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Report on the
Continuing Impact of *United States v. Booker*
on Federal Sentencing



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Key Finding #1:

Offenders and Sentences Over Time

The number of federal offenders has substantially increased, and most federal offenders have continued to receive substantial sentences of imprisonment.

Key Finding #1:

- In FY 1995 there were 37,091 federal offenders compared to 76,216 in FY 2011.
- The average sentence was 49 months in the Koon period, 53 months in the PROTECT Act period, 54 months in the Booker period, and 49 months in the Gall period.
- Sentence lengths have increased or decreased depending on offense type.

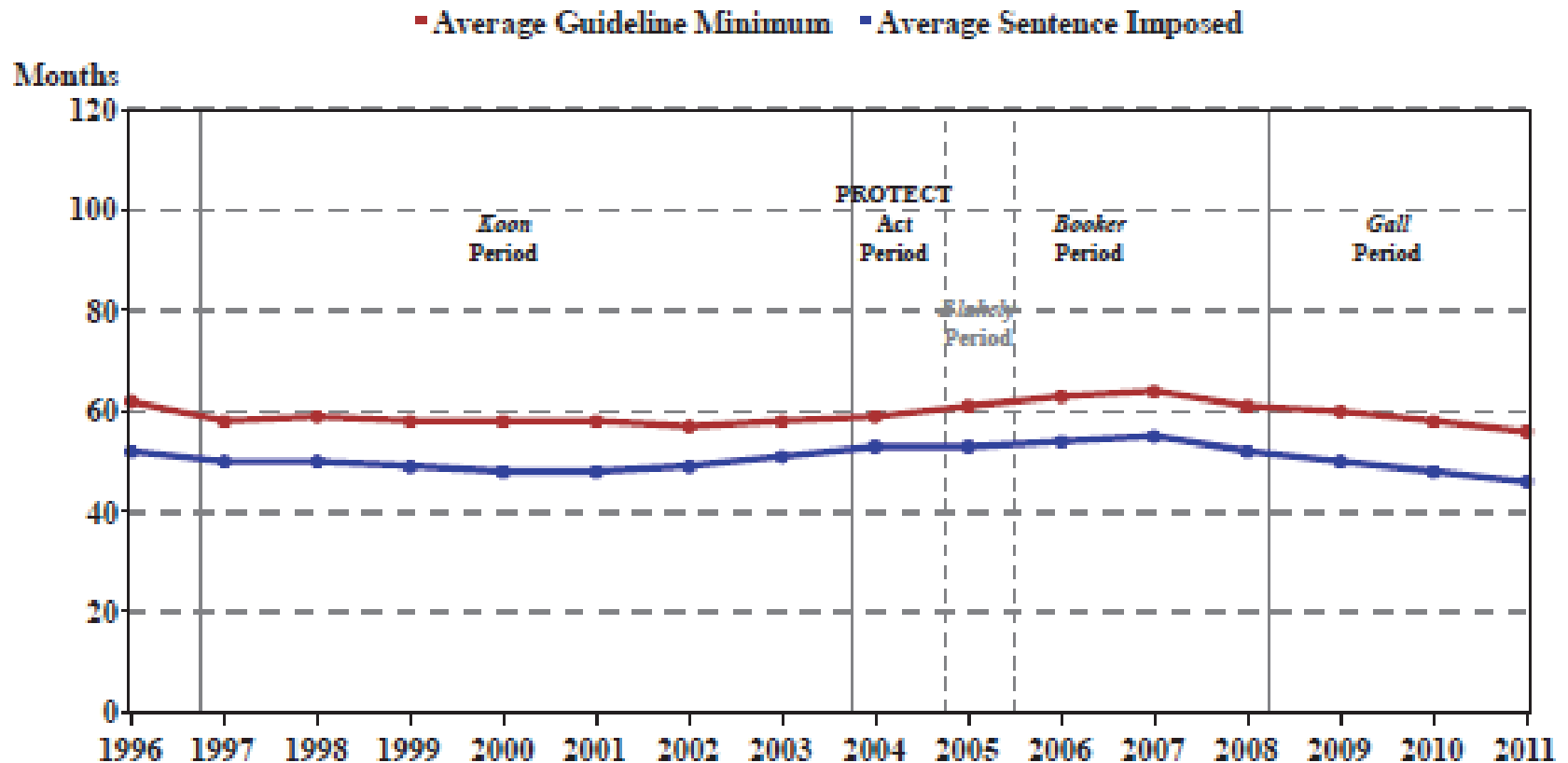
Key Finding #2:

Stable Influence of the Guidelines

The guidelines have remained the essential starting point for all federal sentences and have continued to influence sentences significantly.

Stable Influence of the Guidelines Overall

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



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

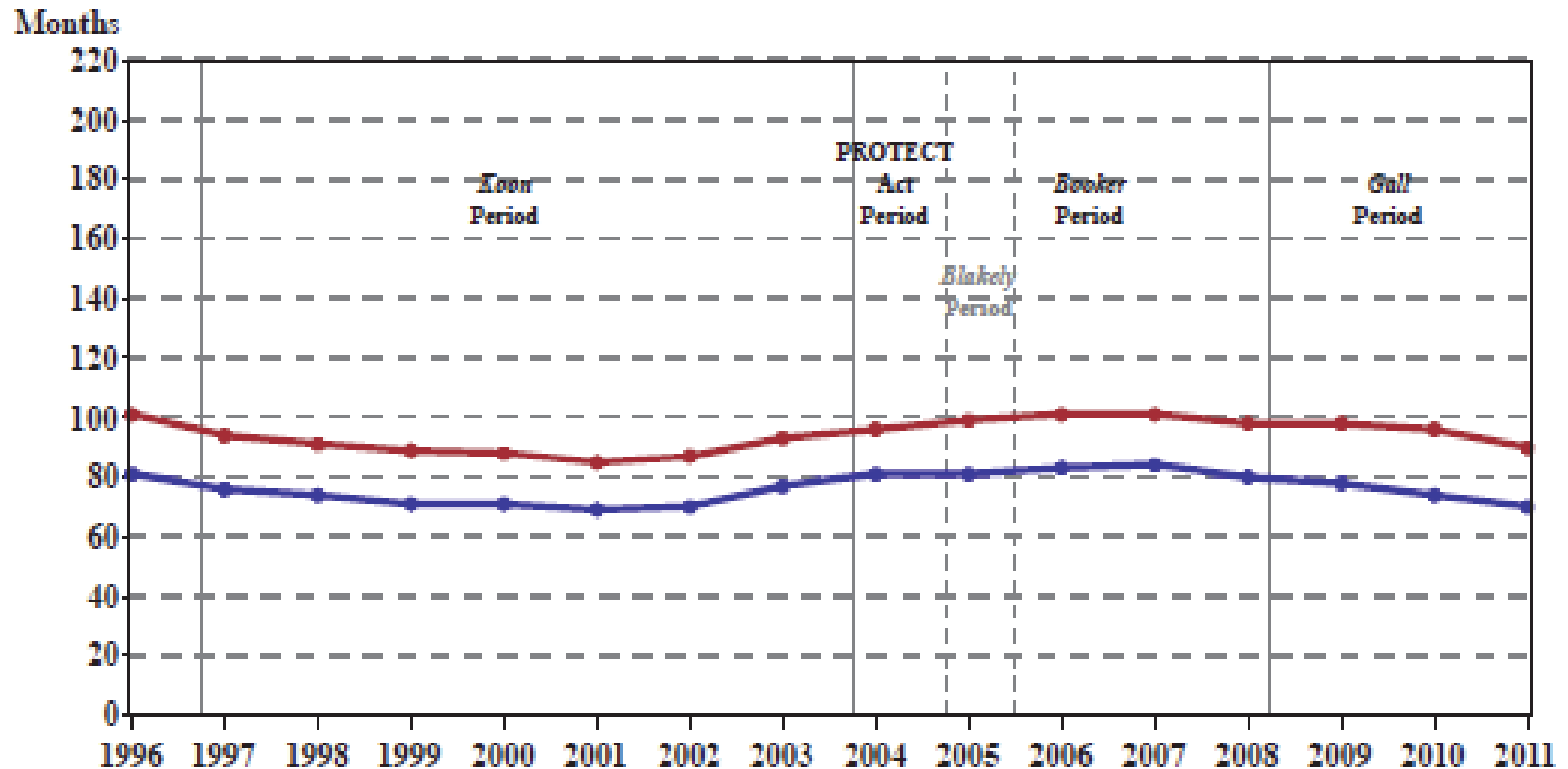
Key Finding #2:

- The influence of the guidelines, as measured by the relationship between the average guideline minimum and the average sentence, has generally remained stable in drug trafficking, firearms, and immigration offenses.

All Drug Offenses

Average Guideline Minimum and Sentence Imposed
Drug Trafficking Offenses
Fiscal Years 1996-2011

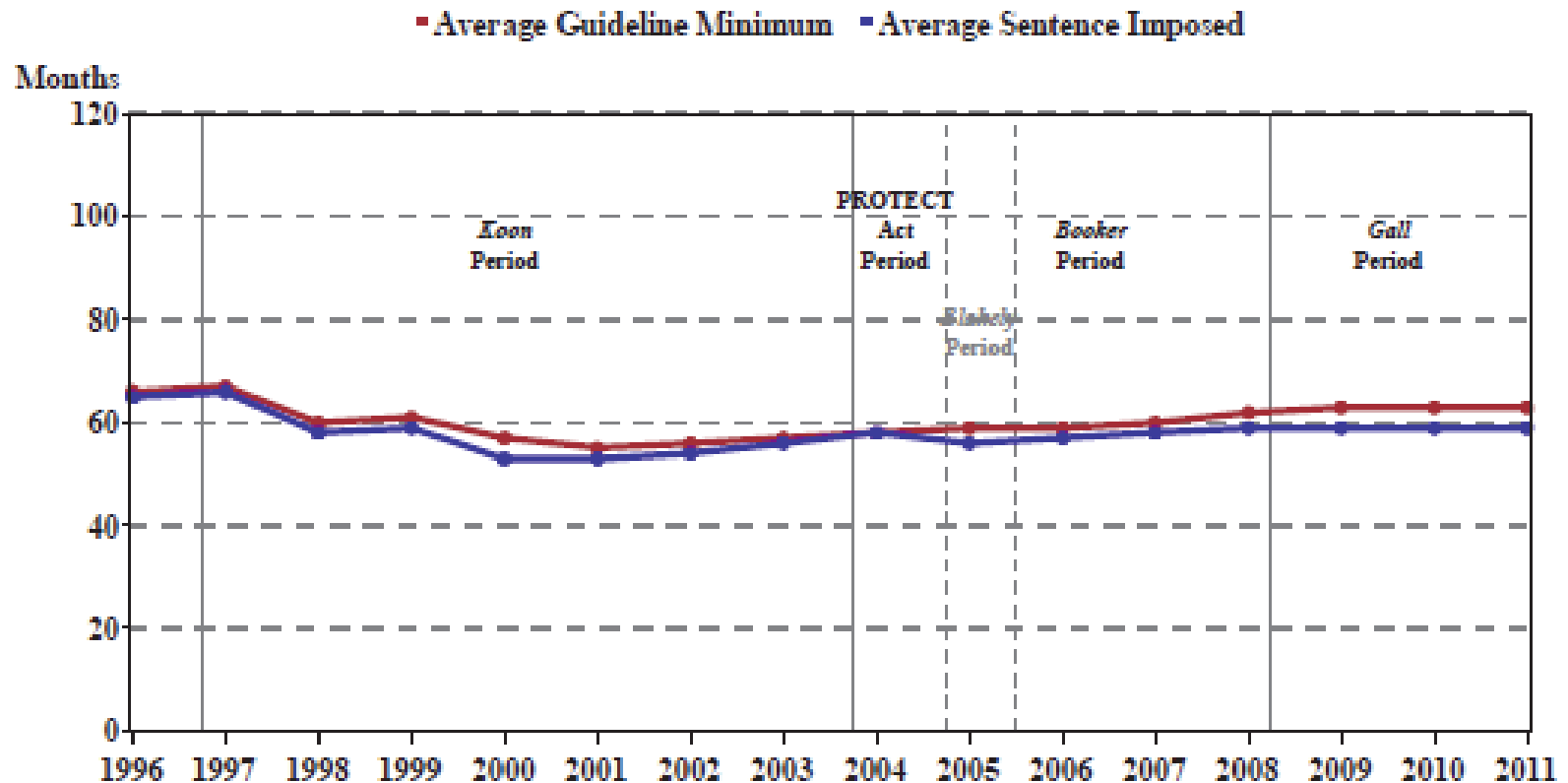
■ Average Guideline Minimum ■ Average Sentence Imposed



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

Firearms Offenses

Average Guideline Minimum and Sentence Imposed
Firearms Offenses
Fiscal Years 1996-2011

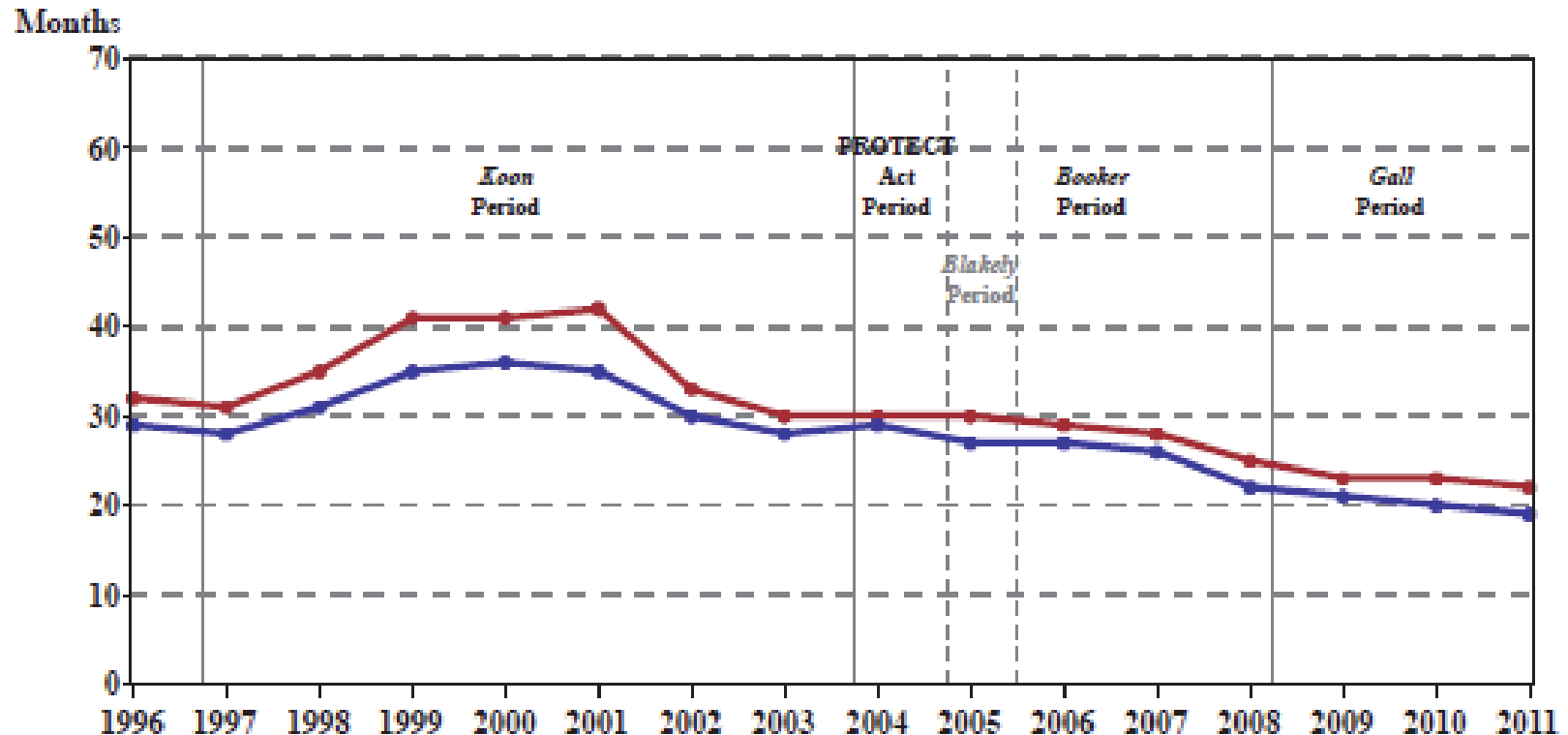


SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Illegal Entry Offenses

Average Guideline Minimum and Sentence Imposed
Illegal Entry Offenses
Fiscal Years 1996-2011

■ Average Guideline Minimum ■ Average Sentence Imposed



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

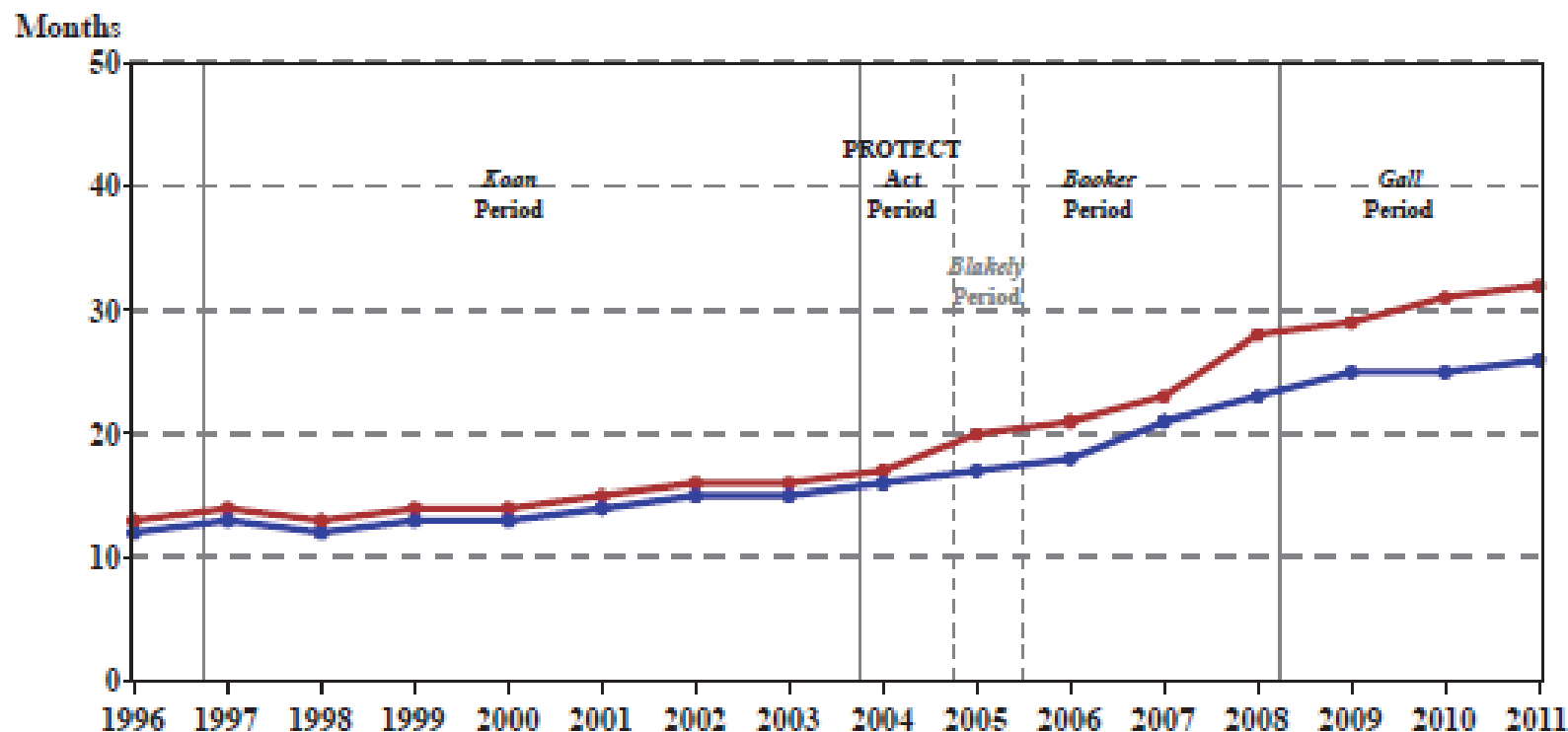
Key Finding #2:

- The influence of the guidelines, as measured by the relationship between the average guideline minimum and the average sentence, has diminished in fraud and child pornography offenses.

Fraud Offenses

Average Guideline Minimum and Sentence Imposed
Fraud Offenses
Fiscal Years 1996-2011

■ Average Guideline Minimum ■ Average Sentence Imposed

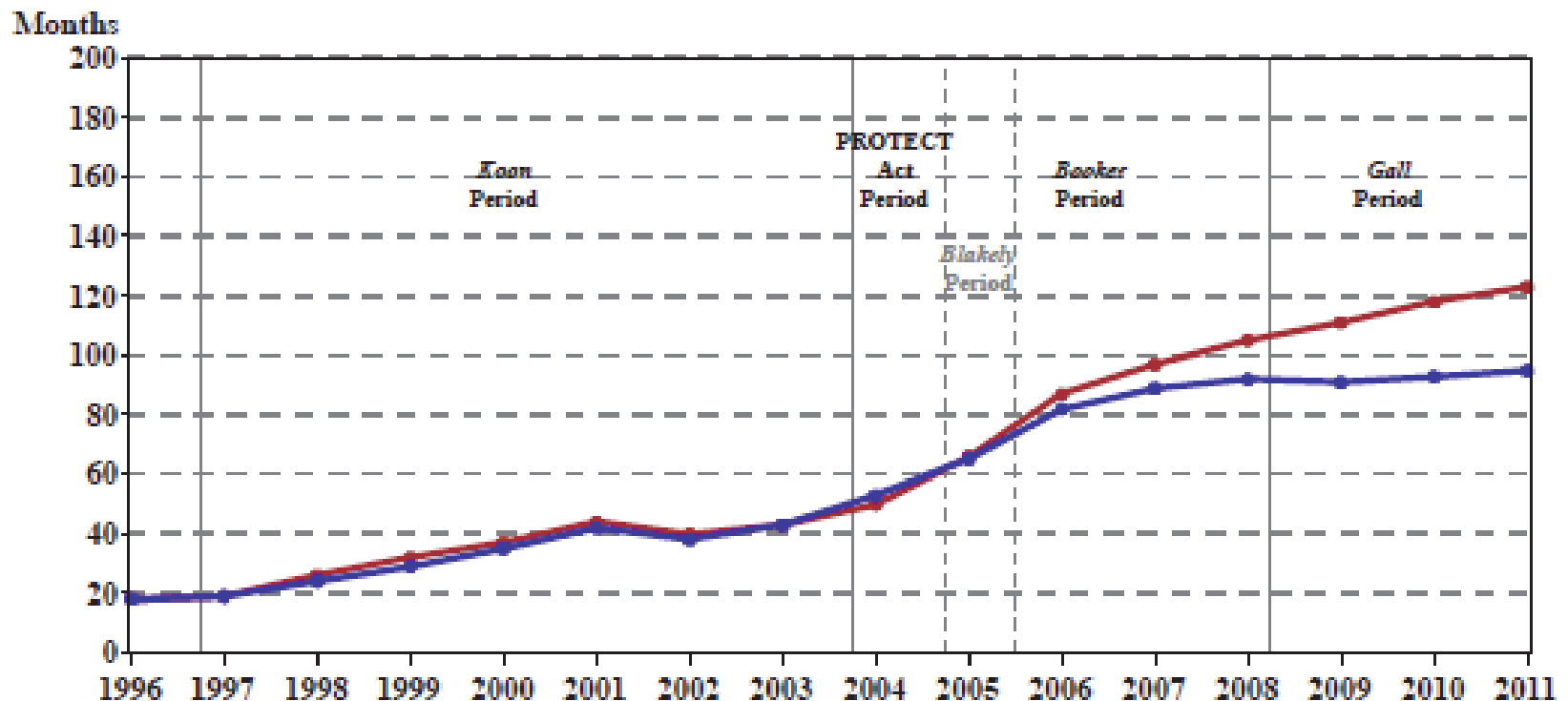


SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Child Pornography Offenses

Average Guideline Minimum and Sentence Imposed
Child Pornography Non-Production Offenses
Fiscal Years 1996-2011

■ Average Guideline Minimum ■ Average Sentence Imposed



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

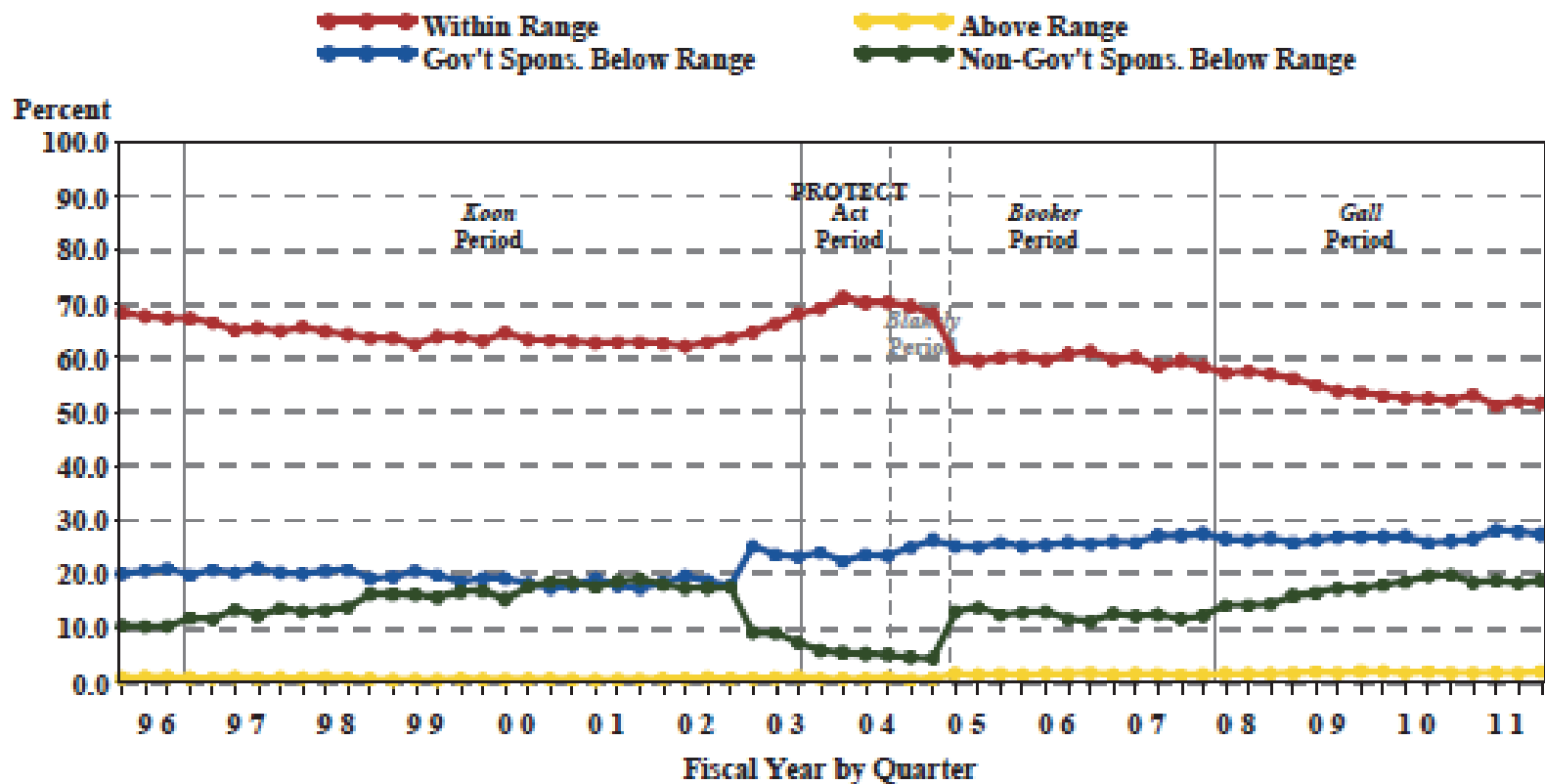
Key Finding #3:

Decreasing Rates of Within Guidelines Sentences Over Time

For most offense types, the rate of within range sentences has decreased while the rate of below range sentences (both government sponsored and non-government sponsored) has increased over time.

All Offenses

Quarterly Data for Within-Range and Out-of-Range Sentences
All Offenses
Fiscal Years 1996-2011



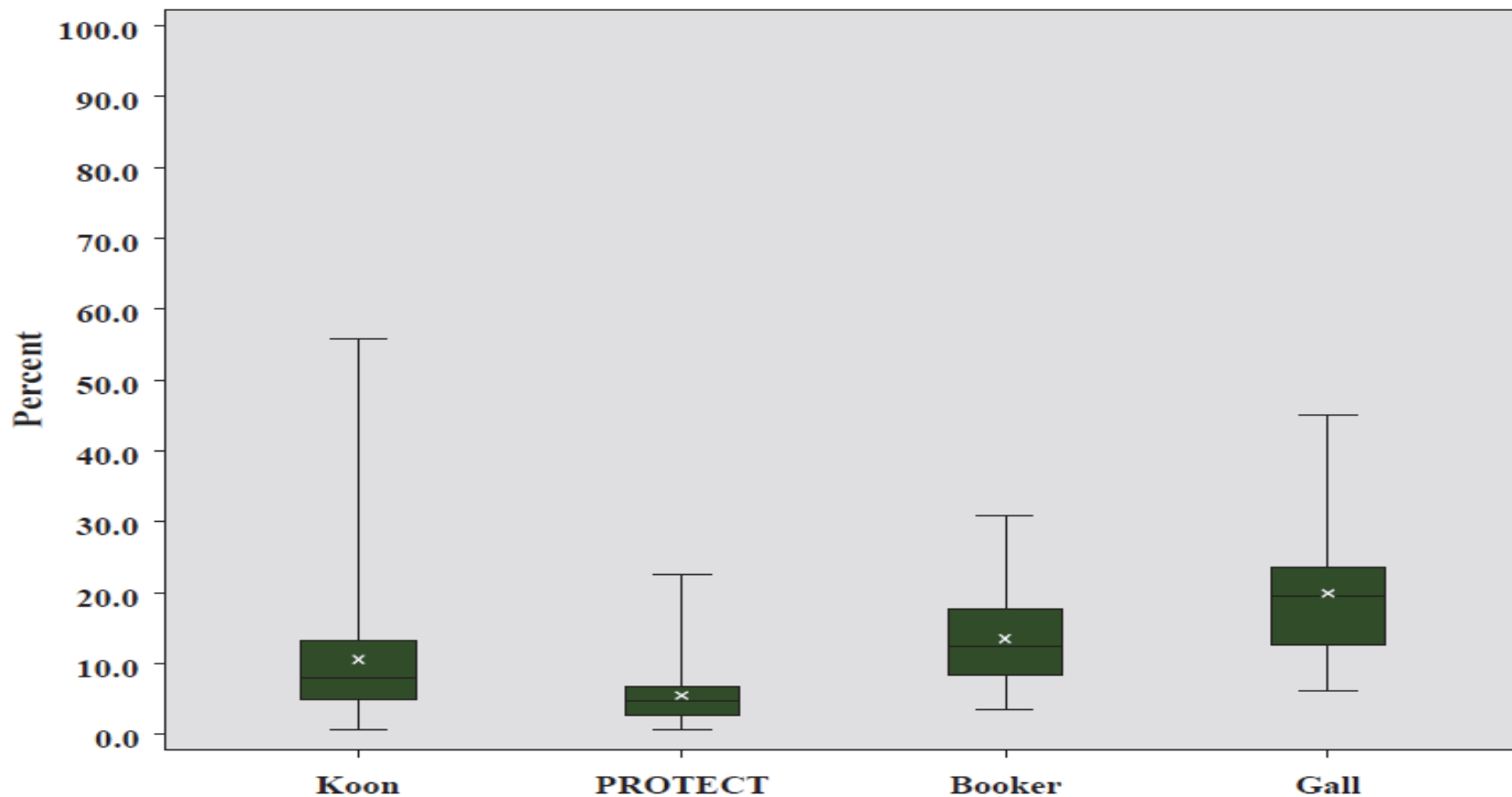
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Key Finding #3: Inter-District Differences

- The variation in rates of non-government sponsored below range sentences have increased in most districts . . . indicating that sentencing outcomes increasingly depend upon the district in which the defendant is sentenced.
- Shown in report using “Box Plots”

Spread of Rates of Non-Government Sponsored Below Range Sentences All Offenses

Koon Period through Gall Period

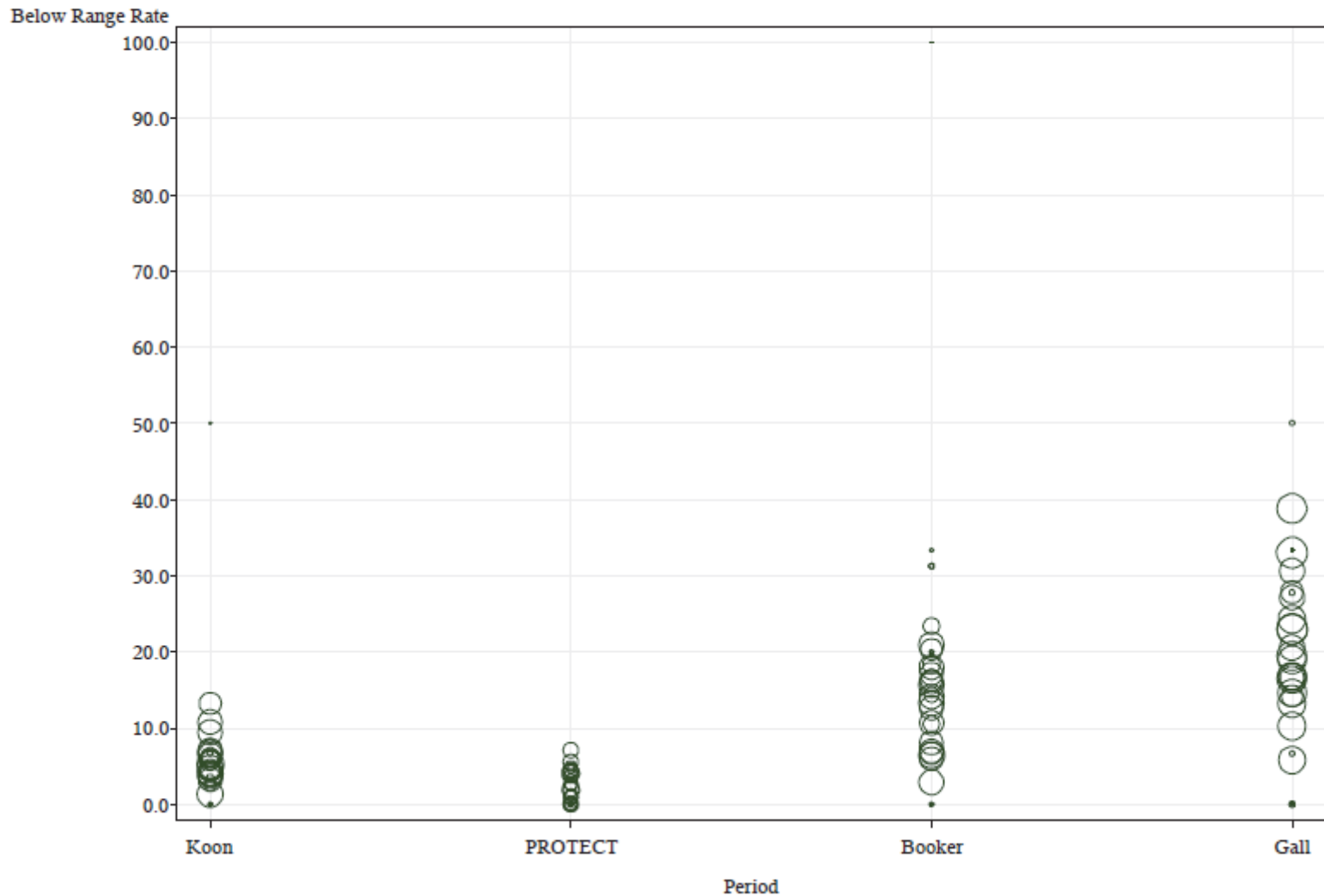


N	94.0	91.0	94.0	94.0
Min	0.8	0.5	3.4	6.1
Max	55.9	22.5	30.8	44.9
Q1	4.8	2.6	8.3	12.6
Q3	13.2	6.7	17.6	23.5
Q2	8.0	4.6	12.3	19.6
Mean	10.6	5.5	13.5	19.9

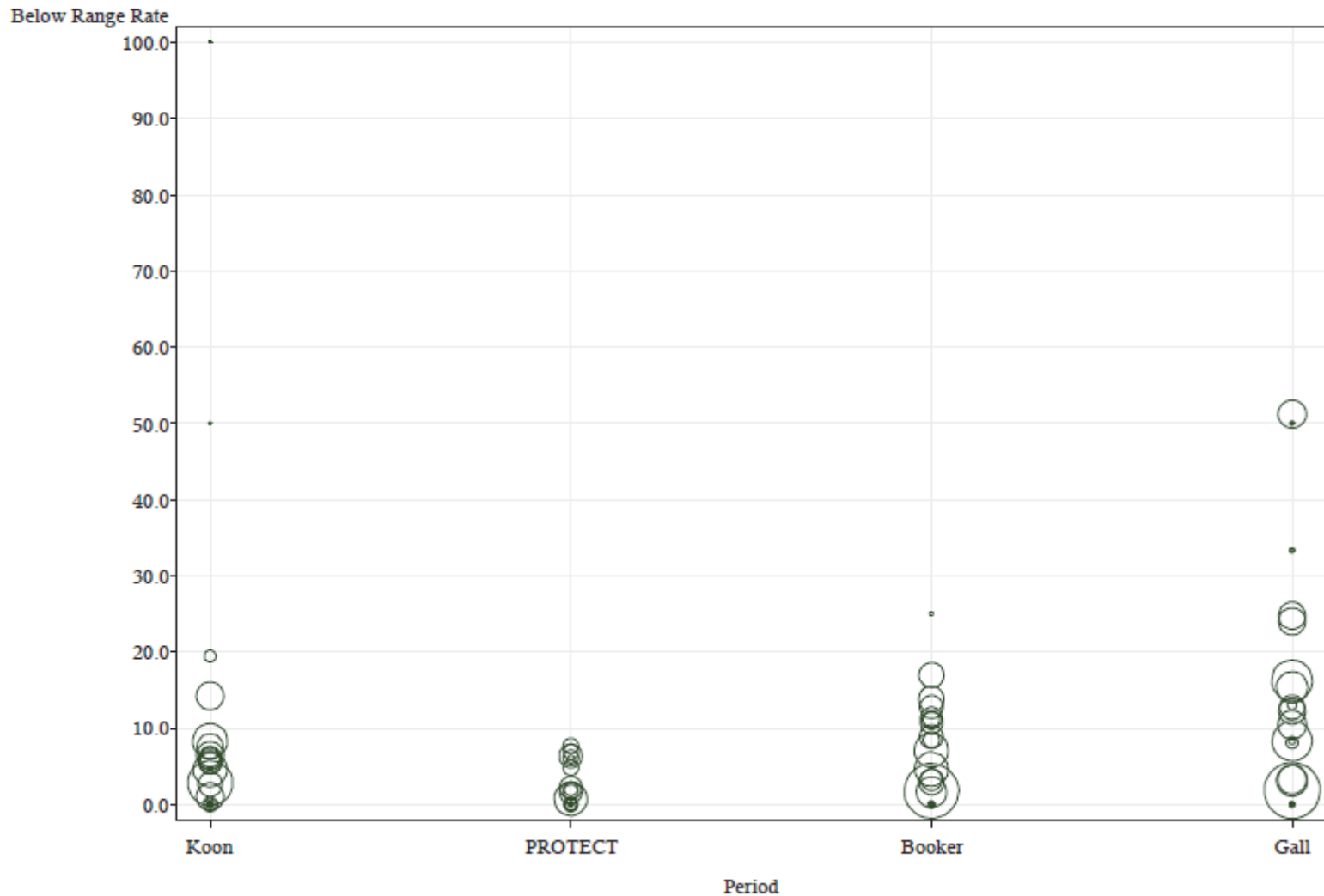
Key Finding #3: Intra-District Differences

- Variation in the rates of non-government sponsored below range sentences among judges within the same district has increased in most districts since Booker, indicating that sentencing outcomes increasingly depend upon the judge to whom the case is assigned.
- 64 out of 94 districts show a similar pattern of differences.
- Shown in report using “Bubble Plots”

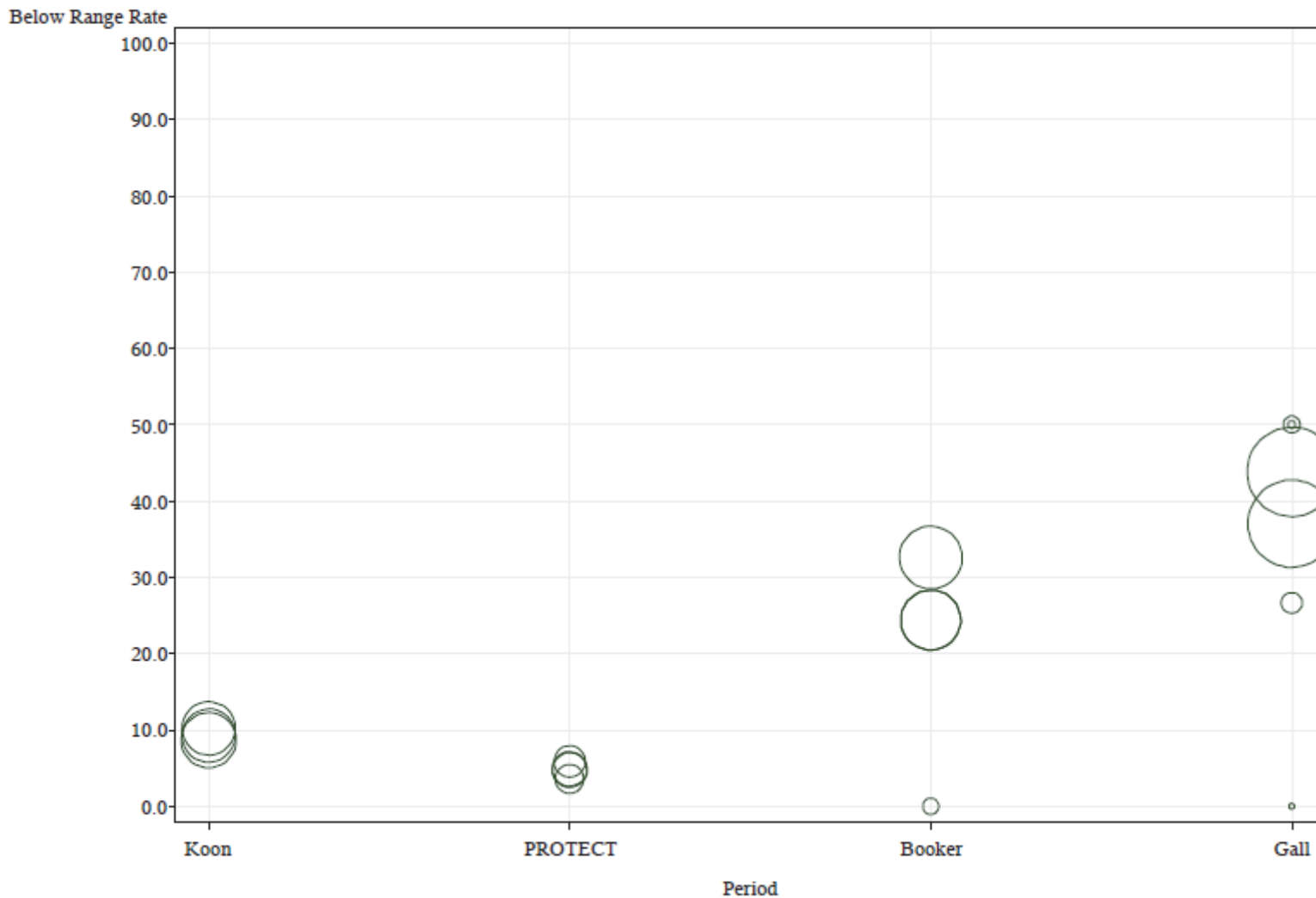
Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Florida, Southern



Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Texas, Northern



Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Rhode Island



Key Finding #4:

Appellate Review

Appellate review has not promoted uniformity in sentencing to the extent the Supreme Court anticipated in Booker.

Key Finding #4:

- Child Pornography Offenses
 - Compare *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009)
 - with *United States v. Pugh*, 515 F.3d 864 (11th Cir. 2008); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010)

Key Finding #4:

- Fraud Offenses
 - Compare *United States v. Whitehead*, 532 F.3d 991 (9th Cir. 2008)
 - with *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010); *United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006)

FEDERAL CHILD PORNOGRAPHY OFFENSES



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Child Pornography Offense Types

- Non-production: §2G2.2
 - 90% of federal CP prosecutions
 - Receipt/Transportation/ Distribution (R/T/D)
 - Usually 5y man min and 20y stat max
 - Possession
 - Usually no man min and 10y or 20y stat max
 - Obscenity
 - Varies based on statute
- Production: §2G2.1
 - 10% of federal CP prosecutions
 - Usually 15y man min and 30y stat max

Child Pornography Report

- To prepare the report:
 - Multi-disciplinary child pornography policy team
 - Social science research, literature review, case law analysis
 - Roundtable and hearing
 - Sentencing data analysis
 - Coding projects
 - Recidivism study

Offenders & Offending Generally

- Offender characteristics have changed little across time
 - Typical offender :
 - White male
 - U.S. citizen
 - Educated
 - Employed
 - Early 40s
 - Little/no criminal record

Offenders & Offending Generally

- Offenders use digital technology to amass collections
 - Typically collect over a period of months or years
 - Typically possess many hundreds or thousands of images (still images and videos)
 - 46% possess at least one image of a child under 6, and 28% possess at least one image of a child under 3 (2006 Nat'l Juvenile Online Victimization Survey, CACRC-Univ. of N.H.)
 - 82% possess at least one image containing sexual penetration (2006 NJOVS)

Offenders & Offending Generally

- Some offenders participate in online “communities”
 - Forums in which to trade child pornography
 - Normalizes and validates pedophilic activity

Key Finding #1:

As Sentencing Ranges and Average Sentences Have Increased, So Have Below-Range Sentences

Guideline penalty ranges and average sentences have substantially increased in part because of changes made by the PROTECT Act.

Key Finding #1:

- Average sentence lengths increased from 54 months in 2004 to 95 months in 2010
- The rate of within-guideline sentences decreased: 83.2% in FY04; 40.2% in FY10 and 32.7% in FY11
- Lowest within-guidelines rate of any major offense type

Key Finding #2:

Technology Used to Commit the Offense has Changed

Significant technological changes related to the commission of child pornography offenses have occurred in the past decade

Key Finding #2:

- Faster computers and Internet speed, much larger storage capacity
- P2P file-sharing was used by nearly two-thirds of federal offenders in 2012, but no evidence that it was used by any federal offender sentenced in 2002
- P2P file-sharing networks enables easy access to many more images, images of younger victims, and more graphic images (resulting in several guidelines enhancements in §2G2.2 now applying in typical cases)

Key Finding #3:

Growing Disconnect Between Offense of Conviction and Offense Conduct

Many offenders who are convicted of possession also received and/or distributed child pornography

Key Finding #3:

- 97.5% of offenders in 2010 engaged in knowing receipt and/or distribution behavior
- Over 50% of offenders in 2010 were convicted of possession offenses (instead of R/T/D)

Key Finding #4:

A significant percentage of non-production child pornography offenders have known histories of sexually dangerous behavior

Key Finding #4:

- “Criminal Sexually Dangerous Behavior” (CSDB)
 - “Contact” Sex Offenses
 - “Non-Contact” Sex Offenses
 - Prior Child Pornography Offenses (separated by an intervening arrest, conviction, or some other official intervention)
- Does not include non-criminal sexually dangerous behavior because it is not recorded consistently in PSRs
- Of the 1,654 §2G2.2 cases, 520 (31.4%) involved either a prior conviction or a finding of CSDB in the PSR
 - 581 including allegations
- Actual rate of CSDB is higher than known rate because child sex offenses are underreported

Key Finding #5:

Increasing Sentencing Disparities

A variety of practices have contributed to widespread and growing sentencing disparities in §2G2.2 cases

Key Finding #5:

- 4 out of 5 cases had one or more of the following factors that reduced sentencing exposure:
 - Charging practices that do not reflect the most serious offense conduct
 - Guideline stipulations in plea agreements (adopted by sentencing courts) that are inconsistent with the facts (of PSR or plea agreement)
 - Government sponsored variances and departures (other than for substantial assistance to the government)
 - Non-government sponsored variances and departures

Key Finding #6:

Known Recidivism

General recidivism rate comparable to recidivism rate of all federal offenders

Key Finding #6:

- Commission's study found that 30% of federal non-production child pornography offenders recidivated, although only 7% of them engaged in sexual recidivism
 - Study of 660 offenders sentenced in FY99-00 followed for an average of 8½ years
 - Most offenders who recidivated did so within the first 36 months

Key Finding #6:

- Results of Commission's study similar to recent recidivism study by BOP researchers
- Conservative figure because sex offenses are underreported

Key Finding #7:

Restitution and Notification of Victims

Victim notification and restitution statutes present unique challenges for victims of non-production child pornography offenses

Key Finding #7:

- A child pornography victim is victimized twice – first by the person who produced the image, later by the people viewing the image
- A victim suffers a distinct harm knowing his or her image will be circulated in perpetuity
- A victim can be a victim for federal crime victims' rights purposes if his or her image is *possessed* by a federal offender – even if the victim has no other contact with the offender
 - This leads to situations where some child pornography victims are victims in hundreds of cases every year, across the country, and are entitled to assert rights to notification and restitution

Takeaways

- The non-production child pornography guideline is outdated (i.e., it does not account for recent technological changes in offense conduct) and also do not reflect the variations in offenders' culpability and sexual dangerousness
- There is widespread inconsistent application of both the non-production guideline and the penal statutes carrying mandatory minimum penalties
- The non-production guideline produces overly severe sentencing ranges for some offenders and unduly lenient ranges for other offenders

Takeaways (cont.)

- Three primary sentencing factors best account for non-production offenders' culpability and dangerousness:
 - Content of offender's child pornography collection and the nature of an offender's collecting behavior
 - Degree of an offender's involvement with other offenders – in particular, in an Internet child pornography "community"
 - Offender's history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense

Recommendations

- Three broad factors (content of collection, involvement in offender communities, and other sex offending) should be the primary considerations in determining the punishments imposed on child pornography offenders
- The guidelines should be amended to address these factors, and Congress should authorize the Commission to amend guideline provisions that were promulgated pursuant to specific congressional directives or legislation

Recommendations

- Congress should amend current statutes to reflect the changing nature of this offense:
 - Penalties for simple possession and receipt should be aligned at a level below the current 5 year mandatory minimum for receipt
 - Victim notification and restitution provisions should be amended to minimize trauma but ensure victims receive timely notification and courts order appropriate restitution

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