

# APPLYING LESSONS LEARNED IN CHILD PORN CASES: HOW TO “WIN” AT ANY TYPE OF SENTENCING HEARING



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Articles available at [http://www.fd.org/odstb\\_SentencingResource3.htm](http://www.fd.org/odstb_SentencingResource3.htm)

# Who can MOST benefit from today's talk?

- ▣ Child Porn clients (ok, that's a gimme)
- ▣ Meth clients
- ▣ Fentanyl/Heroin clients
- ▣ Firearms clients
- ▣ Illegal Immigration Clients
- ▣ Career Offenders
- ▣ Etc.

The goal is to put the prosecutor in the position of defending absurdity...and it is easy.

# Background on Child Porn Clients

- ▣ Guideline 2G2.2 governs possession, receipt, “transportation,” and distribution.
- ▣ Separate from 2G2.1 (production)
- ▣ Yields some of the highest Guidelines for any type of case (above murder, terrorism, etc.).

BUT

Over 70% receive below Guidelines Sentence...why?

# “Joe” Possessor

- Possession ONLY (§ 2G2.2)

## Specific Offense Characteristics:

- 1+ Pictures of a child < 12 yrs. Old (99.4%)
- 1 images of “abusive” conduct (89.6%)
- Used a computer (95+%)
- 1 folder with 8 mpegs + 10 pics = 768 pictures  
(75 x 8 + 10). Note 77% had at least 600  
pictures (max), with median of 2,350 images)
- NO criminal history
- Never abused or exploited a child.
- Full points for Acceptance

# Joe's Sentence

April 30, 1987:	----- (not illegal)
November 1, 1991:	6-12 months
November 27, 1991:	12-18 months
November 1, 1996:	21-27 months
April 30, 2003:	30-37 months
November 1, 2004:	41-51 months
Now:	108-135 months

Percentage increase in the Total Offense Level after Acceptance since 1991: **1,800%** (Gas example: If \$2.00 / gallon in 1991, then \$36 per gallon now)

Increase in the low end of the applicable Guideline Range since Congress directly, and repeatedly, began increasing the Guidelines: **102 months.**

# “Jim-Bob” Swapper

Received/Transported/Distributed - § 2G2.2.

## Specific Offense Characteristics:

- Possessed 1 picture of a child < 12 (99.4%)
- Used a computer (95+% of defendants)
- Possessed at least 1 picture of “sadistic” or bondage (89.6%)
- Traded two mp4 files
- Possessed a couple of videos and 10 pictures (235).  
Note: 97% get some enhancement, and median is 6,300 images

- No Criminal History
- Never Abused anyone
- Full points for Acceptance

# Jim-Bob's Sentence

April 30, 1987:	12-18 months
November 1, 1991:	21-27 months
November 27, 1991:	27-33 months
November 1, 1996:	41-51 months
November 1, 2000:	70-87 months
April 30, 2003:	108-135- months
November 1, 2004:	188-235 months

Percentage increase in the low end of the Guideline Range after Acceptance since 1987: **1,567%**. (Gas example: If **\$2.00 / gallon in 1987, then \$31 / gallon today**)

Actual increase in the low end of the applicable Guideline Range since Congress directly, and repeatedly, began increasing the Guidelines: **176 months**.

# Jim-Bob's Alternate Sentence

If we add 3 x 10 second movie clips, Jim-Bob receives:

April 30, 1987:	12-18 months
November 1, 1991:	21-27 months
November 27, 1991:	27-33 months
November 1, 1996:	41-51 months
November 1, 2000:	70-87 months
April 30, 2003:	<b>121-151 months</b>
November 1, 2004:	<b>210-262 months</b>

This would result in a **1750%** increase, or a **198 month increase** over a defendant sentenced for the same conduct on October 30, 1991. (**\$35 / gallon**)



# How We Get the Better Sentence:

- 1) Dig into the evidence
- 2) Demystify the Guideline
- 3) Deconstruct Common Assumptions
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# Watch for Shady Language I:

- ▣ Text:
  - Agents found thousands of images of pornography, with nearly all depicting females with shaved/partially shaved pubic hair, several depicting females portrayed as teens, dressed in school clothes, cheerleaders, with braces or virgins. Several of the magazines advertised child-oriented material such as “Barely Legal.”
  
- ▣ Implication: Molester!

# The Reality



# Watch for Shady Language II:

The officers pursued the **defendant** at speeds in excess of 70 mph. Officers observed the vehicle slow and the tires lock-up, creating smoke. The **defendant** exited his vehicle while it was still moving and a black object fell to the ground. The **defendant** collected the object, and ran behind the residences. **It should be noted that the location of these residences is between Oakland Junior High School and Blue Ridge Elementary School, which at the time, were in session.** Officers followed the **defendant** around to the back of 2405 Blue Ridge Road, and observed him throw the object over the fence. The **defendant** was then subdued and placed under arrest. A loaded, Glock Model 19, 9mm semi-automatic handgun, Serial No. BHNS713 was found on the other side of the fence.



2400 Blue Ridge Rd  
Columbia, MO 65202

First Church of the Nazarene

Blue Ridge Elementary School

Measure distance ✕

Click on the map to add to your path

Total distance: 1,581.20 ft (481.95 m)

# Watch for Bold Assertions

- Is every picture porn?
- Is every case the “the worst ever?”
- Conclusory Statements such as “Every year it gets younger and younger, worse and worse”

# Ask “But Why?” Questions About

## Enhancements + Conditions:

- ▣ Look at file in its native format – pic on an iphone worse than a poster?
- ▣ Why should my guy get a bigger sentence if his brother stole a gun 5 years ago and my guy didn't know?
- ▣ But WHY does a small Tupperware container of meth deserve 135 months?
- ▣ Does my guy really need “lifetime supervision” – what is the effect on caseload?
- ▣ Isn't 22 years excessive for a 3<sup>rd</sup> drug offense if my client has only ever served 2 months before, and has had no drug treatment?



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# Historic # Comparisons

2G2.2 (child porn)

**70% get a BELOW guideline sentence**

“PURE” variance in 60.3% of cases

- DOJ admits some enhancements make no sense
- Multiple Commission reports asking to revise guideline

vs

2D1.1 (drug possession)

<5% get a below guideline sentence

Variance in just 1.9% of cases (4 of 213)

# 1991 (Congress)

“Senate Amendment No. 780, unfortunately, **would negate the Commission's carefully structured efforts to treat similar conduct similarly** and to provide proportionality among different grades of seriousness of these offenses. Instead, it **would require the Commission to rewrite the guidelines for these offenses in a manner that will reintroduce sentencing disparity** among similar defendants and render the guidelines susceptible to plea bargaining manipulation”

# Methodology Problems

## Ex: The Digital Divide

- ▣ The use of computers was assumed to be the sign of a high-level distributor + Access to the Internet was seen as rare, extreme sophistication  
(now = like charging a person for speeding, and then adding an enhancement for use of a car)
- ▣ Computers crimes were believed to be HARDER to track than mailed materials
- ▣ Computers were believed to leave LESS evidence than mailed materials

# Notable Comments from the 1996 Report

1. Commission critiques computer enhancement:  
“What seems apparent is that a person’s culpability depends on *how they use a computer...*” *Id. at 29.*  
“The adjustment does not distinguish between persons who email images to a single, voluntary recipient and those who establish a BBS and distribute child pornography to large numbers of subscribers.
2. Commission criticizes the “unwarranted disparity” caused by Congress dictating receipt = distribution

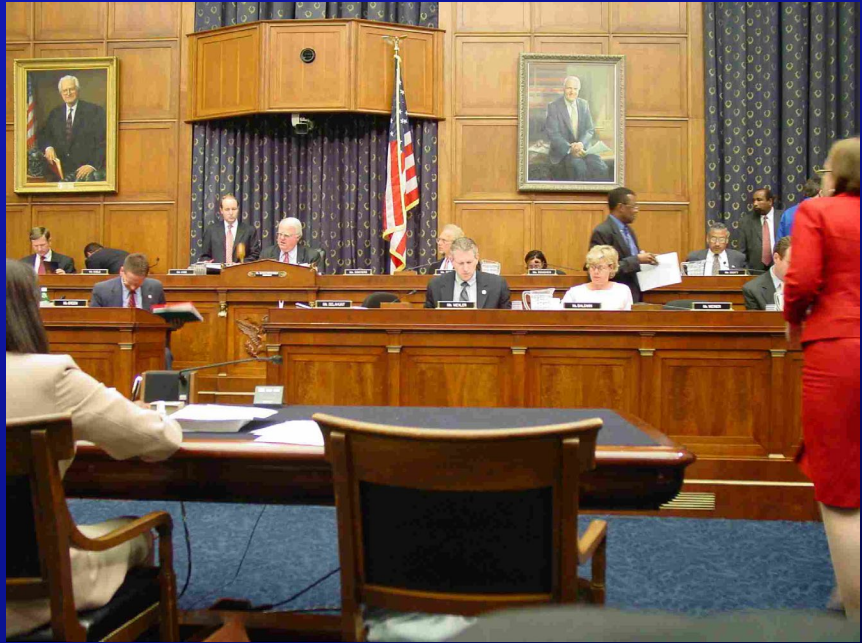
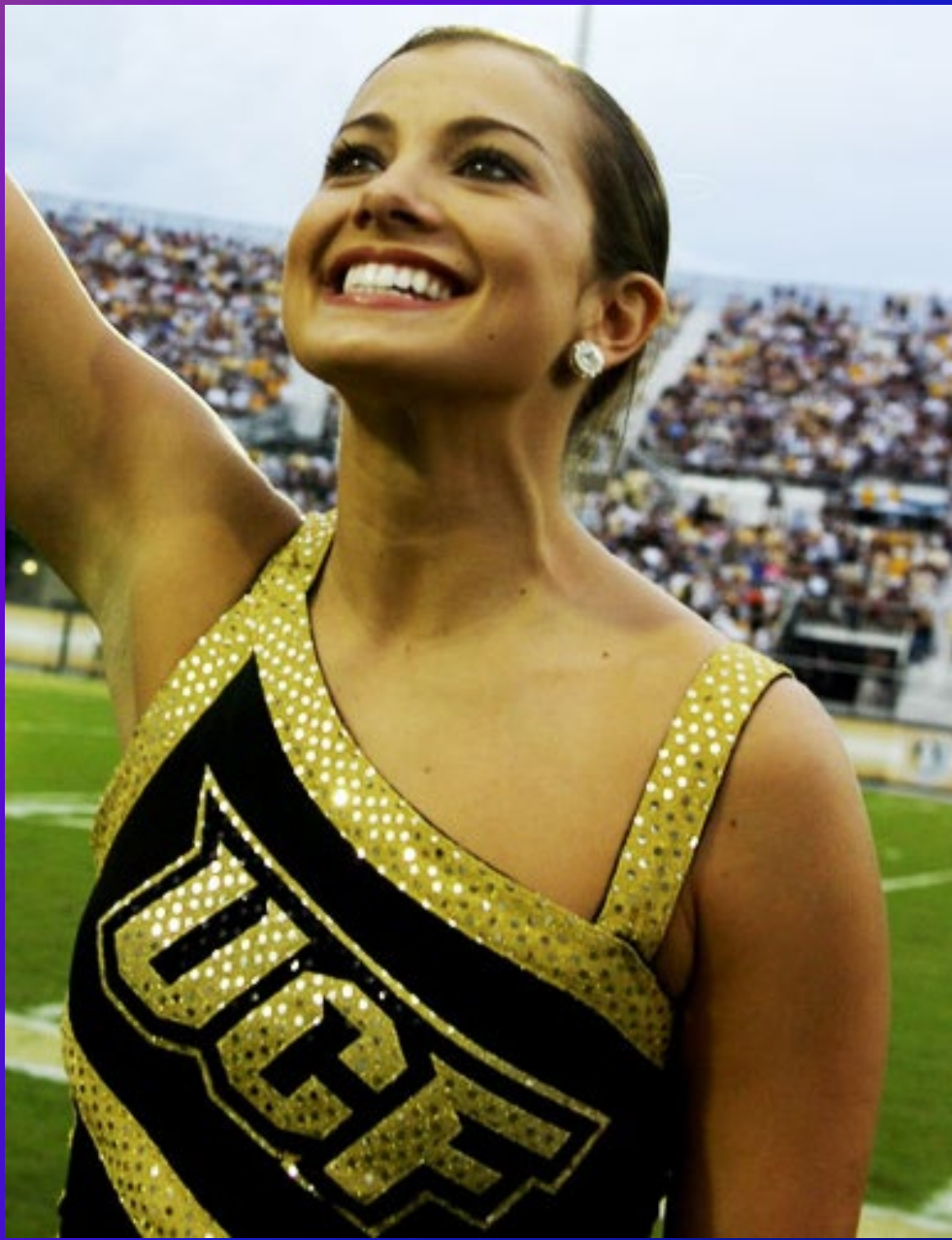
# 2003 - The Protect Act



Rep. Tom Feeney



Rep. Jim Sensenbrenner



# 2004 Commission Report

- ▣ “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.”
- ▣ *An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (2004), available at [http://www.ussc.gov/15\\_15year/15year.htm](http://www.ussc.gov/15_15year/15year.htm) at 72.*



# What Happened...

2008 – Stabenow Article

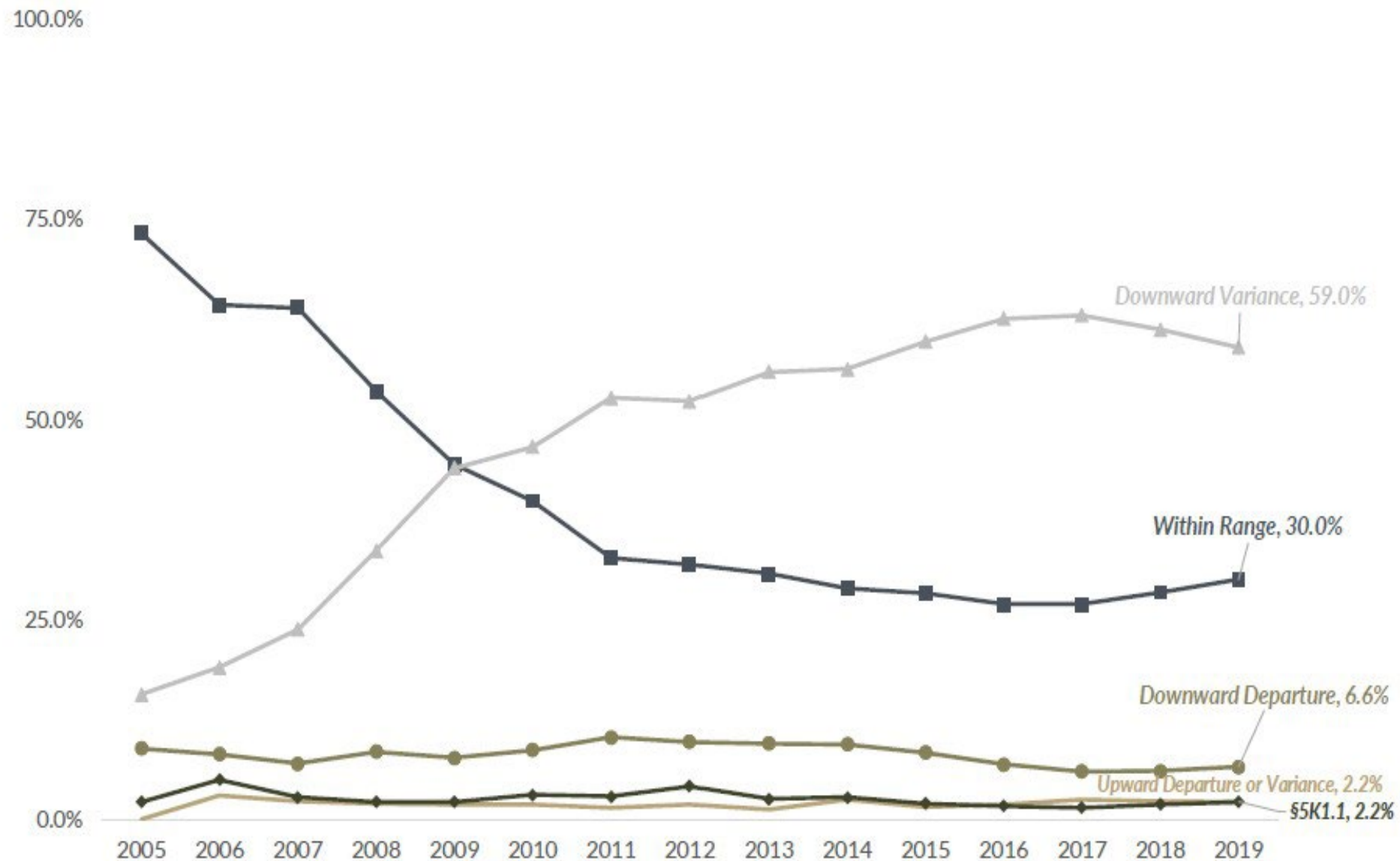
2009 – Dorvee Case (2<sup>nd</sup> Circuit)

2010 – Sentencing Commission Study

2012 – 2<sup>nd</sup> Stabenow Article

2021 - 2<sup>nd</sup> Sentencing Commission Report to  
Congress

Figure 10.  
Trend in Sentences Relative to the Guideline Range for All §2G2.2 Offenses



# So What if we Stop at #2

- 1) Dig into the evidence
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# How We Get the Better Sentence:

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**Assumption #1**  
**If  $\Delta$  viewed child porn, he WILL**  
**molest**

**Butner Redux**

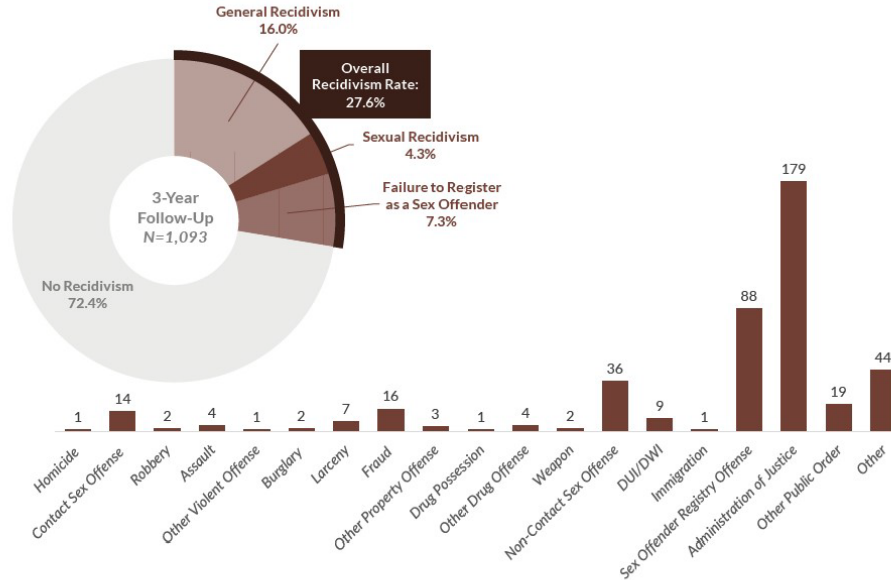
**Beginning of Study: 54 Inmates, 53 contacts**

**End of Study: 131 Inmates, 1477 contacts!!**

## Assumption #2 – But Recidivism!

27.6% Recidivism Rate of 1,093 child  
pornographers followed for 3 year.  
(OUCH!)

Figure 31.  
Recidivism Events by Non-Production Child Pornography Offenders Released or Placed on Probation  
in 2015 After Three-Year Follow-Up Period



## Results of the Recidivism Study

The overall recidivism rate of the 1,093 non-production child pornography offenders was 27.6 percent (302 of 1,093 offenders) three years after release from incarceration (or the commencement of probation). Of the 1,093 offenders, 16.0 percent were arrested for a crime that was not a sex offense or related to the offender's status as a sex offender (depicted as "general recidivism" in Figure 31).

The sexual recidivism rate for all non-production child pornography offenders was 4.3 percent (47 of the 1,093 offenders). An additional 7.3 percent of offenders were arrested or had their term of supervised release revoked for failing to register as a sex offender.<sup>143</sup>

## Rearrest Offense

In addition to the overall recidivism rate among non-production child pornography offenders, the Commission identified any criminal event during the three-year study period for which offenders were rearrested (Figure 31). Some offenders were rearrested more than once.<sup>144</sup> Of the 302 non-production child pornography offenders who recidivated, an administration of justice offense<sup>145</sup> was the most common new crime (179 offenders or 16.4% of the 1,093 offenders). Failure to register as a sex offender was the second most common offense among those who recidivated. Eighty-eight offenders (8.1% of the 1,093 offenders) failed to register as a sex offender following the non-production child pornography offense.<sup>146</sup> Although occurring infrequently, 14 non-production child pornography offenders (1.3% of the 1,093 offenders) were arrested for a contact sex offense and 36 offenders (3.3% of the 1,093 offenders) were arrested for a non-contact sex offense.

# Recidivism!

BUT

That includes ANY violation of ANY kind of supervised release condition.

If we only count “Sexual Recidivism” (that includes being later to register a phone or address change) then recidivism was 7.3%.

AND, IF we look at contact sex offenses, then the danger the judge probably cares about is really only 14 of 1,093 (1.3%).



# And...Watch for Bullshit

“A non insubstantial risk that upon release, the defendant will immediately abduct a child for sexual purposes, and if threatened with capture, kill himself and/or the child”

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# Reports, Reports, Reports

Look at the Commission's own website!!!

- Quick Facts reports
- Reports to Congress
- Annual Sourcebook

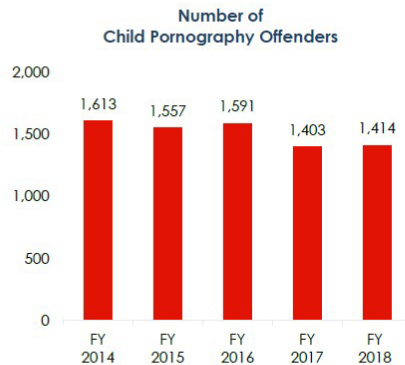


# Quick Facts

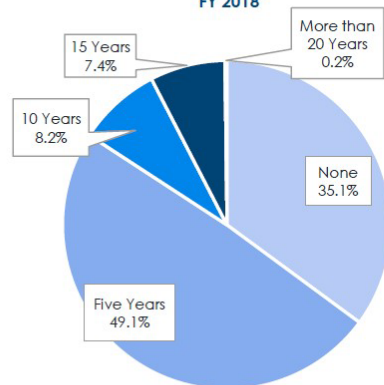
## — Child Pornography Offenders —

### Fiscal Year 2018

- ▶ In FY 2018, 69,425 cases were reported to the U.S. Sentencing Commission.
- ▶ 1,414 of these involved child pornography.<sup>1</sup>
- ▶ Child pornography offenders have decreased 12.4% since FY 2014.



**Length of Mandatory Minimum Penalties for Child Pornography Offenders FY 2018**



### Offender and Offense Characteristics<sup>2</sup>

- 45.5% of child pornography offenders were sentenced for trafficking child pornography; 43.3% were sentenced for possessing child pornography; and 11.2% were sentenced for receiving child pornography.
- 99.3% of child pornography offenders were men.
- 83.3% were White, 9.5% were Hispanic, 4.2% were Black, and 3.0% were Other races.
- Their average age was 41 years.
- 97.8% were United States citizens.
- 76.5% had little or no prior criminal history (Criminal History Category I).
  - ◆ 9.5% were CHC II;
  - ◆ 8.0% were CHC III;
  - ◆ 3.2% were CHC IV;
  - ◆ 1.8% were CHC V;
  - ◆ 1.0% were CHC VI.
- The top six districts for child pornography offenders were:
  - ◆ Southern District of Texas (54);
  - ◆ Eastern District of Virginia (51);
  - ◆ Western District of Missouri (50);
  - ◆ Eastern District of Missouri (38);
  - ◆ Middle District of Florida (38);
  - ◆ Western District of Texas (35).

### Punishment

- 99.1% of child pornography offenders were sentenced to prison; their average sentence was 104 months.
- The average sentence for offenders convicted of trafficking in child pornography was 136 months:
  - ◆ 86.6% of these offenders were convicted of an offense carrying a five-year mandatory minimum penalty; their average sentence was 116 months.
  - ◆ 13.4% had a prior sexual abuse or child pornography conviction and were subject to a 15-year mandatory minimum penalty; their average sentence was 269 months.
- The average sentence for offenders convicted of receiving child pornography was 105 months:
  - ◆ 87.1% of offenders sentenced for receiving child pornography were convicted of an offense carrying a five-year mandatory minimum penalty; their average sentence was 85 months.
  - ◆ 2.9% had a prior sexual abuse or child pornography conviction and were subject to a 15-year mandatory minimum penalty; their average sentence was 241 months.

**USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS**  
**Guideline Calculation Based**  
**Fiscal Year 2020**

Guideline and SOC	Applied	Percent
§2G2.2 Trafficking, Receipt, or Possession of Child Pornography	1,084	1.7
(a)(1) Defendant convicted of 18 U.S.C. §1466(A)(b), §2252(a)(4) or §2252A(a)(5) (BOL 18)	491	45.3
(a)(2) Otherwise (Base offense level 22)	593	54.7
Chapter 2 Specific Offense Characteristic Adjustments	1,081	99.7
(b)(1)(A) If (a)(2) applies (B) defendant only received material and (C) did not traffic material (decrease 2 levels)	142	13.1
(b)(2) Victim under the age of 12 (2 levels) <sup>63</sup>	1,015	93.6
(b)(3)(A) Offense involved distribution for pecuniary gain (§2B1.1(b)(1) level, but at least 5 levels) <sup>64</sup>	4	0.4
(b)(3)(B) Defendant distributed in exchange for thing of value (5 levels) <sup>65</sup>	109	10.1
(b)(3)(B) Offense involved distribution in exchange for thing of value (5 levels) <sup>64</sup>	0	0.0
(b)(3)(C) Offense involved distribution to a minor (5 levels) <sup>64</sup>	14	1.3
(b)(3)(D) Offense involved distribution to a minor to coerce to facilitate travel of a minor to engage in any illegal activity other than covered under (E) (6 levels)	11	1.0
(b)(3)(E) Offense involved distribution to a minor to coerce to engage in sexual behavior (7 levels) <sup>64</sup>	6	0.6
(b)(3)(F) Offense involved distribution other than in (b)(3)(A)-(D) (2 levels) <sup>64</sup>	387	35.7
(b)(4)(A) Sadistic or masochistic conduct or other forms of violence depicted (4 levels) <sup>66</sup>	618	57.0
(b)(4)(B) Sexual abuse or exploitation of an infant or toddler depicted (4 levels)	266	24.5

<sup>63</sup> SOC was formerly §2G2.2(b)(1) and redesignated §2G2.2(b)(2) on November 1, 2004. The statistics reflect all instances of the application of this SOC.

<sup>64</sup> SOC was formerly §G2.2(b)(2) and redesignated §2G2.2(b)(3) on November 1, 2004. The statistics reflect all instances of the application of this SOC.

<sup>65</sup> SOC was altered on November 1, 2016 from an “offense involved” standard to “defendant engaged in” standard.

<sup>66</sup> SOC was formerly §2G2.2(b)(3) and redesignated §2G2.2(b)(4) on November 1, 2004 and subsequently redesignated §2G2.2(b)(4)(A) on November 1, 2016. The statistics reflect all instances of the application of this SOC.

# Results:

- ▣ Overall, *only 41 of 1654 cases* (2.4%) nationally did not involve PSIRs detailing actions that would trigger the base offense level for distribution. Despite these facts and existing adjustments, the Commission found that nearly 80% of all 2G2.2 offenders received some additional type of special reduction. 2012 report at xii.

and

- ▣ Median sentence for 1<sup>st</sup> time offenders without production is 71 months

(That includes 1/3 of people with evidence of “Criminal Sexually Dangerous Behavior”)



# UNITED STATES SENTENCING COMMISSION INTERACTIVE DATA ANALYZER

HOME

MAJOR CRIME TYPES

SENTENCING OUTCOMES

GUIDELINE APPLICATION

METHODOLOGY

Fiscal Year 2021

Clear Filter

## Geography

Circuit 8th Circuit

State --Select--

District --Select--

Clear Filter

## Demographics

Race --Select--

Gender --Select--

Age --Select--

Citizenship --Select--

Education --Select--

Clear Filter

## Crime Type

Crime Type Child Porn

Clear Filter

## Primary Guideline

Guideline §2G2.2

Clear Filter

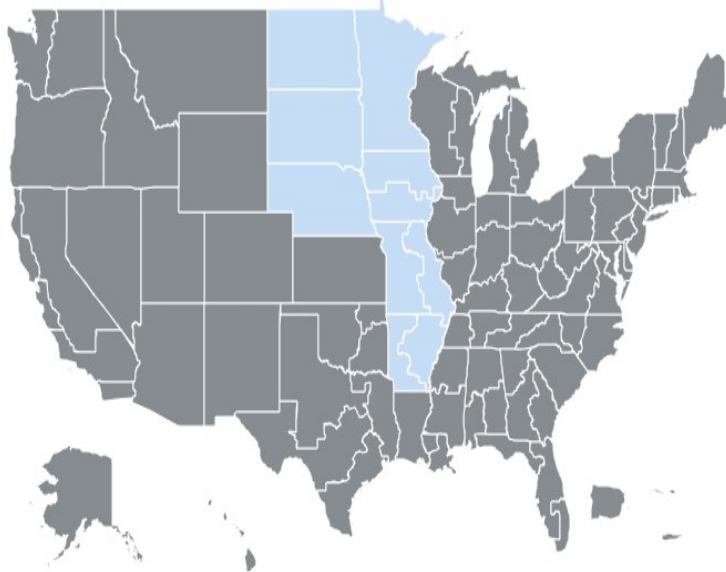
## Drug Type

## Federal Offenders in Each District

Fiscal Year 2021

# of Offenders 6 2K

+  
-



The figure includes the 205 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure.

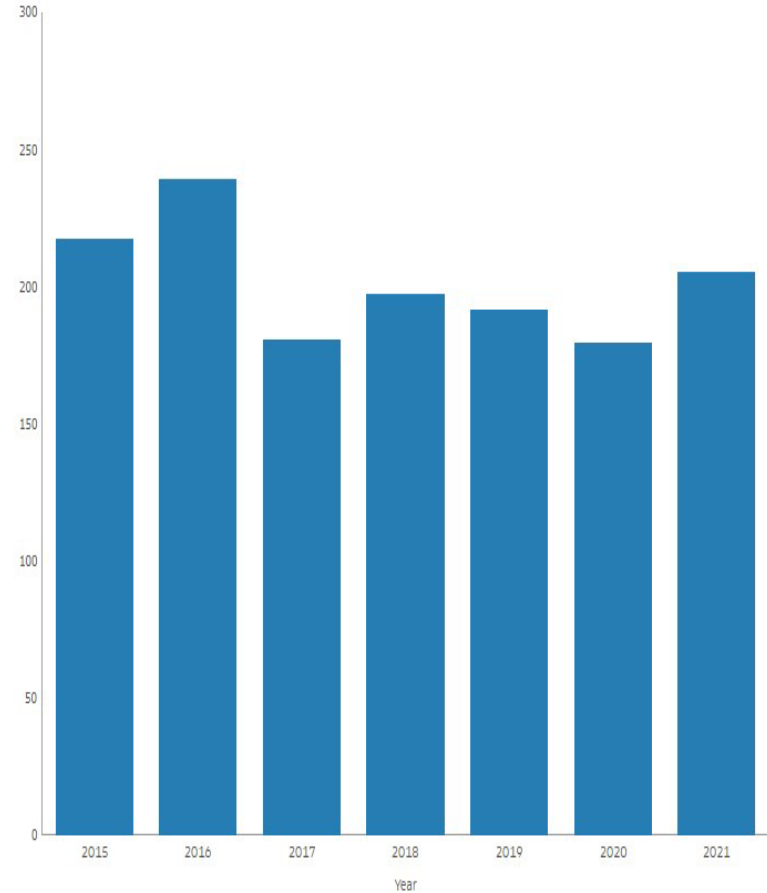
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Fiscal Year: 2021; Circuit: 8th Circuit; State: All; District: All; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Crime Type: Child Pornography; Guideline: §2G2.2; Drug Type: All; Criminal History: All; Career Offender Status: All

## Federal Offenders in Each District

## Number of Offenders Over Time

Fiscal Year 2015,2016,2017,2018,2019,2020,2021



The figure includes the 1,408 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure.

### FILTER:

Fiscal Year: 2015,2016,2017,2018,2019,2020,2021; Circuit: 8th Circuit; State: All; District: All; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Crime Type: Child Pornography; Guideline: §2G2.2; Drug Type: All; Criminal History: All; Career Offender Status: All



# UNITED STATES SENTENCING COMMISSION INTERACTIVE DATA ANALYZER

**HOME**

MAJOR CRIME TYPES

SENTENCING OUTCOMES

GUIDELINE APPLICATION

Fiscal Year

[Clear Filter](#)

**Geography**

Circuit

State

District

[Clear Filter](#)

**Demographics**

Race

Gender

Age

Citizenship

Education

[Clear Filter](#)

**Crime Type**

Crime Type

[Clear Filter](#)

**Federal Offenders in Each District**

Fiscal Year 2021

Circuit	District	N	%
<b>Grand Total</b>		<b>205</b>	<b>100.0%</b>
8th Circuit	Arkansas, Eastern	6	2.9%
	Arkansas, Western	8	3.9%
	Iowa, Northern	14	6.8%
	Iowa, Southern	37	18.0%
	Minnesota	13	6.3%
	Missouri, Eastern	30	14.6%
	Missouri, Western	32	15.6%
	Nebraska	36	17.6%
	North Dakota	8	3.9%
	South Dakota	21	10.2%

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# UNITED STATES SENTENCING COMMISSION INTERACTIVE DATA ANALYZER

HOME

MAJOR CRIME TYPES

**SENTENCING OUTCOMES**

GUIDELINE APPLICATION

METHODOLOGY

Plea Status

Sentence Type

**Sentence Length**

Fine/Restitution Amounts

Citizenship --Select--

Education --Select--

Clear Filter

### Crime Type

Crime Type --Select--

Clear Filter

### Primary Guideline

Guideline §2G2.2

Clear Filter

### Drug Type

Drug --Select--

Clear Filter

### Sentencing Zone

Zone --Select--

Clear Filter

### Criminal History

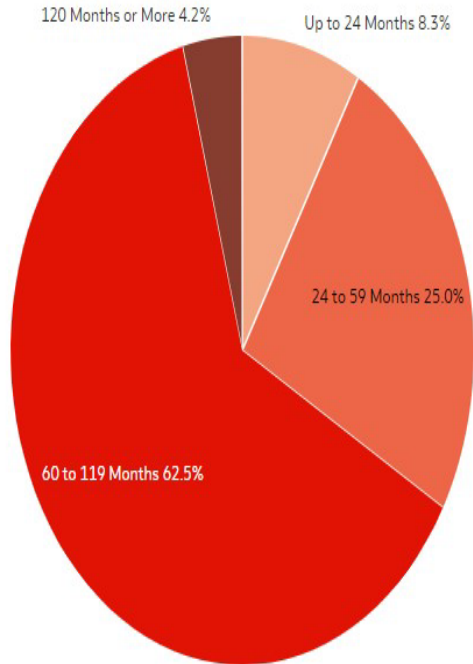
Category |

Career Offender Status --Select--

Clear Filter

## Distribution of Sentence Length

Fiscal Year 2021



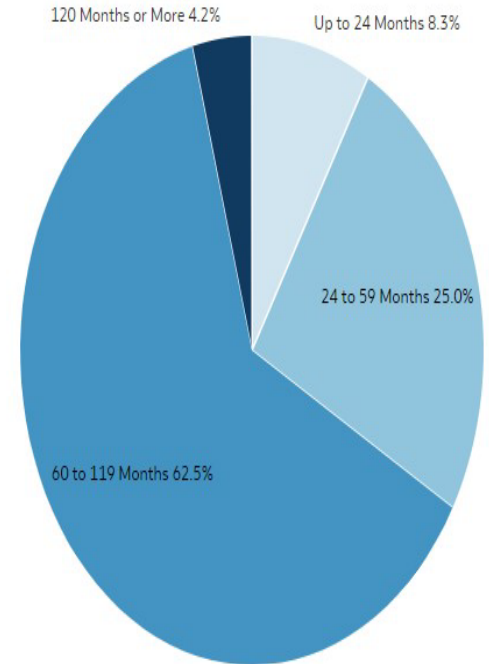
The figure includes the 24 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure. Sentences of probation only are included here as zero months.

**FILTER:**

Fiscal Year: 2021; Circuit: 8th Circuit; State: All; District: Missouri, Eastern; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Crime Type: All; Guideline: §2G2.2; Drug Type: All; Sentencing Zone: All; Criminal History: I; Career Offender Status: All

## Distribution of Imprisonment Length

Fiscal Year 2021



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**FILTER:**

Fiscal Year: 2021; Circuit: 8th Circuit; State: All; District: Missouri, Eastern; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Crime Type: All; Guideline: §2G2.2; Drug Type: All; Sentencing Zone: All; Criminal History: I; Career Offender Status: All



# UNITED STATES SENTENCING COMMISSION INTERACTIVE DATA ANALYZER

HOME MAJOR CRIME TYPES **SENTENCING OUTCOMES** GUIDELINE APPLICATION METHODOLOGY

Plea Status | Sentence Type | **Sentence Length** | Fine/Restitution Amounts

Citizenship --Select--  
Education --Select--  
Clear Filter

Crime Type  
Crime Type --Select--  
Clear Filter

Primary Guideline  
Guideline §2G2.2  
Clear Filter

Drug Type  
Drug --Select--  
Clear Filter

Sentencing Zone  
Zone --Select--  
Clear Filter

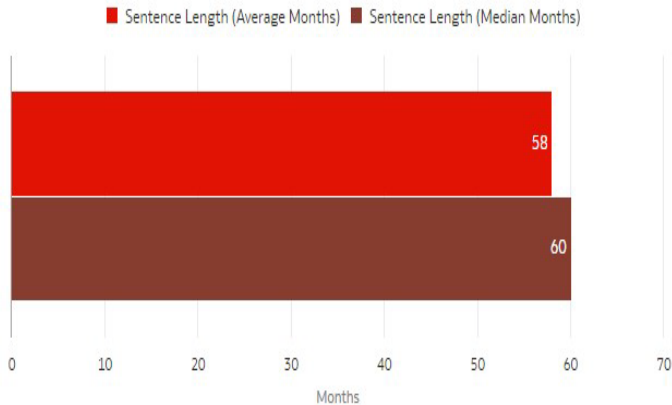
Criminal History  
Category |  
Career Offender Status --Select--  
Clear Filter

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## Average and Median Sentence Length

Fiscal Year 2021



The figure includes the 24 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure. Sentences of 470 months or greater (including life) and probation were included in the sentence average computations as 470 months and zero months, respectively. Sentences of probation only are included here as zero months. The information in this figure includes conditions of confinement as described in USSG §5C1.1.

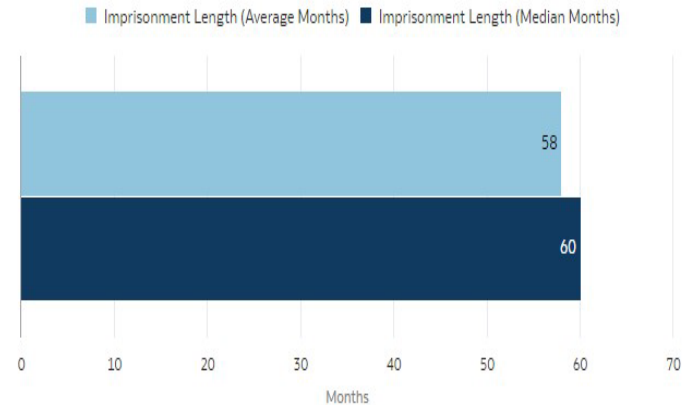
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## Average and Median Imprisonment Length

Fiscal Year 2021



The figure includes the 24 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure. Sentences of 470 months or greater (including life) were included in the sentence average computations as 470 months. The information not include probation or conditions of confinement as described in USSG §5C1.1.

**FILTER:**  
Fiscal Year: 2021; Circuit: 8th Circuit; State: All; District: Missouri, Eastern; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Guideline: §2G2.2; Drug Type: All; Sentencing Zone: All; Criminal History: I; Career Offender Status: All

In 2021, Courts sentenced 119 defendants on the basis of possession offenses. For those 119 defendants, the mean advisory guideline was 78 to 97 months, but 81.5% received a downward variance. Even including the repeat offenders who received sentences in excess of fifteen and twenty years, the average sentence for the entire group was still only 47 months. Nationwide, fully 13% received probationary sentences. Stated another way, one out of every 7.7 defendants sentenced in the United States on the basis of a possession offense received probation. For the 82 offenders who were convicted of possession, but who engaged in swapping or distribution activities, the outcomes were slightly higher. The Final Offense Level of 30 was most common in these cases, yielding an advisory Guideline Range of 97-121 months, but with some cases still receiving probation. The average sentence was 57 months.

# How We Get the Better Sentence:

- 1) Dig into the evidence
- 2) Demystify the Guidelines
- 3) Deconstruct Common Assumptions
- 4) Use Data to Our Advantage
- 5) **Provide a Principled Alternate Sentence**

# Set a Ceiling vs other Conduct

## ▣ Compare to 18 USC 2422(b)

Hypo – 50-year-old writes to “13-year-old” – agrees to meet for sex. Man travels across the country, and is arrested, in the driveway, with a box of condoms and a teddy bear.

This is a logical ceiling if (3553(a) is going to actually promote respect for the law – i.e. more serious offenses should get more serious punishments , or general deterrence can't work

- 104 months for travel to engage in sex with a child 12 or older;
- 46 months for sexual assault of a child; and
- 37 months for statutory rape.

# Compare to Similar Defendants

- ▣ Look to stats and experience to define the client's guilt level
  
- ▣ Force an apples to apples look
  - 1) 601 total pics:
    - 1 distributed to a friend
    - 1 pic of adult bondage
  - 2) 6,000 total pics
    - 6,000 distributed to anonymous people all over the world
    - All of bondage

# The Download Spectrum

- ▣ Done at client's request
- ▣ Paid site or for exchange (and does it matter?)
- ▣ Encouraged in some form (web counters)
- ▣ "Silent" receipt (example "P2P" sharing)

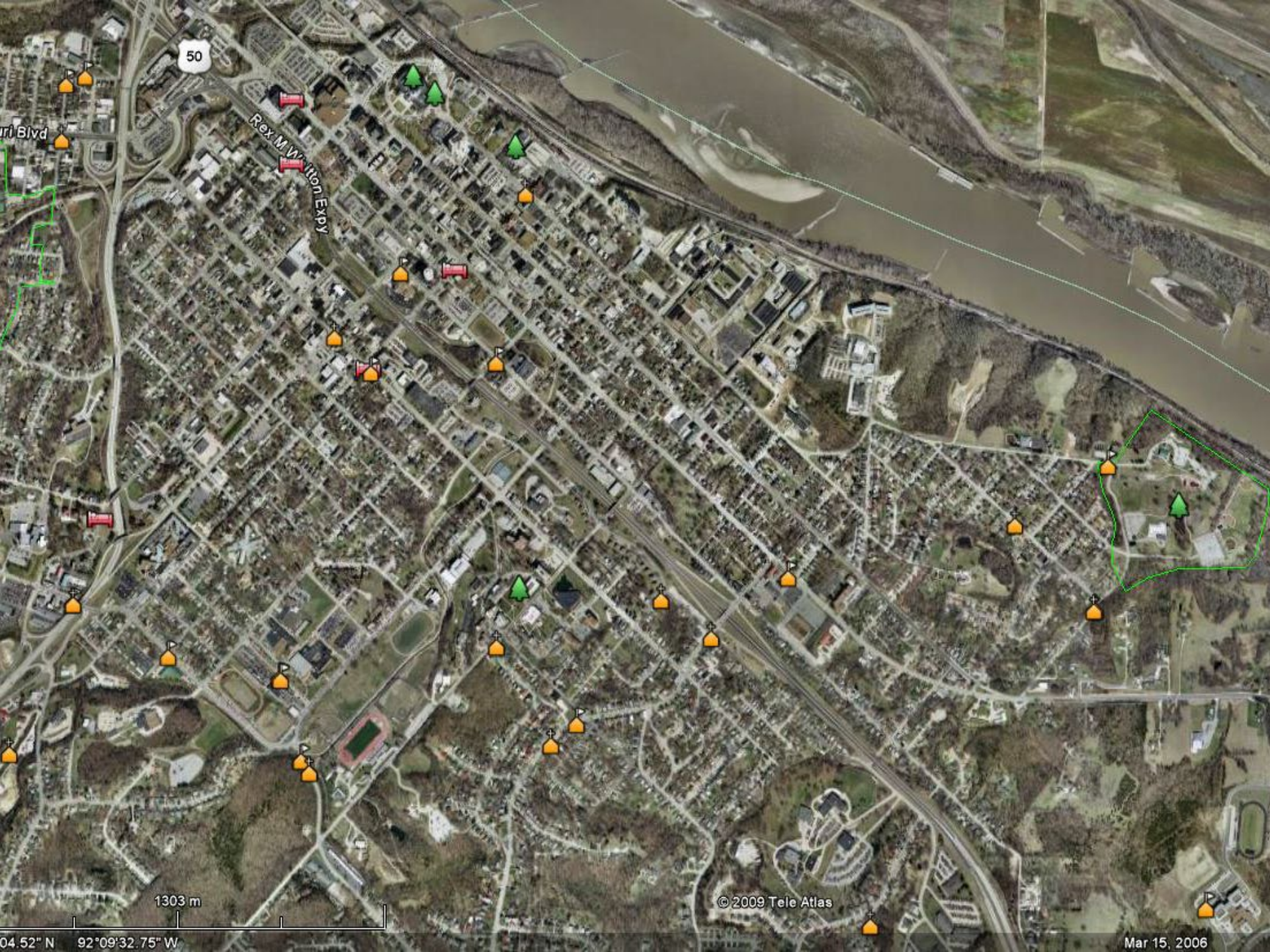
# Discuss Personal Variance Issues

- ▣ Age?
- ▣ Sophistication?
- ▣ Susceptibility to rape/abuse?
- ▣ Victimization as a child?  
(note – possible 2 edged sword)
- ▣ Evaluations



# Discuss Supervision Factors

- ▣ Can be up to lifetime supervision
- ▣ Limits on where they can live, work, go, associate, use computer devices, etc.



50

Rex M. Wilson Expy

Carl Blvd

1303 m

04.52" N 92°09'32.75" W

© 2009 Tele Atlas

Mar 15, 2006



04.52" N 92°09'32.75" W 1303 m

20

Mar 15, 2006



# Lessons

- ▣ Even the worst offenders are likely to have silly enhancements or good points of comparison
  - ▣ Guidelines and Govt. arguments are not so hard to attack
- 1) See if # makes any sense generally
  - 2) See if # makes sense to this defendant specifically
    - If either answer is “no,” deconstruct
  - 3) See if Guideline makes sense in comparison to other crimes
  - 4) Cite to other judges and THEIR arguments

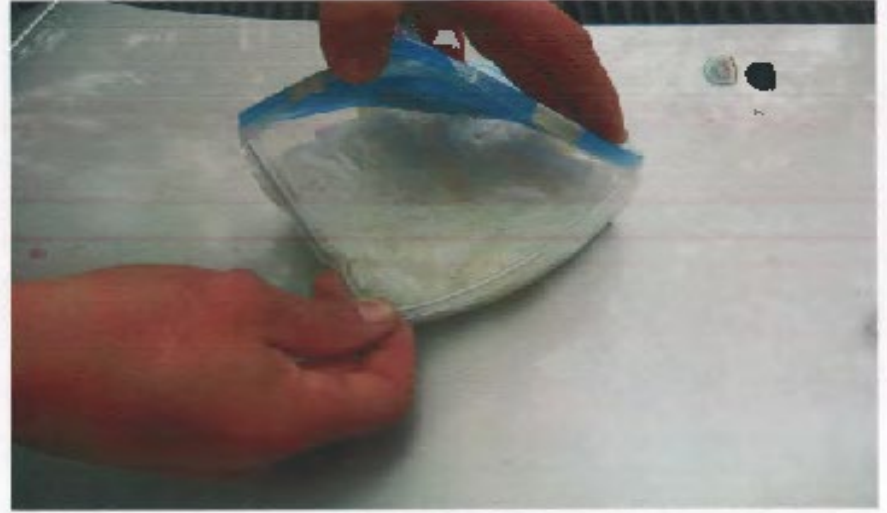
# Applying Our Lessons

# Client #1: Drug Dealer





# 224 grams of high purity meth: Base Offense level 34





# How We Get the Better Sentence:

- 1) **Dig into the evidence**
- 2) Demystify the Guidelines
- 3) Deconstruct Common Assumptions
- 4) Use Data to Our Advantage
- 5) Provide a Principled Alternate Sentence

# Step #1 - Dig into the Evidence

## KNOW your drugs

- ▣ Drugs increasingly coming from Mexico – often higher purity
- ▣ Costs of some drugs falling (heroin, meth), costs of others skyrocketing (cocaine went from \$18k per kilo to \$30+k per kilo in one year)
- ▣ Ex: Meth Prices fell from \$500/gm to \$100/gm in 6 reported DEA in 2019 ; eightball (3.5 gms) now \$100 in 2023.
- ▣ Heroin = 1/10 gram (or 1/20)
- ▣ Heroin Ounce = ONLY 24 grams, not 28grams
- ▣ \$24 for 1/2 gram meth (4-5 lines) (1/10 gram)
- ▣ Look at Usage/Dosage charts are at 2D1.1

## Step #2 – Deconstruct

First Question – Does the  
Guideline Make sense generally?

# Base Offense Level 34

- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 500 G but less than 1.5 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP,
- At least 150 G but less than 500 G of Methamphetamine (actual)
- At least 3,000 KG but less than 10,000 KG of Marihuana;

# Tip: Restate it Practically

Small Tupperware container of “ice” =  
same as:

500,000 doses of cocaine

**500,000 doses of heroin**

20,000,000 marijuana joints (10,000kg)

# Attack the Logical Fallacy

- ▣ Show how awful those other drugs are (google is a wonderful tool!)

For instance, compare data for meth vs heroin.



# Have Fun with It!

Population of St. Louis in 2021: 293,310

So...Compare your client to the strawman! (i.e. compare your client to the Pablo Escobars of the world)

“My client getting paid \$200 to deliver a tuperware container of meth from one house to another is the same as someone distributing a dose of heroin to every man, woman, and child in this entire city, AND having 207,00 doses left over?!”

# How We Get the Better Sentence:

- 1) Dig into the evidence
- 2) Demystify the Guidelines
- 3) **Deconstruct Common Assumptions**
- 4) **Use Data to Our Advantage**
- 5) Provide a Principled Alternate Sentence

# But don't long sentences deter and protect?

2011 study recently reported to Congress found 30.4% of defendants released early on the “crack minus two” adjustment recidivated, while 32.6% of defendants who served their full sentence without an adjustment recidivated

“some reduction in the sentences of drug offenders would not lead to increased recidivism and crime.” (Um, actually it show reduction leads to LESS recidivism)

# Step #5 - Provide a Principled Alternate Sentence

- ▣ Allow for 500-hour program
- ▣ Argue the Scale-up from prior sentences served
- ▣ Compare to favorable (for us) types of other offenses – e.g. what is the norm for a bank robbery?

# Client #2: “Actual Meth”



## 2 mins of Google gets:

Meth (Actual) = 80% or higher. Guidelines say: purity “is probative of the defendant’s role or position in the chain of distribution,” and that “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.”

But...DEA’s own Annual “National Drug Threat Assessment” says “Methamphetamine sampled through the MPP averaged 97.5 percent purity”

UNCLASSIFIED



# 2020

DRUG ENFORCEMENT ADMINISTRATION

# NDTA

NATIONAL DRUG THREAT  
ASSESSMENT

MARCH 2021  
DEA-DCI-DIR-008-21



U.S. DEPARTMENT OF JUSTICE  
DRUG ENFORCEMENT ADMINISTRATION

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**Figure 41. Number of Methamphetamine Laboratory Incidents, 2000 - 2017**



Source: El Paso Intelligence Center as of March 27, 2019

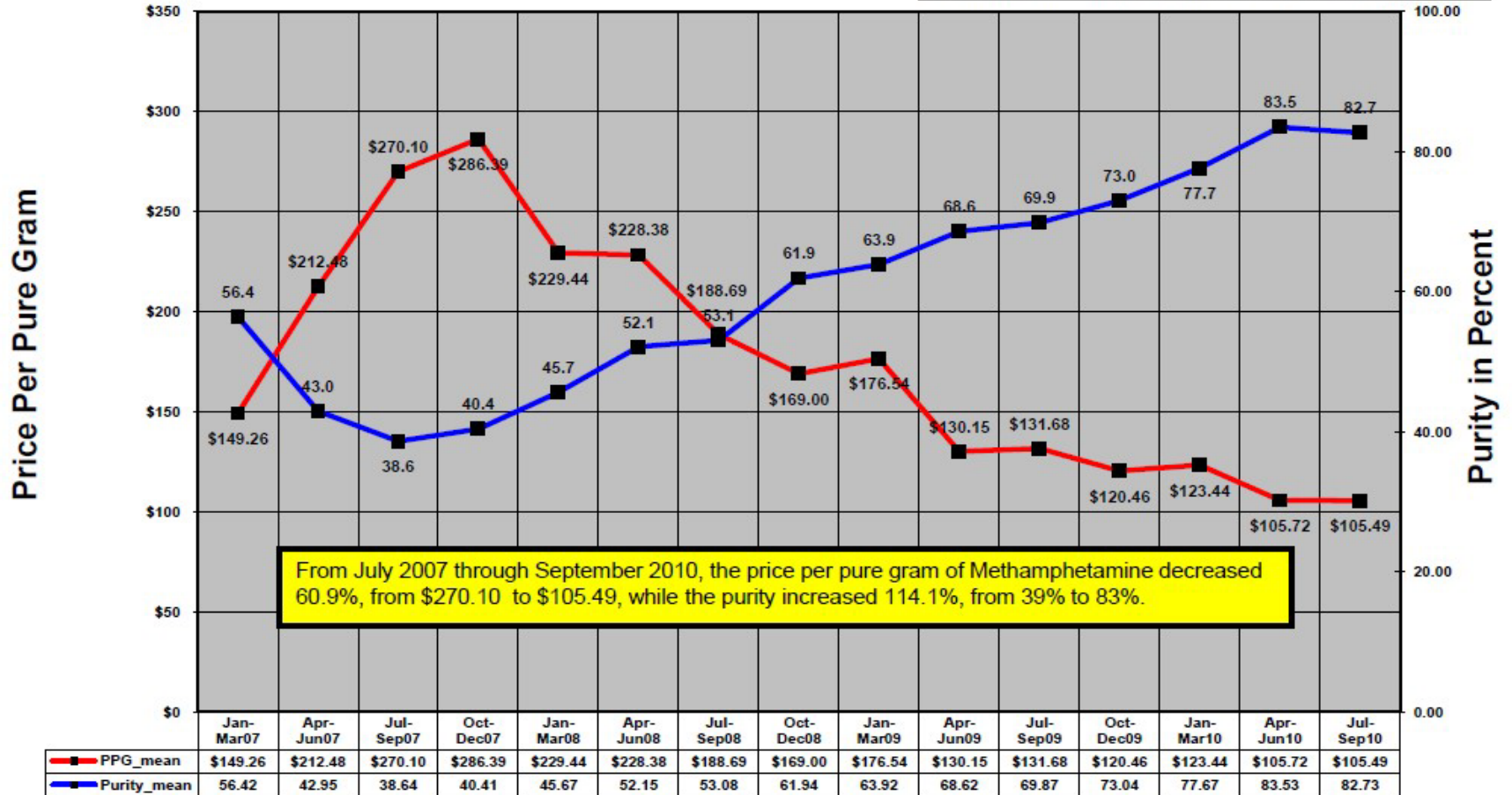


# Figure 11. Methamphetamine Price and Purity Data

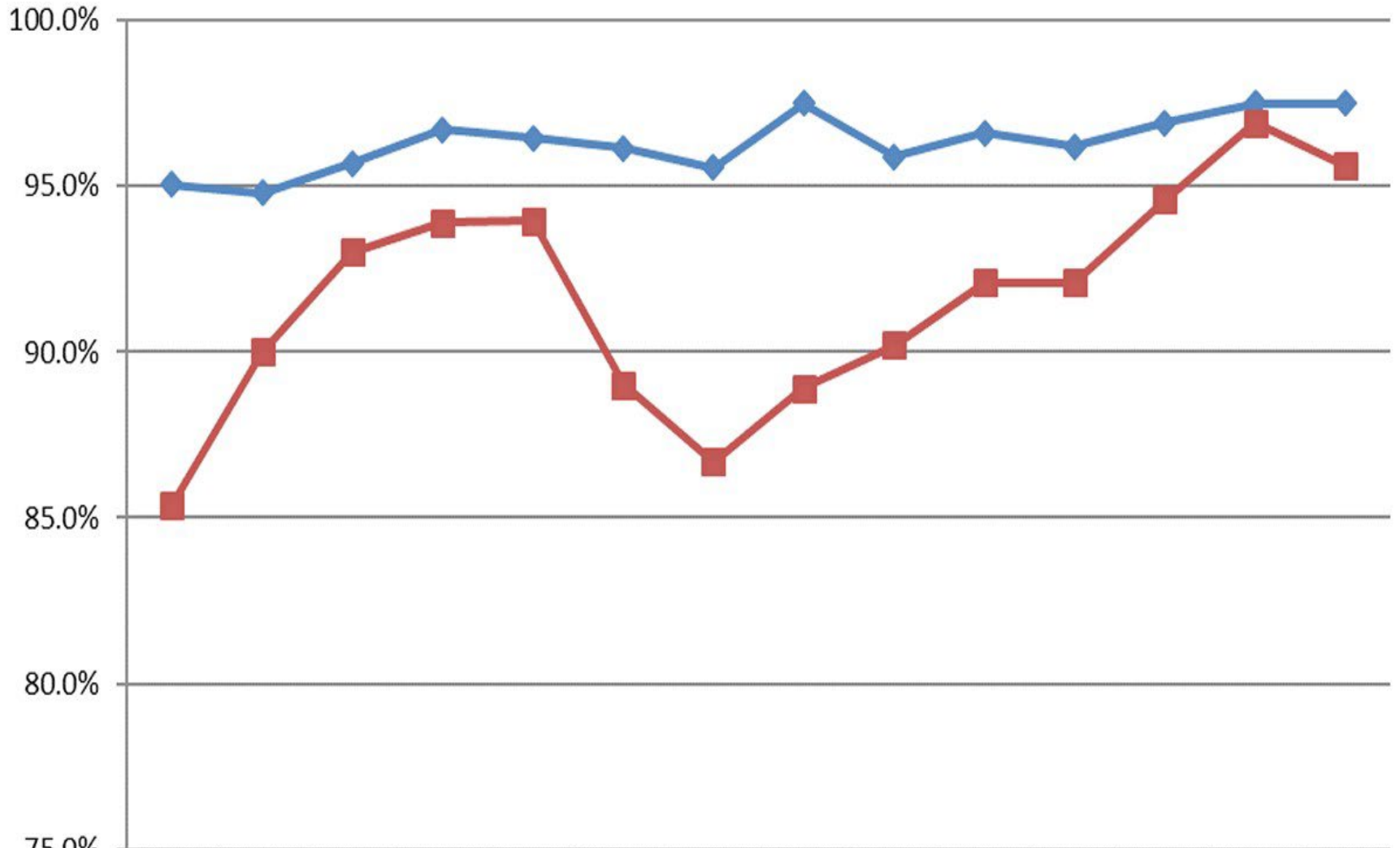


## All Methamphetamine Purchases Domestic STRIDE Data January 2007- September 2010

STRIDE is a database of drug exhibits sent to DEA laboratories from the DEA, FBI, CBP, ICE, USCG, and Washington MPD. STRIDE is not a representative sample of drugs available in the United States, but reflects all evidence submitted to DEA laboratories for analysis. STRIDE data are not collected to reflect national market trends. Nonetheless, STRIDE data reflect the best information currently available on changes in methamphetamine price and purity.



**Figure 37. Methamphetamine Purity and Potency**



	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd
	2012		2013		2014		2015		2016		2017		2018	
◆ Purity	95.1%	94.8%	95.7%	96.7%	96.5%	96.2%	95.6%	97.5%	95.9%	96.60%	96.20%	96.9%	97.5%	97.5%
■ Potency	85.4%	90.0%	93.0%	93.9%	94.0%	89.0%	86.7%	88.9%	90.2%	92.10%	92.10%	94.6%	96.9%	95.6%

# So...How's the Logic Hold Up?

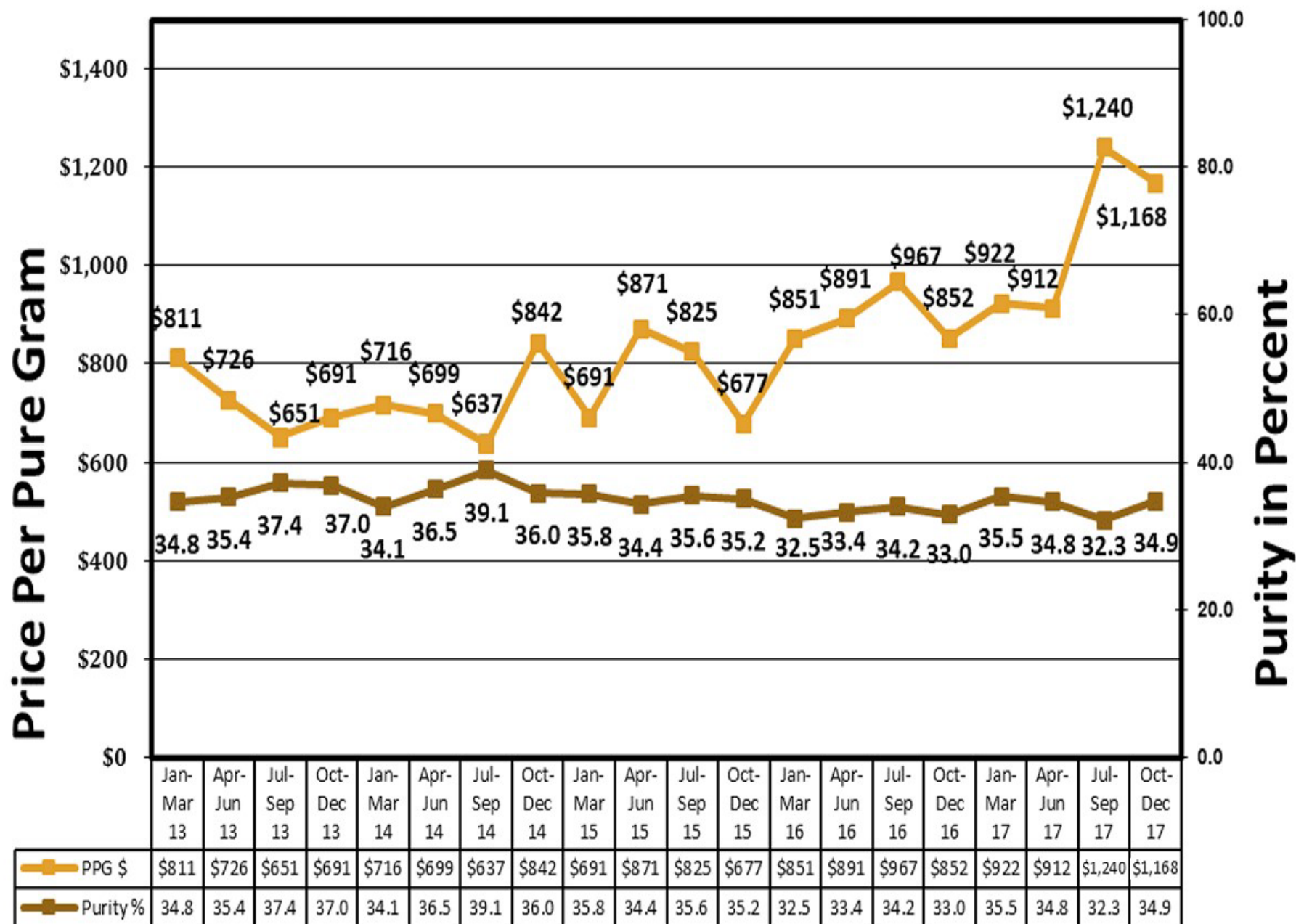
Year	2007	2010	2021
Avg Purity	38.6%	83.5%	97.5%
Cost / gram	\$270.10	\$105.49	\$56

Furthermore,

Purity has remained basically stable since at least 2013.

99.2% of meth in the U.S. is made using the identical chemical method.

**Figure 13. DEA Domestic Heroin Purchases, January 2013 – December 2017**



Source: DEA

# Client #3: Firearms



# Client #3: Firearms

## Enhancement for “High Capacity Magazine”

Counsel looked at the 20 most popular handguns sold in America last year, and it appears that **ALL** come with magazines exceeding 15 rounds, except for those specifically billing themselves as modified for better concealed carry.<sup>3</sup> For instance, the Glock G19 (#1 selling in America) comes with 15, 17, 19, 24, 31, and 33 round magazines standard.<sup>4</sup> In contrast, the Springfield Hellcat (#3 seller in America) does not come with a 17+ round magazines, but is advertised as “the world’s highest capacity micro-compact,” with associated literature stressing that the sacrifice of a magazine under 17 rounds is to balance the desire for maximize magazine size with the ability to best conceal and hide the handgun in clothing.<sup>5</sup> The handguns in this case were the Glock G25, the Glock G26, and the Taurus G2. The G25 is a discontinued model that sold with various “high capacity” magazines, while both the G26 (#15 in sales) and Taurus G2 (#9 in sales) are current models with sales packages including magazines up to 33 and 34 rounds respectively.

# Client #4: Illegal Aliens

2015 Commission Report says:

- ▣ Criminal History Category III is most common offender
- ▣ 94% of CH II – CHVI offenders had at least one prior felony
- ▣ Average #of prior deportations is 3.2
- ▣ Average # of prior convictions is 4.4
- ▣ 45.9% of folks w/ 4 lvl enhancement got below guideline sentence, despite only 0.1% cooperation

# Client #5: Career Offenders

- ▣ Congress said it was designed to target High Level cartel members who were actively involved in forming large, international supply chains for drugs.
- ▣ Commission admits guideline is too high for most offenders!



# Remember

IN LAW SCHOOL THEY CALL IT  
PLAGIARISM...IN THE REAL WORLD WE  
CALL IT SMART LAWYERING.

CALL  
SEND AN EMAIL  
ASK AROUND  
GOOGLE

# Deconstructed at [http://www.fd.org/odstb\\_SentencingResource3.htm](http://www.fd.org/odstb_SentencingResource3.htm)

- ▣ Cocaine / Crack
- ▣ Immigration
- ▣ Firearms
  - Example: bump for obliterated serial # / stolen
- ▣ Meth
- ▣ Career Offender
- ▣ Fraud
- ▣ Probation
- ▣ Relevant Conduct
- ▣ Tax

# QUESTIONS?

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[http://www.fd.org/odstb\\_SentencingResource3.htm](http://www.fd.org/odstb_SentencingResource3.htm)