

Hot Topics in Federal Sentencing

U.S. Sentencing Commission National Training Seminar



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Hot Topics in Federal Sentencing

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Addressing Unwarranted Sentencing Disparities after *Booker*

Historical Perspective

- Prior to the SRA, judges had largely unfettered discretion in imposing sentences for federal defendants.
- The federal sentencing system was seen as providing very little consistency, fairness, or certainty.
 - “The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.” H.R. Rep. No. 98-1017, 34 (1984).
 - “[G]laring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence.” S.Rep. No. 97–307, 956 (1981).

The Sentencing Reform Act (1984)

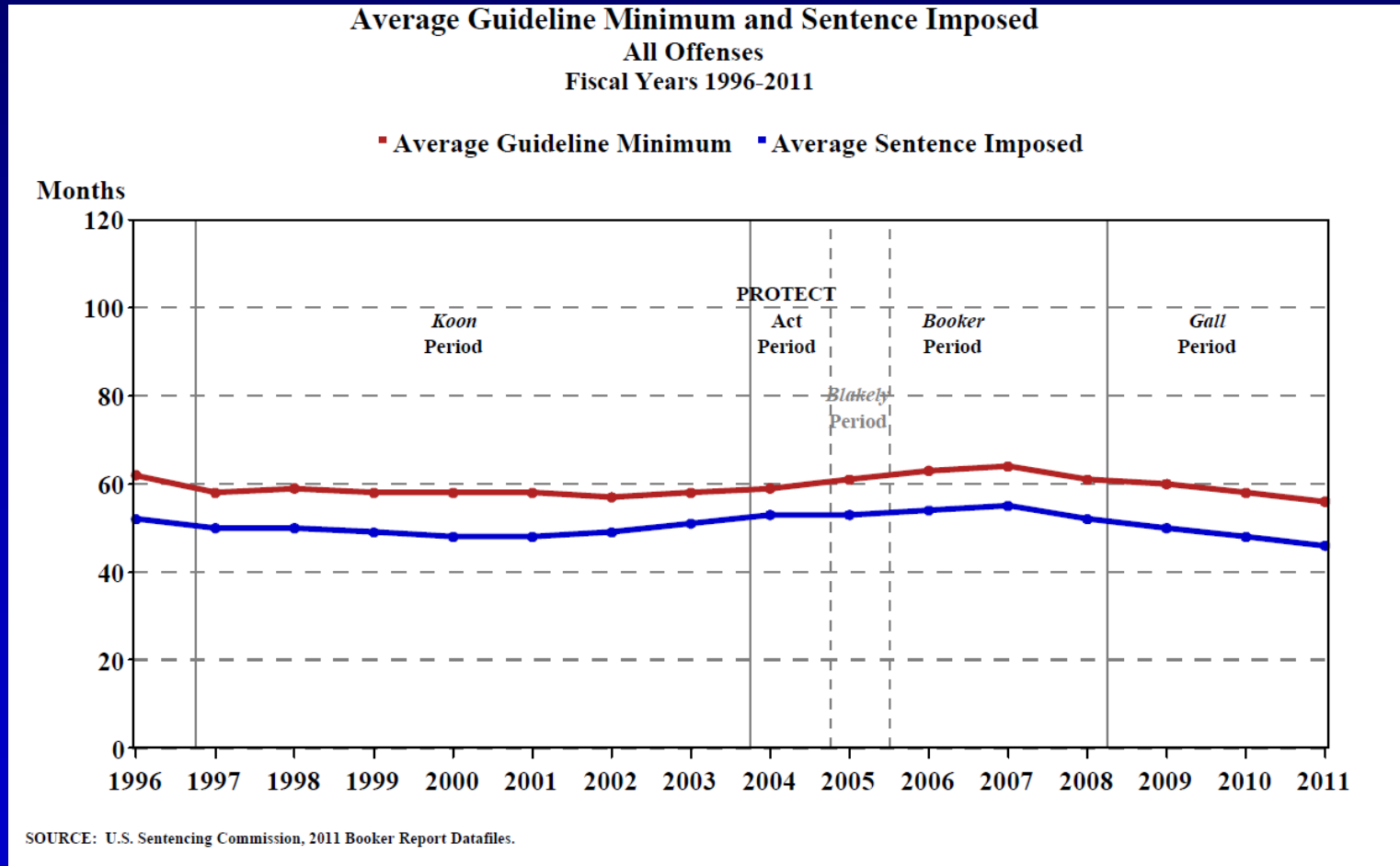
- “[T]he most comprehensive effort ever undertaken by Congress to reform the federal sentencing system.”
 - *See* Brief for Sens. Hatch, Kennedy, and Feinstein as Amici Curiae in Support of Petitioner, *U.S. v. Booker*, 2004 WL 1950640 (2004) (Nos. 04-104, 04-105).
- “It is the product of more than a decade of inter-branch and bipartisan legislative efforts in both Houses of Congress to eliminate the ‘shameful disparity in criminal sentences’ that had long plagued the federal sentencing system and fostered ‘a disrespect for the law.’”
 - *Id.* (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 46, 65 (1983)).
- The SRA created the Commission and the sentencing guidelines system.
 - *See* 28 U.S.C. §§ 991, 994(a).

The Sentencing Reform Act

28 U.S.C. § 994(f) :

The Sentencing Reform Act explicitly provides that one purpose of the guidelines is to provide “certainty and fairness in sentencing and reduc[e] **unwarranted sentence disparities.**”

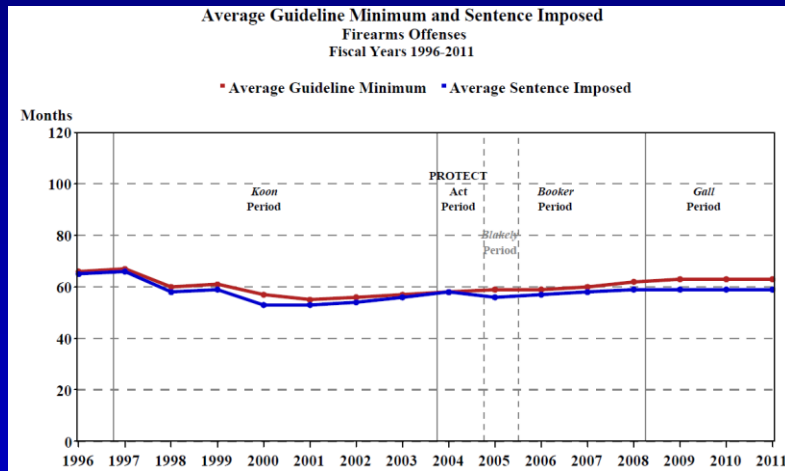
Over time, the relationship between the average guideline minimum and the average sentence imposed has remained largely unchanged.



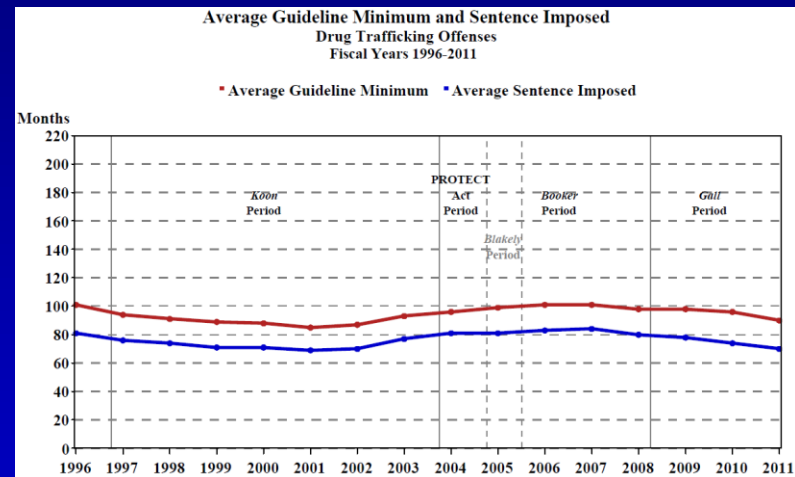
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

This is especially true for certain types of offenses.

Firearms Offenses

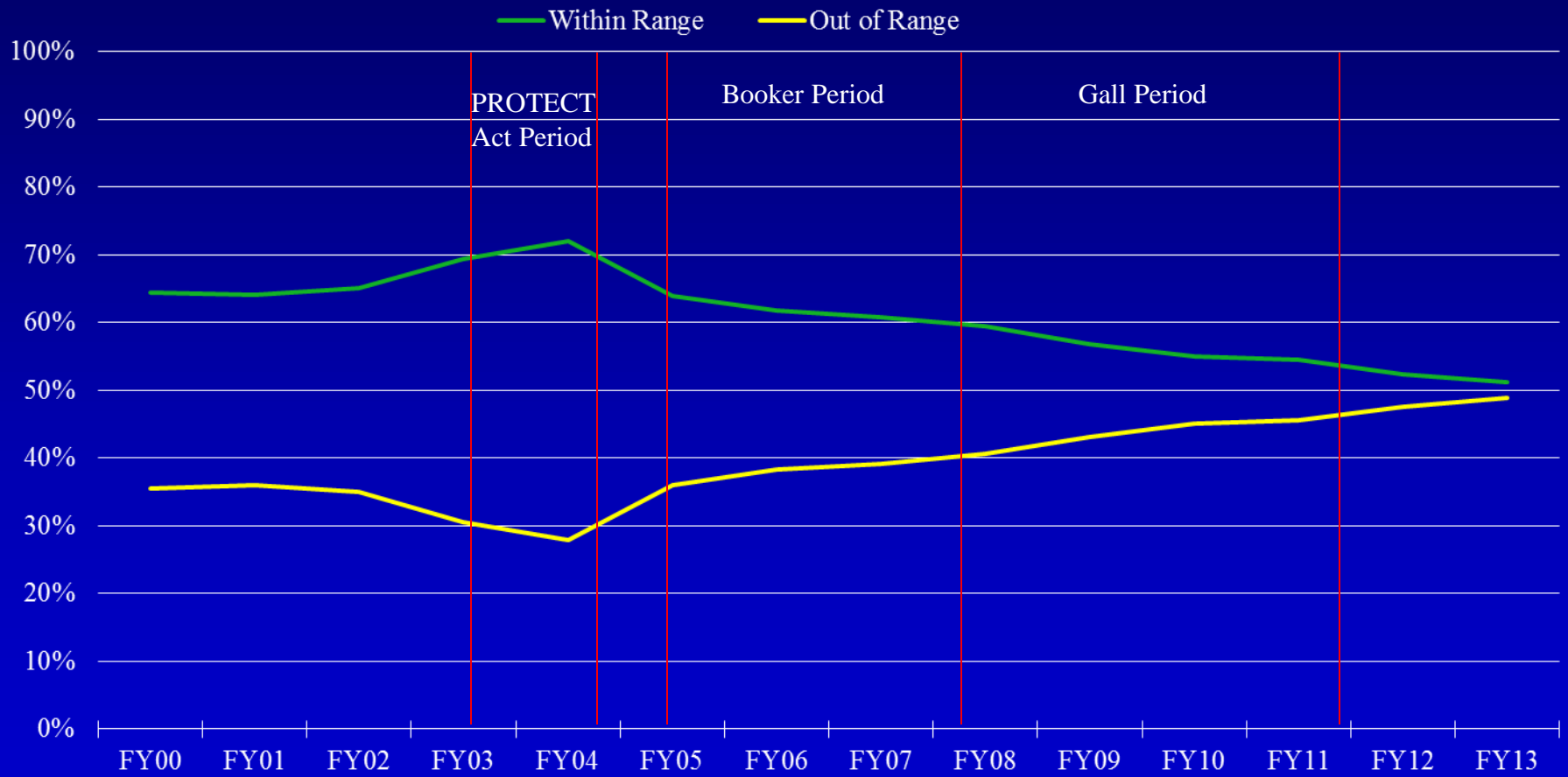


Drug Trafficking Offenses



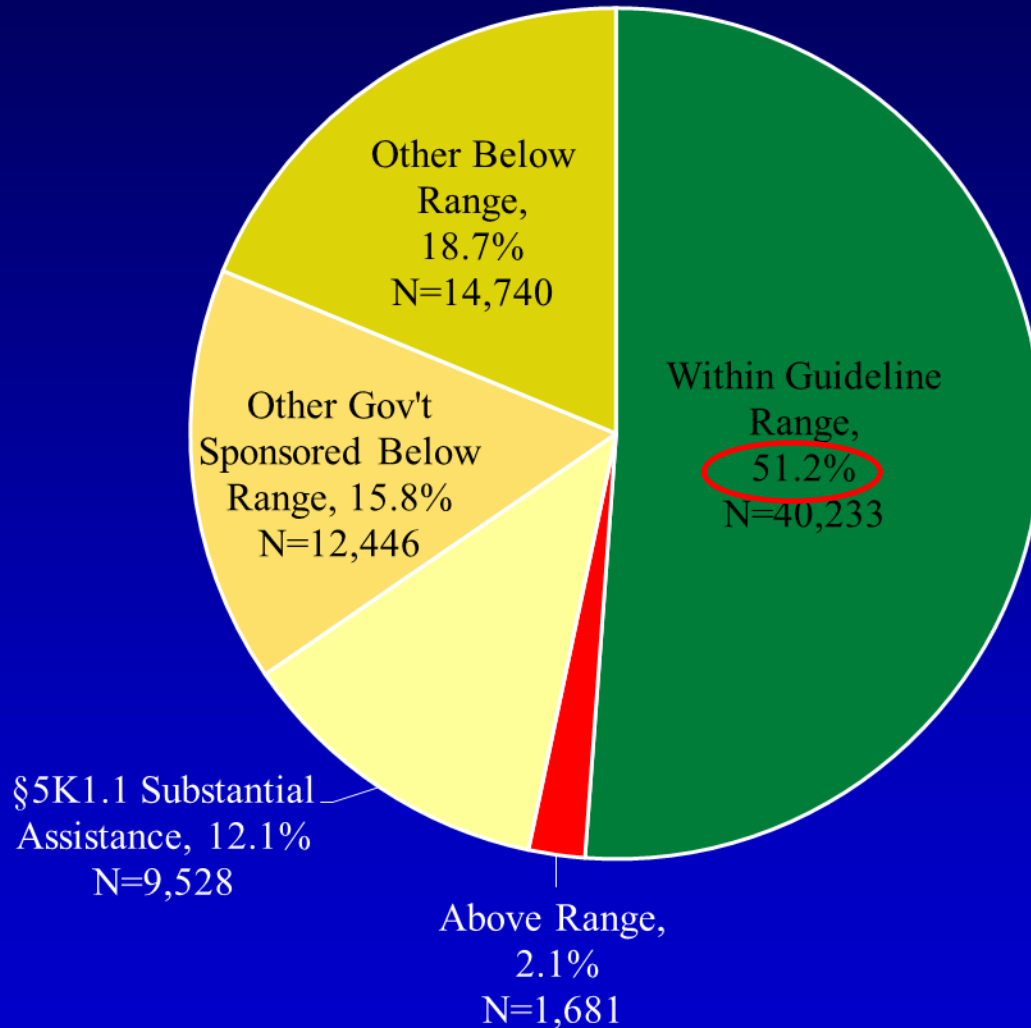
However, in the past decade, there is a trend toward fewer sentences within the guideline range.

Within Range and Out of Range Sentences FY2000-2013



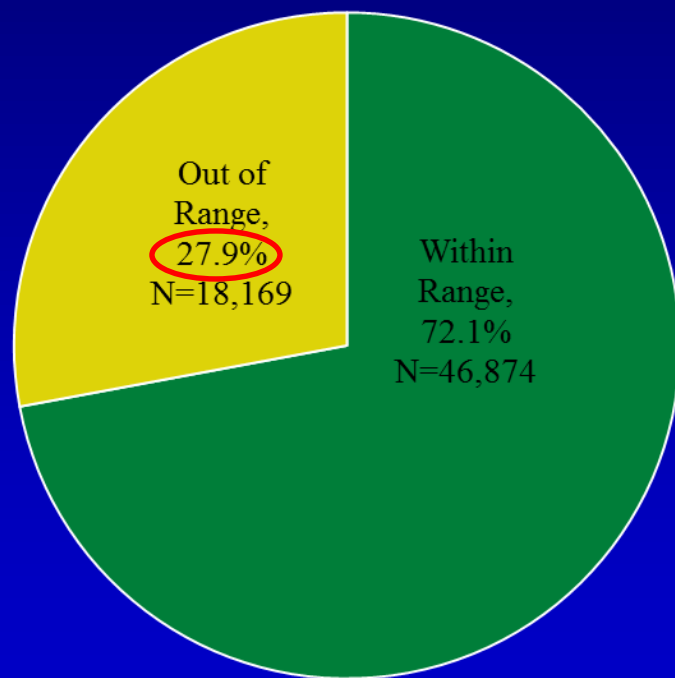
SOURCE: U.S. Sentencing Commission, 2000-2013 Datafiles USSCFY00-13.

Position of Sentences in Relation to Guideline Range National - FY 2013

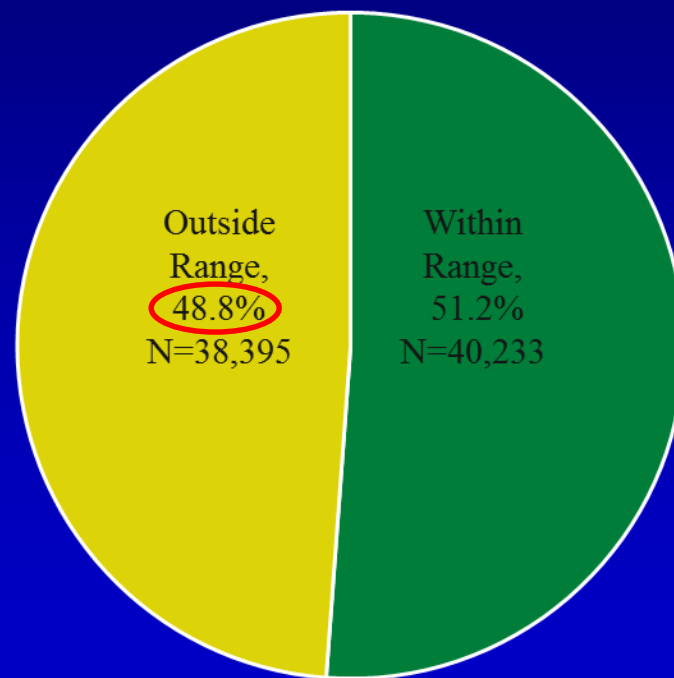


Comparison of FY04 and FY13 Within and Outside Range Sentences

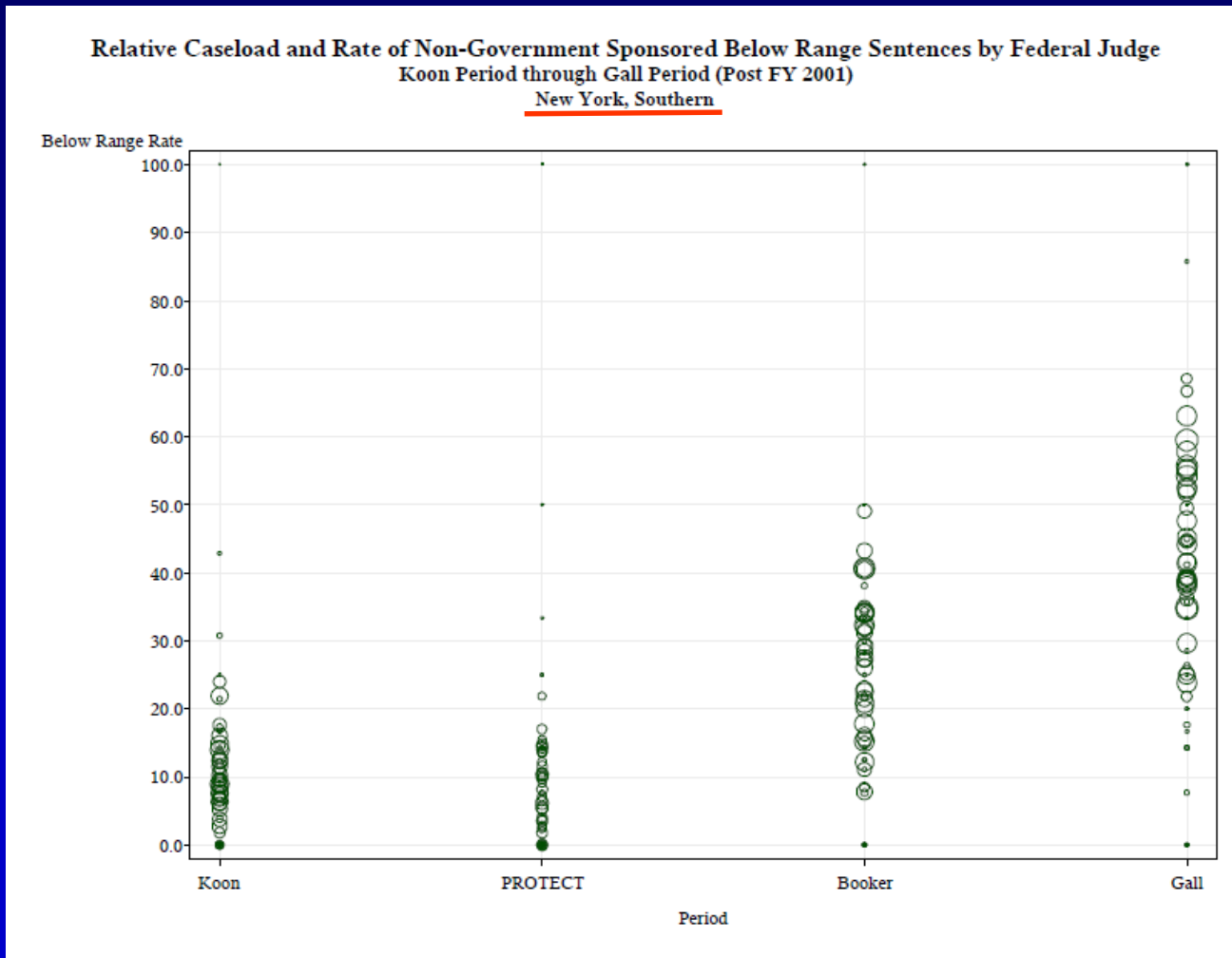
FY04 (pre-Booker)



FY13



Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by District



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

Sentencing post-*Booker*

18 U.S.C. § 3553(a)(6) :

Among the factors to be considered by a judge at sentencing, a judge “shall consider . . . the need to avoid **unwarranted sentence disparities** among defendants with similar records who have been found guilty of similar conduct.”

Program Discussion

- Discussion Topics: Process-related adjustments some district courts use to address potential unwarranted sentencing disparities post-*Booker*
 - Use of Empirical Data in Sentencing
 - Reemergence of Sentencing Councils
 - Advent of Risk Assessments in Sentencing
 - Increased use of C-Pleas?
 - Disclosure of Sentencing Recommendations

DISCUSSION

Use of Empirical Data in Sentencing

Data Sources

- U.S. Sentencing Commission

- Website: www.ussc.gov

- Annual Reports and Sourcebooks; QuickFacts; Data files; Other Publications.

- HelpLine: [202-502-4545](tel:202-502-4545)



- Bureau of Justice Statistics

- Administrative Office of the U.S. Courts

Use of Empirical Data

- District Court Cases
 - *See, e.g., U.S. v. Parris*, 573 F.Supp.2d 744 (E.D.N.Y. 2008).
- Appellate and Supreme Court Cases
 - *See, e.g., Peugh v. U.S.*, ___ U.S. ___, 133 S.Ct. 2072 (2013).
- Academic Articles
 - *See, e.g., Starr, Sonja B. and Rehavi, Marit, Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2 (2013).
- Sentencing Memoranda
 - *See, e.g., www.fd.org.*

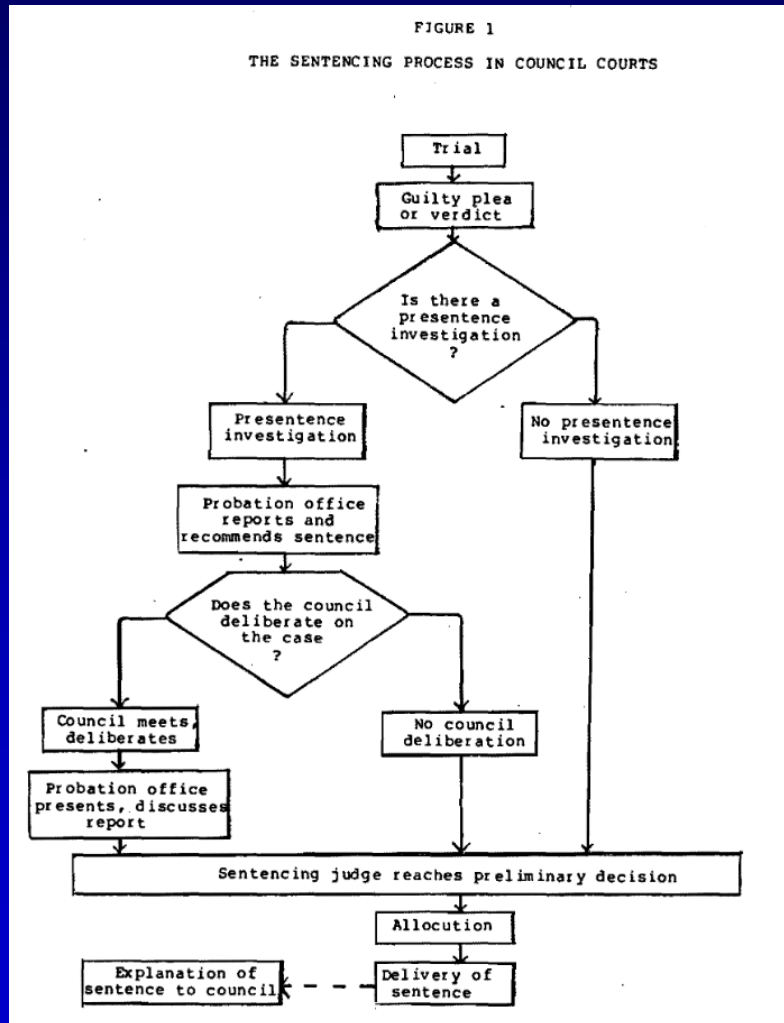
DISCUSSION

Reemergence of Sentencing Councils

Sentencing Councils

- Group of judges in a district who get together to consult with their colleagues about sentencing of specific cases.
- Original Sentencing Councils date back to the 1950s. They were “the primary procedural response by federal judges to the problem of sentencing disparity.”

Sentencing Councils



| Symbol | Meaning |
|--------|--|
| | Activity in the sentencing process |
| | Decision point in the sentencing process |
| | Direct flow of activities |
| | Occurs only occasionally and only in one court (Chicago) |

Sentencing Councils

- After *Booker*, some have suggested that sentencing councils could curb sentencing disparities among defendants.
 - See, e.g., *U.S. v. Ayala*, 610 F.3d 1035 (8th Cir. 2010) (Bright, J., concurring).

Sentencing Councils

Criticisms:

- It is unclear whether sentencing councils truly affect disparities.
 - *See* Federal Judicial Center, THE EFFECTS OF SENTENCING COUNCILS ON SENTENCING DISPARITY, 11-16 (September 1981).
- There are no rules or guidance among the districts that use sentencing councils.
- Sentencing councils may highlight regional and political differences.

DISCUSSION

Advent of Risk Assessments in Sentencing

Risk Assessments

Risk assessment tools attempt to predict an offender's future dangerousness by mathematical reliance on certain relevant demographic and behavioral variables.

Risk Assessments

See, e.g.,

Pre-Trial Risk Assessment (PTRA)

Post-Conviction Risk Assessment (PCRA)

Risk Assessments

- Endorsed by the AO for determinations re: pretrial detention and supervision.
- At least 12 states incorporate risk assessment into sentencing determination (AZ, IN, KY, MI, MO, OH, OK, PA, UT, VA, WA, WV).
- The ALI revisions to the Model Penal Code would require states to implement similar actuarial risk assessments for sentencing.
 - *See* AM. L. INSTIT., MODEL PENAL CODE: SENTENCING § 6B.09 (Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending), 52-63 (Discussion Draft No. 2, 2011).
- DOJ and several academics strongly urge courts not to consider such tools for sentencing.

Risk Assessments

- Common criticisms:
 - Risk assessments focus the sentencing determination on a group of similar offenders, rather than on the individual and the facts of a specific case
 - Some variables (*i.e.* race, sex, national origin, religion, and socio-economic status) are forbidden from sentencing consideration under the Equal Protection Clause or the Sentencing Reform Act

DISCUSSION

Increased use of C-Pleas?

C-Pleas

Fed. R. Crim.P. Rule 11:

“(c) Plea Agreement Procedure

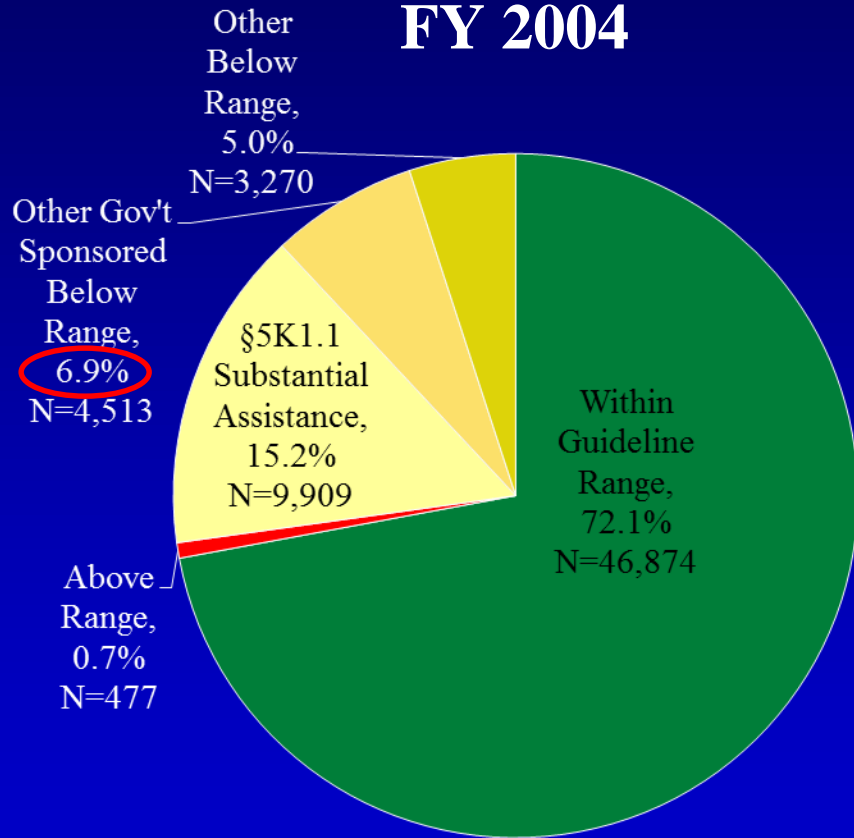
(1) In General. An attorney for the government and the defendant's attorney . . . may discuss and reach a plea agreement. . . . [T]he plea agreement may specify that an attorney for the government will:

...

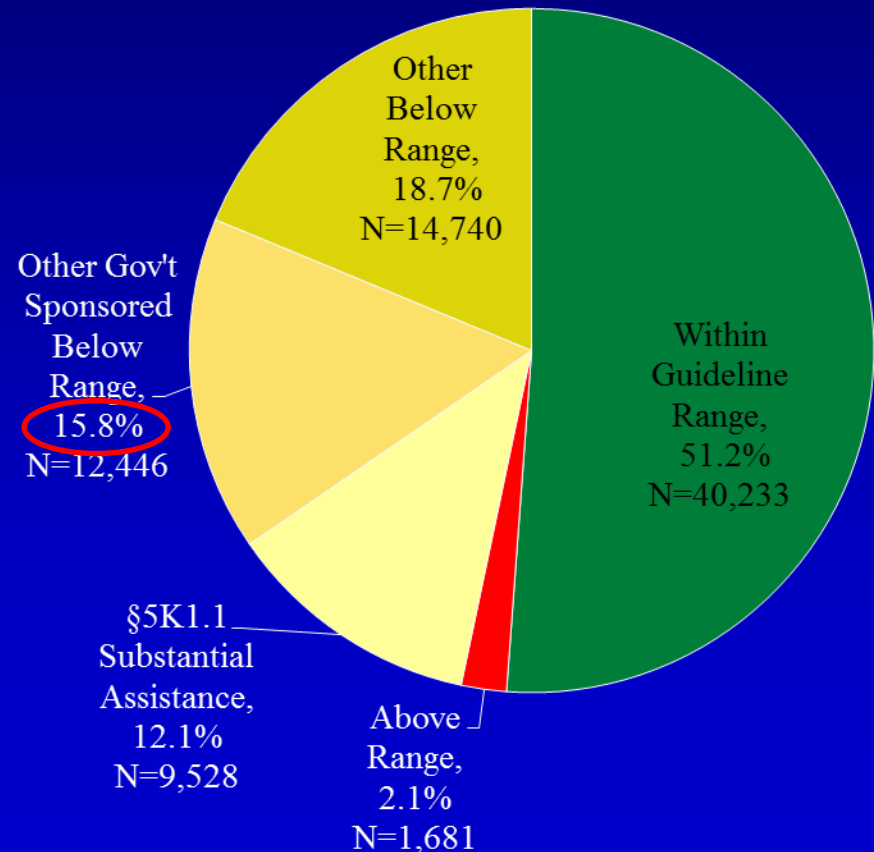
(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).”

Position of Sentences in Relation to Guideline Range National – FY 2004 and FY 2013

FY 2004



FY 2013



DISCUSSION

Disclosure of Sentencing Recommendations

Sentencing Recommendations

Fed. R. Crim.P. Rule 32:

“(e) Disclosing the Report and Recommendation

....

(3) **Sentence Recommendation.** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer’s recommendation on the sentence.”

Sentencing Recommendations

- Supplemental to the PSR
- Sometimes filed under seal, other times unknown to the parties
- Parties cannot review or contest the basis for the recommendation
- Judges appreciate probation officers' candid assessments, but the sentence is still determined by the judge
- Some defendants are filing motions to view the recommendation, and to contest the overall process as unconstitutional
- Probation officers argue that revealing the recommendation could strain their relationship with a future supervisee.

DISCUSSION

