Touro Law Review

Volume 12 | Number 1 Article 7

1995

"Mixture or Substance": Continuing Disparity Under the Federal Sentencing Guidelines Section 2D1.1

Eric J. Stockel

"MIXTURE OR SUBSTANCE": CONTINUING DISPARITY UNDER THE FEDERAL SENTENCING GUIDELINES § 2D1.1

INTRODUCTION

The sentences for most federal narcotic offenses are governed by 21 U.S.C. § 841[1] and section 2D1.1[2] of the Federal Sentencing Guidelines [hereinafter Sentencing Guidelines]. Under these sections, the severity of the sentence imposed directly relates to the amount (i.e., the weight) of the controlled substance in question.[3] However, the relevant weight for sentencing purposes is not determined solely on the weight of the drug in its pure form.[4] According to Congress, the weight of any "mixture or substance containing a detectable amount" of a controlled substance should be included in sentencing since narcotics are commonly cut, concealed or otherwise mixed with non-controlled substances.[5] Although, at first glance, the phrase "mixture or substance

---

1. 21 U.S.C. § 841 (1988 & Supp. 1992). Section 841(a) states:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Id. Section 841(b) outlines the penalty to be administered according to the type of controlled substance and the quantity of the substance at issue. For example, if a violation of subsection (a) involves:

> 5 kilograms or more of a mixture or substance containing a detectable amount of... cocaine, its salts, optical and geometric isomers, and salts of isomers... such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

Id.

2. UNITED STATES SENTENCING COMM'N GUIDELINES MANUAL § 2D1.1, (Nov. 1994), *reprinted in* 18 U.S.C.A. app. 4. [hereinafter sections of the Manual will be preceded by U.S.S.G.]. Section 2D1.1(c) sets forth a drug quantity table that assigns offense levels based on the quantity and type of the drug involved. *See* U.S.S.G. § 2D1.1(c)

3. 21 U.S.C. § 841(b). *See also* U.S.S.G. § 2D1.1(c).

4. *See* 21 U.S.C. § 841(b).

5. 21 U.S.C. § 841(b)(1)(A)(i).

containing a detectable amount" appears to be unambiguous, the federal circuit courts have struggled in determining the definition of a mixture or substance when calculating a defendant's sentence. Due to differences in interpretation, a defendant convicted in one circuit may receive a far less severe sentence than another defendant, who, due to his own misfortune, was convicted of the same crime in another circuit.[6] First, this Comment targets the differences in how the federal circuits address the issue of whether or not to include the weight of a carrier medium that contains a detectable amount of a controlled substance, other than lysergic acid diethylamide [hereinafter LSD], for purposes of calculating the base offense level under the Federal Sentencing Guidelines.[7] Second, this Comment examines how the 1993 amendments to the Sentencing Guidelines will affect future sentencing determinations.[8]

I. BACKGROUND

Congress' attempts to fight drug trafficking, partially codified in 21 U.S.C. § 841[9] and section 2D1.1 of the Sentencing Guidelines,[10] are the focal points of the inconsistency among the Federal circuits.

A. Brief History of 21 U.S.C. § 841 and the Federal Sentencing Guidelines section 2D1.1

The Sentencing Reform Act of 1984 [hereinafter the Reform Act][11] was enacted to "enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system."[12] The intent of the Reform Act was to focus judicial discretion with a highly structured sentencing scheme designed to promote honesty,[13] uniformity and

6. *Compare* United States v. Walker, 960 F.2d 409 (5th Cir. 1992) (holding that waste water is part of the "mixture") *with* United States v. Jennings, 945 F.2d 129 (6th Cir. 1991) (holding that only the consumable part of the carrier to be part of the "mixture or substance").

7. *See infra* notes 47-214 and accompanying text.

8. *See infra* notes 215-239 and accompanying text.

9. 21 U.S.C. § 841 (1988), *amended by* 21 U.S.C. § 841 (Supp. 1992).

10. U.S.S.G. § 2D1.1.

11. The Sentencing Reform Act of 1984 was passed as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-437, § 211-39, 98 Stat. 1837, 1987 (codified in 18 U.S.C. §§ 3551-86, 3621-25, 3742 and 28 U.S.C. § 991-998 (1988)).

12. U.S.S.G. § 1A(3), intro. comment.

13. "By 'honesty' Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compro-*

proportionality[14] in sentencing.[15] The Reform Act established the Federal Sentencing Commission in order to promulgate detailed sentencing guidelines which judges are required to follow.[16]

The Comprehensive Crime Control Act of 1984[17] amended § 841 so that sentences would be determined according to the weight of the drug involved.[18] However, the weights prescribed by the amended statute lacked any reference to mixtures or substances; it referred only to the weights of the drugs themselves.[19] Two years later, certain aspects of the sentencing scheme, specifically the relevant weights of the drugs, were replaced by the Anti-Drug Abuse Act of 1986.[20] This Act amended 21 U.S.C. § 841, inter alia, by increasing the penalties for drug offenses involving various amounts of the listed drugs.[21] These penalties were designated for offenses involving the weights of mixtures of narcotics.[22] In *United States v. Daly*[23] the court held that the Anti-Drug Abuse Act accomplished this by establishing the measurement of drug quantities and, therefore, the guidelines by which to assign minimum penalties.[24] The court held "[p]ursuant to various amendments to 21 U.S.C. § 841(b) . . . penalties . . . were henceforth to be assessed *not* (as under prior law) according to the involved quantity of the drug *itself*, but instead according to the involved quantity of any 'mixture or substance containing a detectable amount' of the drug."[25] The result of this par-

---

mises Upon Which They Rest, 17 HOFSTRA L. REV. 1, 4 (1988) (citing Anthony Partridge & William B. Eldridge, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES, 1-3 (1974)).

14. *Id.* By "uniformity" and "proportionality," Congress meant "to reduce 'unjustifiably wide' sentencing disparity." *Id.*

15. U.S.S.G. § 1A(3), intro. comment.

16. *Id.* "The United States Sentencing Commission . . . is an independent agency in the judicial branch . . . . Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." U.S.S.G. § 1A(1), intro. comment.

17. The Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 3437, is a chapter of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 1837.

18. 1984 U.S.C.C.A.N. at 3437.

19. *Id.* at 3440.

20. Pub. L. No. 99-570, 1986 U.S.C.C.A.N. (100 Stat.) 3207.

21. *See* H.R. REP. NO. 845, 99th Cong., 2d Sess., pt. 1, at 1-5 (1986).

22. *See* 21 U.S.C. § 841(b)(1)(A)(i)-(viii); 841(b)(1)(B)(i)-(viii) (referring to any "mixture or substance containing a detectable amount" of the listed narcotics).

23. 883 F.2d 313 (4th Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).

24. *Id.* at 316.

25. *Id.* (quoting 21 U.S.C. § 841(b)(1)(B)(v)).

ticular wording was that sentences could now be determined based on the total weight of the narcotic, including substances other than the drug itself.[26] To further promote this end, Congress "adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of sentence."[27] This sentencing scheme was designed to target both the high and low level trafficker in the drug distribution chain.[28] Street level traffickers were considered appropriate targets of the statute "because they keep the street markets going."[29] In examining Congress' intent the Supreme Court explained this policy by stating:

> [Congress] intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found-cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level. Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going.[30]

Section 2D1.1 of the Sentencing Guidelines established a range of sentences for violation of 21 U.S.C. § 841.[31] The Sentencing Commission calculated the guideline ranges for these violations using the statutory minimum penalties of § 841.[32] As in § 841, the Sentencing Guidelines did not refer to the amount of pure narcotics involved, but rather to mixtures and substances containing detectable amounts of controlled substances.[33] To this end, the Sentencing Guidelines followed Congress' approach to drug trafficking as codified in § 841.[34] The Commission

---

26. *See, e.g.*, Chapman v. United States, 500 U.S. 453 (1991) (holding that it is proper to include the weight of LSD and the weight of blotter paper in which the LSD is combined).

27. *Id.* at 461. *See* H.R. REP. NO. 99-845, 99th Cong., 2d Sess., pt. 1, at 11-12, 17 (1986).

28. H.R. REP. NO. 99-845, 99th Cong., 2d Sess., pt. 1, at 12 (1986).

29. *Id.*

30. *Chapman*, 500 U.S. at 461 (citing H.R. REP. NO. 99-845, 99th Cong., 2d Sess., pt. 1, at 12 (1986)).

31. *See* U.S.S.G. § 2D1.1.

32. *See* U.S.S.G. § 2D1.1, comment. (n.10).

33. U.S.S.G. § 2D1.1, comment. (n.1). A footnote to the Drug Quantity Table following § 2D1.1 provides that "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. §2D1.1(c) (n. *) Drug Quantity Table.

34. Theresa Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 413

concluded that "[c]onsistent with the provisions of the Anti-Drug Abuse Act, if any mixture [or] compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity."[35]

Although Congress used the phrase "mixture or substance containing a detectable amount" throughout § 841(b) as a basis for calculating the quantity of controlled substances, it failed to provide a clear definition for this phrase.[36] Likewise, the Sentencing Commission declined to clarify the meaning of the phrase. Instead the Sentencing Guidelines simply state that "'[m]ixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841 . . . ."[37] Hence, Congress and the Sentencing Commission have left the courts with the difficult task of deciding which combinations of narcotics should be considered "mixtures or substances" for sentencing purposes.

B. Chapman v. United States: *The Supreme Court's Interpretation of "Mixture or Substance"*

In *Chapman v. United States*,[38] the Court addressed the "mixture or substance" issue within the context of LSD distribution.[39] In determining the proper definition, the Court relied on the legislative history of 21 U.S.C. § 841(b)[40] and the history of Congress' efforts to control the distribution of controlled substances.[41] According to Chief Justice Rehnquist, writing for a seven-to-two majority, "[n]either the statute nor the Sentencing Guidelines define the terms 'mixture' or 'substance,' nor do they have any established common-law meaning. Those terms there-

---

(1991). "Guidelines sentencing apparently is meeting the congressional goal of stiffening penal sanctions for drug offenders." *Id.* at 416.

35. U.S.S.G. § 2D1.1, at 2.39 (n.*) (1988).

36. The words are neither defined in the statute itself nor by its legislative history. *See generally* 21 U.S.C. § 841 (1988 & Supp. III 1991); H.R. REP. NO. 99-845, 99th Cong., 2d Sess., pt. 1, (1986).

37. U.S.S.G. § 2D1.1, comment. (n.1).

38. 500 U.S. 453 (1991).

39. Petitioner was convicted in the district court of selling ten sheets (1,000 doses) of blotter paper containing LSD. *Id.* at 455. Although petitioner's pure LSD weighed approximately fifty milligrams, the court included the total weight of the blotter paper and LSD, a total of 5.7 grams, in calculating his sentence. *Id.* at 455-56. The total weight of 5.7 grams resulted in the "imposition of the mandatory minimum sentence of five years required by § 841(b)(1)(B)(v) for distributing more than one gram of a mixture or substance containing a detectable amount of LSD." *Id.* at 456.

40. *Chapman*, 500 U.S. at 460. *See also* 21 U.S.C. § 841(b)(1)(B)(v) (1988).

41. *Chapman*, 500 U.S. at 460.

fore must be given their ordinary meaning."[42] Rehnquist added that the term mixture "does not include LSD in a bottle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a 'container.'"[43] According to the Court, the "ordinary meaning" definition supports the rational intent of Congress to measure quantity based on the "street weight" of the drugs, measured at the time the drugs are sold, rather than according to the net weight of the active component.[44] As a result, the *Chapman* Court determined that the carrier medium, in this case blotter paper, combined with LSD fell within the ordinary meaning of the word "mixture."[45]

According to Justice Stevens, who wrote the dissent in *Chapman*, "the majority's construction of the statute will necessarily produce sentences . . . that will undermine the very uniformity that Congress sought to achieve when it adopted the Sentencing Guidelines."[46] Therefore, because the "ordinary meaning" definition adopted by the Court in *Chapman* left open the possibility of different interpretations, it is not surprising that the lower courts continue to struggle with how to determine the weight of the controlled substance when drugs are "mixed" with carrier mediums.

II. SEEKING A DEFINITION OF "MIXTURE OR SUBSTANCE" IN THE FEDERAL CIRCUITS.

Since the Supreme Court's decision in *Chapman*, the federal circuits have reached contrary conclusions on this issue, because the circuit courts have attached different meanings to the phrase "mixture or substance." These different interpretations of the statutory language generally fall into three categories.[47] Courts in the first category have applied

---

42. *Id.* at 461-62. The Court stated:

> Neither the statute nor the Sentencing Guidelines defines the terms "mixture" and "substance," nor do they have any established common-law meaning. Those terms, therefore, must be given their ordinary meaning. A "mixture" is defined to include "a portion of matter consisting of two or more components . . . that however thoroughly commingled are regarded as retaining a separate existence."

Id. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986)).

43. *Id.* at 462-63.

44. *Id.* at 465.

45. *Id.* at 466.

46. *Id.* at 468 (Stevens, J., dissenting).

47. Since *Chapman*, the Fourth Circuit and the District of Columbia Circuit have not explicitly adopted any of these approaches. In a pre-*Chapman* decision, the Fourth Circuit held in United States v. Meitinger, 901 F.2d 27, 29 (4th Cir.), *cert. denied*, 498

a literal meaning to the term "mixture or substance" which closely follows the *Chapman* decision.[48] Courts in the second category have shifted away from the literal interpretation of the statutory language and have followed a more lenient approach when distinguishing their cases from *Chapman*, in order to exclude the weights of non-controlled substances when making sentencing determinations.[49] Courts in the final category use a hybrid approach which combines the reasoning of the other classifications and treat the poisonous waste from methamphetamine differently than uningestable carrier-mediums or packaging materials.[50]

A. The "Literal" Courts

The First, Eighth, and Tenth Circuit Courts of Appeals have concluded that the weight of uningestable material containing a detectable amount of a controlled substance should be used in calculating the base offense level of a convicted drug trafficker.[51]

i. The First Circuit

The First Circuit, starting with *United States v. Mahecha-Onofre*,[52] has taken the position that the weight of a carrier medium should be included for sentencing purposes if the mediums are "mixed" in any way with the illegal drugs.[53]

In *Mahecha-Onofre* (decided less than one month after *Chapman*), the defendant, Luis Mahecha-Onofre, was convicted under 21 U.S.C.

U.S. 985 (1990), that "[u]nder the plain language of the Anti-Drug Abuse Act and the Guidelines, the combined gross weight of a narcotic and any carrier medium may be used for the purposes of determining the base offense levels under § 2D1.1." *Id.* (citing United States v. Daly, 893 F.2d 313, 316 (4th Cir. 1988).

48. *See infra* notes 51-96 and accompanying text.

49. *See infra* notes 97-171 and accompanying text.

50. *See infra* notes 172-214 and accompanying text.

51. *See, e.g.*, United States v. Killion, 7 F.3d 927 (10th Cir. 1993) (holding that the waste by-product of P-2-P manufacturing process be included in drug sentencing), *cert. denied*, 114 S. Ct. 1106 (1994); United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir.) (holding that the total weight of a suitcase consisting of a blend of cocaine and acrylic, minus its metal parts, was properly considered in determining the appropriate sentence), *cert. denied*, 502 U.S. 1009 (1991).

52. 936 F.2d 623 (1st Cir.), *cert. denied*, 502 U.S. 1009 (1991).

53. *Id.* at 626. *See also* United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir.) (cocaine secreted within a fiberglass suitcase), *cert. denied*, 113 S. Ct. 484 (1992); United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991) (beeswax statues containing cocaine), *cert. denied*, 502 U.S. 1066 (1992).

§ 841(a)(1) of possession of cocaine with intent to distribute.[54] The cocaine was hidden in two suitcases specially constructed to avoid detection.[55] A field test revealed that the suitcases, belonging to the defendant, were themselves made of cocaine.[56] It was later shown that the suitcases were constructed from 2.5 kilograms of cocaine chemically bonded with acrylic, weighing a total of twelve kilograms.[57] The district court determined Mahecha-Onofre's base level offense using the total weight of the suitcases (approximately twelve kilograms), minus all the metal parts, rather than the weight of the 2.5 kilograms of cocaine actually found in the suitcases.[58]

The First Circuit affirmed the district court's decision holding that the lower court was correct in using the total weight of the cocaine/acrylic suitcase (minus the metal parts) when determining the defendant's sentence.[59] The court held that any carrier medium that is chemically bonded with a drug substance is part of that drug "mixture."[60] In reaching its decision, the First Circuit applied the reasoning used by the Supreme Court in *Chapman*. The court noted that, unlike the blotter paper in *Chapman*, the suitcase material obviously could not be consumed, but concluded that this fact alone did not command a different outcome, "for 'ingestion' would not seem to play a critical role in the definition of 'mixture' or 'substance.'"[61] According to the First Circuit, one reason why the Sentencing Commission and Congress have explicitly refrained from considering drug purity in the sentencing determination is that weight and purity generally correlate with the seriousness of the crime: "[t]hat is to say, a defendant who has *more* of the drug is also likely to have *purer* drug (not in *every* case, but, very *roughly* speaking, in many cases)."[62] Applying this reasoning, the court noted that it was important to observe that the effort required to create a suitcase made of chemically bonded cocaine and acrylic "suggests a serious drug smuggling effort of a sort that might warrant increased punishment."[63]

---

54. *Mahecha-Onofre*, 936 F.2d at 624.
55. *Id.*
56. *Id.*
57. *Id.* at 625.
58. *Id.*
59. *Id.* at 626.
60. *Id.*
61. *Id.*
62. *Id.* According to the First Circuit, Congress has determined that the extra effort required to determine the purity of a drug is not necessary for correlating punishment with crime seriousness. *Id.*
63. *Id.*

The First Circuit applied the same reasoning in two subsequent cases involving the importation of cocaine, *United States v. Restrepo-Contreras*[64] and *United States v. Lopez-Gil*.[65] In *Restrepo-Contreras*, the defendant was convicted of possession with intent to distribute cocaine after customs agents determined that eleven beeswax statues in his luggage contained cocaine combined with the wax.[66] The First Circuit affirmed the district court's decision to use the entire weight of the eleven statues in determining the defendant's sentence.[67] The court was not persuaded by the defendant's argument that the district court incorrectly applied the term "mixture or substance" when it included the weight of the beeswax statue for sentencing purposes.[68] The *Restrepo-Contreras* court, in passing, mentioned the Supreme Court's decision in *Chapman*, but it relied solely on the First Circuit's decision in *Mahecha-Onofre* as precedent. The Court explained that "we can discern no meaningful difference between an acrylic-cocaine suitcase and a beeswax-cocaine statue."[69] The court added that "[s]ince the statues unquestionably contained a detectable amount of cocaine, the evidence was sufficient to support conviction under § 841(a)(1)."[70]

In *United States v. Lopez-Gil*, a case factually similar to *Mahecha-Onofre*, the court calculated the defendant's sentence using the total weight of suitcases made, in part, of cocaine.[71] The court, citing both *Chapman* and *Mahecha-Onofre*, agreed with the district court that the cocaine was sufficiently "mixed" with the suitcase and thus affirmed the sentence.[72] With these three decisions, the First Circuit has established

---

64. 942 F.2d 96 (1st Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992).

65. 965 F.2d 1124 (1st Cir.), *cert. denied*, 113 S. Ct. 484 (1992).

66. *Restrepo-Contreras*, 942 F.2d at 97.

67. *Id.* at 99.

68. *Id.* Although the defendant argued his case to the First Circuit approximately six months prior to the Supreme Court's decision in *Chapman*, the court did not publish the *Restrepo-Contreras* decision until some three months after *Chapman* was decided.

69. *Id.* at 99. "[T]his fact alone can[not] make a difference in the outcome, for 'ingestion' would not seem to play a critical role in the definition of 'mixture' or 'substance.'" United States v. Mahecha-Onofre, 936 F.2d 623, 626 (1st Cir.), *cert. denied*, 502 U.S. 1009 (1991).

70. *Restrepo-Contreras*, 942 F.2d at 99 n.1.

71. United States v. Lopez-Gil, 965 F.2d 1124, 1129 (1st Cir.), *cert. denied*, 113 S. Ct. 484 (1992). The facts of the two cases are very similar with the exception that the cocaine in *Lopez-Gil* was not chemically bonded with the suitcase to the same extent as the cocaine was in *Mahecha-Onofre*. *Id.* at 1125-27.

72. *Id.* at 1127. Although not sufficiently explained, the court held the chemically bonded cocaine to be a mixture with the suitcase, rather than the suitcase acting as a container for the cocaine and, that a mixture is not "easily distinguished from, and sepa-

itself as among the most stringent in its reading of the phrase "mixture or substance."

ii. The Eighth Circuit

In *United States v. Young*,[73] the Eighth Circuit held that the defendant was properly sentenced to 188 months imprisonment following his guilty plea to possessing Dilaudid[74] with intent to distribute.[75] The court concluded that the defendant's sentence was correctly calculated based upon the weight of the entire tablet and not just the amount of the hydromorphine involved.[76] The court, in reaching its decision, relied on the language found in the footnote following the Drug Quantity Table.[77] The defendant in *Young* argued that the exclusion of the "mixture or substance" language in 21 U.S.C. § 841(b)(1)(c) indicated that Congress only intended the weight of the hydromorphine to be included in the calculation.[78] However, the Eighth Circuit, following the examples of other circuits,[79] held that the Sentencing Commission adopted the same method for computing the weight of pharmaceuticals as Congress had adopted for "street drugs" listed in 21 U.S.C. § 841 (b)(1)(a) and (b) and, therefore, the entire weight of the Dilaudid tablet should be included in sentencing calculations.[80]

iii. The Tenth Circuit

The Tenth Circuit also includes the weight of uningestable materials as being part of the entire amount for the purposes of sentencing.[81] In *United States v. Dorrough*,[82] the defendant was convicted "for attempt-

---

rated from such a container." *Id.* at 1127 (quoting Chapman v. United States, 500 U.S. 453, 462-63 (1991)).

73. 992 F.2d 207 (8th Cir. 1993).

74. Dilaudid, a synthetic heroin, is a pharmaceutically manufactured pain killer. The active ingredient in Dilaudid is hydromorphine, which is a schedule II controlled substance. *See* 21 U.S.C. § 812; PHYSICIANS' DESK REFERENCE, 1126 (1994 ed.) ("Dilaudid is a narcotic analgesic; its principal therapeutic effect is relief of pain.").

75. *Young*, 992 F.2d at 208 n.1.

76. *Id.* at 209.

77. *Id. See also supra* note 33 and accompanying text.

78. *Young*, 992 F.2d at 209.

79. *See* United States v. Shabazz, 933 F.2d 1029 (D.C. Cir.), *cert. denied sub nom.* McNeil v. United States, 502 U.S. 964 (1991); United States v. Lazarchik, 924 F.2d 211 (11th Cir.), *cert. denied*, 502 U.S. 827 (1991).

80. *Young*, 992 F.2d at 210.

81. *See infra* notes 82-96 and accompanying text.

82. 927 F.2d 498 (10th Cir. 1991).

ing to manufacture phenyl-2-propanone and amphetamine and for possession of phenyl-2-propanone with intent to manufacture amphetamine."[83] The defendant argued on appeal that the district court applied the incorrect base offense level under the Sentencing Guidelines and contended that the correct weight for calculating the base offense level, in a manufacturing case, should be the maximum amount of drugs that could be produced from the manufacturing process.[84] The defendant also argued that the waste products of the process should not have been included.[85] The circuit court disagreed with the defendant and affirmed the district court's decision that the correct base offense level was thirty four.[86]

In *United States v. Nguyen*,[87] the court of appeals held that the district court had correctly included the weight of the sodium bicarbonate powder when determining the defendant's sentence after he pled guilty to two counts of cocaine base distribution.[88] The defendant had argued that his sentence was contrary to the intent of the Sentencing Guidelines and was "grossly exaggerate[d]" since crack cocaine is not normally combined with sodium bicarbonate powder.[89] The court compared the defendant's arguments with the Supreme Court's holding in *Chapman* and determined that *Chapman* decided "the intent of Congress [was] to establish a 'market-oriented' approach for sentencing.... Thus, the form of the drug would not matter...."[90] The *Nguyen* court further explained that its decision was based partially on Congress' intent to punish retail-

83. *Id.* at 499. "Phenyl-2-propanone is a controlled substance produced by heating chemicals under the proper conditions. It is then heated in combination with other chemicals to produce amphetamine." *Id.* at 499 n.1.

84. *Id.* at 502. The trial court sentenced the defendant on a base offense level of 34. The court arrived at this level by "multiplying the 94 liters of liquid containing [phenyl-2-propanone] that was found at the laboratory by the .375 cocaine equivalency formula contained in the Guidelines' drug equivalency table and arriving at a cocaine equivalency of 35.25 kilograms." *Id.* The defendant contended that the base offense level of 34 was incorrect and should have been 28. This calculation was based on the testimony of a defense chemist who concluded that only 8.85 kilograms of phenyl-2-propanone could have been produced. *Id.*

85. *Id.*

86. *Id.*

87. 1 F.3d 972 (10th Cir. 1993).

88. *Id.* at 975. The court concluded that, although the district court had incorrectly portrayed the drugs as being made up entirely of pure cocaine instead of a mixture of cocaine and sodium bicarbonate powder (baking soda), it was a harmless error because "under the correct application of the sentencing guidelines the sentence would be the same." *Id.*

89. *Id.*

90. *Id.*

ers who distributed drugs in any form,[91] and the intended principles of the Sentencing Guidelines, as well as the ordinary definition of the term "mixture," made inclusion of the baking soda proper.[92]

In *United States v. Richards*,[93] the Tenth Circuit, in dicta, took the opportunity to explain its rationale for the inclusion of waste products, when computing the base offense level under section 2D1.1 of the Sentencing Guidelines.[94] The court noted that *Chapman* did not compel a change in the law of the Tenth Circuit, nor did it contradict any previous decisions.[95] Finally, the court stated:

> [t]hat decision [*Chapman*] did not deal with the elements involved in the drug manufacturing process, nor did it identify any elements of a mixture that should not be included in computing total mixture weight. *Chapman* simply explained why Congress rationally included the weight of the carrier medium along with the weight of the drug.[96]

B. The "Lenient" Courts

In contrast to the decisions of the "literal" courts, the Second, Third, Sixth, Seventh, and Eleventh Circuits have concluded that the weight of unusable or uningestable portions of mixtures containing a detectable amount of a controlled substance should not be used when making a sentencing determination.[97] Generally, the "lenient" courts, in their in-

---

91. *Id.*

92. *Id.* The Tenth Circuit reiterated its belief that the "market-oriented" approach was reasonable insofar as it punished retailers in the street market by not reducing sentences for lack of purity of the mixture. *Id.* The court also noted that the baking soda could have remained in the final cocaine base form after distillation. *Id.*

93. 5 F.3d 1369 (10th Cir. 1993), *grant of post-conviction relief aff'd*, 1995 WL 596840 (10th Cir. Oct. 11, 1995). The defendant pled guilty to "possession of 1 kilogram or more of a mixture containing a detectable amount of methamphetamine, with intent to manufacture methamphetamine in powder form, in violation of 21 U.S.C. § 841(a)." *Id.* at 1370; *see also* discussion *infra* part III.

94. *Richards*, 5 F.3d at 1371. At district court, the defendant filed two motions pursuant to 28 U.S.C. § 2255. The first motion was denied, but the court entertained the second motion, in which the defendant claimed, for the first time, that the waste water was incorrectly included in the base offense level, and therefore, the district court had misapplied the sentencing guidelines. *Id.* The district court granted this motion and subsequently reduced the defendant's sentence from 188 months to 60 months. *Id.* The government subsequently filed its appeal opposing the grant of the defendant's second motion. *Id.* The court agreed with the government's position and held that the defendant's motion "was procedurally barred for his failure to raise the issue on direct appeal or in an earlier § 2255 motion . . . ." *Id.* at 1370.

95. *Id.* at 1371.

96. *Id.*

97. *See* discussion *infra* parts II.B.i-v.

terpretation of the term "mixture," have not included products that are either uningestable or unmarketable.

i. The Eleventh Circuit

The Eleventh Circuit, in *United States v. Rolande-Gabriel*,[98] was the first circuit to impose a marketability and ingestability requirement. In *Rolande-Gabriel*, after the defendant pled guilty to the importation of cocaine, the district court sentenced her based on the total weight of the liquid in which she had concealed the cocaine.[99] The total weight of the liquid was 241.6 grams while the mostly dissolved powder weighed 72.2 grams.[100] Sixty-five out of the 72.2 grams of powder was a cutting agent, leaving only 7.2 grams of actual cocaine base.[101]

Defendant argued that the district court incorrectly included the weight of the liquid, based on the fact that the liquid was unrelated to the cocaine's use, and that the drug was unusable until the powder was separated from the liquid.[102] Defendant also argued that "widely divergent sentences will arise from the inclusion of unusable carrier mediums."[103] The Eleventh Circuit considered this line of reasoning and held that the Sentencing Guidelines Statutory Mission and Policy Statement "clearly and plainly indicate that the primary purpose of the guidelines system is to create a scheme of 'uniform and rational' sentencing."[104] Considering this policy statement, the court decided that section 2D1.1 should be applied in "a manner which creates the greatest degree in uniformity and rationality in sentencing."[105]

Considering this interpretation of section 2D1.1, the Eleventh Circuit held that the liquid waste should not have been included in the sentencing determination under the Sentencing Guidelines.[106] In reversing the defendant's sentence, the Eleventh Circuit focused on the marketable and ingestable nature of the LSD and blotter paper in *Chapman*, as dis-

98. 938 F.2d 1231 (11th Cir. 1991).

99. *Id.* at 1233. Defendant was caught attempting to import sixteen plastic bags containing a liquid substance and cocaine. *Id.* at 1232.

100. *Id.* at 1233.

101. *Id.*

102. *Id.*

103. *Id.* The defendant described, as an example, a situation where a defendant with only "one ounce of usable cocaine and a defendant with one ounce of usable cocaine mixed with an unusable liquid having a total weight of ten ounces, would receive substantially different sentences for essentially the same offense." *Id.*

104. *Id.* at 1235. *See* U.S.S.G. § 1A(3), intro. comment.

105. *Rolande-Gabriel*, 938 F.2d at 1235.

106. *Id.* at 1238.

tinguished from the liquid and cocaine combination used in *Rolande-Gabriel*.[107] The court emphasized that the LSD considered in *Chapman* was characterized as "usable, consumable, and ready for wholesale or retail distribution when placed on standard carrier mediums, such as blotter paper . . . [however], the cocaine mixture in this case was obviously unusable while mixed with the liquid."[108] The court further determined that the term "mixture," as used in 21 U.S.C. § 841(b) and section 2D1.1 of the Sentencing Guidelines, did not encompass unusable mixtures:[109]

> The [*Chapman*] Court stated that the inclusion of the weight of the standard carrier mediums is rational because standard carrier mediums facilitate the use, marketing and access of LSD and other drugs. The liquid waste in this case, however, did not accomplish any of these purposes. The inclusion of the carrier medium of unusable liquid waste in this case for sentencing is irrational.[110]

The court of appeals also analogized the liquid to a "packing material" because it was easily distinguished from the cocaine and cutting agent.[111] Therefore, the Eleventh Circuit has restricted its interpretation of "mixture or substance" to "drug mixtures which are usable in the chain of distribution."[112]

ii. The Sixth Circuit

In *United States v. Jennings*,[113] the Sixth Circuit relied on the "market-oriented" approach that considers carrier material or waste from drug manufacturing as a part of the "mixture or substance containing a detectable amount" of the drug in question only if it is consumable with the drug.[114] In *Jennings*, the defendants were interrupted in the process

---

107. *Id.* at 1237.

108. *Id.*

109. *Id.* at 1238. In reaching its conclusion, the court noted how the *Chapman* Court recognized "that 'hypothetical cases can be imagined involving heavy carriers and very little [drug]'" and that the case at bar was this very situation. *Id.* at 1237-38 (quoting Chapman v. United States, 500 U.S. 453, 466 (1991)). The *Rolande-Gabriel* court then noted that "[t]here are real facts present in this case that are dramatically different from *Chapman* which this court cannot overlook." *Id.* at 1238.

110. *Id.* (quoting *Chapman*, 500 U.S. at 462 (citation omitted)).

111. *Id.*

112. *Id. See also* United States v. Bristol, 964 F.2d 1088 (11th Cir. 1992) (holding that the district court improperly included the weight of a liquid (wine), in which cocaine was suspended, for sentencing purposes).

113. 945 F.2d 129 (6th Cir. 1991).

114. *Id.* at 137.

of "cooking" methamphetamine.[115] The district court found the entire 4,180 grams of chemicals involved to be a mixture containing a detectable amount of methamphetamine and included it in its sentencing determination.[116] The defendants argued that if the chemicals had been allowed to react, the final product would have weighed much less.[117] The court of appeals agreed and remanded for re-sentencing, reasoning that the inclusion of poisonous by-products of the manufacturing process would be illogical and contrary to Congress' intent:[118] "[i]t seems fortuitous, and unwarranted by the statute, to hold the defendants punishable for the entire weight of a mixture when they could have neither produced that amount of methamphetamine nor distributed the mixture containing methamphetamine."[119]

The court distinguished the methamphetamine mixture in *Jennings* from the Supreme Court's decision in *Chapman* by emphasizing that "the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestable byproducts [sic] of its manufacture."[120] Accordingly, the court remanded the case for sentencing, with directions for the district court to determine the amount of methamphetamine that could have been manufactured from the chemical mixture.[121]

iii. The Second Circuit

In *United States v. Acosta*,[122] the court of appeals for the Second Circuit held that the district court mistakenly included the weight of an unusable creme liqueur, in which cocaine had been dissolved, in the total weight of the cocaine involved in the case.[123] Although the liqueur and cocaine combination may have fit the dictionary definition of the term "mixture," the function, and not the form of the creme liqueur, in light of

115. *Id.* at 134.
116. *Id.*
117. *Id.*
118. *Id.* at 136.
119. *Id.*
120. *Id.* at 137.
121. *Id.*
122. 963 F.2d 551 (2d Cir. 1992). The defendant attempted to import cocaine by mixing the drug with the contents of six bottles of creme liqueur. *Id.* at 552.
123. *Id.* The cocaine without the creme liqueur weighed 2.245 kilograms. *Id.* The cocaine with the liqueur weighed 4.662 kilograms and the defendant argued that this would result in a sentencing range 10-13 months longer. *Id.*

the legislative history, convinced the court that the weight of the creme liqueur must be excluded.[124] According to the court, Congress was concerned with the product that would eventually reach the streets, (i.e., consumable mixtures).[125] Furthermore, the court determined that since Congress intended to create a "market-oriented" approach to combat drug trafficking, the culpability of the defendant in *Acosta* was no different than that of defendants who did not conceal the drug in liqueur.[126] Essentially, the same quantity of drugs would reach the street market.[127]

The Second Circuit distinguished its holding from *Chapman* by looking at the fact that the LSD in *Chapman* was ready for consumption, while the cocaine/liqueur mixture in *Acosta* was useless and uningestable.[128] The *Acosta* court held it essential that the cocaine would have had to been distilled out of the liqueur before distribution, and that the liqueur was merely a mask to conceal the cocaine and as such, the court considered the liqueur "the functional equivalent of packing material."[129] Packing material, according to the court, is "clearly is not to be included in weight calculation."[130]

Similarly, the Second Circuit, in *United States v. Salgado-Molina*,[131] with facts almost identical to those in *Acosta*, had little trouble in reaching the same conclusion that the weight of the liqueur in which the cocaine was concealed should not be included in the sentencing determination.[132] The court suggested the following hypothetical situation

---

124. *Id.* at 554.

125. *Id.*

126. *Id.* The court held that:

> Viewed through a market-oriented prism, there is no difference in culpability between individuals bringing the identical amount and purity of drugs to the market but concealing the drugs in different amounts of unusable mixtures .... Sentencing these individuals differently ... would also fly in the face of the fundamental underpinnings of the Guidelines, namely, uniformity and proportionality in sentencing.

Id.

127. *Id.* (reasoning that it would make no difference to the street market value if the cocaine was smuggled into the country in ten kilograms of liquid or if it was brought in twenty kilograms of liquid).

128. *Id.* at 555.

129. *Id.* at 554 (citing United States v. Rolande-Gabriel, 938 F.2d 1231, 1237 (11th Cir. 1991)).

130. *Id.* The court compared the situation in the case at bar to Rehnquist's majority opinion in *Chapman* as to what is, and what is not to be considered a mixture. *Id.*; *see supra* note 42 and accompanying text.

131. 967 F.2d 27 (2d Cir. 1992).

132. *Id.* at 28. The court stated "[f]or the reasons set forth in *Acosta*, we reverse and remand." *Id.*

which was meant to demonstrate how "fundamentally absurd" it would be if the court was to reach the opposite conclusion:[133]

> [U]nder a broad application of *Chapman*, if one could "float a few kilograms of cocaine across the ocean" and "extract the cocaine from the ocean," the weight of the entire Atlantic Ocean would be used to compute that defendant's base offense level. Including the liquid in this case as a measure of punishment is no more rational than including the weight of the Atlantic Ocean in sentencing the hypothetical ocean smuggler.[134]

iv. The Third Circuit

In *United States v. Rodriquez*,[135] the Third Circuit held that a mixture comprised of cocaine and boric acid was not a "mixture or substance" under 21 U.S.C. § 841 or section 2D1.1 of the Sentencing Guidelines.[136] In *Rodriquez*, the defendant sold blocks of "cocaine" to DEA agents. After testing the blocks, the DEA chemists determined that the blocks consisted of only 65.1 grams of actual cocaine and 2976 grams of boric acid.[137] According to the court, the particles of the boric acid had not mixed with the cocaine and could be easily be distinguished from the cocaine on visual inspection because of their different colors.[138] The court distinguished *Chapman* on the basis that the boric acid was not intended to be used as a cutting agent and, unlike the blotter paper in *Chapman*, "did not facilitate the distribution of the cocaine."[139]

The Third Circuit also distinguished this case from the ordinary case where the cocaine is dispersed with an agent in order to increase the

---

133. *Id.* at 29.

134. *Id.*

135. 975 F.2d 999 (3d Cir. 1992).

136. *Id.* at 1007.

137. *Id.* at 1001. "In essence, the brick-like packages were constructed in an effort to fool an unsuspecting customer... into thinking that they were compressed wholly of cocaine." *Id.* The defendant compressed boric acid into blocks and covered them with yellow tape. He then spread a thin layer of cocaine over the tape. A hole was drilled into each block and then filled with cocaine. Lastly, the defendant wrapped the blocks in plastic and brown paper. A buyer could examine the cocaine that covered the top surface and could sample the cocaine placed in the hole. The plastic and brown paper, however, prevented a buyer from observing the bottom and sides of the blocks and determining the true nature of the contents of the block. *Id.*

138. *Id.* at 1005. "When particles are mixed together it takes more effort to separate them than to scrape one layer from another. Though the boric acid and cocaine were placed in close proximity, they remained, like layers of a sundae, separate and distinct." *Id.*

139. *Id.*

amount of the drug available to the seller.[140] The court recognized that this "was not the ordinary drug product moving in the stream of commerce in the manner envisioned by Congress."[141] The *Rodriquez* court, as the court did in *Acosta*, noted that the boric acid "functioned more like a packaging material on which and into which the cocaine was placed and from which the cocaine would have to be removed for use. *Chapman* recognized that packaging material was not to be included in the weight calculation."[142] The court concluded by stating that the distinction between usable and unusable mixture made in other jurisdictions, which followed the same line of reasoning, better promoted the goals of uniformity and proportionality in sentencing.[143]

v. The Seventh Circuit

The Seventh Circuit, in *United States v. Johnson*,[144] held that waste water left over from the manufacturing process of crack cocaine should not be included in computing a defendant's sentence.[145] In *Johnson*, the defendant was found guilty of "knowingly and intentionally possessing, with intent to distribute, more than fifty grams of cocaine."[146] The total weight of the crack recovered, including cutting agents and adulterants, but excluding the waste water, was 47.4 grams,[147] and the waste water weighed 31.89 grams.[148]

In *Johnson*, the court looked to Congress' "market-oriented" approach, in which the total quantity of the substance that is to be distributed, rather than the amount of the pure drug, for sentencing purposes.[149] The court held that Congress' focus "was on the weight of the drug mixtures 'ready for wholesale or ready for distribution at the retail

140. *Id.* at 1006. "[T]he undisputed facts here show that the cocaine was used only to effectuate the scam by masking the identity of the boric acid blocks." *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1007. "We find that the usable/unusable differentiation adopted by the Second, Sixth, Ninth, and Eleventh Circuits, rather than the First Circuit approach, best follows the reasoning in *Chapman*." *Id.*

144. 999 F.2d 1192 (7th Cir. 1993).

145. *Id.* at 1197.

146. *Id.* at 1193. *See also* 21 U.S.C. § 841(b).

147. *Johnson*, 999 F.2d at 1194. "The process of manufacturing cocaine base or 'crack' consists of mixing regular cocaine and baking soda in water. The mixture is then heated. The cocaine base can be removed with a spoon when it settles to the bottom of the water." *Id.* at 1194 n.3.

148. *Id.* at 1194.

149. *Id.* at 1195 (citing Chapman v. United States, 500 U.S. 453, 461 (1991)).

level.'"[150] The court, relying on the Second Circuit's reasoning in *United States v. Acosta*, explained that the waste water did not facilitate the distribution of the crack cocaine, in that the cocaine was not dependent on the waste water for ingestion, and the water did not in any way increase the amount of drug available at the retail level and therefore, should not be included.[151] The Seventh Circuit concluded by stating that, because Congress was mainly concerned with mixtures that will eventually reach the streets, the issue before the court was marketability, not purity, and the waste water here had no marketable value.[152]

Less than one year after its decision in *Johnson*, the Seventh Circuit in *United States v. Tucker*,[153] held that the inclusion of the entire weight of both the cocaine base (crack cocaine) and the water with which it was mixed was proper for sentencing.[154] Based on this decision, the defendant was convicted of distributing five grams or more of cocaine base.[155] The weight of the cocaine base was 5.2 grams at the time of the defendant's arrest.[156] However, upon a reweighing several months after the indictment, the cocaine base weighed 4.04 grams.[157] The forensic scientist who weighed the cocaine base explained that .2 grams were used for qualitative analysis, and that the balance of the weight loss was due to the evaporation of water from the original sample.[158] At sentencing, the defendant objected to the use of the 5.2 grams as the weight, contending that water is not a controlled substance and that the court should calculate the appropriate sentence based solely on the weight of the pure cocaine.[159] The court dismissed his argument by stating that because water is necessary for the creation of cocaine base and users of

150. *Id.* (quoting *Chapman*, 500 U.S. at 461).

151. *Id.* at 1196. "Under a market-oriented approach, when the mixture is not ingestable and therefore not marketable, there is no rational basis to a sentence based on the entire weight of a useless mixture." *Id.* (citing United States v. Acosta, 963 U.S. 551, 555 (2d Cir. 1992)).

152. *Id.* (citing *Acosta*, 963 U.S. at 555).

153. 20 F.3d 242 (7th Cir. 1994).

154. *Id.* at 244.

155. *Id.* at 243.

156. *Id.*

157. *Id.* The difference between the original weight and the weight of the cocaine base when reweighed several months later was relevant to the defendant because "distributing five grams or more of cocaine base carries with it a minimum of five years imprisonment." *Id. See also* 21 U.S.C. § 841 (b).

158. *Tucker*, 20 F.3d at 243.

159. *Id.*

it need not wait for the water to evaporate before using the cocaine base, the two are part of a "mixture."[160]

At first glance it appears that the decision of the *Tucker* court was in opposition to that of the *Johnson* court,[161] by holding that the water, along with the cocaine base and baking soda, is "part of a whole, blended together, and therefore comport[s] with the common understanding of 'mixture' recognized in *Chapman*,"[162] and should be included in the sentencing determination.[163] The *Tucker* court based its holding on the market-oriented approach and stated that "the form in which the Illinois State Police found the cocaine base in this case, it weighed 5.2 grams, and sentencing [the defendant] based on the weight of the cocaine base as found satisfies the intent of Congress as recognized by *Chapman*." [164]

In *Ambriz v. United States*,[165] the defendant, pursuant to a plea agreement, was convicted and sentenced to five years imprisonment for "knowingly and intentionally possessing with the intent to distribute" 1000 grams of cocaine.[166] The defendant argued on appeal that he should have been sentenced only for the 22.5 grams of cocaine that he possessed and that the district court was incorrect when it included the weight of the dirt for sentencing purposes.[167] The Court of Appeals disagreed with the defendant and cited to earlier Seventh Circuit cases in which defendants had attempted to possess large quantities of cocaine but, because of substitutions by the government, ended up possessing only a small fraction of that amount[168] and the court properly used the weight of the entire mixture for sentencing determination.[169]

---

160. *Id.* at 244.

161. The *Johnson* court held that the waste water was not marketable because it contained only a "trace amount of the cocaine [base] suspended in the liquid." United States v. Johnson, 999 F.2d 1192, 1194 (7th Cir. 1993). In *Tucker*, the court held that the water was part of the cocaine base and was marketable as such. *Tucker*, 20 F.3d at 244.

162. *Id.*

163. *Id.* The court went further to say that "[w]ater is *a part of* cocaine base, not something used to carry it . . . ." *Id.*

164. *Id.*

165. 14 F.3d 331 (7th Cir. 1994).

166. *Id.* at 332. The defendant thought he was taking possession of one kilogram of cocaine, but prior to his arrest "law enforcement officers removed all but 22.5 grams of the cocaine . . . [and] replaced it with approximately 977.5 grams of dirt." *Id.*

167. *Id.* at 333. "Under the . . . Guidelines, a sentence for the 22.5 grams of cocaine would put Ambriz's sentencing level at 12 and make him eligible for a sentence of 10-16 months. . . . Instead, under the district court's approach, Ambriz was eligible for sentencing level 26 and a 63-78 month sentence." *Id.* (citations omitted).

168. *See* United States v. Levia, 959 F.2d 637 (7th Cir. 1992) (holding that defendants were properly sentenced for 30 kilograms of cocaine where government informants

The *Ambriz* court distinguished the present case from *Johnson* by noting that the decisive issue in *Ambriz* was "whether to include material disguised by the government as cocaine."[170] Therefore, the court focused on the intent of the defendant and stated that, unlike the defendant in Johnson, "*Ambriz* was properly sentenced because he *tried to possess* the full kilogram of cocaine."[171]

C. *The "Hybrid" Courts*

The Fifth and Ninth Circuits can both be construed as "hybrid" circuits because they treat the poisonous waste from methamphetamine differently than they treat uningestable carrier-mediums or packing materials.[172]

i. The Fifth Circuit

The Fifth Circuit, in its approach to sentencing drug offenders, has adopted an position similar to that of the "strict" courts in cases involving methamphetamine combined with waste products.[173] In *United*

---

had actually sold the defendants two kilograms of cocaine and twenty-eight kilograms of flour), *cert. denied*, 113 S. Ct. 2372 (1993); United States v. White, 888 F.2d 490 (7th Cir. 1989) (holding that the full 302 grams should be included for sentencing purposes where DEA agents had replaced 300 grams of cocaine with sugar and left slightly less than two grams of cocaine).

169. *Ambriz*, 14 F.3d at 334.

170. *Id.*

171. *Id.* (emphasis added).

172. *Compare* United States v. Walker, 960 F.2d 409, 411 (5th Cir.) (affirming the use of the entire weight of a waste product, created by the process of manufacturing methamphetamine, to determine sentencing), *cert. denied*, 113 S. Ct. 443 (1992) *with* United States v. Palacios-Molina, 7 F.3d 49, 54-55 (5th Cir. 1993) (reversing and remanding a sentence for drug trafficking because the entire weight of a liquid containing cocaine was used to determine sentencing, rather than the weight of the marketable cocaine). *Compare* United States v. Innie, 7 F.3d 840, 847 (9th Cir. 1993) (affirming the use of the entire weight of a mixture containing methamphetamine, for sentencing purposes, as being consistent with the plain language of the Sentencing Guidelines), *cert. denied*, 114 S. Ct. 1567 (1994) *with* United States v. Robins, 967 F.2d 1387, 1391 (9th Cir. 1992) (holding that cocaine combined with cornmeal was not a "mixture" under the Sentencing Guidelines).

173. *See* United States v. Sherrod, 964 F.2d 1501 (5th Cir.), *cert. dismissed*, 113 S. Ct. 832 (1992), *and cert. denied*, 113 S. Ct. 1422 (1993); United States v. Walker, 960 F.2d 409 (5th Cir.), *cert. denied*, 113 S. Ct. 443 (1992); United States v. Mueller, 902 F.2d 336 (5th Cir. 1990); United States v. Butler, 895 F.2d 1016 (5th Cir.), *cert. denied*, 498 U.S. 826 (1989); United States v. Baker, 883 F.2d 13 (5th Cir.), *cert. denied*, 493 U.S. 983 (1989). Often the waste product consists of a liquid by-product of the metham-

States v. Baker,[174] authorities seized a crockpot containing fifty-one pounds of a mixture, of which approximately eleven pounds was methamphetamine powder and forty pounds was liquid mostly made up of waste materials.[175] The district court held that the entire weight of the fifty-one pound mixture should be considered for sentencing purposes.[176] The court explained that determining the base offense level by reference to the total weight of the mixture "adequately accomplishes Congress' purposes" of imposing a sentence based on quantity instead of purity.[177]

Similarly, in *United States v. Walker*,[178] police seized various materials of a methamphetamine laboratory; among the materials seized was a small quantity of methamphetamine dissolved in a toxic liquid.[179] The Fifth Circuit, in its decision, rejected the defendant's argument that *Chapman* overruled *Baker* and its progeny and held that district court properly included the weight of the waste product.[180] The court explained that *Chapman* "did not involve methamphetamine; nor did it involve a liquid" and thus did not overrule *Baker*.[181] In fact, the court went further to state that "[t]o the contrary, much of the language of *Chapman* supports this court's decision in *Baker*."[182]

In *United States v. Sherrod*,[183] DEA agents uncovered a methamphetamine laboratory and discovered 17.5 kilograms of precursor chemicals and small amounts of methamphetamine.[184] The Fifth Circuit

---

phetamine manufacturing process. *See, e.g., Baker*, 883 F.2d at 14. The liquid usually contains small amounts of methamphetamine but is not ingestable or marketable. *Id.*

174. 883 F.2d 13 (5th Cir.), *cert. denied*, 493 U.S. 983 (1989).

175. *Id.* at 14.

176. *Id.* at 15.

177. *Id.*

178. 960 F.2d 409 (5th Cir.), *cert. denied*, 113 S. Ct. 443 (1992).

179. *Id.* at 411-12.

180. *Id.* at 412. The court also stated that it was able to overrule the decision of a prior Fifth Circuit panel "in the absence of en banc reconsideration or superseding decision of the Supreme Court." *Id.* at 412, n.2 (quoting Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991)).

181. *Id.* at 412.

182. *Id.*

183. 964 F.2d 1501 (5th Cir.), *cert. dismissed*, 113 S. Ct. 832 (1992), *and cert. denied*, 113 S. Ct. 1422 (1993).

184. *Id.* at 1504-05. The defendants also challenged the actual amounts of the liquid involved. *Id.* at 1508. The 17.5 kilogram figure was an estimate extrapolated by the government because the DEA agents destroyed the chemical mixtures. *Id.* at 1507-08. The court of appeals held that the defendants were not deprived their constitutional rights of due process and confrontation, by the destruction of the evidence, and stated "the sworn

relied on *Walker* by arguing that the Supreme Court's analysis in *Chapman* did not apply to methamphetamine.[185] The court based its argument on the language of both *Chapman* and the Sentencing Guidelines.[186] According to the *Sherrod* court, the Supreme Court did not intend its market-oriented analysis from *Chapman* to apply to methamphetamine since the Court established its market-oriented approach after expressly distinguishing the treatment of LSD from methamphetamine.[187] Thus, the court held that the entire mixture was properly considered for sentencing purposes.[188]

In *United States v. Palacios-Molina*,[189] the Fifth Circuit's holding followed that of the lenient courts, in cases involving cocaine combined with waste products. In *Palacios-Molina*, the court held that the liquid portion of a cocaine/liquid mixture "was not a mixture within the meaning of § 2D1.1"[190] and should not have been included when calculating the defendant's sentence under the Sentencing Guidelines.[191] The defendant objected to the sentencing weight because it included the waste liquid from the bottles.[192] The circuit court held that the "market-oriented" approach outlined in *Chapman* required the exclusion of the

---

testimony of two government agents is a sufficient 'indicia of reliability' to support the district court's findings." *Id.* at 1508.

185. *Id.* at 1510. *See* United States v. Walker, 960 F.2d 409, 412 (5th Cir.), *cert. denied*, 113 S. Ct. 443 (1992). "*Chapman* did not involve methamphetamine; nor did it involve a liquid. Hence, the Court did not speak to the issue of whether the weight of liquid waste containing methamphetamine should serve as a basis for computing a defendant's offense level." *Id.*

186. *Sherrod*, 964 F.2d at 1510. According to the Fifth Circuit, the market-oriented analysis in *Chapman* does not apply for two reasons. *Id.* First, the commentary in the Sentencing Guidelines provides that sentences for methamphetamine can be based on either the weight of the pure drug or on the weight of a mixture containing a detectable amount of the actual drug. *Id.* (citing U.S.S.G. § 2D1.1). Second, the court in *Sherrod* found that because the Guidelines provided an option in methamphetamine cases of using either the pure weight of the drug or the weight of the mixture containing a detectable amount of the drug, the entire weight should be included as long as the mixture contains a detectable amount. *Id.*

187. *Id.* (citing United States v. Chapman, 500 U.S. 453, 459 (1991)).

188. *Sherrod*, 964 F.2d at 1511.

189. 7 F.3d 49 (5th Cir. 1993).

190. *Id.* at 55. The defendant was arrested in Houston's Intercontinental Airport after custom officials uncovered powdered cocaine hidden in two aerosol cans he had in his possession. *Id.* at 50. Officials also discovered two bottles of sangria containing a thick liquid which was partially comprised of cocaine. *Id.*

191. *Id.* at 55.

192. *Id.* The defendant argued that if the waste liquid was not included his base offense level would have been 28, not the base offense level of 30 assigned by the district court. *Id.*

waste liquid in which the cocaine was distilled because the "liquid was not part of a marketable mixture . . . ."[193]

The court distinguished its holding in *Palacios-Molina* form prior Fifth Circuit holdings in *Walker* and *Sherrod*, both of which involved methamphetamine, by comparing methamphetamine offenses with cocaine offenses.[194] The court concluded that the "market-oriented" approach did not apply to methamphetamine, but was applicable in cases involving cocaine.[195] The court also distinguished the liquid in this case from the waste liquid in methamphetamine cases by categorizing the liquid in the wine bottles as an "otherwise innocuous" method of concealment, whereas the liquids in the methamphetamine cases were "necessary to the manufacturing and ultimate distribution of the controlled substance."[196]

ii. The Ninth Circuit

The Ninth Circuit, like the Fifth Circuit, treats the poisonous waste water from methamphetamine differently than it does other uningestable carrier-mediums or packaging materials. In *United States v. Innie*,[197] the court used a "strict" approach when it calculated the defendant's sentence based upon the total volume of the liquid mixture containing methamphetamine.[198] The defendant argued that the court should have based his sentence only on the amount of the pure drug involved.[199] He claimed that sentencing him based on the entire weight of the mixture would be irrational because, had the manufacturing process been completed, a much smaller amount of pure methamphetamine would have actually been produced; he also objected to the sentence because if in-

193. *Id.* at 54. "[T]he liquid in the wine bottles in this case was akin to the packaging material found not to be includible in *Chapman*." *Id.* The court stressed that "[u]nder the market oriented approach the issue is marketability." *Id.* (citing United States v. Acosta, 963 F.2d 551, 555 (2d Cir. 1992)). The court went further to hold that the cocaine in that state was not a usable substance and would only be marketable once it was distilled from the liquid. *Id.*

194. *Id.* at 53.

195. *Id.*

196. *Id.* In its decision the court also relied on, what was then, the proposed amendments to the Sentencing Guidelines as "at least persuasive authority as to the meaning of the term 'mixture.'" *Id.* at 52, n.6; *see also* discussion *infra* part III.

197. 7 F.3d 840 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1567 (1994).

198. *Id.* at 847. Police found bottles containing methamphetamine in liquid form and a bottle of acetone in the defendant's motel room. *Id.* at 843. The liquid methamphetamine mixture was four to eight percent pure. *Id.* at 845.

199. *Id.*

gested, the mixture in its present state was poisonous.[200] The *Innie* court held that the entire liquid mixture should be included because, "unlike a mere packaging agent like the creme liqueur in *Acosta* or the cornmeal in *Robins*, the entire liquid mixture can be said to facilitate the distribution of methamphetamine because the methamphetamine could not have been produced without it."[201]

In *United States v. Robins*,[202] the Ninth Circuit used a lenient approach to hold that a substance, consisting of .1 gram of cocaine and 2779 grams of cornmeal, was not a mixture within the meaning of the Sentencing Guidelines.[203] In *Robins*, the defendant attempted to sell two blocks of cornmeal, into which he placed small amounts of cocaine near v-shaped cuts in the tops of the packages.[204] After he was convicted, the district court sentenced the defendant using the weight of the entire cocaine/cornmeal mixture.[205]

In reversing the district court's sentencing decision, the court of appeals concluded that the weight of the cornmeal should not be included in the weight of the cocaine for several reasons. First, the court noted that the cornmeal was not being used to dilute the cocaine, thus it was not within the evils that Congress had in mind when it adopted it strategy of basing sentences on the full weight of drug mixtures.[206] Second, the court determined that the cocaine and the cornmeal were not a "mixture."[207] According to the court, the cornmeal had to be separated from the cocaine prior to the cocaine being used; therefore, it was the functional equivalent of packaging material.[208]

Finally, the *Robins* court distinguished the case at bar from its prior holdings in *United States v. Beltran-Felix*[209] and *United States v. Chan Yu-Chong*,[210] holding that, in those cases, the mixture facilitated the

200. *Id.* Although ultimately rejecting the defendant's argument, the court noted that the Sixth Circuit was persuaded by this argument in United States v. Jennings. *Id. See supra* notes 113-121 and accompanying text.

201. *Id.* at 847 (citing United States v. Robins, 967 F.2d 1387, 1390 (9th Cir. 1992)).

202. 967 F.2d 1387 (9th Cir. 1992).

203. *Id.* at 1388, 1391.

204. *Id.* at 1388. After the defendant was arrested he stated "I purchased the cornmeal because it came in a plastic bag, shaped like a brick of cocaine. I wrapped the cornmeal plastic bag in duct tape.... I then made V-shaped cuts in both bricks... I then poured in the cocaine I had into both V-shaped cuts." *Id.*

205. *Id.*

206. *Id.* at 1389.

207. *Id.*

208. *Id.*

209. 934 F.2d 1075 (9th Cir. 1991), *cert. denied*, 502 U.S. 1065 (1992).

210. 920 F.2d 594 (9th Cir. 1990).

distribution of the drug. The defendants in *Chan Yu-Chong* were sentenced based on the total weight of an unidentifiable substance combined with heroin.[211] There was no evidence that the unidentified substance was not consumable,[212] thus the defendants were sentenced based on the combined amount of the "mixture."[213] In *Robins*, the Ninth Circuit determined that, although the cornmeal was consumable it should not be included in the weight of the controlled substances for sentencing purposes because "the sole purpose of the cocaine was to mask the identity of the cornmeal."[214]

III. 1993 AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

On April 29, 1993, the United States Sentencing Commission, after observing the overwhelming dissimilarity in sentencing handed down by the courts of appeal, finally promulgated amendments to the Federal Sentencing Guidelines.[215] The purpose of these amendments was to make the sentencing scheme more rational.[216] This section will focus on and examine the main amendment which will effect the "mixture or substance" definition problem as suggested by the Sentencing Commission.

Because there has been much conflict over the way the circuit courts have interpreted the phrase "mixture or substance," the proposed amendments to section 2D1.1 of the Sentencing Guidelines were designed to resolve this conflict and, as Congress intended, add to uniformity and proportionality in sentencing.[217] It appears that the Com-

---

211. *Robins*, 967 F.2d at 1390. The court distinguished *Beltran-Felix*, a case factually similar to *Innie*, by holding that a mixture under U.S.S.G. § 2D1.1 does not mean a readily marketable mixture. *Id.* (quoting *Beltran-Felix*, 934 F.2d at 1076).

212. *Chan Yu-Chon*, 920 F.2d at 597.

213. *Id.* at 596.

214. *Robins*, 967 F.2d at 1390. The court reasoned that "the cornmeal was not used to facilitate distribution of the one-tenth of a gram of cocaine. The cornmeal was used to trick a purchaser into buying cornmeal thinking it was cocaine." *Id.* at 1391.

215. 58 Fed. Reg. 27,148 (1993) (codified at U.S.S.G. App. C, no. 484) (enacted November 1, 1993).

216. *Id.*

217. *Id.* at 27,155. Application note one of § 2D1.1 was amended to read as follows:

> 'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled

mission has adopted the approach of the "lenient" courts in this amendment, by including the phrase "'mixture or substance' does not include materials that must be separated from the controlled substance before the controlled substance can be used."[218]

Congress amended section 2D1.1 in an attempt to resolve two main issues that have been encountered by the federal circuits. The first issue that this amendment attempts to resolve is what portion of the drug mixture should be included in the sentencing determination.[219] After the enactment of this amendment, the weight of a carrier medium, which can neither be ingested along with the controlled substance it is carrying nor facilitate the marketability of the controlled substance, is not to be included when determining the weight of the drug for sentencing purposes.[220] The second issue is whether or not liquid waste produced during the manufacturing of a controlled substance should be included.[221] This amendment makes it clear that the weight of such waste and the chemicals used for processing the drugs are not to be included.[222]

Even though the amendment was created to clarify the interpretation problem regarding "mixture or substance," the question still arises as to what effect, if any, the amendment will have on future cases involving this issue. The language used in the amendment may still be interpreted in an ambiguous manner by the courts and may continue to lead to disparate sentencing between the circuits. Although the amendment's language is unambiguous, except for the examples stated, it is not clear from the amendment exactly what materials "must be separated" from the controlled substances. This leaves open the question regarding situa-

---

substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Id.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* This seems to clearly address the problems the courts have had regarding methamphetamine production. *Compare* United States v. Baker, 883 F.2d 13, 15 (5th Cir.) (holding that waste water be included for sentencing purposes), *cert. denied*, 493 U.S. 983 (1989) *with* United States v. Jennings, 945 F.2d 129, 136 (6th Cir. 1991) (holding that it would be irrational to include the weight of the waste water).

222. U.S.S.G. § 2D1.1, comment. (n.1).

tions involving controlled substances mixed with materials such as creme liqueur, as was the case in *United States v. Acosta*.[223]

Another potential problem is with the phrase "if such material cannot readily be separated from the mixture or substance . . . the court may use any reasonable method to approximate the weight of the mixture or substance" to be included.[224] This last provision might lead the courts to reach contrary results when deciding what can or cannot be readily separated. Based on the already existing views of the individual circuits, it is hard to imagine that the courts will be able to reach a uniform conclusion as to what materials "can be readily separated," without some form of clarification.

Even if the courts can come to common understanding of what materials "can be readily separated," there is yet another problem. The amendment expresses that courts would still have discretion as to what "reasonable method" they employ in determining the weight to be used to calculate the base offense level.[225] As it has been in the past, it is possible that people convicted of the same offense, in different circuits, will receive disparate sentences because each circuit will have its own "method" in determining what weight is to be used.

The 1993 amendments will also provide the circuit courts of appeals with many opportunities to re-examine the issue of whether or not to include a "mixture or substance containing a detectable amount of a controlled substance" for sentencing purposes. This is no more apparent than in the recent Tenth Circuit case, *United States v. Richards*.[226] In *Richards*, the defendant filed a motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2).[227] He relied on the amended commentary to the guidelines which excludes waste water from the definition of "mixture or substance" for purposes of weighing methamphetamine.[228] The district court granted the defendant's motion and reduced his sentence from 188 months to 60 months.[229] The Government, in its appeal, conceded that the amended commentary is applicable to the defendant but argued that the "Sentencing Commission's decision to exclude waste

223. 963 F.2d 551 (2d Cir. 1992).

224. 58 Fed. Reg. at 27,155 (1993).

225. *Id.*

226. 1995 WL 596840 (10th Cir. Oct. 11, 1995).

227. *Id.* at *1.

228. *Id. See supra* note 220.

229. *Richards*, 1995 WL 596840 at *1. The defendant pled guilty to possession with intent to manufacture methamphetamine. *Id.* He possessed 28 grams of pure methamphetamine, which was combined with waste water to form a mixture weighing 32 kilograms. *Id.*

water from 'mixture or substance' does not alter the definition of that phrase in the statutory context."[230] The government based its argument "on the notion that [the] amended commentary to the sentencing guidelines cannot change the established judicial interpretation of a statute."[231] The Tenth Circuit agreed with this assertion and stated that the "amended commentary cannot alter any prior, independent construction of 21 U.S.C. § 841(b) [that has been] made,"[232] but said that it was irrelevant because, in their words, "we disagree that we have definitively construed the statute itself to include waste water in its definition of 'mixture or substance.'"[233]

The court looked to the holdings in *Callihan* and *Dorrough* and determined that the Tenth Circuit had construed "mixture or substance" in section 2D1.1 of the Sentencing Guidelines "without any reference or citation to the statute or its construction, merely relying on the Sentencing Commission's admonition that 'if any mixture or compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity.'"[234]

The court then re-examined the holding of the district court, which had reduced the defendant's sentence to sixty months, in an effort to determine whether the amendments had any effect on the interpretation of the sentencing practices of the Tenth Circuit.[235] The court stated that "[t]he Sentencing Commission specifically addressed the current issue in its amended commentary to § 2D1.1, clearly excluding the weight of waste water from the measurement of a 'mixture or substance.'"[236]

The court also noted that the Sentencing Commission specifically stated its intent to have these amendments resolve the inter-circuit conflict when it expressed to Congress its reasons for amending the commentary.[237] The court, in affirming the decision of the district court, concluded by stating:

---

230. *Id.*

231. *Id.* at *2.

232. *Id.* at *3.

233. *Id.* at *2. The government conceded that the court has interpreted "mixture or substance" only in the context of § 2D1.1 of the Sentencing Guidelines, but they argued that because "mixture or substance" as used in § 2D1.1 has the same meaning as in 21 U.S.C. § 841, the court has implicitly settled the statutory issue as well. *Id.* at *3.

234. *Id.* (citing United States v. Callihan, 915 F.2d 1462, 1463 (10th Cir. 1990)).

235. *Id.* at *5.

236. *Id.*

237. *Id.* at *5. *See* 58 Fed. Reg. 27,148, 27,155 (1993) (codified at U.S.S.G. App.C. no. 484) (enacted November 1, 1993).

> [W]e are free to interpret the statute as an issue of first impression. [This court] is not required to interpret a statute in accordance with an outdated guideline and in conflict with the current, applicable guideline. We thus construe 'mixture or substance' in [21 U.S.C.] § 841 to be consistent with the guideline commentary as revised.[238]

Thus, it appears that the 1993 amendments caused the Tenth Circuit to shift from its "strict" interpretation of a "mixture or substance," to join "the majority of [its] sister circuits in adopting Congress' market-oriented approach to drug sentencing as articulated in *Chapman*."[239]

It is still too early to see what long-term effects the 1993 amendments to the Guidelines will have on future cases, but if the *Richards* case is any indication, the Sentencing Commission has not fulfilled its goal to have these amendments resolve the inter-circuit conflict.

CONCLUSION

Congress desires uniform and proportional sentencing for all defendants convicted under the Sentencing Guidelines and 21 U.S.C. § 841, but has failed to give the courts any guidance in how to apply the term "mixture or substance." The Supreme Court's decision in *Chapman* has done little to help settle the current split among the federal circuits. Some courts have applied a literal meaning to the term "mixture or substance" which closely follows the *Chapman* decision, while others have shifted away from the literal interpretation of the statutory language and have followed a more lenient approach in order to exclude the weights of non-marketable or uningestable mixtures when making sentencing determinations.

The problem with 21 U.S.C. § 841 and section 2D1.1 of the Sentencing Guidelines goes far beyond the "mixture or substance" interpretation, because the definition, by itself, fails to give the courts the necessary guidance when they need to decide what should be included in the sentencing determination. The 1993 amendments may prove to be helpful, but the Supreme Court, Congress and the Sentencing Commission are on notice that the split within the circuits must be resolved as soon as possible if the goals of uniformity and proportionality in sentencing are to be achieved.

*Eric J. Stockel**

---

238. *Richards*, 1995 WL 596840 at *6.

239. *Id.*

* I would like to thank my wife Michele for the support she gave me while writing this article.