

Collected policy arguments for downward variances from the applicable guideline range in meth cases

Sentencing Resource Counsel Project of the Federal Public & Community Defenders

Created 2024; most recently updated April 24, 2026

This outline is SRC's attempt to gather and distribute effective policy arguments for downward variances that are specific to meth cases – especially those with a base offense level based on pure meth (whether characterized as “Methamphetamine (actual)” or “Ice.”). We have also produced an outline of policy arguments regarding § 2D1.1 more generally, and resources relevant to the Commission's 2025 Amendment related to mitigating role at §3B1.2 in §2D1.1. Those arguments overlap with meth cases too – in addition to cases dealing with other controlled substances.

This is in outline form, to make it easier for attorneys to borrow arguments and citations in whatever order they prefer. These arguments and citations are borrowed primarily from sentencing memos that have been filed in districts around the country, as well as from other sources. Thus, while this is an SRC outline, it is largely built on the excellent work that defenders and CJA panel attorneys are doing. If anyone reviewing this has ideas about points to add, remove, or change in this outline, please let us know – email shelley_fite@fd.org. We intend to update this outline from time to time and would love to hear your suggestions on how to improve it.

The arguments described in this outline are intended to be useful in sentencing memos asking for a below-guideline sentence. Therefore, we would be remiss if we did not emphasize at the outset that our sentencing memos are generally most effective when we center them around our clients' stories. That is, even where there is an excellent, compelling policy argument for rejecting the guideline range, a sentencing pitch cannot rest on that policy argument alone. Ultimately, the court is sentencing an individual person, under the standard described at § 3553(a), and sentencing memos work best when they are framed around that individual person's story, and the reasons that a lower-than-guideline-range sentence is appropriate, with the guideline-focused argument being just one piece of that – even if it is an important piece.

HYPERLINKED TABLE OF CONTENTS

- I. [Background – methamphetamine](#)
 - a. [Meth 101](#)
 - b. [Purity and the changing meth market](#)
- II. [Background – sentencing law](#)
- III. [Policy arguments for varying downward from the pure-meth-based guideline range – at least down to the range that would result from the mixed-meth base offense level, but ideally even more](#)
 - a. [Section 2D1.1 distinguishes between pure meth and meth mixture in setting the base offense level for meth offenses, with pure meth punished more harshly than meth mixture by a factor of ten to one.](#)
 - b. [As a general matter, the meth guidelines are poorly calibrated: even the meth-mixture guideline is too high for a large percentage of cases, and the pure-meth guideline is too high for essentially all cases.](#)
 - c. [The extreme disparity between the mixed-meth and pure-meth base offense levels is irrational and creates unwarranted disparities between similarly situated individuals convicted of meth offenses.](#)
- IV. [Arguments against application of the meth-specific “importation” enhancement](#)
 - a. [The enhancement](#)
 - b. [Policy arguments against the meth-specific importation enhancement at § 2D1.1\(b\)\(5\) that could be used in any case, whether or not the client was directly involved in importation](#)
 - c. [Argument against the § 2D1.1\(b\)\(5\) enhancement only applicable specifically where the client’s individual offense did not involve importation – do not raise unless the PSR/government is pushing this issue](#)

OUTLINE

I. Background – methamphetamine

a. Meth 101

- i. Methamphetamine ($C_{10}H_{15}N$) is a central nervous system stimulant which was first synthesized from ephedrine in 1893.¹ Methamphetamine triggers the release of the monoamine neurotransmitters dopamine, serotonin, and norepinephrine that overwhelm the pleasure center of the brain and provide a long-lasting sensation of euphoria.² It can also cause serious health problems, including hypertension, anxiety, hallucinations, and stroke.³ Overdose deaths attributed to methamphetamine have been on the rise in recent years, as use of methamphetamine has risen,⁴ although the number of meth-related overdose deaths is still much lower than the number of deaths attributed to opioids.⁵
- ii. The DEA has designated meth as having a high psychological addiction liability, and placed it on CSA Schedule II.⁶ It is accepted for limited medical uses related to ADHD and obesity.⁷
- iii. Methamphetamine is most frequently encountered as a hydrochloride salt – a/k/a “crystal meth” or “ice.”⁸ The difference between meth and crystalline meth is similar to powder and crack

¹ See S. Laskow, *Brewing Bad: The All-Natural Origins of Meth*, *The Atlantic* (Oct. 3, 2014), <https://www.theatlantic.com/technology/archive/2014/10/brewing-bad-the-all-natural-origins-of-meth/381045/>; Narconon, *Short Overview of the History of Methamphetamine*, <https://www.narconon.org/drug-information/meth-short-overview.html>.

² U.S. Sent’g Comm’n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* at 6 (June 13, 2024) (2024 Meth Report), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

³ *Id.*

⁴ *Id.*

⁵ Nat’l Inst. on Drug Abuse, *Drug Overdose Deaths: Facts and Figures*, at Figure 2, <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates#Fig2> (Aug. 2024).

⁶ See 21 C.F.R. § 1308.12 Schedule II (d)(2).

⁷ DEA, *Drug Fact Sheet: Methamphetamine* (Apr. 2020), https://www.dea.gov/sites/default/files/2020-06/Methamphetamine-2020_0.pdf.

⁸ U.S. Sent’g Comm., *2024 Meth Report*, *supra* note 2, at 7.

cocaine: the latter is smokable.⁹ Except where the distinction is relevant, this document will not distinguish between meth and its salt but will refer simply to “meth.”

- iv. Meth can vary in both purity and potency, and purity and potency do not always go hand-in-hand.¹⁰

b. Purity and the changing meth market

- i. In the past, meth in the United States had highly variable purity. In the 1980s, when Congress set different mandatory minimums for pure methamphetamine versus “a mixture or substance containing a detectable amount of methamphetamine,”¹¹ average purity hovered at 30–50%.¹² At the time, most meth in this country was home-cooked: Senator Bob Dole, speaking on behalf of the Anti-Drug Abuse Act of 1988, said to his fellow Senators “we must keep in mind that 100 percent of the methamphetamines consumed illegally here are produced within our boundaries.”¹³ It seems unlikely that literally 100 percent of methamphetamine was produced domestically, but it is clear that at the time “most of the methamphetamine illicitly available [came] from clandestine laboratories in the United States.”¹⁴ Even as recently as 2007, the average purity of methamphetamine was 38.6%.¹⁵

⁹ See John Corkery et al., *Smokable (“ice,” “crystal meth”) and non smokable amphetamine-type stimulants: Clinical pharmacological and epidemiological issues, with special reference to the UK*, 43(1) *Annali dell Istituto Superiore di Sanita* 110-5 (Feb. 2007) (PMID: 17536161), available for download at https://www.researchgate.net/publication/6300229_Smokable_ice_crystal_meth_and_non_smokable_amphetamine-type_stimulants_Clinical_pharmacological_and_epidemiological_issues_with_special_reference_to_the_UK; European Union Drugs Agency, Methamphetamine drug profile, https://www.euda.europa.eu/publications/drug-profiles/methamphetamine_en#:~:text=Methamphetamine%20base%20is%20a%20colourless,as%20crystals%20soluble%20in%20water (last visited Oct. 17, 2024).

¹⁰ U.S. Sent’g Comm., 2024 Meth Report, *supra* note 2, at 9 (Figure 3).

¹¹ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, § 6470 (Nov. 18, 1988)

¹² See Executive Office of the President, Office of National Drug Control Policy, *The Price and Purity of Illicit Drugs: 1981 Through the Second Quarter of 2003*, at 45 (Figure 26) (Nov. 2004) (2004 Price and Purity Report), https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/bullet_3.pdf.

¹³ 134 Cong. Rec. S17301, S17303 (daily ed. Oct. 21, 1988) (statement of Sen. Dole) (available at 1988 WL 178508).

¹⁴ 134 Cong. Rec. E2879-02 (Statement of Rep. Bates) (available at 1988 WL 175475).

¹⁵ Report available online at www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf at Figure 11.

- ii. However, after a crackdown on meth precursors in the 2000s, the practice of home-cooking meth plummeted.¹⁶ And smuggling picked up the slack: today, most meth sold in the U.S. is produced in Mexico in industrial-grade labs, with its manufacture and importation controlled by a small number of cartels operating in both Mexico and the United States.¹⁷ This shift has dramatically elevated meth purity. As the DEA has explained it: “Gone are the days of domestic super-labs and one-pot labs whose product often averaged 60 percent purity with potency varying upon the manufacturing method. Today’s methamphetamine from Mexico comes from mega-labs capable of producing hundreds of pounds of the drug in a single cycle, all with a purity in the upper 90th percentile and potency not far behind.”¹⁸
- iii. This pure meth is not being diluted by wholesalers or retail-level dealers. The average purity of meth seized by law enforcement started rising in the 2000s: In 2005, the DEA reported that “the average purity of methamphetamine samples tested increased from 40.0 percent in 2001, to 43.8 percent in 2002, and 57.4 percent in

¹⁶ In 2006, the Combat Methamphetamine Epidemic Act (CMEA) was signed into law, which was designed to reduce explosions and fires occurring in makeshift “cook” operations by regulating ephedrine purchases. Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, tit. VII, 120 Stat. 256 (2006). The CMEA appears to have “worked,” although it may have contributed to Mexican cartels taking over the meth trade. See DEA, 2017 *National Drug Threat Assessment* at 75–77, https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf (reporting that domestic laboratory seizures decreased 67 percent from 2012 to 2016, but seizures of smuggled meth was sharply rising and there was an overall increase in meth distribution); see also DEA, 2020 *Threat Assessment* at 22 (Figure 14), https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf (reporting that the number of methamphetamine production accidents fell from a high of 23,703 annually before the CMEA to a total of only 890 incidents in 2019); see also *id.* at 23 (discussing the CMEA’s influence on domestic meth production); see also Melnikova et al., *Hazards of Illicit Methamphetamine Production and Efforts at Reduction: Data from the Hazardous Substances Emergency Events Surveillance System*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3072910/> (last visited July 8, 2019) (“Since 2004, with the implementation of local and federal laws and prevention activities, the number of meth lab events has declined.”).

¹⁷ DEA, 2024 *National Drug Threat Assessment* at 2, 31–32 (May. 2024), <https://www.dea.gov/sites/default/files/2024-05/5.23.2024%20NDTA-updated.pdf>.

¹⁸ DEA, *Methamphetamine Seizures Continue to Climb in the Midwest* (July 10, 2019), <https://www.dea.gov/stories/2019/2019-07/2019-07-10/methamphetamine-seizures-continue-climb-midwest>.

2003.”¹⁹ Since 2011, purity has exceeded 90 percent.²⁰ In 2024, the Sentencing Commission reported that for the last year purity data was available, average purity was 93.2 percent, “with a median purity of 98.0 percent.”²¹

- iv. It’s not surprising that meth traffickers don’t see a need to dilute their product: conditions in Mexico resulting in an oversupply of methamphetamine have contributed to record low prices. Between July of 2007 and September of 2010, the price per “pure” gram of methamphetamine fell from \$270.10 per gram to \$105.49 per gram.²² By 2017, the price of pure meth had fallen to just \$56 per gram.²³ More recent DEA reports have not updated pricing data but, in 2020, a special agent in charge of the DEA’s El Paso, Texas, region, reported that meth was being sold for as little as \$2,000 per pound, which translates to a staggeringly low \$4 per gram.²⁴
- v. Expert testimony from the Commission’s August 2025 hearing on methamphetamine, which included pharmacologists, addiction medicine specialists, and public health researchers, testified that: the pharmacological effects of methamphetamine do not vary

¹⁹ National Drug Intelligence Center, *Methamphetamine Drug Threat Assessment* (March 2005), <https://www.justice.gov/archive/ndic/pubs13/13853/avail.htm>.

²⁰ DEA, *2017 National Drug Threat Assessment* at 70 (Figure 61), https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf.

²¹ U.S. Sent’g Comm’n, *2024 Meth Report*, *supra* note 2, at 4 (describing the report’s “key findings”).

²² DEA, *2011 National Drug Threat Assessment*, at 33 (Figure 11), www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf.

²³ DEA, *2019 National Drug Threat Assessment*, at 45 (Figure 36), https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf.

²⁴ Daniel Borunda, *DEA: Meth now primary drug threat in El Paso area as Mexican drug cartels boost production*, *El Paso Times* (Feb. 27, 2020), <https://www.elpasotimes.com/story/news/crime/2020/02/27/dea-meth-now-primary-drug-threat-el-paso-region/4871335002/>. The ease of making cheap synthetic drugs like methamphetamine impacts how these drugs get imported, as well. A recent article about fentanyl smuggling explained that fentanyl, a synthetic (versus plant-derived) drug, could “be replaced quickly. If a load gets intercepted at the border, traffickers do not have to wait for plants to grow the way they do with cocaine or heroin — they just mix up a few chemicals and send over a new batch.” The same is true for methamphetamine. And given this reality, “[l]osing product is relatively unimportant,” allowing cartels to rely on large numbers of “inexperienced American drug mules” to transport their product. Natalie Kitroeff and Robert Gebeloff, *The American Drug Mules Smuggling Fentanyl Into the U.S.*, *N.Y. Times* (Sept. 28, 2024), <https://www.nytimes.com/2024/09/28/world/americas/fentanyl-drug-smugglers-us.html>.

meaningfully based on purity;²⁵ there is no pharmacological, medical, or public health rationale for adjusting sentencing based on purity;²⁶ current sentencing thresholds based on purity are unwarranted given today's methamphetamine market;²⁷ and the current system disproportionately penalizes low-level individuals based on outdated assumptions about purity and culpability.²⁸

- vi. Putting this together, methamphetamine sold in the U.S. today is almost uniformly pure and it's incredibly cheap.²⁹ As we will see, however, the sentencing guidelines applicable to meth offenses have not evolved with the meth market. They punish pure meth far more harshly than a meth mixture, based on distinctions that were drawn back in the 1980s in an attempt to distinguish between kingpins and retail-level dealers, even while the guidelines punish *all* meth more harshly than most other drugs.

II. Background – sentencing law

- a. Through the Sentencing Reform Act of 1984, Congress created the U.S. Sentencing Commission and charged the Commission with promulgating sentencing guidelines “which assure the meeting of the purposes of sentencing as set forth in” 18 U.S.C. § 3553(a)(2).³⁰ Enumerated within those statutory purposes are the need to promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public. Specifically, sentencing courts are obligated to impose a sentence which is “sufficient, but not greater than necessary,” to serve these enumerated purposes.³¹
- b. Under this scheme, the Commission “fills an important institutional role: it has the capacity courts lack to base its determinations on empirical data and national experience, guided by professional staff with appropriate

²⁵ [Statement of Richard De La Garza II](#), Ph.D., Adjunct Professor Department of Pharmacology, University of Texas Medical Branch to USSC on Methamphetamine at 5 (Aug. 5, 2025).

²⁶ [Statement of Gavin Bart](#), MD, Ph.D., Professor, Medical Discovery Team on Addiction, University of Minnesota Medical School to USSC on Methamphetamine at 7 (Aug. 5, 2025).

²⁷ [Statement of Karla Wagner](#), Ph.D., Professor, School of Public Health University of Nevada, Reno to USSC on Methamphetamine at 6 (Aug. 5, 2025).

²⁸ See Statement of [Edwin C. Chapman](#), MD, Specialist Internal Medicine and Addiction Medicine to USSC on Methamphetamine (Aug. 5, 2025) (describing impacts on witness's clients who are “low-income men and women”).

²⁹ See USSC, [2026 Proposed Guidelines Amendment: Drug Offenses](#) at 4 (Dec. 12, 2025).

³⁰ 28 U.S.C. §§ 991(b)(1)(A) & 994(a)(1), (a)(2), (f) & (g).

³¹ 18 U.S.C. § 3553(a).

expertise.”³² And it is through this role that the Sentencing Commission is able to produce guidelines that, in the ordinary case, “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.”³³

- c. However, the Sentencing Guidelines are not mandatory – and haven’t been for almost 20 years.³⁴ And where the Commission has not based a guideline on empirical data and national experience, district courts are under no obligation to follow it. Although a sentencing court is required to correctly calculate a federal defendant’s guideline range, in determining a sentence that is sufficient, but not greater than necessary, district courts may “not presume that the guideline range is reasonable.”³⁵ Sentencing courts should consider whether a guideline sentence is inappropriate either because “the Guidelines reflect an unsound judgment,” or otherwise fail to properly reflect the purposes of sentencing set forth in 18 U.S.C. § 3553(a).³⁶
- d. And district courts can vary from a particular guideline as a policy matter – even categorically (that is, in every case).³⁷ This is particularly appropriate where a guideline “do[es] not exemplify the Commission’s exercise of its characteristic institutional role.”³⁸ That is, an advisory imprisonment range proposed by a particular guideline is only as good as that guideline’s development and empirical foundation. And where a guideline does not exemplify the Sentencing Commission’s “characteristic institutional role,” it is entitled to less deference.³⁹
- e. The Supreme Court in *Kimbrough* and *Spears* held that it was reasonable for the court to disregard § 2D1.1’s guideline range that resulted from a quantity-based offense level that lacked any empirical basis – instead, the range was simply keyed to Congress’s mandatory minimum scheme and

³² *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

³³ *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)).

³⁴ See *United States v. Booker*, 543 U.S. 220 (2005).

³⁵ *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

³⁶ *Rita*, 551 U.S. at 357.

³⁷ See *Kimbrough*, 552 U.S. at 109; *Spears v. United States*, 555 U.S. 261, 264–66, 268 (2009).

³⁸ *Kimbrough*, 552 U.S. at 109 (finding it was not an abuse of discretion to conclude “that the crack/powder disparity yields a sentence “greater than necessary” to achieve § 3553(a)’s purposes, even in a mine-run case.”).

³⁹ See *id.* at 575.

based on politics.⁴⁰ As discussed below, the methamphetamine guidelines suffer from precisely the same flaw.

III. Policy arguments for varying downward from the pure-meth-based guideline range – *at least* down to the range that would result from the mixed-meth base offense level, but ideally even more

- a. Section 2D1.1 distinguishes between pure meth and meth mixture in setting the base offense level for meth offenses, with pure meth punished more harshly than meth mixture by a factor of ten to one.
 - i. Section 2D1.1 distinguishes between “Methamphetamine,” “Methamphetamine (actual)” and “Ice.” The term “Methamphetamine” refers to the entire quantity of a substance or mixture containing any percentage of meth.⁴¹ The term “Methamphetamine (actual)” refers to pure meth, as separated out from whatever it’s mixed with, or as sold in its pure form.⁴² And “Ice” refers specifically to crystal meth (d-methamphetamine hydrochloride) that’s at least 80% pure.⁴³
 - ii. Meth (actual) and Ice garner the same offense level, which is ten times greater than the offense level applicable to mixed methamphetamine.⁴⁴ Because the meth (actual) and Ice guidelines are interchangeable, this document will use the generic term “pure meth,” to distinguish both meth (actual) and Ice from meth mixture.

⁴⁰ See *id.* at 566–73, 575; *Spears*, 842–44.

⁴¹ U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table at (B).

⁴² *Id.*

⁴³ U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table at (C). The “Ice” guideline was created in response to a congressional directive instructing the Commission to review guidelines applicable to “smokable crystal methamphetamine” to ensure “that convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level under the guidelines which is two levels above that which would have been assigned to the same offense involving other forms of methamphetamine.” Crime Control Act of 1990, Pub. L. 101-647, sec. 2701. The Commission in fact assigned Ice an offense level *four to eight* levels higher than offenses involving just methamphetamine, so that the new category would match the meth-actual category. Guidelines that derive from Congressional directives, rather than data and national experience, are particularly ripe for policy-based variance arguments, see *infra*, pp. 10–11 & note 51.

⁴⁴ See, e.g., § 2D1.1(c)(1) (assigning base offense level 38 to 45 kilograms of methamphetamine or to 4.5 kilograms of “Methamphetamine (actual)” or “Ice”); see also § 2D1.1(c), app. note 8(D) (Drug Conversion Tables) (equating 1 gram of “Methamphetamine” to 2 kilograms of converted drug weight, while equating 1 gram of “Methamphetamine (actual)” or “Ice” to 20 kilograms of converted drug weight).

- b. As a general matter, the meth guidelines are poorly calibrated: even the meth-mixture guideline is too high for a large percentage of cases, and the pure-meth guideline is too high for essentially all cases.⁴⁵
 - i. The sky-high meth guidelines are grounded in politics, not data or other empirical evidence, or national experience.
 - 1. Meth-specific offense levels, like other drug-type-specific offense levels, were keyed to quantity-based mandatory minimums. Congress's idea that quantity should drive drug sentencing was based on the idea that quantity indicated culpability – that is, role in the drug-distribution chain.⁴⁶ But nothing supported this idea.⁴⁷ Thus, in opting to key the drug guidelines to statutory mandatory-minimum thresholds, the Commission produced a patchwork set of guidelines that were grounded in politics.⁴⁸

⁴⁵ If the federal government were able to prosecute high-level cartel leaders, perhaps the pure-meth guideline would be appropriate. But that is not who is getting prosecuted.

⁴⁶ The quantity-based mandatory minimums originally came out of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570. Congress established ten-year mandatory minimums to target “kingpins” – the “masterminds who are really running the operations.” U.S. Sent’g Comm., *Cocaine and Federal Sentencing Policy* (Feb. 1995), at 119 (quoting 132 Cong. Rec. S. 14,300 (Sept. 30, 1986)), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf. Congress set five-year mandatory minimums to target “middle-level dealers,” including “serious traffickers,” who Congress characterized as “the managers of retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials and doing so in substantial street quantities.” *Id.* at 119–20 (quoting H.R. Rep. No. 845, 99th Cong., 2d Sess. pt. 1, at 16–17 (1986)).

⁴⁷ See Statement of Michael Nachmanoff Before the U.S. Sent’g Comm’n, Washington, D.C., at 4 (May 27, 2010) (in turn citing a statement by Justice Rehnquist in 1993: “Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’ Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole.” William H. Rehnquist, Luncheon Address (June 18, 1993), in U.S. Sent’g Comm’n, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286–87 (1993)), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Nachmanoff.pdf; see also Statement of James Skuthan Before the U.S. Sent’g Comm’n, Washington, D.C., at 7 (Mar. 17, 2011) (explaining that the drug weight thresholds that triggered the mandatory minimums were “hastily chosen in the heat of partisan debate and based on demonstrably mistaken assumptions,” with citation to *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong., 1st Sess., at 166, 169–70 (June 26, 2007) (statement of Eric Sterling)), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110317/Testimony_FPD_Skuthan.pdf.

⁴⁸ See *United States v. Hayes*, 948 F. Supp. 2d 1009, 1022 (N.D. Iowa 2013) (citing Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 24 n. 121 (1988) (concluding that the drug guidelines were based solely on “legislative direction” that “superseded

2. When the Sentencing Guidelines were first released, in 1987, there was no meth-based mandatory minimum, and there was no meth-specific offense level. The drug conversion table treated one gram of meth as equivalent to two grams of cocaine or 0.4 grams of heroin.⁴⁹ But the situation quickly changed, after Congress in 1988 established mandatory minimums for meth offenses.⁵⁰ The Sentencing Commission responded “by incorporating these statutory penalties into the drug trafficking guideline” – both the far harsher penalties and the distinction between pure and other meth – although, again, these were based on politics, not data or empirical evidence.⁵¹ These increases, which went into effect in 1989, “ascribed to methamphetamine [mixture] a potency approximately 2.5 times that of the former law,” and amplified methamphetamine (actual) 20 times over previous thresholds.⁵² One gram of pure methamphetamine was now equivalent to 10 grams of heroin or 50 grams of cocaine.⁵³
3. Over the years, the Sentencing Commission made the meth guidelines even more harsh. After 1989, the biggest hike in penalties came in 1999, after Congress again increased the penalties for methamphetamine at the urging of the Justice Department – cutting in half the quantities triggering mandatory minimums.⁵⁴ The Commission responded by “conform[ing]” the methamphetamine guidelines to the new

the current-practice analyses.”)). See USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf.

⁴⁹ U.S.S.G. § 2D1.1, app. note 10 (Drug Equivalency Tables) (1987). It is unknown how the Commission derived these initial equivalencies; methamphetamine offenses were not included in the Commission’s study of pre-guideline sentencing practices.

⁵⁰ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g).

⁵¹ U.S. Sent’g Comm., *Methamphetamine Final Report* at 8 (Nov. 1999) (“1999 Meth Report”), https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf.

⁵² *Id.*; see also U.S.S.G. § 2D1.1(c) (1989) (100 grams of pure methamphetamine = 5 kilograms of cocaine = 1 kilogram of heroin = 1,000 kilograms of marihuana).

⁵³ U.S.S.G. § 2D1.1(c) (1989).

⁵⁴ See Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998); see also H.R. Rep. No. 105-711, pt. 1, at 8 (1998) (setting forth DOJ’s position in support of H.R. 3898, a bill similar to the one passed, and its view that penalties for methamphetamine should be the same as crack).

mandatory minimums.⁵⁵ And the record is crystal clear that this was a political act, not one that was based on data or experience: the Commission explained that “un-linking the Drug Quantity Table from the mandatory minimum quantities established by Congress in a manner that reduces sentences would vary from past practice of the Commission *and may prove politically unwise.*”⁵⁶

4. Several additional increases to the meth guidelines were based on congressional directives to the Sentencing Commission.⁵⁷ It is well understood that when a guideline is impacted by a congressional directive, that impact is based on politics, not data.⁵⁸ And the meth guideline is no

⁵⁵ U.S. Sent’g Comm., 1999 Meth Report, *supra* note 46, at 12 n.35.

⁵⁶ U.S. Sent’g Comm., 1999 Meth Report, *supra* note 46, at 18 (emphasis added); *see also id.* (recognizing that the Commission *could have* gone a different way and set guidelines independently of mandatory minimums, allowing the mandatory minimums to “trump” guideline ranges only in cases in which they exceeded the top of the range).

⁵⁷ Two of the more impactful examples of this came out of directives enacted in 1990 and 1996. In 1990, Congress directed the Commission to amend the meth guidelines “so that convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level under the guidelines which is two levels above that which would have been assigned to the same offense involving other forms of methamphetamine.” Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789, § 2701. In response, the Commission created the “Ice” guideline, making it so that 80% pure crystal meth is treated like entirely pure meth (which, incidentally, is far more than two levels higher than meth mixture). U.S.S.G. App’x C, Amend. 370 (Nov. 1, 1991). In 1996, Congress directed the Commission to amend its guidelines and policy statements “to provide for increased penalties for unlawful manufacturing, importing, exporting, and trafficking of methamphetamine. ...” The Commission shall ensure that the sentencing guidelines “... reflect the heinous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine.” Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, §§ 101-02, 201, 203 and 301. In response to this directive, the Commission cut in half the quantity cut-offs for meth mixture, effectively doubling offense levels. U.S.S.G. App’x C, Amend. 555 (Nov. 1, 1997).

⁵⁸ *See* Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1023–24 (2001) (article by one of the original Sentencing Commissioners and one of the Commission’s initial staff members, explaining that in the modern guidelines era, “congressional micro-management of the guidelines amendment process” occurs “through specific statutory ‘directives’ that the Commission either ‘consider’ or actually adopt a new guideline provision, typically involving an enhancement to sentence levels for a specific type of offense or even a specific offense characteristic, often by a given number of ‘offense levels’ actually specified in the legislation. As one might expect from a purely political process, this type of legislation tends to reflect the congressional concerns du jour . . . and therefore tends to be ad hoc and non-systematic. We do not mean to suggest that there is anything improper in Congress legislating in response to the popular will: that is what Congress – as opposed to the Commission – constitutionally is authorized to do, as Congress is a politically responsive body whose members stand for election. However, this type of legislation obviously makes the Commission’s job of systematic rationalization of sentences more difficult, and tends to reinforce a misconception of the Commission as the ‘junior-varsity’

exception: directives—including the 1990 directive that led to the creation of the “Ice” guideline and the 1996 directive that dramatically elevated the mixed-meth guideline—pushed the meth guidelines even further from any empirical basis.

5. Today, meth *mixture* garners an offense level 10 times harsher than powder cocaine and twice as harsh as heroin.⁵⁹ For pure meth, the differential is astounding: it is punished more harshly than heroin by a factor of 20:1; more harshly than powder cocaine by a factor of 100:1; and more harshly than crack cocaine by a factor of 5.6:1.⁶⁰
6. Meth’s harm profile is most similar to powder cocaine. As Dr. Jonathan Caulkins testified at the Commission’s 2025 hearing, both substances are “powerful, addictive psychostimulants” that occupy similar positions in illegal drug markets.⁶¹ Regarding per-unit weight, meth prices are consistently lower than cocaine prices, meaning a given weight of methamphetamine is worth *less* to traffickers than the same weight of cocaine.⁶² Based on profits generated and the incentives and harm they can create, one can argue that a *greater* quantity of methamphetamine should be required to trigger the same sentence as a given quantity of cocaine.⁶³

that exists simply to carry out the transitory political will.”); see also U.S. Sent’g Comm., *Fifteen Years of Guidelines Sentencing*, at 73 (Nov. 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (“The frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress.”); *United States v. Kelly*, 868 F. Supp. 2d 1202, 1204 (D. N.M. 2012) (explaining in a different context (the child-pornography-guideline context) that a guideline provision based on a directive is owed less deference because it is “not the product of the Sentencing Commission’s usual institutional competence and expertise, but is instead the result of numerous politically-based Congressional directives”).

⁵⁹ See U.S.S.G. § 2D1.1, app. note 8(D) (Drug Conversion Table).

⁶⁰ See U.S.S.G. § 2D1.1, app. note 8(D) (Drug Conversion Table) (assigning 1 gram of pure meth a converted drug weight of 20 kilograms).

⁶¹ [Statement of Jonathan Caulkins](#), Ph.D., H. Guyford Stever University Professor of Operations Research and Public Policy, Carnegie Mellon University to USSC on Methamphetamine at 5, 5-12 (Aug. 5, 2025) (detailing basis for setting methamphetamine ratio as same as powder cocaine).

⁶² *Id.* at 6.

⁶³ *Id.* at 7.

7. The result is that imposed meth sentences far exceed those for cocaine, heroin, and even fentanyl,⁶⁴ despite no evidence indicating that meth is more dangerous than these other drugs and substantial evidence that it is less dangerous than opioids (real or synthetic).⁶⁵
- ii. The overly harsh meth guidelines exacerbate pernicious racial disparities: the majority of meth sentences are imposed on people of color, who are already profoundly overrepresented in the federal prison system.⁶⁶ Relatedly, these guidelines contribute to the mass incarceration of Black and brown men: “[meth] has been the predominant drug in the federal caseload since fiscal year 2014 and comprised approximately one-half (48.7%; n=9,555) of all drug trafficking offenses in fiscal year 2022.”⁶⁷
- iii. Courts have relied on the fact that § 2D1.1 treats methamphetamine far more harshly than non-meth drugs in the absence of evidentiary support for such treatment, in imposing below-guideline sentences

⁶⁴ See USSC, [Drug Trafficking Offenses Quick Facts](#) (FY 2024) (May 2025)) (providing that the average sentence for methamphetamine cases (100 months) was higher than fentanyl (76 months); crack cocaine (68 months); heroin (66 months); powder cocaine (64 months); oxycodone (50 months); and marijuana (37 months); see also [Federal Sentencing Snapshot: Methamphetamine Trafficking](#) (“Individuals sentenced for methamphetamine offenses received the longest sentences, on average, compared to other drug types, including fentanyl . . .”).

⁶⁵ See [Federal Sentencing Snapshot: Methamphetamine Trafficking](#) at 2 (indicating average fentanyl sentence (76 months) is substantially lower than the average guideline minimum in such cases (102 months).

⁶⁶ 2024 Methamphetamine Report, *supra* note 2, at 21 (explaining that while more white individuals are sentenced for meth than for other drugs, it remains true that a significant majority of individuals sentenced for meth—58.2%—are minorities (39.4% Hispanic, 14.3% Black, 4.5% Other).

⁶⁷ *Id.* at 4.

in meth cases.⁶⁸ And on average, Sentencing Commission data show that meth cases mostly garner below-guideline sentences.⁶⁹

- c. The extreme disparity between the mixed-meth and pure-meth base offense levels is irrational and creates unwarranted disparities between similarly situated individuals convicted of meth offenses.⁷⁰
 - i. The Sentencing Commission's justification for higher sentences based on higher purity is that *unusually* pure substances "indicate a

⁶⁸ See, e.g., *United States v. Bean*, 371 F. Supp. 3d 46, 54 (D.N.H. 2019) (finding that the guidelines' harsher treatment of actual methamphetamine as compared to other drugs, including both powder and crack cocaine, heroin, and fentanyl, "is unsupported by empirical data and runs contrary to the 'need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct'" (quoting § 3553(a)(6))); *United States v. Harry*, 313 F. Supp. 3d 969, 973 (N.D. Iowa 2018) (discussing the fact that pure meth garners a guideline range that's more than twice as high as heroin: "Why? Is ice methamphetamine more than twice as potent, dangerous, destructive or addictive than heroin? I am aware of no objective evidence—from the United States Sentencing Commission or otherwise—supporting such a proposition."); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1026 (N.D. Iowa 2013) ("[M]any drug abuse experts contend that methamphetamine is not the most harmful drug."); cf. *United States v. Nawanna*, 321 F. Supp. 3d 943, 953–54 (N.D. Iowa 2018) ("The harsh treatment of methamphetamine offenses is also apparent from the relative low percentage of methamphetamine offenders, compared to other drug offenders, who receive Guidelines enhancements for commission of drug offenses near protected locations or for an aggravating role in the offense during fiscal year 2017. Only 0.1% of methamphetamine offenders received a 'protected location' enhancement, while 1.5% of total drug offenders received that enhancement, making methamphetamine offenders 15 times less likely to receive such an enhancement. No other percentage of drug offenders was anywhere near as low. Similarly, 5.8% of methamphetamine offenders received an 'aggravating role' adjustment, as compared to 7.2% of total drug offenders, and that percentage for methamphetamine offenders was lower than for any other drug offenders except marijuana offenders."). In the Sentencing Commission's recent report, it noted that "very few individuals sentenced for trafficking methamphetamine engaged in offense conduct that posed a harm to either persons or the environment (0.8%) or actually harmed the environment (0.1%) during their offense conduct (Figure 25). Additionally, very few (0.4%) individuals were involved in offenses that resulted in death or serious bodily injury from ingesting methamphetamine." 2024 Methamphetamine Report, *supra* note 2, at 42.

⁶⁹ See [Federal Sentencing Snapshot: Methamphetamine Trafficking](#) at 3 (In FY 2024, the below-guideline sentencing rates for reasons other than substantial assistance of 45%, 49%, and 51% for Ice, meth-mixture, and meth-actual, respectively). In the same year, the average guideline minimum for meth-actual cases (139 months) and the average sentence imposed across all meth cases (96 months).⁶⁹ That is, the average guideline *minimum* for the threshold level that the Commission might contemplate applying across all (combined) meth cases is *nearly four years higher* than the average sentence imposed in combined meth cases. *Id.* at 2–3.

⁷⁰ See 18 U.S.C. § 3553(a)(6) (instructing courts to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct" when imposing sentence).

prominent role in the criminal enterprise and proximity to the source of the drugs.”⁷¹

- ii. While the Commission’s tiered treatment of actual/mixture methamphetamine offenses in the past may have at least appeared logical, “[r]ealities on the ground have since changed.”⁷² Even if it were true in the past that only kingpins had access to highly pure meth,⁷³ it is not true anymore – now, essentially all meth is pure. In other words, there’s nothing *unusual* about highly pure meth in today’s market.
 1. As discussed above, in the 1980s, when Congress and the Commission set different mandatory minimums for methamphetamine mixture and pure methamphetamine, the

⁷¹ U.S.S.G. § 2D1.1, app. note 27(C) (“Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs.”); *see also United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249, 1255 (D.N.M. 2017) (recognizing that the theory underlying the purity-based distinction in the methamphetamine guidelines is found at application note 27(C)). This application note is more precisely related to an upward departure, encouraging sentencing courts to impose terms of imprisonment above the guideline range where a defendant was “[t]rafficking in controlled substances, compounds or mixtures of unusually high purity” U.S.S.G. § 2D1.1, app. note 27(C). But there is no doubt that it is relevant here: methamphetamine is expressly excluded from this upward departure provision because “the guideline itself provides for the consideration of purity.” *Id.* In other words, high purity is not a factor relevant to a departure because the purity-as-proxy-for-culpability reasoning is already “baked into” the meth guidelines. *See* U.S.S.G. § 1A1.4(b) (introduction to the Guidelines Manual, explaining that “departures” are intended to permit judicial discretion only in “unusual cases outside the range of the more typical offenses for which the guidelines were designed”).

⁷² *United States v. Hoover*, No. 4:17-CR-327, 2018 WL 5924500, at *2 (D. Idaho Nov. 13, 2018) (“From my experience, purity levels of seized drugs in the 10% range were common until approximately 20 years ago. Realities on the ground have since changed.”).

⁷³ There is evidence that it has never been true that, with meth, higher purity indicated higher status in the distribution chain. The President’s Office of National Drug Control Policy reported in 2004 that while heroin, cocaine, and other substances tended to be diluted as they progressed through the distribution chain, “[h]istorically, there has been little variation in average d-methamphetamine purity across quantity levels.” Executive Office of the President, Office of National Drug Control Policy, 2004 Price and Purity Report, *supra* note 12, at 16. And “since the late 1990s, the *highest* purities have been observed at the *lowest* quantity levels.” *Id.* at 16 (emphasis added); *see also id.* at 18. The authors of this report found that it was “not clear why this happens.” *Id.* at 16. This phenomenon was also observed in a research publication that was created four years later: Institute for Defense Analysis, *The Price and Purity of Illicit Drugs: 1981–2007*, at VII-3 (PDF page 93) (Oct. 2008), https://www.ojp.gov/pdffiles1/ondcp/price_purity07.pdf (“Since 1995 or so, the expected purity values were generally highest at the lowest quantity level, and they were lowest at the highest quantity level. National trends for purities were unaffected when results from seizures were incorporated into the analyses.”).

average purity was 30–50%.⁷⁴ Purity levels remained low through the 1990s and into the 2000s.⁷⁵

2. The situation has changed: as discussed above, now essentially all meth is pure. Purity of street-level methamphetamine has been above 90% for many years.⁷⁶ As the Sentencing Commission recently reported, “methamphetamine tested in fiscal year 2022 was uniformly highly pure regardless of whether it was sentenced as methamphetamine mixture (91.0% pure on average), methamphetamine actual (92.6%), or Ice (97.6%).”⁷⁷
3. This purity is consistent across the country: although essentially all meth in the U.S. is imported from Mexico, “average purity of methamphetamine tested in border districts (92.3%) was nearly the same as the average in non-border districts (93.8%).”⁷⁸
4. This was also consistent regardless of the individual defendant’s function within the distribution chain – from “a high-level supplier to a low-level employee.”⁷⁹
5. The effect: throughout the country, the meth guidelines subject low-level dealers and couriers to sharply elevated penalties that were designed for kingpins.⁸⁰

⁷⁴ See Executive Office of the President, Office of National Drug Control Policy, 2004 Price and Purity Report, *supra* note 12, at 45 (Figure 26).

⁷⁵ U.S. Sent’g Comm., 1999 Meth Report, *supra* note 46, at 15 n.41.

⁷⁶ U.S. Sent’g Comm., 2024 Meth Report, *supra* note 2, at 9 (Figure 3) (showing that meth purity has been well over 90 percent at least since 2011) *see also* *United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249, 1254–55 (D.N.M. 2017) (“As a result of increased cartel control over methamphetamine distribution, the average purity of methamphetamine has increased to over 90 percent while the price per gram has dropped to about \$70.”).

⁷⁷ U.S. Sent’g Comm’n, 2024 Meth Report, *supra* note 2, at 4.

⁷⁸ *Id.* at 34–35.

⁷⁹ *Id.* at 36–38.

⁸⁰ *United States v. Johnson*, 379 F. Supp. 3d 1213, 1224 (M.D. Ala. 2019) (Given that the Guidelines treat actual methamphetamine and ice more harshly than methamphetamine mixture, the national average of more than 90% purity meant that the sentencing Guidelines would treat the average individual convicted of a crime involving methamphetamine as a kingpin or leader, even though that simply is not true. . . . In other words, the high purity of methamphetamine in a specific case does not reliably indicate the offender’s role in the drug trade, given that methamphetamine throughout the U.S. market is highly pure.”) (cleaned up). While courts are charged with avoiding unwarranted disparities in sentencing

- iii. What distinguishes a meth-mixture case from a pure-meth case is the existence of a lab report – which is related to law enforcement priorities and practices, and lab capacity – not anything having to do with the defendant at bar or his offense.
 1. Today, since it is almost unheard of for tested methamphetamine to be less than 80% pure (the cut-off for determining what is “Ice”), whether meth is deemed pure or not is a function only of whether a lab report was produced (and submitted to the PSR writer).
 2. Thus, while a lab report identifying pure meth can reveal something about law enforcement priorities, plea negotiations, and lab backlogs, it reveals nothing about the individual being sentenced or his offense. “Most of those factors are beyond a defendant’s control, and none of them should result in additional months or years of imprisonment.”⁸¹
 - a. Whether a lab report is created can depend on the district of prosecution.

similarly situated people, it is also important to avoid “unwarranted *similarities*” among differently situated people. See *Gall v. United States*, 552 U.S. 38, 55 (2007).

⁸¹ See *United States v. Havel*, No. 4:21-CR-3075, 2023 WL 1930686, at *5 (D. Neb. Feb. 10, 2023) (collecting cases and explaining that “differing outcomes are driven by whether or not methamphetamine is tested for purity in the first place” (internal citations omitted)). The Commission recognized that meth sentencing often turned on the availability of a lab test, not the reality of the offense, many years ago when it reviewed a small representative sample of meth cases and found that only 36.8 percent were sentenced using the meth-actual guideline notwithstanding that the meth-actual guideline would produce a higher range (and thus should theoretically apply) to any case involving meth with purity greater than 10 percent, which would be true of most meth. The Commission found that the distinguishing factor between cases sentenced under the pure-meth guideline and cases sentenced under the meth-mixture guideline was the availability of a lab report. U.S. Sent’g Comm., 1999 Meth Report, *supra* note 46, at 15. In the Commission’s more recent meth report, it again found that meth sentencing turned on the existence of a lab report and highlighted this as a “key finding” of the report. U.S. Sent’g Comm., 2024 Meth Report, *supra* note 2, at 5; see also *id.* at 28–29. In a recent filing with the Sentencing Commission, the Federal Public and Community Defenders (representing defender offices nationwide) reported that “[s]ome U.S. Attorneys’ Offices do not typically seek purity testing until they start preparing for trial while others seek purity testing as a matter of course, and still others leave this decision to plea bargaining. Moreover, Defenders report that some judges direct the USAO to test for purity in every meth case before sentencing.” Ltr. from Heather Williams, Chair of the Federal Defender Sentencing Guidelines Committee, to Hon. Carlton W. Reeves, Chair of the U.S. Sentencing Commission, regarding proposed priorities, at 9 n.22 (May 15, 2024), https://src.fd.org/sites/src/files/blog/2024-06/20240515%20Defender%20Annual%20Letter%20_0.pdf.

- i. Sentencing Commission data shows that the rate of lab testing varies dramatically from district to district, with some districts testing all (or nearly all) methamphetamine for purity and others testing at much lower rates.⁸²
 - ii. Whether a district is more likely to have a high rate of lab-testing does not neatly correspond with geography, but the DEA reports that on average “border districts had higher rates of drug testing (86.4%) compared to non-border districts (71.2%).”⁸³
- b. Within any particular district, whether a lab report is created can also depend on whether meth was actually seized (versus established by witness statements), whether the arrest was conducted by local, state, or federal authorities, plea negotiations, or the simple timing of the criminal case relative to lab testing.⁸⁴
- iv. Although § 2D1.1 links purity to a higher base offense level based on the fiction that purity correlates with an individual’s role in the distribution chain, it is worth noting that there is also no pharmacological basis for treating pure meth 10 times more harshly than meth mixture.

⁸² U.S. Sent’g Comm’n, 2024 Meth Report, *supra* note 2, at 5, 30–31.

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 28–29; *see also United States v. Hartle*, No. 4:16-CV-00233-BLW, 2017 WL 2608221, at *3 (D. Idaho June 15, 2017) (“The reasons why testing is or is not performed in any case are completely arbitrary. In many cases, only some of the drugs were seized and available for testing. In others, the testing lab was too busy to complete testing before sentencing. In some, the wise defendant pled guilty early in the case so that sentencing would occur before testing could be completed. In many cases, the prosecution originated with a state agency where testing could not be completed in a timely manner. Regardless, none of these reasons relate to the defendant’s culpability or the danger which he or she poses to society.”); *United States v. Rodriguez*, 382 F. Supp. 3d 892, 897 (D. Alaska 2019) (“[I]n Alaska, testing for purity is almost always performed and reported for sentencings where the case started under the jurisdiction of a federal law enforcement agency. However, for cases referred by a state or local law enforcement agency, testing for purity – and whether the results of that testing are subsequently reported for sentencing purposes – occurs in only approximately half of such cases. Moreover, there are cases where the results of lab testing were not ready at the time of sentencing – or were not reported at all for sentencing purposes.”).

1. The potency of meth is not directly proportional to purity. “‘A lot of people often confuse purity with potency,’ DEA Omaha Division Assistant Special Agent in Charge Steve Bell said,” as quoted in a 2019 DEA publication.⁸⁵ “Purity is exactly that, how pure the actual product is. Potency is the effect the methamphetamine has on your body. It’s the determining factor in how high a person will get after using the substance. It’s possible to make a highly pure methamphetamine with a low potency that wouldn’t cause much effect to the body.”⁸⁶
2. As for dangerousness, the chemical structure of the methamphetamine is the same whether it is pure or mixed with something else. And cutting agents are highly variable. So while pure meth is certainly capable of being more dangerous than a particular meth mixture, a meth mixture — depending on the cutting agent — can be far more dangerous.⁸⁷
3. There is no evidence of an increase in social harm based upon pure versus mixed meth. To be sure, the fact that our country is currently flooded with cheap meth is causing significant social harm.⁸⁸ But this is the result of systemic

⁸⁵ DEA, *Methamphetamine Seizures Continue to Climb in the Midwest*, *supra* note 16; see also U.S. Sent’g Comm., 2024 Meth Report, *supra* note 2, at 9 (Figure 3) (illustrating purity versus potency).

⁸⁶ *Id.*; see also *United States v. Rodriguez*, No. 3:17-CR-00031-TMB, 2019 WL 1508036, at *3 n.27 (D. Alaska Apr. 5, 2019) (“[D]ue to changes in how methamphetamine is synthesized, ‘. . . increase[s] in purity do[] not always translate to an increase in potency.’”).

⁸⁷ See Clare Cole et al., *Cut: A Guide to Adulterants, Bulking agents, and other Contaminants found in illicit drugs* (April 2010) (discussing adulterants that have been found in meth, including (among other things) lead), <https://www.health.ny.gov/diseases/aids/consumers/prevention/oduh/docs/cut.pdf>; Alpas Wellness, *What is Methamphetamine Cut With?*, <https://alpaswellnesscenters.org/methamphetamine-treatment/what-methamphetamine-is-cut-with/> (last visited Oct. 14, 2024) (describing cutting agents, which range from inert to poisonous). Indeed, one study funded by the Department of Justice noted that “[m]ethamphetamine itself [was] the final and least hazardous substance involved in” production of meth by small toxic laboratories within the United States, which have largely been replaced by imported meth. Hunt et al., *Methamphetamine Use: Lessons Learned*, at 26, (Feb. 2006), <https://www.ojp.gov/pdffiles1/nij/grants/209730.pdf>.

⁸⁸ See DEA, *Methamphetamine Seizures Continue to Climb in the Midwest*, at 6 (July 10, 2019) (“The ample supply, low cost, and high potency has enabled the [Sinaloa] cartel to expand beyond traditional methamphetamine markets in the western United States into eastern U.S. markets, effectively flooding the United States with another deadly product.”), <https://www.dea.gov/stories/2019/2019-07/2019-07-10/methamphetamine-seizures-continue-climb-midwest>. Fifteen years ago and more, meth presented a different social harm: dangers related to home meth manufacturing operations. See DOJ National Drug Intelligence Center, *Methamphetamine Laboratory Identification and Hazards: Fast Facts* (brochure),

social and political factors – not the fact that the meth is pure. And the social harms related to our country being flooded with cheap meth cannot be remedied by over-punishing people whose individual participation in the drug trade has essentially no impact on those harms.⁸⁹ The federal government in this case is not prosecuting the leaders of the international cartels that are controlling today's meth market. Instead, the government is prosecuting **[[***say something appropriate about client that is consistent with the overall theme of your sentencing presentation]]**.⁹⁰

<https://www.justice.gov/archive/ndic/pubs7/7341/7341p.pdf> (last visited Oct. 14, 2024) (warning the public of risks of explosion and toxicity to individuals exposed to meth labs and also risks to the environment: “The average methamphetamine laboratory produces 5 to 7 pounds of toxic waste for every pound of methamphetamine produced. Operators often dispose of this waste improperly, simply by dumping it near the laboratory. This can cause contamination of the soil and nearby water supplies.”).

⁸⁹ It has long been understood that higher penalties (as opposed to the certainty of being caught) do not promote general deterrence. *See, e.g.,* U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, *Five Things About Deterrence* (May 2016) <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>. As for incapacitation and protection of the public, with drug-trafficking offenses, incapacitation of all but essentially kingpins also has essentially no impact on public protection, because these offenses are committed within a large, complex market, in which the incapacitation of any mid- or low-level trafficker simply creates space for somewhat else to fill the void. *See* Roger Pryzbylski, et al., *The Impact of Long Sentences on Public Safety: A Complex Relationship*, 36 Fed. Sent. R. 81, 82 (2023) (explaining that while there is evidence that “selective incapacitation” can impact violent crime, incapacitation “may produce the opposite effect for those engaged in drug-related offending or other group-based crimes where an incarcerated individual is quickly replaced by a new recruit. This ‘replacement effect’ occurs – and undermines the overall crime-reducing effects of incapacitation – when there is ‘demand’ for particular criminal activity. The illicit drug business offers the most obvious example: when someone who plays a role in a drug trafficking organization is incarcerated, someone else must take his or her place.”).

⁹⁰ ****Note to practitioners with courier cases:** Prosecutors sometimes claim that drug couriers should be treated harshly because they are close to the cartels that control meth manufacture, in that they are employed by cartels. But even though couriers are in some sense employed by cartels, it is generally through individuals who are many levels removed from cartel leadership. *See* Adam B. Weber, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 Fordham L. Rev. 1749, 1776–77 (2019) (“[D]rug-trafficking organizations often intentionally keep the couriers uninformed as a way to insulate their high-level members. While couriers may have information on the individuals who originally gave them the drugs to import, this intelligence is often of little use to prosecutors because those individuals are typically outside the United States. Additionally, the leaders of the drug-distribution conspiracy have every incentive to withhold the true identity of the person to whom the couriers are delivering the drugs and simply provide an alias or general description.”); *see also* David Bjerk & Caleb Mason, *The Market for Mules: Risk and Compensation of Cross-Border Drug Couriers*, 39 Int'l Rev. L. & Econ. 58 (2014) (explaining that drug couriers operate “outside of the drug retail operation and [are] not looking to ‘work their way up’ within the organization”); Natalie Kitroeff and Robert Gebeloff, *The American Drug Mules Smuggling Fentanyl Into the U.S.*, N.Y. Times (Sept. 28, 2024) (describing the way cartels recruit and control vulnerable individuals, mostly U.S. citizens, to become couriers), <https://www.nytimes.com/2024/09/28/world/americas/fentanyl-drug-smugglers-us.html> (describing the way cartels recruit and control couriers). Legal scholars and others have bemoaned the

- v. Commentators have compared the methamphetamine actual/mixture disparity to the cocaine powder/base disparity, with one commentator dubbing it “Crack 2.0.”⁹¹ It is the unwarranted disparity between powder and crack cocaine, resulting in crack sentences that were far too harsh, that spurred the Supreme Court to declare in *Kimbrough* that district courts were free to reject guideline provisions for policy reasons.
- vi. Many stakeholders have urged the Commission to eliminate the meth purity distinction.⁹²

overly harsh treatment of drug couriers since the Guidelines’ inception: the quantity of product that they convey can expose them to some of the harshest penalties, although they are often young, inexperienced, and lack any control over the drug trade; indeed, they are often unaware of what they are carrying. See Deborah Young, *Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 Fed. Sent. R. 63 (Vera Inst. Just. 1990); see also, e.g., Adam B. Weber, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 Fordham L. Rev. 1749 (2019); Kevin Lerman, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. Irvine L. Rev. 679 (2017). It does not make sense to punish couriers more harshly than other bit-players in the drug market any more than it would make sense to blame a cashier at a mall’s Disney Store for the actions of Disney CEO Bob Iger. Drug couriers, similar to retail-level drug dealers, are “easily replaceable cogs in the vast drug distribution machinery.” Deborah Young, *Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 Fed. Sent. R. 63, 63 (Vera Inst. Just. 1990).

⁹¹ Lex A. Coleman, *Crack 2.0: Federal Methamphetamine Sentencing Policy, the Crack/Meth Sentencing Disparity, and the Meth/Meth-Mixture Ratio – Why Drug Type, Quantity, and Purity Remain “Incredibly Poor Proxies” for Sentencing Culpability Under 21 U.S.C. § 841(b) and U.S.S.G. §2D1.1*, 34 Fed. Sent. R. 29, 37 (Vera Inst. Just. 2021); cf. Stephanie R. Bush-Baskette & Vivian C. Smith, *Is Meth the New Crack for Women in the War on Drugs? Factors Affecting Sentencing Outcomes for Women and Parallels Between Meth and Crack*, 7 Fem. Criminol. 48 (2011); Hayes, 948 F. Supp. 2d at 1026 (comparing the false assumptions behind the methamphetamine guidelines with the crack/powder disparity). In order to remedy past injustices, Congress has now reduced the drug quantity disparity between powder and crack cocaine. And, of course, the Sentencing Commission has followed suit by lowering the Guidelines for crack cocaine offenses, and making that amendment retroactive. Meanwhile, although Congress acted explicitly in 1998 to make the mandatory minimums applicable to methamphetamine equal to those of crack cocaine, the methamphetamine Guidelines have not been reduced along with those of crack cocaine. Thus, whatever the rationale may have once been for the steady increase in the methamphetamine and the crack cocaine Guidelines, the rationale for the decrease of the crack cocaine Guidelines has not been likewise extended to methamphetamine. Because one Guideline has been adjusted and the other has not, 50 grams of methamphetamine (“actual” / “ice”) is treated the same as 280 grams of crack cocaine, 5 kilograms of powder cocaine, 1 kilogram of heroin, and 1,000 kilograms of marijuana, and they all yield a base offense level of 30. See U.S.S.G. § 2D1.1(c), Drug Quantity Table.

⁹² See USSC, [2026 Proposed Guidelines Amendment: Drug Offenses](#) at 4–5 (Dec. 12, 2025); see also [Defenders’ 2025 Drug Comment](#) at 31 (supporting setting base offense levels at current meth-mixture quantity thresholds); [PAG’s Comment on the USSC’s 2025 Proposed Drug Amendments](#) at 23 (March 3, 2025) (same); [POAG Comment on the USSC’s 2025 Proposed Drug Amendments](#) at 20 (Mar. 3, 2025) (agreeing that actual and mixture should be treated the same but suggesting that appropriate threshold quantity levels may lie somewhere in between the current meth-mixture and meth-actual levels).

- vii. Similar to how judges responded to the powder/crack disparity, district judges around the country have refused to apply the pure-meth guideline as a policy matter, regardless of lab results.⁹³

⁹³ See, e.g., *United States v. Celestin*, No. 21-125, 2023 WL 2018004, at *5 (E.D. La. Feb. 15, 2023) (“[T]he Court finds methamphetamine purity is no longer an accurate way to assess culpability, and the Court refrains from using purity as a proxy for culpability moving forward.”); *United States v. Havel*, No. 21-CR-3075, 2023 WL 1930686, at *5 (D. Neb. Feb. 10, 2023) (“[T]he ready availability of methamphetamine (actual) to everyone in the chain of distribution, from the kingpin to the mule to the end user, has utterly severed any connection between the purity of the drug and the defendant’s position in the criminal enterprise—and as a result, contrary to § 3553(a), the guideline is treating all of them like kingpins.”); *United States v. Brittain*, 578 F. Supp. 3d 1175, 1178–79, (D. Idaho 2022) (“In this decidedly imperfect world, I am going to exercise my discretion to consider the drug quantity and purity issue as only loosely advisory” and would “therefore routinely consider granting a variance in cases where drug purity testing has been completed, so as to ameliorate the unwarranted disparity between cases involving tested and untested substances, and to impose a sentence that reflects the seriousness of the offense”); *United States v. Carrillo*, 440 F. Supp.3d 1149, 1154–55 (E.D. Cal. Feb. 24, 2020) (addressing the purity disparity “by assigning the base offense level for a methamphetamine mixture, calculated using the quantity of actual methamphetamine for which the defendant was held accountable”); *United States v. Rodriguez*, 382 F. Supp. 3d 892, 898 (D. Alaska 2019) (“The distinction between actual and mixed methamphetamine does not comport with the reality of how methamphetamine is created, trafficked, and sold today, and creates an arbitrary distinction between defendants that runs contrary to the § 3553(a) factors.”); *United States v. Johnson*, 379 F. Supp. 3d 1213, 1226 (M.D. Ala. 2019) (“As we can see, the policy criticisms outlined in the above-cited opinions apply to cases like Johnson’s, which do not involve ice, because the guidelines’ 10-to-1 ratio still led him to receive a higher base-offense level due to the purity of the methamphetamine involved in the crimes.”); *United States v. Bean*, 371 F. Supp. 3d 46, 52 (D.N.H. 2019) (“The assumption underlying the methamphetamine guidelines—that purity indicates that a defendant is close to the source of drugs and therefore played a leadership role in the conspiracy—is divorced from current market reality.”); *United States v. Moreno*, 2019 WL 3557889, at *2-4 (W.D. Va. Aug. 5, 2019) (“[M]ethamphetamine purity is no longer an accurate indicator of a defendant’s role in a drug trafficking conspiracy.”); *United States v. Pereda*, No. 18-cr-00228-CMA, 2019 WL 463027, at *5 (D. Col. Feb. 6, 2019) (“Moreover, although rejecting the actual/pure methamphetamine Guidelines will result in reduced, alternative Guideline ranges, this will hardly constitute a windfall to defendants in methamphetamine cases because even the less-harsh methamphetamine mixture Guideline ranges are...higher than the ranges for similar quantities of heroin and cocaine....” (internal citation and quotation marks omitted)); *Nawanna*, 321 F. Supp. 3d at 955 (“Because I conclude that the methamphetamine Guidelines are based on a flawed assumption that methamphetamine purity is a proxy for role in the offense, I reject them based on a policy disagreement.”); *United States v. Harry*, 313 F. Supp. 3d 969, 974 (N.D. Iowa 2018) (“I find both (a) drug purity is not an accurate proxy for culpability in light of the fact that nearly all of the methamphetamine cases brought in our district involve high-purity methamphetamine and (b) the 10-to-1 ratio established in the Guidelines is not based on empirical evidence.”); *United States v. Ferguson*, No. Cr 17-204 (JRT/BRT), 2018 WL 3682509, at *4 (D. Minn. Aug. 2, 2018) (“[T]he Guideline range applicable for methamphetamine mixtures more accurately reflects the appropriate range for him rather than the range applicable for pure/actual methamphetamine.”); *United States v. Saldana*, 2018 U.S. Dist. Lexis 44402, Case No. 1:17-CR-271, Dkt. 330, at *8 (W.D. Mich. March 2, 2018) (“This Court ... concludes that its policy disagreement with the Sentencing Commission on the methamphetamine sentencing guidelines supports sentencing all cases by considering all methamphetamine quantities to be methamphetamine mixtures.”); *United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249, 1256–57 (D.N.M. 2017) (“[T]he Court

Indeed, even the current chair of the Sentencing Commission has done so.⁹⁴ **[[Note to practitioners: If judges in your district have varied below the meth guideline, cite to those cases here too – presumably using whatever Pacer citation is available!]]**

- viii. Meth-mixture levels are among the highest in the book – higher than not just powder cocaine but also heroin and PCP.⁹⁵ Sentencing Commission data confirms that most pure-meth cases garner a below-guideline-range sentence.⁹⁶
- ix. As for what is the appropriate benchmark for sentencing, if not the pure-meth guideline, most courts use the mixed-meth guideline.⁹⁷ It's worth nothing, however, that meth and powder cocaine are comparable psychostimulants that fill broadly similar marketplace roles, and, in a weight-based regime, equal weights should trigger equal sentences.⁹⁸
- x. It's also worth repeating that even the mixed-meth guideline is overly harsh for many cases.⁹⁹ The best way to measure culpability

believes a sentence within the methamphetamine-mixture range is appropriate both because Mr. Ibarra-Sandoval is no more culpable than the mine-run defendant who would have been sentenced under the methamphetamine-mixture range, and because the Commission believed the methamphetamine-mixture range was sufficient to punish those aforementioned mine-run defendants.”); *United States v. Ortega*, No. 8:09-CR-400, 2010 WL 1994870, at *7 (D. Neb. May 17, 2010) (“The two-tiered actual/mixture approach . . . is only an accurate measure of culpability when it corresponds to a defendant’s position in the typical hierarchy that characterizes most drug conspiracies . . .”).

⁹⁴ *United States v. Robinson*, No. 3:21-CR-14-CWR, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022) (Reeves, J.). The Methamphetamine Report recently released by the Sentencing Commission suggests that the Commission may be poised to address the pure/mixed meth disparity in the upcoming amendment cycle.

⁹⁵ See generally USSC §2D1.1(c).

⁹⁶ In pure-meth cases sentenced in fiscal year 2023 (under primary guideline § 2D1.1 with a primary drug type of “Methamphetamine (actual)” or “Ice,” after excluding cases with any counts of conviction under 18 U.S.C. § 924(c)), sentences fell below the advisory guidelines range in 78% of those cases. Twenty-seven percent of those cases involved a downward variance, and an additional 18% involved a government-sponsored downward variance or departure. The data used for these analyses were extracted from the U.S. Sentencing Commission’s “Individual Datafiles” for Fiscal Year 2023. The Commission’s “Individual Datafiles” are publicly available for download on its website. U.S. Sent’g Comm’n, Commission Datafiles (last visited Oct. 14, 2024).

⁹⁷ See [Federal Sentencing Snapshot: Methamphetamine Trafficking](#) at 3 (indicating that courts imposed below-guideline sentences in 71% of meth-actual cases and 76% of Ice cases).

⁹⁸ [Statement of Jonathan Caulkins](#), Ph.D., H. Guyford Stever University Professor of Operations Research and Public Policy, Carnegie Mellon University to USSC on Methamphetamine at 5-12 (Aug. 5, 2025) (detailing basis for setting methamphetamine ratio as same as powder cocaine).

⁹⁹ Given the harshness of all the meth guidelines, one court has suggested that judges should (1) calculate base-offense levels using the meth-mixture guideline, regardless of lab results; then (2) consider

in a meth case is the one that Hon. Reeves, Chair of the Sentencing Commission, described in *Robinson*: “[G]iven the on-the-ground reality in methamphetamine cases, the better way to determine culpability is to examine all of the circumstances of the defendant’s case and life – seeing the defendant as a ‘whole person,’ as the Supreme Court just instructed” in *Concepcion v. United States*, 597 U.S. 481, 486 (2022).¹⁰⁰

IV. Arguments against application of the meth-specific “importation” enhancement

a. The enhancement

- i. Section 2D1.1(b)(5) increases the offense level by two levels any time “the offense involved the importation of amphetamine or methamphetamine,” or the importation of precursors for the manufacture of either of these, so long as the defendant does not receive a mitigated role adjustment under § 3B1.2.
- ii. The drug guideline’s only other enhancement related to importation is § 2D1.1(b)(16)(C), which increases the offense level by the exact same amount – 2 levels – but only if “the defendant was directly involved in the importation of a controlled substance,” and is *also* subject to an aggravated role adjustment under § 3B1.1. (emphasis added).¹⁰¹

- b. Policy arguments against the meth-specific importation enhancement at § 2D1.1(b)(5) that could be used in any case, whether or not the client was directly involved in importation

varying downward from the meth-mixture guideline based on more generalized concerns about quantity-based sentencing. See, e.g., *United States v. Johnson*, 379 F. Supp. 3d 1213 (M.D. Ala. 2019).

¹⁰⁰ *United States v. Robinson*, No. 3:21-CR-14-CWR, 2022 WL 17904534, at *7 (S.D. Miss. Dec. 23, 2022)

¹⁰¹ As the Eleventh Circuit has explained, there is a significant difference between § 2D1.1(b)(5) and § 2D1.1(b)(16)(C): the former applies anytime the offense “involved” importation, whereas the latter applies only if the defendant him- or herself was “directly involved” in importation. *United States v. Rodriguez*, 780 F. App’x 764, 767 (11th Cir. 2019). Incidentally, the § 2D1.1(b)(16)(C) enhancement also reaches non-importation offenses through other subsections, applicable where the defendant both receives an aggravated role adjustment and also engaged in other specific aggravating conduct. With non-importation offenses, § 2D1.1(b)(16) applies where the defendant both receives an aggravated role adjustment and also: (1) coerced another person into getting involved with the drug-trafficking scheme, although the other person received little or no compensation for their role and had minimal knowledge of the scheme; (2) distributed a controlled substance to an unusually vulnerable person or involved an unusually vulnerable person in the drug-trafficking scheme; (3) obstructed justice in relation to the offense; or (4) committed the offense as part of a pattern of criminal conduct engaged in as a livelihood.

- i. The 2-level enhancement at § 2D1.1(b)(5) is not grounded in empirical evidence; it is illogical; and it results in unwarranted disparities. Thus, it should be rejected for policy reasons.
 1. This enhancement was not based on empirical evidence, past practices, or anything else regarding which the Sentencing Commission would have particular expertise; rather, it was based on a congressional directive. And as noted above, it is well understood that when a guideline is impacted by a congressional directive, that impact is based on politics, not data.¹⁰²
 - a. Congress in the Comprehensive Methamphetamine Control Act of 1996 directed the Commission to “provide for increased penalties for unlawful manufacturing, importing, exporting, and trafficking of methamphetamine” and related offenses.¹⁰³ The Act noted that in carrying out this increase in penalties, the Commission should ensure that the meth guidelines reflect, among other things, “the

¹⁰² See Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1023–24 (2001) (article by one of the original Sentencing Commissioners and one of the Commission’s initial staff members, explaining that in the modern guidelines era, “congressional micro-management of the guidelines amendment process” occurs “through specific statutory ‘directives’ that the Commission either ‘consider’ or actually adopt a new guideline provision, typically involving an enhancement to sentence levels for a specific type of offense or even a specific offense characteristic, often by a given number of ‘offense levels’ actually specified in the legislation. As one might expect from a purely political process, this type of legislation tends to reflect the congressional concerns du jour . . . and therefore tends to be ad hoc and non-systematic. We do not mean to suggest that there is anything improper in Congress legislating in response to the popular will: that is what Congress—as opposed to the Commission—constitutionally is authorized to do, as Congress is a politically responsive body whose members stand for election. However, this type of legislation obviously makes the Commission’s job of systematic rationalization of sentences more difficult, and tends to reinforce a misconception of the Commission as the ‘junior-varsity’ that exists simply to carry out the transitory political will.”); see also U.S. Sent’g Comm., *Fifteen Years of Guidelines Sentencing*, at 73 (Nov. 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (“The frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress.”); *United States v. Kelly*, 868 F. Supp. 2d 1202, 1204 (D. N.M. 2012) (explaining in a different context (the child-pornography-guideline context) that a guideline provision based on a directive is owed less deference because it is “not the product of the Sentencing Commission’s usual institutional competence and expertise, but is instead the result of numerous politically-based Congressional directives”).

¹⁰³ Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104–237, 110 Stat 3099, § 301.

recent increase in the illegal importation of methamphetamine and precursor chemicals.”¹⁰⁴

- b. In compliance with this directive, most notoriously, the Commission increased penalties for meth offenses by reducing by one-half the quantity of a mixture or substance containing methamphetamine that triggered each offense level.¹⁰⁵ In the same amendment, however, the Commission also created the meth-importation enhancement, which was then at § 2D1.1(b)(4) (1997).¹⁰⁶
 - c. There is no evidence that, at the time the Commission created the meth-importation enhancement, courts were finding guideline sentences inadequate to punish individuals convicted of meth importation, much less that they were inadequate for individuals who were not directly involved in importation but whose offense somehow otherwise involved importation. There is also no evidence of any other empirical basis for the amendment at § 2D1.1(b)(5).¹⁰⁷
2. At the time § 2D1.1(b)(5) (then (d)(4)) was promulgated, there was far more domestically manufactured methamphetamine. Now, as discussed above, meth is almost

¹⁰⁴ *Id.*

¹⁰⁵ See U.S.S.G. App'x C, amend. 555 (eff. Nov. 1, 1997).

¹⁰⁶ *Id.* Initially, this enhancement covered only methamphetamine, which was the only substance referenced in the congressional directive. *Id.* Later, the Commission added “amphetamine,” “because of the similarities of the two substances.” U.S.S.G. App'x C, amend. 622 (eff. Nov. 1, 2001).

¹⁰⁷ Letter from Fred Warren Bennett, Chair, Practitioners' Advisory Group, to Hon. Richard P. Conaboy, Chair, U.S. Sent'g Comm., re Proposed Guideline Amendments, at 2 (Mar. 24, 1997) (advising the Commission that “no evidence has been shown to justify [the meth-specific importation enhancement], rather for at least five years, the Commission has been presented with a barrage of overwhelming evidence which justifies lowering penalties for those who commit drug crimes . . .”), https://src.fd.org/sites/src/files/resources/ussc-materials/public-comment/ussc_publiccomment_199703/ussc_publiccomment_199703.pdf (PDF p. 137). In its 1999 report, the Sentencing Commission described the rate of various downward departures in meth cases and noted that “[u]pward departures for these cases, like nearly all guideline offenses, are rare.” 1999 Meth Report, *supra* note 46, at 17; see also U.S. Sent'g Comm., 1996 *Sourcebook of Federal Sentencing Statistics* tbl. 40 (Departure Status of Drug Defendants By Drug Type, Oct. 1, 1995, through Sept. 30, 1996), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1996/TAB-40_0.pdf.

exclusively imported. But the Sentencing Commission has not revisited the enhancement in any substantive way.¹⁰⁸

- ii. The 2-level enhancement at § 2D1.1(b)(5) is illogical and creates unwarranted disparities between meth cases and non-meth cases.
 1. The meth-specific importation enhancement at § 2D1.1(b)(5) is broadly applicable to meth cases that touch on importation. In contrast, the importation enhancement that applies to other controlled substances—including cocaine, heroin, and fentanyl—requires *both* direct participation in importation *and* additional aggravated conduct.¹⁰⁹ Section 2D1.1(b)(5) requires neither, yet it garners the same 2-level enhancement. There is no rational explanation for this.
 2. Section 2D1.1(b)(5)'s limitation that individuals who receive a minimal-role adjustment are not eligible for the enhancement is woefully inadequate to limit application of the enhancement to individuals with some sort of control over the flow of methamphetamine into the United States. Indeed, it does not even effectively exclude couriers, although these are some of the lowest-level participants in the drug trade and there's good reason to think that the Commission *intended* the "minimal role" exclusion to reach couriers.¹¹⁰

¹⁰⁸ There have been two amendments to § 2D1.1(b)(5) since it was first promulgated as § 2D1.1(b)(4), but neither was substantive as to methamphetamine. An amendment in 2001 added "amphetamine" to the enhancement, which had previously applied to meth offenses only. U.S.S.G. App'x C, amend. 622 (eff. Nov. 1, 2001). A later amendment renumbered the enhancement from (b)(4) to (b)(5). U.S.S.G. App'x C, amend. 750 (eff. Nov. 1, 2011).

¹⁰⁹ § 2D1.1(b)(16)(C).

¹¹⁰ When the Commission proposed what is now § 2D1.1(b)(5), the Federal Public and Community Defenders' comment to the Commission regarding the amendment focused on how it would be overly punitive toward drug couriers. Statement of Thomas W. Hillier, II, on behalf of Federal Public and Community Defenders, to the U.S. Sent'g Comm., concerning the Proposed Guideline Amendments, at 26–27 (Mar. 28, 1997) ("The vast majority of defendants who are arrested for importing are low-level mules or couriers. Their sentences are already too high. Frequently couriers and mules are poor people without a future who bring drugs into the United States for a fee that has no relation to the street-value of what they bring in."), https://src.fd.org/sites/src/files/resources/ussc-materials/public-comment/ussc_publiccomment_199703/ussc_publiccomment_199703.pdf (PDF p. 77–78). The Commission has encouraged judges to give drug couriers a mitigating-role adjustment, *see* U.S.S.G. App'x C, amend. 794 (Reason for Amendment) (explaining that the Commission amended the mitigating-role adjustment instructions in the commentary to make them more generous, in part to respond to a difference in how judges in the various circuits applied the adjustment to drug mules and couriers:

3. The result is that individuals sentenced for meth offenses involving importation, even when they perform low-level functions in the drug trade, are treated more harshly than similarly situated individuals sentenced for other controlled-substance offenses touching on importation.¹¹¹ This harsh treatment no doubt contributes to BOP overcrowding but it certainly has not inhibited meth importation, which has grown exponentially between 1997 (when § 2D1.1(b)(6) was created) and today.¹¹²
- c. Argument against the § 2D1.1(b)(5) enhancement ***only applicable specifically where the client's individual offense did not involve importation – do not raise unless the PSR/government is pushing this issue
- i. The problem to be addressed in this outline section
 1. Section 2D1.1(b)(5) calls for a 2-level enhancement where “the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully,” and the defendant is not subject to a mitigating-role adjustment.
 2. At least the Fifth, Eighth, and Eleventh Circuits have affirmed a district court’s decision to apply this enhancement even in meth cases where the defendant’s

“application of mitigating role varies along the southwest border, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another.”). However, there are still significant disparities in how this gets applied along the southern border, with the Fifth Circuit’s caselaw, in particular, discouraging application of the adjustment to couriers. U.S. Sent’g Comm., *Primer: Aggravating and Mitigating Role Adjustments*, at 17 & n.81 (2024) (citing, among other cases, *United States v. Castro*, 843 F.3d 608, 613–14 (5th Cir. 2016) (“[I]t is improper for a court to award a [§ 3B1.2] adjustment simply because the defendant does less than the other participants[.] . . . the defendant must do enough less so that [s]he at best was peripheral to the advancement of the illicit activity.” (citations omitted))), https://www.ussc.gov/sites/default/files/pdf/training/primers/2024_Primer_Role.pdf.

¹¹¹ Consider, for example, two individuals who are acting as drug couriers in order to alleviate poverty, neither of whom knows the type of controlled substance they are conveying; one conveys meth and the other fentanyl. The enhancement at § 2D1.1(b)(16) would not apply to either person, because neither is eligible for an aggravated-role adjustment. In many districts, where couriers are routinely denied the mitigating-role adjustment, the enhancement at § 2D1.1(b)(5) would apply to the individual conveying meth. But it would not apply to the individual conveying fentanyl.

¹¹² See U.S. Sent’g Comm., 2024 Meth Report, *supra* note 2, at 16.

offense did not include importation, based on the fact that the meth had been imported.¹¹³

- a. In the Fifth and Eighth Circuits, the circuit court went further, holding that there is no mens rea requirement – meaning that if the meth was imported, the importation enhancement applies, even if the defendant did know it was imported.¹¹⁴ (And again, all meth is imported.)
 - b. With or without mens rea, now that essentially all meth is imported, this could permit district courts to find that the importation enhancement applies in every meth case.¹¹⁵
3. The Ninth Circuit has broken with these circuits, holding that while § 2D1.1(b)(5) does not require that the defendant personally imported meth, it does require that importation be “relevant conduct” in the case, sharply limiting application of this enhancement.¹¹⁶
 4. Anecdotally, whether this enhancement gets applied in cases where the individual being sentenced was not involved with importation appears to be arbitrary – depending on the prosecutor, the district, the judge.

¹¹³ *United States v. Foulks*, 747 F.3d 914, 915 (5th Cir. 2014); *United States v. Rivera-Mendoza*, 682 F.3d 730, 734 (8th Cir. 2012); *United States v. Biao Huang*, 687 F.3d 1197, 1205–06 (9th Cir. 2012); *United States v. Perez-Oliveros*, 479 F.3d 779, 784 (11th Cir. 2007).

¹¹⁴ *United States v. Kearby*, 943 F.3d 969, 976–77 (5th Cir. 2019); *United States v. Serfass*, 684 F.3d 548, 551–53 (5th Cir. 2012); *United States v. Werkmeister*, 62 F.4th 465, 469 (8th Cir.), *cert. denied*, 144 S. Ct. 164 (2023), and *cert. denied sub nom. Robey v. United States*, 144 S. Ct. 256 (2023), and *reh’g denied sub nom. United States v. Garcia*, No. 21-3753, 2024 WL 1548902 (8th Cir. Apr. 10, 2024).

¹¹⁵ See, e.g., *United States v. Williams*, 949 F.3d 237, 239 (5th Cir. 2020) (“Williams’ second claim on appeal is that the district court erred in applying a two-level enhancement under U.S.S.G. § 2D1.1(b)(5), upon finding that Williams’ methamphetamine, *based on its purity and quantity*, was imported.” (emphasis added)).

¹¹⁶ *United States v. Job*, 871 F.3d 852, 871–72 (9th Cir. 2017); see also *United States v. Biao Huang*, 687 F.3d 1197, 1206 (9th Cir. 2012) (applying the enhancement where the court’s discussion of the facts makes clear that the relevant conduct included importation – describing how the defendant, a Chinese citizen, and a co-defendant would distribute meth imported from China through the Northern Mariana Islands to American Samoa and Hawaii). Under the relevant conduct rule, conduct by another person can be imputed to the defendant being sentenced where there was “jointly undertaken criminal activity.” U.S.S.G. § 1B1.3(a)(1)(B).

- ii. Argument to be made in circuits other than the Fifth, Eighth, and Eleventh Circuits: § 2D1.1(b)(5) applies only to meth cases in which the individual's offense includes at least relevant conduct related to importation. (Note: in the Ninth Circuit, you should already win this argument without fanfare, under *Job*.)
 - 1. The plain and unambiguous text of § 2D1.1 requires, in relevant part, that the "*offense* involved the importation of . . . methamphetamine." This refers to the offense of conviction and any relevant conduct – not conduct of unknown, unrelated actors up the distribution train – and thus does not apply to an individual who was not in any way involved with importation.
 - a. According to the Guidelines Manual, "offense" refers to "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context."¹¹⁷
 - b. Under the relevant conduct rules, conduct by another person can be imputed to the defendant being sentenced only where there was "jointly undertaken criminal activity" (and other requirements are met).¹¹⁸
 - 2. The history of this enhancement confirms that the enhancement does not apply to an individual who was not in any way involved with importation.
 - a. The enhancement was created in 1997 in response to a congressional directive requiring the Sentencing Commission to "review and amend its guidelines and its policy statements to provide for increased penalties for unlawful manufacturing, importing, exporting, and trafficking of methamphetamine," and ensure that recommendations account for "the recent increase in the illegal importation of methamphetamine and precursor chemicals."¹¹⁹

¹¹⁷ U.S.S.G. § 1B1.1, app. note 1(I).

¹¹⁸ U.S.S.G. § 1B1.3(a)(2) and (2).

¹¹⁹ U.S.S.G. App'x C, Amend. 555, Reason for Amendment (Nov 1, 1997) (citing the directive at sections 301 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat.

- b. An increased penalty for a person who was not in any way involved in the importation of methamphetamine has no conceivable impact on persons who are involved with importation and cannot be considered a response to the increase in importation.
3. Applying this enhancement to individuals who were not in any way involved with importation makes the meth-importation enhancement even more irrational.
 - a. In a market in which essentially all meth is imported from Mexico, where it was produced in sophisticated labs, the application of § 2D1.1(b)(5) to individuals who were in no way involved with importation functions simply as a 2-level increase to the pure-meth guideline, which is among the harshest in the book and, as discussed, is already routinely criticized as being far too high for nearly all defendants.
 - b. This situation is analogous to the child pornography guideline, in which everyone—including the Sentencing Commission—understands that “enhancements that were initially added to target more serious offenses and more culpable offenders” capture conduct that “has become so ubiquitous that [the enhancements] now apply in the vast majority of cases” to which the guideline applies.¹²⁰ This is not how enhancements are meant to function.
4. Happily, this is not how § 2D1.1(b)(5) functions: its plain language encompasses only a person whose offense (defined to include relevant conduct) involves importation of methamphetamine. This is what the Ninth Circuit has held.¹²¹

3099); *see also* U.S.S.G. App’x C, Amend. 555, Reason for Amendment (Nov 1, 1997) (noting more generally that the amendment was intended to respond “to evidence of a recent, substantial increase in the importation of methamphetamine and precursor chemicals”).

¹²⁰ U.S. Sent’g Comm’n, *Federal Sentencing of Child Pornography Offenses: Non-Production Offenses*, at 68 (June 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf.

¹²¹ *United States v. Job*, 871 F.3d 852, 872 (9th Cir. 2017).

iii. In the Eighth and Eleventh Circuits — *we can still win this argument*

1. See the above argument.
2. *Add*: While the circuit court previously found that the defendant did not need to himself import meth, that court has not held in a published case that § 2D1.1 applies even where importation was not even arguably relevant conduct. In each of this circuits' cases addressing the issue, the defense argument was about how the defendant had personally not imported the drugs, not about the "offense" including "relevant conduct," and in fact the relevant conduct in these cases almost certainly included importation of meth.¹²²

iv. In the Fifth Circuit:

Unfortunately, the Fifth Circuit seems to have rejected the offense-only-means-this-offense-plus-relevant-conduct-based argument, albeit with essentially no reasoning.¹²³ Thus, the argument against applying § 2D1.1(b)(5) to defendants who were not involved in importation can only be preserved for eventual banc review. Or, perhaps, failed claims could spur the Sentencing Commission to clarify the enhancement (in a good way).

¹²² *United States v. Werkmeister*, 62 F.4th 465, 469 (8th Cir.), *cert. denied*, 144 S. Ct. 164, 217 L. Ed. 2d 62 (2023), and *cert. denied sub nom. Robey v. United States*, 144 S. Ct. 256, 217 L. Ed. 2d 98 (2023), and *reh'g denied sub nom. United States v. Garcia*, No. 21-3753, 2024 WL 1548902 (8th Cir. Apr. 10, 2024) (explaining that one of the members of the drug conspiracy, Mario Hernandez, worked with a broker who brought meth from Mexico to Texas, where Hernandez would pick it up and bring it to Iowa, and that this broker "was an unindicted member of the charged conspiracy with Mario Hernandez and the other conspirators in Iowa"); *United States v. Rivera-Mendoza*, 682 F.3d 730, 733–34 (8th Cir. 2012) (describing evidence that the defendant told a DEA agent that a Mexican courier brought him eight pounds of meth from a Mexican super lab, he made wire-tapped calls to Mexican meth sources, and he sent drug proceeds to Mexico); *United States v. Perez-Oliveros*, 479 F.3d 779, 784 (11th Cir. 2007) (describing how the defendant would pick up a truck in San Antonio, Texas, that had come from Mexico, to drive it to its final destination).

¹²³ *United States v. Kearby*, 943 F.3d 969, 976–77 (5th Cir. 2019).