Suffolk Journal of Trial and Appellate Advocacy

Volume 19 | Issue 1 Article 16

1-1-2014

Which Weight Matters in Drug Offense Cases

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Recommended Citation
19 Suffolk J. Trial & App. Advoc. 335 (2014)

WHICH WEIGHT MATTERS IN DRUG OFFENSE CASES?

I. INTRODUCTION

> *"A person who sells LSD on blotter paper is not a worse criminal than one who sells the same number of doses on gelatin cubes, but he is subject to a heavier punishment."*

United States v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990) (Posner J., dissenting).

When federal drug offenders are found guilty of drug offenses, their sentence depends on the amount of drug involved in the crime, which can be calculated in two potential ways.[1] First, the entire amount of the involved substance, even if it contains just a trace of narcotic, can be weighed to determine the sentence.[2] Alternatively, the sentence can be determined by weighing the amount of useable drug involved in the offense, pursuant to the United States Sentencing Commission Guidelines Manual.[3] The calculation method varies from circuit to circuit, producing incongruities in drug offense sentences for similar offenses from jurisdiction to jurisdiction.[4]

The question of whether or not to include all substances containing traces of narcotic or to simply weigh the useable amount has been a longstanding question in the war against drugs.[5] In response to the rise in drug abuse in the United States, Congress passed the Comprehensive Drug

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[1] *See* Controlled Substances Penalties Amendment Act of 1984, chp. Comprehensive Crime Control Act of 1984, 21 U.S.C. § 841 (2006); *see also* Chapman v. United States, 500 U.S. 453, 460 (1991); United States v. Stewart, 361 F.3d 373, 382 (7th Cir. 2004) (holding that only useable mixtures can be used in determining drug quantity for sentencing purposes). *But see* United States v. Mahecha-Onofre, 936 F.2d 623, 625-26 (1st Cir. 1991) (holding that weight of indigestible materials should be considered in drug weight for sentencing).

[2] *See* Mahecha-Onofre, 936 F.2d at 625-26 (holding total weight of suitcase constructed partially of cocaine was appropriately included in drug weight).

[3] *See* U.S. SENTENCING GUIDELINES MANUAL, § 2D1.1 cmt. n. 1 (2013) [hereinafter "USSG"], *available at* http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/index.cfm; United States v. Johnson, 999 F.2d 1192, 1196-1197 (7th Cir. 1993) (holding that amount of useable drug should be used in determining sentences).

[4] *See* Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1505 (2000).

[5] *See* Chapman v. United States, 500 U.S. 453, 460 (1991).

Abuse Prevention and Control Act of 1970.[6] Subsequently, Congress made amendments to this Act, setting the stage for *Chapman v. United States*[7] in 1991.[8] In *Chapman*, the Supreme Court stated "[s]o long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence."[9] The decision in *Chapman* has caused a split among the circuits regarding how to interpret the holding.[10] Subsequently, the Supreme Court affirmed the *Chapman* holding in *Neal v. United States*.[11] However, many courts are still reluctant to impose sentences based on the weight of an entire mixture, causing sentences to vary from jurisdiction to jurisdiction.[12] The Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits employ the "market-oriented" approach, which holds that

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[6] *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 (1970).

[7] 500 U.S. 453 (1991).

[8] *See* Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3561 (1984) (containing two particularly relevant provisions relating punishment to quantity and attempting to end sentencing disparity); Anti-Drug Abuse Act of 1986, 21 U.S.C. § 801 (1986) (introducing idea of sentencing drug offenders based on amount of distributed drug).

[9] 500 U.S. at 459.

[10] *See* United States v. Stewart, 361 F.3d 377, 377 (7th Cir. 2004) ("[O]nly useable or consumable mixtures or substances are included in the drug quantity for sentencing purposes."); United States v. Berroa-Medrano, 303 F.3d 277, 284 (3d Cir. 2002) (including entire weight of heroin that was heavily diluted with common cutting agents); United States v. Coleman, 166 F.3d 428, 432 (2d Cir. 1999) (including weight of moisture in consumable crack cocaine); United States v. Tucker, 20 F.3d 242, 244 (7th Cir. 1994) (including weight of moisture in fully processed, consumable crack cocaine); United States v. Johnson, 999 F.2d 1192, 1196-97 (7th Cir. 1993) (finding waste water containing unusable cocaine base is excluded from weight of mixture); United States v. Acosta, 963 F.2d 551, 556 (2d Cir. 1992) (holding total weight of mixture method is contrary to congressional intent and purposes underlying guidelines); United States v. Rodriguez, 975 F.2d 999, 1007 (3d Cir. 1992) (excluding weight of unusable boric acid from packages containing boric acid and layer of cocaine); United States v. Jennings, 945 F.2d 129, 136 (6th Cir. 1991) (explaining punishing defendant for mixture weight which exceeds potential meth weight is unwarranted by statute); United States v. Rolande-Gabriel, 938 F.2d 1231, 1238 (11th Cir. 1991) (holding that term mixture as used in USSG does not include unusable mixtures). *But see* United States v. Clarke, 564 F.3d 949, 956 (8th Cir. 2009) (holding liquid which was not yet meth but not waste water should be included); United States v. Treft, 447 F.3d 421, 425 (5th Cir. 2006) (holding Chapman's marketability test does not apply to cases involving meth); United States v. Kuenstler, 325 F.3d 1015, 1023 (8th Cir. 2003) (counting unfinished methamphetamine solution as mixture because it would eventually be turned into useable product); United States v. Richards, 87 F.3d 1152, 1158 (10th Cir. 1996) (basing sentence on solution which had not been processed into meth instead of useable material); United States v. Mahecha-Onofre, 936 F.2d 623, 625-26 (1st Cir. 1991) (finding cocaine, together with acrylic forming part of a suitcase was a "mixture").

[11] 516 U.S. 284, 296 (1996) (holding statute directs sentencing courts to take weight of blotter paper into account).

[12] *See* Richard Belfiore; Annotation, *Under What Circumstances Should Total Weight of Mixture or Substance in which Detectable Amount of Controlled Substance is Incorporated be Used in Assessing Sentence Under United States Sentencing Guideline § 2d1.1 – Post*-Chapman *Cases*, 113 A.L.R. FED. 91 (2012).

"only useable or consumable mixtures or substances are included in the drug quantity for sentencing purposes."[13] Alternatively, the so-called plain-language approach, employed by the First, Fifth, Eighth, and Tenth Circuit, compels sentencing courts to include in the drug weight, which, for statutory purposes, is *any* part of a solid or liquid containing a detectable amount of drug.[14] In Part I, this note will discuss how Congress's intent in drafting 21 U.S.C. §841(b) sheds light upon the intended meaning of "mixture and substance" in the statute, clarifying any ambiguities.[15] Furthermore, subsequent amendments reinforce this ideal. In Part II, this note will demonstrate that using the market-oriented approach is the proper way to resolve the circuit splits because it carries out the intent of Congress.[16] Lastly, Part III will demonstrate the perils of employing the plain-language approach over the market-oriented approach, due to the alarming disparity in sentences for similar crimes that contradicts Congress's intent to provide uniformity.[17] This note will investigate the fairness of these sentences to determine if the plain-language approach, in fact, may lead to absurd results.[18] Such analysis will show that the marked-oriented approach will provide a more consistent result and decrease disparate sentencing for federal drug offenses, thus carrying out the intent of Congress.

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[13] *See* United States v. Stewart, 361 F.3d 373, 377 (7th Cir. 2004); United States v. Berroa-Medrano, 303 F.3d 277, 284 (3d Cir. 2002) (finding that entire weight of heroin should be considered when heavily diluted by cutting agents); United States v. Coleman, 166 F.3d 428, 432 (2d Cir. 1999); United States v. Tucker, 20 F.3d 242, 244 (7th Cir. 1994) (finding that weight of moisture in consumable crack is included in mixture); United States v. Johnson, 999 F.2d 1192, 1196 (7th Cir. 1993) (concluding that weight used to calculate offense level should not include byproduct of cocaine production); United States v. Rodriquez, 975 F.2d 999, 1006 (3d Cir. 1992); United States v. Acosta, 963 F.2d 551, 557 (2d Cir. 1992) (finding that weight of liqueur used to conceal drug should not be included in mixture); United States v. Jennings, 945 F.2d 129, 135 (6th Cir. 1991); United States v. Rolande-Gabriel, 938 F.2d 1231,1238 (11th Cir. 1991) (excluding weight of liquid carrier medium in which cocaine was dissolved because it was unuseable).

[14] *See Clarke*, 564 F.3d at 956 (finding liquid which was not wastewater but not meth should be included in sentencing weight); *Treft*, 447 F.3d at 425 (finding mixture which had not been made into meth should be included); *Mahecha-Onofre*, 936 F.2d at 625-26); (holding weight of indigestible materials should be included in drug weight).

[15] *See infra* Part II; *see also*, 21 U.S.C. § 841(a)-(a)(1) (2012) ("[I]t shall be unlawful for any person knowingly or intentionally[] to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .").

[16] *See infra* Part III; *see also* USSG § 1A1 Intro (A) (2013).

[17] *See* cases cited *supra* note 10 and accompanying text (listing cases from each side of circuit split).

[18] *See* United States v. Johnson, 999 F.2d 1192, 1196-97 (7th Cir. 1993) (citing Rolande-Gabriel, 938 F.2d 1231, 1235 (11th Cir. 1991) (including weight of useable mixtures leads to "widely divergent sentences" for severity.")).

II. HISTORY

The history of 21 U.S.C. § 841 extends back to 1970, when Congress passed the Comprehensive Drug Abuse Prevention and Control Act ("CDAPCA") in an effort to quell the rising problems with substance abuse in the United States.[19] The CDAPCA divided drugs based on their potential for abuse and linked penalties to whether or not the drug involved in the offense was narcotic or non-narcotic.[20] In 1984, Congress passed the Comprehensive Crime Control Act, "a sweeping set of reforms that sought to address the problem of crime in our society,"[21] to amend the CDAPCA in order to combat the sentencing disparities resulting from the CDAPCA and its failure to account for quantity when determining punishment.[22]

A chapter of this amendment, called the Controlled Penalties Amendments Act, provided for the first time that punishment is dependent upon the quantity of the drug involved.[23] Two years later, in 1986, Congress passed the Anti-Drug Abuse Act, in an effort to more effectively and fairly punish drug traffickers who were supplying drugs to the street market, by basing punishment on the quantity of drug distributed rather than the amount of pure drug involved.[24]

> The rationale behind this method was that Congress did not want to punish drug traffickers any less because even though they were dealing in smaller quantities of pure drug, they were the source of the drugs supplying the mar-

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[19] *See* 21 U.S.C. § 841(a)-(a)(1) (2012) ("[I]t shall be unlawful for any person knowingly or intentionally[] to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."); Act of Oct. 27, 1970, Pub. L. 91-513, 84 Stat. 1236 (1970) (classifying drugs according to potential for abuse); *see also* Chapman v. United States, 500 U.S. 453, 460 (1991) (explaining that law based punishment on whether drug was narcotic, not amount of drug possessed).

[20] *See Chapman*, 500 U.S. at 460 (explaining punishment was not linked to quantity of drug involved in offense).

[21] *See* Jane L. Froyd, *supra* note 4, at 1472 (addressing Congress's response to issue of increased drug offenses in our communities).

[22] *See* Comprehensive Crime Control Act of 1984, 21 U.S.C. § 841 (1984) (making punishments dependent on amount of drug involved in offense); *see also Chapman*, 500 U.S. at 460-61 (explaining shift from basing penalties on whether drug is narcotic to weight of drug).

[23] *See Chapman*, 500 U.S. at 460 ("The Controlled Substances Penalties Amendments Act of 1984 . . . first made punishment dependent upon the quantity of the controlled substance involved.").

[24] *See* USSG Appendix. C. (2013); Anti-Drug Abuse Act of 1986, H.R. REP. NO. 99-845, pt. 1, at 12, 17 (1986), *available at* 1986 WL 295596; *see also Chapman*, 500 U.S. at 461 (suggesting Congress intended to punish drug traffickers similarly because they were perpetuating street market).

ket, and without them, the drug trade could not exist.[25]

With regard to traffickers, the total quantity seemed more important than quality when the goal was to quell the drug market.[26]

The 1986 Act represented a concerted effort by Congress to deal harshly with the nation's drug problem through strict, mandatory sentences for drug offenders.It based the new mandatory minimum penalties on the principle that the quantity of drug involvement in an offense reflects both the harm to society as well as the offender's culpability.[27]

Congress initiated these reforms, such as the Sentencing Reform Act, in order to strengthen its arsenal in the "war against drugs."[28] Upon study of the legislative history of the Sentencing Reform Act, Congress's intention becomes clear: to create a fair sentencing system which would eliminate sentencing disparities.[29] In fact, Congress expressed three specific objectives for the Sentencing Reform Act.[30] First, Congress wanted the time served to match the sentence, instead of offenders being released after serving just a few months.[31] Next, and most relevant to this note, Congress aimed to reduce the disparity in sentencing offenders who were convicted of similar crimes and had similar criminal histories.[32] Finally, Congress wanted to establish a scheme that produced more proportional results in sentencing offenders, by ensuring that the sentence given matched the severity of the crime.[33] In order to achieve these three objectives, Congress established the United States Sentencing Commission.[34]

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[25] *Chapman*, 500 U.S. at 461.

[26] *See id.* at 561.

[27] *See* Froyd, *supra* note 4, at 1486-87 (internal quotation omitted) (describing that laws were passed to combat increasing drug- related offenses).

[28] *See* Belfiore, *supra* note 12.

[29] *See* Froyd, *supra* note 4, at 1471.

[30] *See id.* at 1475-76.

[31] *See* Froyd, *supra* note 4, at 1475-76; *see also*, S. REP. NO. 98-225, at 56 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235; USSG § 1A1 Intro (A)(1) (2013) ("[The] practice [of indeterminate sentencing] resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.").

[32] *See* Froyd, *supra* note 4 at 1478; *see also* S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235; USSG § 1A1 Intro (A)(3) (2013).

[33] *See* Froyd, *supra* note 4, at 1478 . "The Senate Committee Report states that 'the use of sentencing guidelines and policy statements is intended to assure that each sentence is fair compared to all other sentences.'" *Id.* At 1476, n. 47 (quoting S. REP. NO. 98-225 at 51 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234; *see also* USSG, ch. 1, pt. A3 (2013) ("Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.")).

[34] Froyd, *supra* note 4, at 1476-77.

Additionally, when drafting 21 U.S.C. § 841(b), Congress aimed to enable law enforcement to focus on disabling "major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs."[35] Although its major target was the drug kingpins, Congress did not intend to lessen the punishment for retail drug traffickers; although street dealers deal in lesser quantities of drug, they "keep the street markets going."[36] Congress did not want to let street dealers off the hook; however, it also was not Congress's intention to ratchet up the offense level based on a mixture that is not ingestible and therefore, not marketable.[37] The main concern of Congress was regulating "mixtures that will eventually reach the streets, i.e., consumable mixtures."[38] The focus should not be on how the offender transports the drug—for example, in how many bottles of crème liqueur he uses to transport it, as described in *United States v. Acosta*—but the weight of the amount of drug transported in those bottles.[39]

Section 2D1.1(a) of the United States Sentencing Guidelines states that "unless 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 detectible amount of the controlled substance."[40] The accompanying Application Note 1 to United States Sentencing Commission Guidelines Manual section 2D1.1 states that the phrase "mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. [41] The definition does "not include materials that must be separated from the controlled substance before the controlled substance can be used" and gives examples such as "fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water" resulting from the manufacturing of a controlled substance.[42] "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

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[35] H.R. REP. NO. 99-845, at sec. 314 (1986), *available at* 1986 WL 295596 (describing background of bill).

[36] *See* United States v. Johnson, 999 F.2d 1192, 1195 (7th Cir. 1993) (quoting *Chapman*, 500 U.S. at 460 (citing H.R. REP NO. 99-845, pt. 1, ppp. 12 (1986), *available at* 1986 WL 295596 (explaining Congress intended penalties for amounts of drugs ready for retail))).

[37] *See Johnson*, 999 F.2d at 1196 (citing United States v. Acosta, 963 F.2d 551 (2d Cir. 1992)).

[38] *See* United States v. Acosta, 963 F.2d 551, 554. (2d Cir. 1992) (quoting USSG § 2D1.1(a) (2004)).

[39] *See id.* at 963 F.2d at 556.

[40] *See* USSG 2D1§ 2D.1(a), n.1 (2013).

[41] *See* USSG § 2D1.1, n.1 (2013).

[42] *See id.* (expounding upon unclear definition of "mixture or substance").

mixture or substance to be counted."[43] In 1993, the Sentencing Commission amended the Guidelines, including the Application Notes to section 2D1.1, by adding the above-quoted passages, as well as another clarification that excluded the weight of an lysergic acid diethylamide ("LSD") container from the sentencing calculation.[44]

During the reign of the Anti-Drug Abuse Act, the Supreme Court decided *United States v. Chapman*.[45] In *Chapman,* the three plaintiffs were convicted of selling one thousand doses of LSD in violation of 21 U.S.C. § 841.[46] The weight of the LSD alone was 0.05 grams, but when the blotting papers were included, the weight increased to 5.57 grams, causing the plaintiffs to be sentenced to the five-year mandatory minimum for possession of greater than one gram.[47] The Supreme Court affirmed the district court's ruling that § 841(b)(1)(B)(v) required the weight of the carrier medium be included in the weight for sentencing.[48] In his dissent, Stevens posits that the consequences of the majority's interpretation of the statute are so bizarre, that it cannot be what Congress intended.[49]

In *Chapman*, the Court did admit that situations may arise where a sentence would be disproportionate or even arbitrary.[50] While the Court held that Chapman used the typical carrier medium for LSD, they could imagine a case where using the plain-language approach could result in a disparate sentence due to the weight of the carrier medium being much greater than the drug.[51]

In 1993, in response to the conflict that arose among the circuits post-*Chapman,* the United States Sentencing Commission approved Amendment 484 to the Sentencing Guidelines.[52] This amendment clarified

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[43] *See id.*

[44] *See* USSG Appendix C, amends. 484, 488 (2013) (amending Guidelines to clarify differing interpretations of "mixture or substance" by courts).

[45] 500 U.S. 453 (1991).

[46] *See id.* at 467-68; *see also* 21 U.S.C. § 841(a) (2010) ("[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or . . . a mixture or substance . . . .").

[47] *See Chapman*, 500 U.S. at 455-56.

[48] *See id.* at 459 ("So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence.").

[49] *See id.* at 468. (arguing that such results will contradict Congress's intent for uniformity in sentencing). *Id.* at 474; S. REP. NO. 98-225, at 45-46 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3228-29 ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.")

[50] *Chapman*, 500 U.S. at 466.

[51] *See id.* at 466.

[52] *See* USSG Appendix C., amend. 488 (2013) (controlling mandatory minimum sentence under § 841(b)).

the definition of "mixture" and "substance" providing that "mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used."[53]

III. FACTS

As a result of the decision in *Chapman*, the circuits have been split on their interpretations. A number of the circuits have taken the "market-oriented" approach, holding that only the useable portion of the drug should be weighed for sentencing purposes.[54] However, other circuits have held the plain-language approach applies and the gross weight should be taken into account for sentencing, including unusable material as well as carrier materials, such as blotting papers.[55] The First, Fifth, and Tenth Cir-

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[53] *See* USSG § 2D1.1, note 1 (2013); United States v. Sprague 135 F.3d 1301, 1305 (9th Cir. 1998) (holding unusable materials that must be removed before drug use must be excluded from sentence); USSG § 2D1.1, comment (n.1) (2013) ("The weight of a packaging material to which a controlled substance is bonded, such as 'fiberglass in a cocaine/fiberglass bonded suitcase' or 'beeswax in a cocaine/beeswax statue[,' is excluded]."); *see also* United States v. Stewart, 361 F.3d 373, 378 (7th Cir. 2004) ("[W]eighing everything for sentencing purposes can lead to irrational results contrary to congressional intent.").

[54] *See* United States v. Stewart, 361 F.3d 377, 380 (7th Cir. 2004) ("[O]nly usable or consumable mixtures or substances are included in the drug quantity for sentencing purposes . . . ."); United States v. Berroa-Medrano, 303 F.3d 277, 284 (3d Cir. 2002) (including entire weight of heroin that was heavily diluted with common cutting agents); United States v. Coleman, 166 F.3d 428, 432 (2d Cir. 1999) (including weight of moisture in fully processed, consumable crack); United States v. Sprague, 135 F.3d 1301 (9th Cir. 1998) (finding that if able to be separated, non-useable material should be excluded for calculating sentence); United States v. Carter, 110 F.3d 759, 761 (11th Cir. 1997) (holding weight of pot was too wet to use for sentencing purposes); United States v. Tucker, 20 F.3d 242, 244 (7th Cir. 1994) (including weight of moisture in fully processed, consumable crack); United States v. Jackson, 115 F.3d 843, 848 (11th Cir. 1993) (holding sugar and cocaine package should not have been included in weight); United States v. Johnson, 999 F.2d 1192, 1197 (7th Cir. 1993) (excluding weight of unusable waste water in solution with just traces of cocaine base); United States v. Newsome, 998 F.2d 1571, 1575-79 (11th Cir. 1993) (finding "gross weight of 'unusable mixtures' should not be equated with the weight of a controlled substance for sentencing purposes"); United States v. Palacios-Molina, 7 F.3d 49, 53-54 (5th Cir. 1993) (holding weight of liquid not to be used in sentencing because cocaine not marketable until distilled); United States v. Acosta, 963 F.2d 551, 556 (2d Cir. 1992) (excluding weight of creme liqueur from solution containing creme liqueur used to conceal drug); United States v. Robins, 967 F.2d 1387, 1389 (9th Cir. 1992) (refusing to include weight of cornmeal mixed into cocaine because cornmeal portion is not "usable"); United States v. Rodriquez, 975 F.2d 999, 1008 (3d Cir. 1992) (excluding weight of unusable boric acid from packages containing boric acid and layer of cocaine); United States v. Jennings, 945 F.2d 129, 135-36 (6th Cir. 1991) (declining to include entire contents of crockpot containing methamphetamine and other chemicals for sentencing purposes); United States v. Rolande-Gabriel, 938 F.2d 1231, 1235 (11th Cir. 1991).

[55] *See* United States v. Clarke, 564 F.3d 949, 955 (8th Cir. 2009) ("[T]he entire weight of the biphase liquid justly is attributed to [defendant] . . . ."); United States v. Treft, 447 F.3d 421, 425 (5th Cir. 2006) ("The law in this Circuit is clear: the *Chapman* marketability test does not apply

cuits hold if a detectable amount of narcotic is contained in a material, even if such material is not ingestible, then it should be included in the total weight for sentencing.[56] Even though this method is easy to apply in practice, it has great potential to lead to absurd results.[57] In *United States v. Salgado-Molina*, the court held that including liquid waste for purposes of determining sentence length was no more logical than including the weight of the Atlantic Ocean when calculating the sentence of a hypothetical defendant who floated cocaine across the water.[58] By following the plain-language approach, courts have chosen to include in the weight for sentencing twice the total weight of suitcases (minus the metal parts); the weight of a beeswax statue; twenty-four gallons of liquid containing detectable traces of methamphetamine, even though the liquid was considered to be waste; and over forty pounds of liquid waste in a crockpot containing only eleven pounds of finished meth powder.[59] In *United States v. Mahecha-Onofre*, the suitcase, minus the metal parts, weighed 9.5 kilograms, while the cocaine alone weighed just 2.5 kilograms and Mahecha-Onofre was sentenced for a total of twelve kilograms.[60]

The Second, Third, Sixth, Ninth, and Eleventh Circuits reject this notion and hold that if the material in which the narcotic is contained is uningestible, it should not be included in the calculation.[61] This method fur-

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when determining whether a liquid is a mixture or substance containing methamphetamine under § 841."); United States v. Kuenstler, 325 F. 3d 1015, 1023 (8th Cir. 2003) (finding liquid solutions were mixtures containing methamphetamine under plain meaning of term "methamphetamine"); United States v. Richards, 87 F.3d 1152, 1155, 1158 (10th Cir. 1996) (utilizing ordinary meaning of "mixture"); United States v. Mahecha-Onofre, 936 F.2d 623, 625-26 (1st Cir. 1991) (finding that cocaine combined with acrylic material to form part of suitcase was "mixture").

[56] *See supra*, cases cited at note 55 (rejecting notion that sentences should be based on amount of useable drug material).

[57] *See supra* note 55 and accompanying text (sentencing defendants based upon weight of carrier, not upon drug quantity).

[58] United States v. Salgado-Molina, 967 F.2d 27, 29 (2nd Cir. 1992).

[59] *See* United States v. Lopez-Gil, 965 F.2d 1124, 1126 (1st Cir. 1992) (describing lower court's inclusion of weight of suitcases in sentence even though drug was easily distinguishable); United States v. Restrepo-Contreras, 942 F.2d 96, 99 (1st Cir. 1991) (affirming lower court's treatment of cocaine and beeswax as mixture; *Mahecha-Onofre*, 936 F.2d at 625-26 (finding suitcase/cocaine chemically-bonded material was mixture).

[60] *See Mahecha-Onofre*, 936 F.2d at 625.

[61] *See* United States v. Stewart, 361 F.3d 373, 377 (7th Cir. 2004) ("[O]nly useable or consumable mixtures or substances are included in the drug quantity for sentencing purposes"); United States v. Berroa-Medrano, 303 F.3d 277, 284 (3d Cir. 2002) (including entire weight of heroin that was heavily diluted with common cutting agents); United States v. Coleman, 166 F.3d 428, 432 (2d Cir. 1999) (including weight of moisture in fully processed, consumable crack); United States v. Sprague, 135 F.3d 1301, 1305 (9th Cir. 1998) (finding that if able to be separated, non useable material should be excluded for calculating sentence); United States v. Jackson, 115 F.3d 843, 848 (11th Cir. 1997); United States v. Carter, 110 F.3d 759 (11th Cir. 1997) (holding weight of marijuana was too wet to use for sentencing purposes); United States v. Tucker, 20 F.3d 242,

thers the goals of Congress ensuring that the offender is punished for the amount of marketable drug that he has dealt, and not based upon how heavy a substance he has chosen in which to transport it.[62] "[I]t is not *how* one trafficks in the commodity . . . that is important but, rather, *how much* of the commodity one transports or distributes that is relevant in calculating the weight of a controlled substance for sentencing purposes."[63]

The common drugs, which are affected heavily by this distinction in weighing methods, are among some of the most prevalent in our culture: methamphetamine, cocaine, LSD, marijuana, and heroin. The circuits employing the market-oriented approach argue that the rationale of *Chapman* was that material that is used to cut the pure controlled substance or serve as a carrier should be included in the weight.[64] However, it was not the intent of *Chapman* to base sentences on the weight of containers, which is evident from the court's having reasoned that even though the mixture was ingestible since the wine cocaine mix was drinkable, it was not intended for consumption in that form, but was intended only to be transported in that form, and therefore should not be included in the calculation. [65]

IV. ANALYSIS

The meaning of the phrase "mixture or substance" as used in section 2D1.1and § 841(b) is unclear.[66] Neither section 2D1.1, nor § 841(b)

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244 (7th Cir. 1994) (including weight of moisture in fully processed, consumable crack); United States v. Newsome, 998 F.2d 1571, 1575-79 (11th Cir. 1993) (applying sentencing guidelines to show that "gross weight of 'unusable mixtures' should not be equated with the eight of a controlled substance for sentencing purposes"); United States v. Palacios-Molina, 7 F.3d 49, 53-54 (5th Cir. 1993) (weight of liquid in which cocaine mixed not to be used in sentencing because cocaine not marketable until distilled); United States v. Johnson, 999 F.2d 1192 (7th Cir. 1993) (excluding weight of unusable waste water in solution composed of waste water and traces of cocaine base); United States v. Robins, 967 F.2d 1387, 1389 (9th Cir. 1992); United States v. Rodriquez, 975 F.2d 999, 1005 (3d Cir. 1992) (excluding weight of unusable and toxic boric acid from packages containing boric acid and a thin layer of cocaine); United States v. Jennings, 945 F.2d 129, 133 (6th Cir. 1991); United States v. Rolande-Gabriel, 938 F.2d 1231, 1236 (11th Cir. 1991).

[62] *Acosta*, 963 F.2d at 556 (discussing sentence should be based on quantity of drug not weight of means of transport).

[63] *Id.* at 556 (contending amount of drug trafficked is more relevant to sentencing than container it is carried in).

[64] *See* United States v. Sprague, 135 F.3d 1301, 1304 (9th Cir. 1998) (discussing that it would be irrational to include unusable material in weight); Chapman v. United States, 500 U.S. 453, 463 (1991) ("[T]hose items are … clearly not mixed or otherwise combined with the drug.").

[65] *See Sprague*, 135 F.3d at 1304; *Johnson*, 999 F.2d at 1197 ("To read the statute or *Chapman* as requiring inclusion of the weight of all mixtures, whether or not they are usable, ingestible, or marketable, leads to absurd and irrational results contrary to congressional intent.").

[66] *See supra* note 42and accompanying text (explaining the ambiguities in the terms "mixture

expressly define the meaning of "mixture or substance," or how it should be measured for the purposes of the statute.[67] The courts are entrusted with enforcing laws enacted by Congress, and if there is a question as to the meaning, they must look to Congress's intent in drafting.[68] In this instance, the ambiguity of the meaning of the phrase "mixture or substance" can be resolved by analyzing congressional intent.[69] Once intent is determined, the meaning of "mixture or substance" must be given a reading that furthers Congress's goals.[70] The courts have a responsibility to enforce Congress's laws and to consider Congress's intent in drafting those laws while doing so.[71]

The market-oriented approach is more in line with the intent of Congress when drafting 841(b).[72] In order to accomplish its goals, Congress had "adopted a 'market-oriented' approach to punishing drug trafficking."[73] "In the Policy Statement of the Guidelines, the Commission reiterated its Congressional mandate to establish a system that embraced honesty, uniformity, and proportionality in sentencing."[74] The court must apply a market-oriented approach to reduce the disparity in sentencing of similarly situated offenders who committed similar offenses.[75] The lack of uniformity caused by applying different approaches violates Congress's goals in eliminating disparity in sentencing.[76] Furthermore, using the plain-language approach will cause punishments to be unpredictable from

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or substance").

[67] *See supra* note 42and accompanying text (discussing lack of clear explanation of exact meaning of phrase "mixture or substance").

[68] *See* Belfiore, *supra* note 12.

[69] *See supra* note 29 and accompanying text.

[70] *See e.g.*, United States v. Stewart, 361 F.3d 373, 378 (7th Cir. 2004) ("[W]eighing everything for sentencing purposes can lead to irrational results contrary to congressional intent."); United States v. Johnson, 999 F.2d 1192, 1197 (7th Cir. 1993) ("To read the statute or *Chapman* as requiring inclusion of the weight of all mixtures, whether or not they are usable, ingestible, or marketable, leads to absurd and irrational results contrary to congressional intent."); United States v. Acosta, 963 F.2d 551, 556 (2d Cir. 1992) (holding total weight of mixture method is contrary to congressional intent).

[71] *See* United States v. Marshall, 908 F.2d 1312, 1327-292828 (7th Cir. 1990) (Cummings, J., dissenting) (examining legislative history of 21 U.S.C. § 841).

[72] *See* United States v. Richards, 87 F.3d 1152, 1158-59 (10th Cir. 1996) (Portfilio, J., dissenting) (opining that plain-language approach will cause results opposite to intent of the drafters of statute).

[73] *See Chapman*, 500 U.S. at 460.

[74] *See* Todd E. Goyner, *Federal Sentencing in a Post-Chapman World: What is a "Mixture or Substance" Anyhow?*, 46 KAN. L. REV. 983, 988 (1998); *see also* Pub. L. No. 99-570, 100 Stat. 3207 (explaining policy concerns regarding sentencing).

[75] *See supra* notes 55-58 and accompanying text (demonstrating potentially absurd sentencing results absent use of market-oriented approach).

[76] *See* Froyd, *supra* note 4 at ,1471.

jurisdiction to jurisdiction, and from offender to offender, because even if the offense is similar, and there is an identical amount of drug involved, the carriers may have different weights thus producing differing sentences.[77] The market-oriented approach will help to carry out another one of Congress's goals: —sentences proportionate to the crime committed.[78] The best way to ensure the punishment fits the crime and to reduce disparities in sentences is to sentence the offender based on the amount of drugs involved in his offense.[79]

Sentences for drug offenders should increase based on the weight of the drug ready for retail distribution.[80] In the case of *United States v. Robins*, the court held that the weight of cornmeal in which cocaine was mixed, must not be included in the weight for sentencing purposes.[81] Even though the cornmeal was mixed with the cocaine for distribution purposes, in order to dilute cocaine to increase the amount available for sale and trick buyers into purchasing the diluted mixture, the court held that it should not be included in the offense weight.[82] The court found that Congress's legislative intent did not require it to conclude that more than the useable portion of the drug was to be considered when sentencing.[83] In his dissent, Judge Cummings posited that there was no evidence of Congress's desire for the carrier weight to be included when determining sentences in LSD cases.[84] In fact, he stated there is "good reason" to believe that Congress was not aware that the court's interpretation of the statute would produce such inequitable results.[85]

a. The Subsequent 1993 Amendments

The Sentencing Commission's 1993 Amendments served to clarify the muddled mess of the varied interpretations of "mixture or substance"

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[77] *See id.* at 1476.

[78] United States v. Richards, 87 F.3d 1152, 1158 (10th Cir. 1996) (Seymour, C.J., dissenting) (using plain-language approach will have effects contrary to intent of drafters of statute).

[79] *See* Froyd, *supra* note 4, at 1476 (discussing objectives of certainty, uniformity, and proportionality Congress sought to achieve through sentencing reform).

[80] *See* Belifore, *supra* note 12.

[81] *See* United States v. Robins, 967 F.2d 1387, 1390 (9th Cir. 1992) (stating sole purpose of cornmeal was to mask identity of cocaine).

[82] *See id.* at 1390-91 (reasoning that although cornmeal is consumable, it does not increase amount of useable, saleable drug).

[83] *See id.* at 1390-91.

[84] *See* United States v. Marshall, 908 F.2d 1312, 1327-28 (7th Cir. 1990) (Cummings, J., dissenting).

[85] *Id.*

following *Chapman*.[86] However, instead of clarifying, the amendments may have caused additional ambiguities.[87] The amendment espoused the marketable approach of the Second, Third, Sixth, Ninth, and Eleventh Circuits, stating a "mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used."[88]

In the Amendments, the Sentencing Commission specifically references situations where narcotics are bonded or affixed to substances from which they need to be removed for use, and thus not included in the sentencing waste.[89] The amendments also addressed waste water., which, even if containing some narcotic, is excluded.[90] Furthermore, the Sentencing Commission references specific LSD cases in the amendment, which demonstrates the need to deal differently with that drug than from other narcotics.[91]

b. Interpretation of Chapman

Some circuits' interpretations of *Chapman* contradict Congress's intended objectives for sentencing reform.[92] In an effort to clarify the meaning of the phrase "mixture or substance," some courts facing this problem focus on the reasoning of the Supreme Court in deciding *Chapman*.[93] "Most courts seem to fall into two schools of thought, one of which

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[86] *Id.*

[87] Joseph Rizzo, Comment, *Federal Sentencing Guidelines: What Is the Fair Interpretation of "Mixture or Substance"?*, 14 PACE L. REV. 301, 325-26 (1994) (identifying interpretation problems arising from phrase "mixture or substance").

[88] *Id.*

> "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 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.

Id. at 325, n. 191.

[89] *See* USSG Appendix. C., amend. 488 (2013).

[90] *See* USSG Appendix. C., amend. 484 (2013) (clarifying that waste water is not to be included in calculating sentences under amendments).

[91] *Id.*

[92] *See* Froyd, *supra* note 4 at 1476.

[93] *See supra* note 10 and accompanying text (describing holding of *Chapman* and listing cas-

centers its inquiry on whether the mixture at issue, like the blotter paper, is usable, ready for ingestion or consumption and another which does not rely on a usable/unusable distinction."[94] A broad application of *Chapman*, promoting the plain-language approach across all situations, undermines the primary concerns of the Sentencing Guidelines.[95] Such an application encourages disparities in sentencing by going against all congressional goals of rationality and uniformity in sentencing.[96] Such a "hyper-technical or mechanical" application of the statute, which uses the entire weight of the substance for sentencing, defeats the purpose of creating a system that sentences criminals appropriately and proportionally based upon the severity of their crimes.[97] By using the weight of the amount of useable drug, courts will be able to effectively punish dealers based on the amount they sell, which will produce uniform results across the board.[98] Their punishment will be a direct result of the amount of drug that they sold, and thus produce uniform results.[99]

The Supreme Court in *Chapman* admitted that a situation may arise where the weight of the carrier immensely outweighs the amount of drug, and a disproportionate sentence may result.[100] The facts of *Rolande-Gabriel* embody this situation.[101] Just seventy-two grams of a 241.6-gram mixture were useable drug substance.[102] The court reasoned that to include the entire weight was unjust and undermined the noble intent of Congress to provide fair and proportional sentences to offenders.[103] The court distinguished *Rolande-Gabriel* from *Chapman* based on the reasoning that using the plain-language meaning of "mixture" in an LSD case involving standard carrier mediums does not produce an irrational result as it would based on the specific facts in the *Rolande-Gabriel* case.[104] The reasoning in

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es on both sides of split).

[94] *See* Belfiore, *supra* note 12, § 2.

[95] *See* United States v. Richards, 87 F.3d 1152, 1158-59 (10th Cir. 1996) (Seymour, J., dissenting) (opining that plain-language approach will cause results opposite to intent of drafters of statute).

[96] *See id.* at 1196.

[97] *See* United States v. Rolande-Gabriel, 938 F.2d 1231, 1235, 1238 (11th Cir. 1991) ("[W]e hold that the rule of lenity should be applied to the statute to avoid absurdity and irrationality in the application of the Sentencing Guidelines."); *see also* USSG § 1A1 Intro (A) (1)(2) (2013).

[98] *See Rolande-Gabriel*, 938 F.2d at 1235 (choosing rational and uniform approach to sentencing).

[99] *See id.*

[100] *See* Chapman v. United States, 500 U.S. 453, 460 (1991); Belfiore, *supra* note 20, *supra* note 28 at 585.

[101] *See Rolande-Gabriel*, 938 F.2d at 1232-33, 1237.

[102] *See id.* at 1235.

[103] *See id.* at 1235.

[104] *See id.* at 1236.

Chapman works specifically because the drug cannot be distinguished from its carrier medium.[105] The reasoning does not transfer to cases involving other drugs.[106] The Court makes a point to say that *with respect to LSD*, Congress provided that the sentences should be based on mixture weight, thus distinguishing LSD from other drugs.[107]

The United States Court of Appeals for the Eleventh Circuit took a step further with its holding in *Bristol*, when it moved past the ingestibility test and ruled not to include the weight of wine, into which cocaine had been mixed, even though it was capable of being consumed.[108] The court reasoned that the true purposed of the wine, although consumable, was to transport the cocaine, and thus should not be included.[109]

c. Disparity in Sentences

Although one benefit of the plain-language approach is that it is relatively easily applied–just weigh the entire mixture–this does not outweigh the inequitably disparate sentences it produces, and this disparity is precisely the miscarriage of justice that Congress was trying to prevent by enacting the Sentencing Guidelines.[110] Under the plain-language approach, the court's inclusion of the weight of unusable mixtures to determine sentences leads to "widely divergent sentences for conduct of relatively equal severity."[111] By contrast, the market-oriented approach holds that there is no rational basis for a sentence based on the weight of useless material that is neither ingestible, nor marketable, and therefore, it should be excluded, thus leading to a punishment based directly on the amount of drug involved.[112] Because of the high risk of disproportionate sentencing, courts have frequently been unwilling to determine sentences based on the weight of the total mixture.[113] Judge Posner, in his dissent in *Marshall*, concluded that "[t]o base punishment on the weight of the carrier medium makes

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[105] *See id.* at 1237.

[106] *See Rolande-Gabriel*, 938 F.2d at 1237 (distinguishing cocaine from LSD with regard to weighing approaches).

[107] *See id.*; *see also* Chapman v. United States, 500 U.S. 453, 466 (1991); Rizzo, *supra* note 87 at 316.

[108] *See* United States v. Bristol, 964 F.2d 1088, 1090 (11th Cir. 1992).

[109] *Id.*

[110] *See supra* note 8 and accompanying text (indicating Congress's goal to rectify sentencing disparities).

[111] *See Rolande-Gabriel*, 938 F.2d at 1233.

[112] *See supra* note 10; United States v. Johnson, 999 F.2d 1192, 1196 (7th Cir. 1993) (citing United States v. Acosta, 963 F.2d 551 (2d Cir. 1992)).

[113] *See supra* note 28.

about as much sense as basing punishment on the weight of the defendant."[114]

The plain-language approach leads not simply to a disparity in sentences, but often to absurd results.[115] "To read the statute or *Chapman* as requiring inclusion of the weight of *all* mixtures, whether they are useable, ingestible, or marketable, leads to absurd and irrational results contrary to congressional intent."[116] According to his dissent in *Chapman*, Justice Stevens posited that a result of the majority's construction of the statute would be sentences "so anomalous that they will undermine the very uniformity that Congress sought to achieve when it authorized the Sentencing Guidelines."[117] For example, in *Johnson*, Judge Laythe court describes a potential scenario of a marijuana farmer who harvests his crop, leaving trace amounts in the soil.[118] In the hypothetical, the farmer plows the field, mixing the marijuana throughout the soil.[119] It would be absurd for the farmer to be sentenced on the entire weight of soil in the field instead of just the harvested crop.[120] Or of a defendant disposing of drugs in the toilet, and the sentence being based upon the weight of the drug combined with the toilet bowl water.[121] Furthermore, as Judge Posner noted, the severity of the sentences in LSD cases, particularly, would be comparable to those in other drug cases only if the weight of the carrier were disregarded.[122] Including the total weight of the mixture, which consists of just a small amount of useable drug that had been contained in a larger amount of non-drug material, leads to disproportionate and arbitrary sentences.[123]

Federal courts are charged with the responsibility of enforcing the laws enacted by Congress. In order to effectively do so, these courts must consider Congress's intent in drafting and enacting federal laws. By ruling according to the plain-language approach, "[t]he Court . . . shows little respect for Congress's handiwork when it construe[d] a statute to undermine

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[114] United States v. Marshall, 908 F.2d 13211312, 1333 (7th Cir. 1990) (Posner, J. dissenting).

[115] *See Johnson*, 999 F.2d at 1192, 1196

[116] *See supra* note 10; *see also Johnson*, 999 F.2d at 1197.

[117] *See also* Chapman v. United States, 500 U.S. 453, 468 (1991) (Stevens, J., dissenting).

[118] *See Johnson*, 999 F.2d at 1196.

[119] *See id.*

[120] *Id.* at 1196-97.

[121] *See* United States v. Johnson, 999 F.2d 1192, 1196 n. 8 (7th Cir. 1993).

[122] *See* United States v. Chapman, 500 U.S. 453, 469 (1991) (citing United States v. Marshall, 909 F.2d 1312, 1335 (7th Cir. 1990) (Posnor, J., dissenting).

[123] *See* United States v. Salgado-Molina, 967 F.2d 27, 29 (2nd Cir. 1992) ("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.").

the very goals that Congress sought to achieve."[124] By applying Chapman across the board, the plain-language circuits are disregarding the intent of Congress and condemning offenders to sentences that are neither fair, nor proportionate, nor uniform, nor just.

V. CONCLUSION

Almost always, the drug quantity involved in an offense is weighed most heavily in determining a defendant's sentence. Therefore, it is imperative that the weight be calculated in the most fair and accurate way possible. Congress recognized this importance when calling for fairness, proportionality, and uniformity in drafting the Sentencing Guidelines. The market-oriented approach carries out the intent of Congress and provides the fairest, and most accurate means to measure drug quantities. Furthermore, it provides proportionality and predictability in sentencing, thereby building the public's confidence in the justice system. By contrast, the plain-language approach breeds unfair and absurd results causing confusion and instability in the way sentences are determined. In order to carry out Congressional intent and further the goals of fairness, the market-oriented approach is the best path to follow.

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[124] *See* United States v. Chapman, 500 U.S. 453, 477 (1991) (Stevens, J., dissenting).