUIT</b>			
District of Columbia	117	2	0.8
<b>FIRST CIRCUIT</b>			
Maine	51	0	0.0
Massachusetts	48	4	1.6
New Hampshire	50	0	0.0
Puerto Rico	34	1	0.4
Rhode Island	4	0	0.0
<b>SECOND CIRCUIT</b>			
Connecticut	103	3	1.2
New York			
Eastern	285	15	5.8
Northern	108	1	0.4
Southern	175	6	2.3
Western	177	0	0.0
Vermont	62	1	0.4
<b>THIRD CIRCUIT</b>			
Delaware	9	0	0.0
New Jersey	291	5	1.9
Pennsylvania			
Eastern	308	14	5.4
Middle	211	3	1.2
Western	51	0	0.0
Virgin Islands	5	0	0.0
<b>FOURTH CIRCUIT</b>			
Maryland	169	1	0.4
North Carolina			
Eastern	230	6	2.3
Middle	56	3	1.2
Western	149	5	1.9
South Carolina	162	6	2.3
Virginia			
Eastern	93	6	2.3
Western	150	2	0.8
West Virginia			
Northern	27	0	0.0
Southern	35	0	0.0

**Appendix E-7 (cont.)**

<b>District</b>	<b>TOTAL</b>	<b>Cooperation Without Motion</b>	
		<b>n</b>	<b>%</b>
<b>FIFTH CIRCUIT</b>			
Louisiana			
Eastern	39	1	0.4
Middle	44	0	0.0
Western	39	5	1.9
Mississippi			
Northern	31	0	0.0
Southern	33	2	0.8
Texas			
Eastern	74	2	0.8
Northern	105	4	1.6
Southern	469	32	12.4
Western	366	6	2.3
<b>SIXTH CIRCUIT</b>			
Kentucky			
Eastern	181	0	0.0
Western	71	2	0.8
Michigan			
Eastern	205	6	2.3
Western	65	3	1.2
Ohio			
Northern	226	2	0.8
Southern	190	0	0.0
Tennessee			
Eastern	146	2	0.8
Middle	55	0	0.0
Western	125	1	0.4
<b>SEVENTH CIRCUIT</b>			
Illinois			
Central	75	2	0.8
Northern	226	9	3.5
Southern	13	1	0.4
Indiana			
Northern	80	0	0.0
Southern	59	1	0.4
Wisconsin			
Eastern	55	4	1.6
Western	8	1	0.4

## Appendix E-7 (cont.)

District	TOTAL	Cooperation Without Motion	
		n	%
<b>EIGHTH CIRCUIT</b>			
Arkansas			
Eastern	33	0	0.0
Western	38	0	0.0
Iowa			
Northern	50	7	2.7
Southern	73	5	1.9
Minnesota	103	10	3.9
Missouri			
Eastern	175	0	0.0
Western	147	4	1.6
Nebraska	34	2	0.8
North Dakota	39	0	0.0
South Dakota	22	1	0.4
<b>NINTH CIRCUIT</b>			
Alaska	30	1	0.4
Arizona	235	2	0.8
California			
Central	42	0	0.0
Eastern	136	1	0.4
Northern	81	0	0.0
Southern	132	4	1.6
Guam	43	0	0.0
Hawaii	144	6	2.3
Idaho	65	0	0.0
Montana	46	0	0.0
Nevada	28	2	0.8
Northern Mariana Islands	4	0	0.0
Oregon	95	4	1.6
Washington			
Eastern	47	2	0.8
Western	107	4	1.6
<b>TENTH CIRCUIT</b>			
Colorado	167	0	0.0
Kansas	101	2	0.8
New Mexico	75	2	0.8
Oklahoma			
Eastern	10	0	0.0
Northern	21	0	0.0
Western	18	1	0.4
Utah	80	2	0.8
Wyoming	32	0	0.0

**Appendix E-7 (cont.)**

<b>District</b>	<b>TOTAL</b>	<b>Cooperation Without Motion</b>	
		<b>n</b>	<b>%</b>
<b>ELEVENTH CIRCUIT</b>			
Alabama			
Middle	70	0	0.0
Northern	108	0	0.0
Southern	71	0	0.0
Florida			
Middle	363	4	1.6
Northern	62	5	1.9
Southern	194	11	4.3
Georgia			
Middle	73	0	0.0
Northern	89	5	1.9
Southern	37	1	0.4

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SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-8**  
**Cases with Sentence Reductions for Cooperation**  
**With and Without A Government Motion for Each Offense Type**  
**Post-Booker**

<b>Offense Type</b>	<b>TOTAL</b>	<b>USSG §5K1.1 Motion</b>		<b>Cooperation Without Motion</b>	
		<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
<b>TOTAL</b>	9,657	9,399	100.0	258	100.0
<b>Murder</b>	10	10	0.1	0	0.0
<b>Kidnapping</b>	4	4	0.0	0	0.0
<b>Sex Abuse</b>	7	6	0.1	1	0.4
<b>Assault</b>	12	11	0.1	1	0.4
<b>Robbery</b>	171	168	1.8	3	1.2
<b>Arson</b>	10	10	0.1	0	0.0
<b>Drug Trafficking</b>	6,090	5,944	63.2	146	56.6
<b>Drug Comm. Fac.</b>	65	63	0.7	2	0.8
<b>Drug Simple Possession</b>	11	11	0.1	0	0.0
<b>Firearms</b>	873	853	9.1	20	7.8
<b>Burglary</b>	1	1	0.0	0	0.0
<b>Auto Theft</b>	14	14	0.2	0	0.0
<b>Larceny</b>	129	126	1.3	3	1.2
<b>Fraud</b>	991	959	10.2	32	12.4
<b>Embezzlement</b>	20	16	0.2	4	1.6
<b>Forgery</b>	86	82	0.9	4	1.6
<b>Bribery</b>	54	53	0.6	1	0.4
<b>Tax Offenses</b>	91	85	0.9	6	2.3
<b>Money Laundering</b>	225	222	2.4	3	1.2
<b>Racketeering</b>	160	159	1.7	1	0.4
<b>Gambling</b>	17	17	0.2	0	0.0
<b>Civil Rights</b>	8	8	0.1	0	0.0
<b>Immigration</b>	322	299	3.2	23	8.9
<b>Porn./Prost.</b>	50	48	0.5	2	0.8
<b>Prison Offenses</b>	12	11	0.1	1	0.4
<b>Admin. of Justice</b>	137	132	1.4	5	1.9
<b>Enviro./Fish&amp;Wildlife</b>	13	13	0.1	0	0.0
<b>National Defense</b>	7	7	0.1	0	0.0
<b>Anti Trust</b>	10	10	0.1	0	0.0
<b>Food &amp; Drug</b>	6	6	0.1	0	0.0
<b>Other</b>	51	51	0.5	0	0.0

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-9**  
**Reasons Cited for Below-Range Sentences**  
**Imposed for Cooperation A Without Motion**  
**(Where More Than One Reason Was Cited by the Court)**

<b>Reasons</b>	<b>Number</b>	<b>Percent</b>
Cooperation - Motion unknown	114	13.5
(Not 5K1.1) Cooperation without motion	113	13.4
18 USC 3553(a)	77	9.1
Criminal History Issues	63	7.5
Judge specifies presence of variance	59	7.0
(5H1.6) Family ties and responsibilities	41	4.9
(5K2.0) General aggravating and mitigating circumstances	33	3.9
Rehabilitation	24	2.9
Nature & circumstances of offense/hist. of def. pursuant to 18 USC 3553 (a)(1)	22	2.6
Mule/Role in the Offense	20	2.4
(5H1.1) Age	18	2.1
Language from 18 USC 3553(a) statute	18	2.1
Acceptance of responsibility	14	1.7
Reasonableness	14	1.7
Reduce disparity	14	1.7
(5H1.5) Previous employment record	11	1.3
(5H1.4) Drug dependence and alcohol abuse	9	1.1
(5H1.3) Mental and emotional conditions	8	0.9
(5H1.4) Physical condition	8	0.9
(5K2.20) Aberrant Behavior	8	0.9
5K1.1 Substantial Assistance without government motion	8	0.9
Advisory nature of the guidelines	7	0.8
General guideline adequacy issues	7	0.8
Reflect seriousness of offense/promote respect for law/just punishment	7	0.8
Restitution	7	0.8
US v Booker/ US v Fanfan	7	0.8
Deterrence	6	0.7
Remorse	6	0.7
Adequate punishment to meet purposes of sentencing	5	0.6
Avoid unwarranted sentencing disparity among defendants	5	0.6
(5H1.11) Military record/charitable Works/good deeds	4	0.5
Afford adequate deterrence to criminal conduct	4	0.5
Provide defendant with educational/vocational training/medical care/etc.	4	0.5
(5H1.2) Educational and vocational skills	3	0.4
(5H1.6) Community ties	3	0.4
Defendant's positive background/good character	3	0.4
Insufficient documentation provided on SOR to determine reason	3	0.4
Low likelihood of recidivism	3	0.4
Protect public from further crimes	3	0.4
Other <sup>3</sup>	59	7.0
<b>Total</b>	<b>842</b>	<b>100.0</b>

<sup>3</sup> The "Other" category includes all reasons provided fewer than three times among relevant cases.

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-10**  
**Demographic Information for Criminal Sexual Abuse Offenders**  
**Post-Booker**

	USSG §2A3.1 Criminal Sexual Abuse		USSG §2A3.2 Sexual Abuse of a Minor		USSG §2A3.4 Abusive Sexual Contact	
	n	%	n	%	n	%
<b>Gender</b>						
Male	144	99.3	130	97.0	28	96.5
Female	1	0.7	4	3.0	1	3.5
<b>Race</b>						
White	43	29.7	60	44.8	5	16.7
Black	4	2.8	10	7.5	0	0.0
Hispanic	8	5.5	11	8.2	1	3.3
Other	90	62.1	53	39.5	24	80.0
<b>Citizenship</b>						
U.S.	141	97.2	132	98.5	28	96.5
Non-U.S.	4	2.8	2	1.5	1	3.5
<b>Age</b>						
Under 21	11	7.6	9	6.7	5	16.8
21-25	25	17.2	36	26.9	4	13.3
26-30	23	15.9	19	14.2	1	3.3
31-35	17	11.7	13	9.7	6	20.0
36-40	20	13.8	16	11.9	4	13.3
41-50	29	20.0	27	20.1	4	13.3
Over 50	20	13.8	14	10.5	6	20.0
<b>Education</b>						
< H.S.	60	41.4	39	29.1	13	46.5
H.S. Grad.	46	31.7	50	37.3	11	39.3
Some Coll.	28	19.3	35	26.1	2	7.1
Coll. Grad.	11	7.6	10	7.5	2	7.1
<b>Criminal History</b>						
Category I	100	69.0	102	76.1	19	63.4
Category II	22	15.2	15	11.2	6	20.0
Category III	6	4.1	4	3.0	4	13.3
Category IV	3	2.1	2	1.5	0	0.0
Category V	9	6.2	7	5.2	1	3.3
Category VI	5	3.4	4	3.0	0	0.0

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-11**  
**Demographic Information for Sexual Exploitation Offenders**  
**Post-Booker**

	USSG §2G2.1 Exploitation of a Minor		USSG §2G2.2 Trafficking Child Pornography		USSG §2G2.4 Possession of Child Pornography	
	n	%	n	%	n	%
<b>Gender</b>						
Male	94	95.9	525	99.6	393	99.2
Female	4	4.1	2	0.4	3	0.8
<b>Race</b>						
White	91	92.9	497	94.5	364	91.9
Black	4	4.1	6	1.1	3	0.8
Hispanic	1	1.0	18	3.4	22	5.6
Other	2	2.0	5	1.0	7	1.8
<b>Citizenship</b>						
U.S.	95	96.9	518	98.3	385	97.2
Non-U.S.	3	3.1	9	1.7	11	2.8
<b>Age</b>						
Under 21	1	1.0	8	1.5	4	1.0
21-25	4	4.1	49	9.3	37	9.3
26-30	14	14.3	57	10.9	44	11.1
31-35	15	15.3	74	14.1	44	11.1
36-40	16	16.3	74	14.1	52	13.1
41-50	32	32.7	131	25.0	110	27.8
Over 50	16	16.3	132	25.1	105	26.5
<b>Education</b>						
< H.S.	12	12.4	48	9.2	30	7.6
H.S. Grad.	35	36.1	183	35.1	121	30.9
Some Coll.	39	40.2	193	37.0	132	33.7
Coll. Grad.	11	11.3	97	18.6	109	27.8
<b>Criminal History</b>						
Category I	56	57.1	438	83.1	330	83.3
Category II	13	13.3	36	6.8	29	7.3
Category III	7	7.1	29	5.5	18	4.6
Category IV	6	6.1	11	2.1	11	2.8
Category V	8	8.2	10	1.9	4	1.0
Category VI	8	8.2	3	0.6	4	1.0

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-12**  
**Demographic Information for *Booker* Report Datafiles**

	<b>Pre-PROTECT Act (10/1/02-4/30/03)</b>		<b>Post-PROTECT Act (5/1/03-6/24/04)</b>		<b>Post-Booker (1/12/05-1/11/06)</b>	
	Number	Percent	Number	Percent	Number	Percent
<b>Gender</b>						
Male	35,245	86.8	68,062	86.4	57,986	86.8
Female	5,369	13.2	10,735	13.6	8,804	13.2
Missing	303	-	2,409	-	774	-
<b>Race</b>						
White	12,104	30.7	23,418	30.3	18,735	28.8
Black	9,317	23.6	18,184	23.6	15,695	24.1
Hispanic	16,657	42.2	32,536	42.1	27,719	42.6
Other	1,363	3.5	3,077	4.0	2,936	4.5
Missing	1,476	-	3,991	-	2,479	-
<b>Citizenship</b>						
U.S. Citizen	25,546	65.3	49,467	64.4	41,381	63.5
Non-Citizen	13,551	34.7	27,366	35.6	23,782	36.5
Missing	1,820	-	4,373	-	2,401	-
<b>Education</b>						
Less than High School	17,534	47.2	35,143	48.4	29,309	47.5
High School	11,142	30.0	21,567	29.7	19,038	30.9
Some College	6,337	17.1	11,940	16.4	9,764	15.8
College Graduate	2,145	5.8	4,026	5.5	3,578	5.8
Missing	3,759	-	8,530	-	5,875	-
<b>Age</b>						
Less Than 21 Years	1,889	4.8	3,537	4.5	2,464	3.7
21 to 25 Years	7,351	18.5	14,410	18.3	11,200	16.9
26 to 30 Years	8,130	20.5	16,142	20.5	13,534	20.5
31 to 35 Years	6,918	17.4	13,911	17.7	11,951	18.1
36 to 40 Years	5,410	13.6	10,753	13.7	9,149	13.8
41 to 50 Years	6,594	16.6	13,133	16.7	11,920	18.0
Greater Than 50 Years	3,459	8.7	6,842	8.7	5,915	8.9
Missing	1,166	-	2,478	-	1,431	-

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-13**  
**First Offenders**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Post-Booker**

CIRCUIT District	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		Booker	
		n	%	n	%	n	%	n	%	n	%
<b>TOTAL</b>	<b>15,637</b>	<b>9,389</b>	<b>60.0</b>	<b>186</b>	<b>1.2</b>	<b>3,683</b>	<b>23.6</b>	<b>563</b>	<b>3.6</b>	<b>1,816</b>	<b>11.6</b>
<b>DC CIRCUIT</b>											
District of Columbia	104	54	51.9	0	0.0	38	36.5	2	1.9	10	9.6
<b>FIRST CIRCUIT</b>											
Maine	58	41	70.7	0	0.0	15	25.9	0	0.0	2	3.5
Massachusetts	115	62	53.9	1	0.9	17	14.8	8	7.0	27	23.5
New Hampshire	32	19	59.4	0	0.0	8	25.0	2	6.3	3	9.4
Puerto Rico	259	197	76.1	5	1.9	26	10.0	6	2.3	25	9.7
Rhode Island	21	17	81.0	0	0.0	1	4.8	0	0.0	3	14.3
<b>SECOND CIRCUIT</b>											
Connecticut	123	54	43.9	2	1.6	29	23.6	24	19.5	14	11.4
New York											
Eastern	529	170	32.1	7	1.3	147	27.8	71	13.4	134	25.3
Northern	90	45	50.0	1	1.1	28	31.1	6	6.7	10	11.1
Southern	507	294	58.0	1	0.2	89	17.6	27	5.3	96	18.9
Western	134	83	61.9	0	0.0	38	28.4	0	0.0	13	9.7
Vermont	50	27	54.0	0	0.0	17	34.0	4	8.0	2	4.0
<b>THIRD CIRCUIT</b>											
Delaware	40	22	55.0	0	0.0	4	10.0	2	5.0	12	30.0
New Jersey	314	148	47.1	2	0.6	106	33.8	15	4.8	43	13.7
Pennsylvania											
Eastern	241	87	36.1	1	0.4	92	38.2	3	1.2	58	24.1
Middle	89	41	46.1	1	1.1	29	32.6	3	3.4	15	16.9
Western	81	44	54.3	0	0.0	15	18.5	5	6.2	17	21.0
Virgin Islands	69	58	84.1	0	0.0	4	5.8	1	1.5	6	8.7
<b>FOURTH CIRCUIT</b>											
Maryland	129	48	37.2	1	0.8	42	32.6	4	3.1	34	26.4
North Carolina											
Eastern	109	64	58.7	1	0.9	32	29.4	3	2.8	9	8.3
Middle	53	37	69.8	1	1.9	9	17.0	0	0.0	6	11.3
Western	61	34	55.7	0	0.0	21	34.4	1	1.6	5	8.2
South Carolina	183	114	62.3	0	0.0	33	18.0	9	4.9	27	14.8
Virginia											
Eastern	318	240	75.5	2	0.6	27	8.5	5	1.6	44	13.8
Western	100	61	61.0	2	2.0	25	25.0	1	1.0	11	11.0
West Virginia											
Northern	30	22	73.3	0	0.0	1	3.3	2	6.7	5	16.7
Southern	51	36	70.6	1	2.0	8	15.7	0	0.0	6	11.8

CIRCUIT District	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		<i>Booker</i>	
		n	%	n	%	n	%	n	%	n	%
<b>FIFTH CIRCUIT</b>											
Louisiana											
Eastern	100	73	73.0	2	2.0	11	11.0	5	5.0	9	9.0
Middle	37	23	62.2	1	2.7	8	21.6	0	0.0	5	13.5
Western	93	69	74.2	2	2.2	8	8.6	5	5.4	9	9.7
Mississippi											
Northern	21	14	66.7	0	0.0	7	33.3	0	0.0	0	0.0
Southern	74	55	74.3	1	1.4	9	12.2	3	4.1	6	8.1
Texas											
Eastern	118	90	76.3	1	0.9	16	13.6	1	0.9	10	8.5
Northern	219	150	68.5	7	3.2	32	14.6	5	2.3	25	11.4
Southern	1,296	843	65.1	7	0.5	294	22.7	40	3.1	112	8.6
Western	1,192	960	80.5	16	1.3	138	11.6	17	1.4	61	5.1
<b>SIXTH CIRCUIT</b>											
Kentucky											
Eastern	89	51	57.3	1	1.1	31	34.8	1	1.1	5	5.6
Western	75	59	78.7	0	0.0	14	18.7	0	0.0	2	2.7
Michigan											
Eastern	225	100	44.4	4	1.8	69	30.7	13	5.8	39	17.3
Western	67	39	58.2	1	1.5	6	9.0	5	7.5	16	23.9
Ohio											
Northern	222	122	55.0	3	1.4	57	25.7	5	2.3	35	15.8
Southern	123	62	50.4	4	3.3	42	34.2	1	0.8	14	11.4
Tennessee											
Eastern	96	50	52.1	4	4.2	27	28.1	0	0.0	15	15.6
Middle	48	21	43.8	0	0.0	15	31.3	3	6.3	9	18.8
Western	94	57	60.6	0	0.0	25	26.6	0	0.0	12	12.8
<b>SEVENTH CIRCUIT</b>											
Illinois											
Central	63	48	76.2	2	3.2	5	7.9	2	3.2	6	9.5
Northern	273	146	53.5	4	1.5	60	22.0	19	7.0	44	16.1
Southern	35	22	62.9	0	0.0	7	20.0	2	5.7	4	11.4
Indiana											
Northern	77	51	66.2	0	0.0	21	27.3	3	3.9	2	2.6
Southern	80	49	61.3	0	0.0	22	27.5	2	2.5	7	8.8
Wisconsin											
Eastern	85	41	48.2	3	3.5	12	14.1	3	3.5	26	30.6
Western	27	24	88.9	0	0.0	0	0.0	0	0.0	3	11.1

CIRCUIT District	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		<i>Booker</i>	
		n	%	n	%	n	%	n	%	n	%
<b>EIGHTH CIRCUIT</b>											
Arkansas											
Eastern	57	39	68.4	1	1.8	5	8.8	4	7.0	8	14.0
Western	53	42	79.3	0	0.0	4	7.6	2	3.8	5	9.4
Iowa											
Northern	56	40	71.4	3	5.4	5	8.9	2	3.6	6	10.7
Southern	66	35	53.0	1	1.5	13	19.7	0	0.0	17	25.8
Minnesota	127	73	57.5	0	0.0	17	13.4	3	2.4	34	26.8
Missouri											
Eastern	185	118	63.8	0	0.0	40	21.6	9	4.9	18	9.7
Western	134	82	61.2	1	0.8	22	16.4	1	0.8	28	20.9
Nebraska	93	71	76.3	1	1.1	12	12.9	3	3.2	6	6.5
North Dakota	85	69	81.2	1	1.2	10	11.8	0	0.0	5	5.9
South Dakota	83	66	79.5	3	3.6	1	1.2	3	3.6	10	12.1
<b>NINTH CIRCUIT</b>											
Alaska	50	37	74.0	0	0.0	5	10.0	0	0.0	8	16.0
Arizona	951	305	32.1	43	4.5	516	54.3	41	4.3	46	4.8
California											
Central	249	201	80.7	0	0.0	16	6.4	7	2.8	25	10.0
Eastern	236	166	70.3	0	0.0	41	17.4	5	2.1	24	10.2
Northern	144	81	56.3	5	3.5	31	21.5	8	5.6	19	13.2
Southern	746	264	35.4	2	0.3	366	49.1	53	7.1	61	8.2
Guam	63	31	49.2	0	0.0	22	34.9	5	7.9	5	7.9
Hawaii	182	75	41.2	4	2.2	54	29.7	8	4.4	41	22.5
Idaho	28	13	46.4	0	0.0	11	39.3	1	3.6	3	10.7
Montana	95	75	79.0	3	3.2	13	13.7	2	2.1	2	2.1
Nevada	66	46	69.7	0	0.0	9	13.6	2	3.0	9	13.6
Northern Mariana Islands	16	14	87.5	1	6.3	1	6.3	0	0.0	0	0.0
Oregon	125	60	48.0	2	1.6	23	18.4	8	6.4	32	25.6
Washington											
Eastern	62	35	56.5	1	1.6	19	30.7	1	1.6	6	9.7
Western	254	102	40.2	2	0.8	77	30.3	6	2.4	67	26.4
<b>TENTH CIRCUIT</b>											
Colorado	111	61	55.0	0	0.0	39	35.1	1	0.9	10	9.0
Kansas	116	69	59.5	0	0.0	31	26.7	1	0.9	15	12.9
New Mexico	362	232	64.1	2	0.6	99	27.4	8	2.2	21	5.8
Oklahoma											
Eastern	26	23	88.5	0	0.0	2	7.7	1	3.9	0	0.0
Northern	44	31	70.5	1	2.3	9	20.5	0	0.0	3	6.8
Western	57	42	73.7	0	0.0	6	10.5	2	3.5	7	12.3
Utah	103	64	62.1	2	1.9	16	15.5	5	4.9	16	15.5
Wyoming	27	21	77.8	0	0.0	3	11.1	1	3.7	2	7.4

CIRCUIT District	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		<i>Booker</i>	
		n	%	n	%	n	%	n	%	n	%
<b>ELEVENTH CIRCUIT</b>											
Alabama											
Middle	41	30	73.2	0	0.0	11	26.8	0	0.0	0	0.0
Northern	92	47	51.1	2	2.2	29	31.5	2	2.2	12	13.0
Southern	44	32	72.7	0	0.0	7	15.9	0	0.0	5	11.4
Florida											
Middle	594	416	70.0	2	0.3	149	25.1	3	0.5	24	4.0
Northern	45	32	71.1	3	6.7	5	11.1	1	2.2	4	8.9
Southern	738	597	80.9	2	0.3	57	7.7	17	2.3	65	8.8
Georgia											
Middle	59	49	83.1	0	0.0	8	13.6	0	0.0	2	3.4
Northern	190	121	63.7	3	1.6	33	17.4	6	3.2	27	14.2
Southern	63	44	69.8	3	4.8	9	14.3	2	3.2	5	7.9

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-14**  
**First Offenders**  
**Sentences Relative to the Guideline Range for Each Offense Type**  
**Post-Booker**

Offense Type	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		Booker	
		n	%	n	%	n	%	n	%	n	%
<b>TOTAL</b>	<b>15,633</b>	<b>9,387</b>	<b>60.1</b>	<b>186</b>	<b>1.2</b>	<b>3,682</b>	<b>23.6</b>	<b>563</b>	<b>3.6</b>	<b>1,815</b>	<b>11.6</b>
Murder	20	10	50.0	2	10.0	1	5.0	3	15.0	4	20.0
Manslaughter	5	2	40.0	2	40.0	0	0.0	0	0.0	1	20.0
Kidnapping	14	9	64.3	0	0.0	5	35.7	0	0.0	0	0.0
Sex Abuse	97	68	70.1	2	2.1	13	13.4	4	4.1	10	10.3
Assault	99	66	66.7	5	5.1	10	10.1	6	6.1	12	12.1
Robbery	121	68	56.2	3	2.5	20	16.5	10	8.3	20	16.5
Arson	11	7	63.6	0	0.0	4	36.4	0	0.0	0	0.0
Drugs-Trafficking	5,941	3,072	51.7	23	0.4	1,999	33.7	199	3.4	648	10.9
Drugs-Comm. Fac.	75	45	60.0	1	1.3	13	17.3	1	1.3	15	20.0
Drugs-Simple Poss.	96	92	95.8	1	1.0	0	0.0	0	0.0	3	3.1
Firearms	576	330	57.3	11	1.9	130	22.6	20	3.5	85	14.8
Burglary/B&E	9	5	55.6	0	0.0	0	0.0	0	0.0	4	44.4
Auto Theft	8	4	50.0	1	12.5	1	12.5	0	0.0	2	25.0
Larceny	548	420	76.6	4	0.7	51	9.3	15	2.7	58	10.6
Fraud	2,462	1,507	61.2	37	1.5	482	19.6	98	4.0	338	13.7
Embezzlement	303	223	73.6	2	0.7	17	5.6	12	4.0	49	16.2
Forgery/Counterfeit.	212	153	72.2	1	0.5	28	13.2	3	1.4	27	12.7
Bribery	121	61	50.4	0	0.0	38	31.4	4	3.3	18	14.9
Tax Offenses	309	143	46.3	3	1.0	65	21.0	25	8.1	73	23.6
Money Laundering	450	224	49.8	8	1.8	116	25.8	19	4.2	83	18.4
Racketeering/Extort.	163	81	49.7	3	1.8	49	30.1	9	5.5	21	12.9
Gambling/Lottery	40	30	75.0	0	0.0	7	17.5	0	0.0	3	7.5
Civil Rights	29	17	58.6	0	0.0	7	24.1	1	3.5	4	13.8
Immigration	2,598	1,908	73.4	47	1.8	443	17.1	59	2.3	141	5.4
Porn./Prostitution	546	344	63.0	19	3.5	40	7.3	36	6.6	107	19.6
Prison Offenses	12	10	83.3	0	0.0	2	16.7	0	0.0	0	0.0
Admin. Justice	362	213	58.8	6	1.7	69	19.1	21	5.8	53	14.6
Environ./Wildlife	58	39	67.2	0	0.0	13	22.4	0	0.0	6	10.3
National Defense	20	8	40.0	0	0.0	8	40.0	2	10.0	2	10.0
Antitrust	14	2	14.3	0	0.0	11	78.6	1	7.1	0	0.0
Food and Drug	36	31	86.1	0	0.0	3	8.3	0	0.0	2	5.6
Other	278	195	70.1	5	1.8	37	13.3	15	5.4	26	9.4

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-15**  
**Career Offender**  
**Sentences Relative to the Guideline Range for Each Judicial District**  
**Post-Booker**

CIRCUIT District	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		Booker	
		n	%	n	%	n	%	n	%	n	%
<b>TOTAL</b>	2,040	914	44.8	14	0.7	675	33.1	136	6.7	301	14.8
<b>DC CIRCUIT</b>											
District of Columbia	36	10	27.8	1	2.8	16	44.4	2	5.6	7	19.4
<b>FIRST CIRCUIT</b>											
Maine	11	7	63.6	0	0.0	3	27.3	1	9.1	0	0.0
Massachusetts	34	11	32.4	0	0.0	5	14.7	5	14.7	13	38.2
New Hampshire	18	3	16.7	0	0.0	10	55.6	1	5.6	4	22.2
Puerto Rico	3	1	33.3	0	0.0	0	0.0	1	33.3	1	33.3
Rhode Island	11	5	45.5	0	0.0	0	0.0	1	9.1	5	45.5
<b>SECOND CIRCUIT</b>											
Connecticut	42	4	9.5	0	0.0	23	54.8	8	19.1	7	16.7
New York											
Eastern	19	3	15.8	0	0.0	7	36.8	1	5.3	8	42.1
Northern	8	1	12.5	0	0.0	5	62.5	1	12.5	1	12.5
Southern	19	7	36.8	0	0.0	1	5.3	3	15.8	8	42.1
Western	12	4	33.3	0	0.0	7	58.3	0	0.0	1	8.3
Vermont	9	3	33.3	0	0.0	4	44.4	0	0.0	2	22.2
<b>THIRD CIRCUIT</b>											
Delaware	3	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0
New Jersey	41	6	14.6	0	0.0	22	53.7	3	7.3	10	24.4
Pennsylvania											
Eastern	65	18	27.7	1	1.5	27	41.5	5	7.7	14	21.5
Middle	56	21	37.5	0	0.0	29	51.8	2	3.6	4	7.1
Western	24	11	45.8	0	0.0	2	8.3	3	12.5	8	33.3
Virgin Islands											
<b>FOURTH CIRCUIT</b>											
Maryland	56	14	25.0	0	0.0	24	42.9	8	14.3	10	17.9
North Carolina											
Eastern	55	19	34.6	1	1.8	32	58.2	1	1.8	2	3.6
Middle	43	22	51.2	0	0.0	7	16.3	4	9.3	10	23.3
Western	30	14	46.7	0	0.0	13	43.3	0	0.0	3	10.0
South Carolina	66	45	68.2	0	0.0	15	22.7	1	1.5	5	7.6
Virginia											
Eastern	44	32	72.7	0	0.0	2	4.6	1	2.3	9	20.5
Western	28	13	46.4	1	3.6	10	35.7	2	7.1	2	7.1
West Virginia											
Northern	12	9	75.0	0	0.0	3	25.0	0	0.0	0	0.0
Southern	18	9	50.0	0	0.0	0	0.0	4	22.2	5	27.8

CIRCUIT District	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		Booker	
		n	%	n	%	n	%	n	%	n	%
<b>FIFTH CIRCUIT</b>											
Louisiana											
Eastern	9	3	33.3	0	0.0	5	55.6	0	0.0	1	11.1
Middle	6	3	50.0	0	0.0	3	50.0	0	0.0	0	0.0
Western	11	8	72.7	1	9.1	0	0.0	0	0.0	2	18.2
Mississippi											
Northern	2	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0
Southern	9	8	88.9	0	0.0	1	11.1	0	0.0	0	0.0
Texas											
Eastern	39	29	74.4	1	2.6	8	20.5	1	2.6	0	0.0
Northern	14	6	42.9	0	0.0	4	28.6	1	7.1	3	21.4
Southern	27	17	63.0	0	0.0	6	22.2	3	11.1	1	3.7
Western	50	27	54.0	1	2.0	14	28.0	3	6.0	5	10.0
<b>SIXTH CIRCUIT</b>											
Kentucky											
Eastern	16	6	37.5	0	0.0	8	50.0	0	0.0	2	12.5
Western	16	5	31.3	0	0.0	7	43.8	1	6.3	3	18.8
Michigan											
Eastern	24	13	54.2	0	0.0	9	37.5	0	0.0	2	8.3
Western	25	13	52.0	0	0.0	7	28.0	0	0.0	5	20.0
Ohio											
Northern	51	21	41.2	0	0.0	23	45.1	1	2.0	6	11.8
Southern	19	7	36.8	0	0.0	8	42.1	1	5.3	3	15.8
Tennessee											
Eastern	46	20	43.5	0	0.0	20	43.5	0	0.0	6	13.0
Middle	19	11	57.9	0	0.0	5	26.3	1	5.3	2	10.5
Western	25	11	44.0	0	0.0	11	44.0	1	4.0	2	8.0
<b>SEVENTH CIRCUIT</b>											
Illinois											
Central	26	10	38.5	0	0.0	9	34.6	2	7.7	5	19.2
Northern	39	23	59.0	0	0.0	13	33.3	1	2.6	2	5.1
Southern	17	14	82.4	1	5.9	0	0.0	0	0.0	2	11.8
Indiana											
Northern	7	3	42.9	0	0.0	3	42.9	0	0.0	1	14.3
Southern	11	7	63.6	0	0.0	3	27.3	1	9.1	0	0.0
Wisconsin											
Eastern	22	11	50.0	0	0.0	6	27.3	1	4.6	4	18.2
Western	17	12	70.6	0	0.0	3	17.7	0	0.0	2	11.8

CIRCUIT District	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		Booker	
		n	%	n	%	n	%	n	%	n	%
<b>EIGHTH CIRCUIT</b>											
Arkansas											
Eastern	5	3	60.0	0	0.0	1	20.0	0	0.0	1	20.0
Western	4	1	25.0	0	0.0	3	75.0	0	0.0	0	0.0
Iowa											
Northern	13	8	61.5	0	0.0	4	30.8	0	0.0	1	7.7
Southern	17	2	11.8	0	0.0	9	53.0	1	5.9	5	29.4
Minnesota	37	13	35.1	0	0.0	10	27.0	5	13.5	9	24.3
Missouri											
Eastern	49	22	44.9	0	0.0	6	12.2	5	10.2	16	32.7
Western	23	13	56.5	0	0.0	6	26.1	0	0.0	4	17.4
Nebraska	17	5	29.4	1	5.9	7	41.2	2	11.8	2	11.8
North Dakota	6	3	50.0	0	0.0	2	33.3	1	16.7	0	0.0
South Dakota	10	6	60.0	1	10.0	1	10.0	1	10.0	1	10.0
<b>NINTH CIRCUIT</b>											
Alaska	6	3	50.0	0	0.0	1	16.7	0	0.0	2	33.3
Arizona	25	6	24.0	0	0.0	17	68.0	0	0.0	2	8.0
California											
Central	9	6	66.7	0	0.0	2	22.2	1	11.1	0	0.0
Eastern	17	7	41.2	0	0.0	9	52.9	1	5.9	0	0.0
Northern	13	4	30.8	0	0.0	6	46.2	0	0.0	3	23.1
Southern	16	1	6.3	1	6.3	13	81.3	1	6.3	0	0.0
Guam	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0
Hawaii	9	1	11.1	0	0.0	3	33.3	4	44.4	1	11.1
Idaho	2	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0
Montana	5	2	40.0	0	0.0	3	60.0	0	0.0	0	0.0
Nevada	7	1	14.3	0	0.0	2	28.6	1	14.3	3	42.9
Northern Mariana Islands	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0
Oregon	23	8	34.8	0	0.0	7	30.4	1	4.4	7	30.4
Washington											
Eastern	6	1	16.7	0	0.0	2	33.3	1	16.7	2	33.3
Western	11	2	18.2	0	0.0	8	72.7	0	0.0	1	9.1
<b>TENTH CIRCUIT</b>											
Colorado	17	4	23.5	0	0.0	7	41.2	2	11.8	4	23.5
Kansas	27	16	59.3	1	3.7	6	22.2	1	3.7	3	11.1
New Mexico	37	9	24.3	0	0.0	19	51.4	5	13.5	4	10.8
Oklahoma											
Eastern	4	3	75.0	0	0.0	0	0.0	0	0.0	1	25.0
Northern	9	9	100.0	0	0.0	0	0.0	0	0.0	0	0.0
Western	8	4	50.0	0	0.0	1	12.5	1	12.5	2	25.0
Utah	18	9	50.0	0	0.0	3	16.7	2	11.1	4	22.2
Wyoming	5	3	60.0	1	20.0	1	20.0	0	0.0	0	0.0

CIRCUIT District	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		<i>Booker</i>	
		n	%	n	%	n	%	n	%	n	%
<b>ELEVENTH CIRCUIT</b>											
Alabama											
Middle	4	2	50.0	0	0.0	1	25.0	1	25.0	0	0.0
Northern	9	3	33.3	0	0.0	5	55.6	1	11.1	0	0.0
Southern	4	2	50.0	0	0.0	2	50.0	0	0.0	0	0.0
Florida											
Middle	88	35	39.8	0	0.0	27	30.7	11	12.5	15	17.1
Northern	24	17	70.8	0	0.0	5	20.8	0	0.0	2	8.3
Southern	98	67	68.4	0	0.0	18	18.4	7	7.1	6	6.1
Georgia											
Middle	14	9	64.3	0	0.0	5	35.7	0	0.0	0	0.0
Northern	13	6	46.2	1	7.7	3	23.1	2	15.4	1	7.7
Southern	19	11	57.9	0	0.0	5	26.3	2	10.5	1	5.3

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles.

**Appendix E-16**  
**Career Offenders**  
**Sentences Relative to the Guideline Range for Each Offense Type**  
**Post-Booker**

Offense Type	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		Booker	
		n	%	n	%	n	%	n	%	n	%
<b>TOTAL</b>	2,040	914	44.8	14	0.7	675	33.1	136	6.7	301	14.8
<b>Murder</b>	5	4	80.0	0	0.0	0	0.0	0	0.0	1	20.0
<b>Manslaughter</b>	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0
<b>Kidnapping</b>	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0
<b>Sex Abuse</b>	3	2	66.7	0	0.0	0	0.0	0	0.0	1	33.3
<b>Assault</b>	40	31	77.5	1	2.5	3	7.5	2	5.0	3	7.5
<b>Robbery</b>	222	131	59.0	2	0.9	44	19.8	18	8.1	27	12.2
<b>Drug Trafficking</b>	1,464	579	39.6	5	0.3	559	38.2	101	6.9	220	15.0
<b>Drug Communication Facility</b>	15	11	73.3	0	0.0	3	20.0	0	0.0	1	6.7
<b>Firearms</b>	188	94	50.0	3	1.6	46	24.5	7	3.7	38	20.2
<b>Auto Theft</b>	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0
<b>Fraud</b>	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0
<b>Extortion/ Racketeering</b>	28	15	53.6	1	3.6	11	39.3	0	0.0	1	3.6
<b>Immigration</b>	2	0	0.0	0	0.0	1	50.0	0	0.0	1	50.0
<b>Pornography/ Prostitution</b>	7	4	57.1	0	0.0	2	28.6	1	14.3	0	0.0
<b>Prison Offenses</b>	41	24	58.5	1	2.4	4	9.8	4	9.8	8	19.5
<b>Administration of Justice</b>	6	5	83.3	0	0.0	1	16.7	0	0.0	0	0.0
<b>National Defense</b>	3	2	66.7	0	0.0	1	33.3	0	0.0	0	0.0
<b>Other</b>	12	8	66.7	1	8.3	0	0.0	3	25.0	0	0.0

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles. Of the 2,090 Career Offender cases in the post-*Booker* Datafile, 50 were excluded due to missing information.

**Appendix E-17**  
**Career Offenders**  
**Distribution of Offenses for Each Category of Sentence**  
**Relative to the Guideline Range**  
**Post-Booker**

Offense Type	TOTAL	Within-Range		Upward Departure		Government Sponsored		Downward Departure		Booker	
		n	%	n	%	n	%	n	%	n	%
<b>TOTAL</b>	2,040	914	100.0	14	100.0	675	100.0	136	100.0	301	100.0
<b>Murder</b>	5	4	0.4	0	0.0	0	0.0	0	0.0	1	0.3
<b>Manslaughter</b>	1	1	0.1	0	0.0	0	0.0	0	0.0	0	0.0
<b>Kidnapping</b>	1	1	0.1	0	0.0	0	0.0	0	0.0	0	0.0
<b>Sex Abuse</b>	3	2	0.2	0	0.0	0	0.0	0	0.0	1	0.3
<b>Assault</b>	40	31	3.4	1	7.1	3	0.4	2	1.5	3	1.0
<b>Robbery</b>	222	131	14.3	2	14.3	44	6.5	18	13.2	27	9.0
<b>Drug Trafficking</b>	1,464	579	63.4	5	35.7	559	82.8	101	74.3	220	73.1
<b>Drug Comm. Fac.</b>	15	11	1.2	0	0.0	3	0.4	0	0.0	1	0.3
<b>Firearms</b>	188	94	10.3	3	21.4	46	6.8	7	5.2	38	12.6
<b>Auto Theft</b>	1	1	0.1	0	0.0	0	0.0	0	0.0	0	0.0
<b>Fraud</b>	1	1	0.1	0	0.0	0	0.0	0	0.0	0	0.0
<b>Extortion/ Racketeering</b>	28	15	1.6	1	7.1	11	1.6	0	0.0	1	0.3
<b>Immigration</b>	2	0	0.0	0	0.0	1	0.2	0	0.0	1	0.3
<b>Pornography/ Prostitution</b>	7	4	0.4	0	0.0	2	0.3	1	0.7	0	0.0
<b>Prison Offenses</b>	41	24	2.6	1	7.1	4	0.6	4	2.9	8	2.7
<b>Administration of Justice</b>	6	5	0.6	0	0.0	1	0.2	0	0.0	0	0.0
<b>National Defense</b>	3	2	0.2	0	0.0	1	0.2	0	0.0	0	0.0
<b>Other</b>	12	8	0.9	1	7.1	0	0.0	3	2.2	0	0.0

SOURCE: U.S. Sentencing Commission 2006 *Booker* Report Datafiles. Of the 2,090 Career Offender cases in the post-*Booker* Datafile, 50 were excluded due to missing information.

**Appendix E-18**  
**Fast Track Programs Authorized by the Deputy Attorney General**  
**October 29, 2004<sup>4</sup>**

<b>District</b>	<b>Fast Track Program</b>
<b>Arizona</b>	Illegal Reentry After Deportation Cases Transportation or Harboring of Aliens Cases Alien Baby/Child Smuggling and “Bringing In” ( <i>i.e.</i> , cases involving defendants caught guiding defendants across the border) Cases Drug Cases Arising Along the Border First Time Marijuana Offenses Along the Border Involving Less Than 20 Kilograms of Marijuana and First Time Drug Backpacking Offenses (regardless of the amount of marijuana carried)
<b>California Central</b>	Illegal Reentry After Deportation Cases
<b>California Eastern</b>	Illegal Reentry After Deportation Cases
<b>California Northern</b>	Illegal Reentry After Deportation Cases
<b>California Southern</b>	Illegal Reentry After Deportation Cases Transportation or Harboring of Aliens Cases Drug Cases Arising Along the Border
<b>Florida Southern</b>	Cases Involving Aliens Using False/Fraudulent Immigration Documents
<b>Georgia Northern</b>	Cases Involving Aliens Using False/Fraudulent Immigration Documents
<b>Idaho</b>	Illegal Reentry After Deportation Cases
<b>Nebraska</b>	Illegal Reentry After Deportation Cases
<b>New Mexico</b>	Illegal Reentry After Deportation Cases Transportation or Harboring of Aliens Cases Drug Backpacking Cases
<b>New York Eastern</b>	Drug Courier Cases Arising out of John F. Kennedy International Airport
<b>North Dakota</b>	Illegal Reentry After Deportation Cases
<b>Oregon</b>	Illegal Reentry After Deportation Cases
<b>Texas Southern</b>	Laredo Division Drug Cases Arising Along the Border Illegal Reentry After Deportation Cases Transportation or Harboring of Aliens Cases
<b>Texas Western</b>	Illegal Reentry After Deportation Cases Transportation or Harboring of Aliens Cases Drug Cases Arising at Border Ports of Entry
<b>Washington Western</b>	Illegal Reentry After Deportation Cases

<sup>4</sup> Each of the Fast Track Programs listed above is authorized until September 30, 2005. In order to continue a Fast Track Program beyond September 30, 2005, USAOs must submit a request for reauthorization to the Executive Office for United States Attorneys (EOUSA) by September 1, 2005.

SOURCE: United States Department of Justice. *2005 Report on the Department of Justice’s Fast Track Programs*. Washington, D.C.