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# Comment

## Federal Sentencing Guidelines: What Is the Fair Interpretation of “Mixture or Substance”?

### I. Introduction

The phrase “mixture or substance,” was added to the language of the Controlled Substances Act (CSA)<sup>1</sup> by the Narcotics Penalties and Enforcement Act of 1986 (NPEA).<sup>2</sup> This phrase, which is also included in section 2D1.1 of the Federal Sentencing Guidelines (“Guidelines”),<sup>3</sup> seems easy enough to interpret when viewed on its own, but when read in the context of the NPEA and the Guidelines it has caused several federal circuit courts of appeal to split as to its true meaning.<sup>4</sup>

This Comment will focus on the conflict among the circuit courts of appeal as to whether the weight of an uningestible or unmarketable carrier medium<sup>5</sup> that contains a detectable amount of controlled substance should be included when determining the weight of a “mixture or substance” for purposes of

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1. Pub. L. No. 91-513, 84 Stat. 1242, tit. II (1970) (codified as amended in scattered sections of 18, 21 and 42 U.S.C. (1988)) [hereinafter CSA].

2. Pub. L. No. 99-570, 100 Stat. 3207-2, tit. I (1986) (codified as amended in scattered sections of 18, 21, and 28 U.S.C. (1988)) [hereinafter NPEA].

3. 18 U.S.C.A. app. 4 (West Supp. 1993) [hereinafter Guidelines]. The Guidelines’ footnote in section 2D1.1 reads “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 detectable amount of the controlled substance.” *Id.* § 2D1.1 (footnote) (emphasis added).

4. See *infra* notes 7-8 and accompanying text.

5. An unmarketable or uningestible carrier medium is any material that is mixed with a controlled substance solely for the purpose of smuggling or transporting that substance. If the drug must be extracted from the medium in order for it to be “useable” by the street buyer, then the mixture of the drug and the material is considered unmarketable or uningestible.

calculating the base offense level under the Guidelines.<sup>6</sup> Some circuits held that the weight of the uningestible or unmarketable substance should be included in determining the weight of the mixture or substance for sentencing purposes.<sup>7</sup> Other circuits reached the opposite conclusion and do not include the weight of the uningestible or unmarketable substance for sentencing purposes.<sup>8</sup>

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6. The sentencing table has two major components: The first is the base "Offense Level (1-43), [which] forms the vertical axis [of the table] and is determined by the kind and weight of [the] controlled substance." *United States v. Lopez-Gil*, 965 F.2d 1124, 1133 n.16 (1st Cir. 1992). The second component is the Criminal History Category, which forms the horizontal axis, and is determined by a variety of factors such as length and number of prior sentences, and whether the offense was committed while the defendant was on probation or escape status. *Id.* "The intersection of the Offense Level and the Criminal History Category is the Guideline range in months of imprisonment." *Id.*

The table below shows a portion of the sentencing table:

Offense Level	Criminal History Category					
	I	II	III	IV	V	VI
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37

18 U.S.C.A. app. 4, ch. 5, pt. A (West Supp. 1993). See Application notes 1-3 of this section for a more complete explanation of how the Sentencing Table is used to determine the Guideline range. *Id.* at comment(n.1-3).

7. See, e.g., *United States v. Walker*, 960 F.2d 409, 412-13 (5th Cir. 1992) (holding that the district court properly used the entire weight of a liquid mixture which contained methamphetamine, a controlled substance, even though the government stipulated that over 95% of the liquid consisted of solvents); *United States v. Fowner*, 947 F.2d 954 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1998 (1992) (holding that the inclusion of 24 gallons of liquid mixture containing detectable amounts of methamphetamine was proper even though an expert testified that the liquid was waste); *United States v. Mahecha-Onofre*, 936 F.2d 623, 625 (1st Cir. 1991) (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).

8. See, e.g., *United States v. Acosta*, 963 F.2d 551, 556-57 (2d Cir. 1992) (holding that the weight of creme liqueur in which cocaine had been mixed should not be included in determining the appropriate sentence); *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1236 (11th Cir. 1991) (holding that the term mixture in the Guidelines does not include unusable mixtures); *United States v. Jennings*, 945 F.2d 129, 136 (6th Cir. 1991) (holding that interpreting the statute to require the inclusion of the entire weight of a crockpot containing poisonous by-products with a detectable amount of methamphetamine would produce an illogical result and would be contrary to the legislative intent underlying the statute).

The conflict stemmed from the different interpretations of the meaning of the phrase "mixture or substance",<sup>9</sup> located in the Guidelines, given by the different circuit courts of appeal. Even though the United States Supreme Court has recently interpreted the phrase "mixture or substance" in deciding that the weight of the carrier medium used for Lysergic Acid Diethylamide (LSD)<sup>10</sup> should be included in determining the appropriate sentence under the Guidelines in *Chapman v. United States*,<sup>11</sup> the conflict still persists regarding mixtures of other drugs. Resolution of this conflict is important because it can result in disparate sentences across the country for violation of the same federal laws.<sup>12</sup>

The United States Sentencing Commission (hereinafter "Sentencing Commission") has recently proposed, and Congress has accepted, amendments to the Guidelines.<sup>13</sup> The amendments to section 2D1.1 were specifically designed to try to resolve the conflict caused by the different interpretations of the phrase "mixture or substance" by the circuit courts of appeal.<sup>14</sup> All references to the Guidelines refer to the pre-1993 version of the Guidelines unless otherwise specified. The 1993 amendments will be specifically discussed in a separate section.

Section II.A. of this Comment will briefly discuss the statutes involved, mainly the NPEA and the Guidelines. Sections II.B. and II.C. will examine the legislative histories of the NPEA and the Guidelines respectively. Section II.D. will analyze the Supreme Court decision in *Chapman* as well as the lower court decisions. Section II.E. will discuss circuit courts of appeal decisions that include the weight of uningestible material when calculating the base offense level. Section II.F. will

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9. See *Fowner v. United States*, 112 S. Ct. 1998 (1992) (White, J., dissenting from denial of *cert.*); *Walker v. Guerra*, 113 S. Ct. 443 (1992) (White and Blackmun, JJ., dissenting from denial of *cert.*); *Sewell v. Sherrod*, 113 S. Ct. 1367 (1993) (White and Blackmun, JJ., dissenting from denial of *cert.*). See also *supra* notes 7-8 for a comparison of the different circuit holdings.

10. LSD is "a crystalline compound that causes psychotic symptoms similar to those of schizophrenia." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1351 (1976).

11. 111 S. Ct. 1919, 1929 (1991).

12. *Fowner v. United States*, 112 S. Ct. 1998, 2000 (1992) (White, J., dissenting from denial of *cert.*).

13. See *infra* notes 185-88 and accompanying text.

14. 58 Fed. Reg. 27,148, 27,155 (1993) (proposed May 6, 1993).

discuss the circuit courts of appeal decisions that do not include the weight of uningestible material when calculating the base offense level. Section II.G. will examine the pertinent sections of the 1993 amendments to the Guidelines (1993 Amendments).

Section III.A. will analyze the effect the *Chapman* decision had on cases involving controlled substances other than LSD. Section III.B. interprets the phrase "mixture or substance" in conjunction with the legislative histories of the NPEA and the Guidelines. The overall perception that the Guidelines system is a failure will be briefly discussed in section III.C. Finally, Section III.D. will discuss the possible effects of the 1993 amendments on future cases involving the weight of a "mixture or substance" of a controlled substance.<sup>15</sup>

Section IV concludes that it is more logical not to include the weight of uningestible material in determining the base offense level. Including the weight of uningestible material leads to disparate sentencing for similarly situated offenders which is contrary to one of the main purposes of the Guidelines. This section also concludes that this conflict will not likely be resolved by the Supreme Court. It is up to the Sentencing Commission to define for the courts what is meant by "mixture or substance." Finally, this section concludes that although the Sentencing Commission has attempted to clarify the meaning of the phrase "mixture or substance" in the 1993 amendments it is questionable whether these amendments will solve the problem of disparate sentencing in this area.

## II. Background

### A. Statutes Involved

The Narcotics Penalties and Enforcement Act of 1986 (NPEA)<sup>16</sup> makes it unlawful for a person to manufacture or distribute a controlled substance.<sup>17</sup> The Act also provides for maxi-

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15. As of the writing of this note this author is unaware of any case involving the "mixture or substance" of a controlled substance that has been decided using the amended version of the Guidelines.

16. NPEA, *supra* note 2.

17. *Id.* This section reads in pertinent part:

"Except as authorized in this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with

mum and minimum sentences depending on the type of drug involved<sup>18</sup> and, in many instances, on the weight of a "mixture or substance" containing a detectable amount of the drug involved.<sup>19</sup> However, the NPEA does not provide a definition for the phrase "mixture or substance."<sup>20</sup>

The Guidelines contain the Drug Quantity Table<sup>21</sup> which the courts use to determine the Base Offense Level of the crime in cases involving the "[u]nlawful [m]anufacturing, [i]mporting, [e]xporting, or [t]rafficking" of drugs.<sup>22</sup> The Base Offense Level is graded according to the weight of the particular controlled substance involved,<sup>23</sup> which includes the weight of a "mixture or substance containing a detectable amount of the controlled substance."<sup>24</sup> The courts impose a sentence within the prescribed range dictated by the Base Offense Level.<sup>25</sup> This section of the Guidelines provides no definition of the phrase "mixture or substance." The section merely states that "'mixture or substance' as used in this guideline has the same meaning as in [provision] 21 U.S.C. Section 841" of the NPEA.<sup>26</sup>

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intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a) (1988).

18. See 21 U.S.C. § 841(b) (1988).

19. *Id.* This section reads in pertinent part: "In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life." *Id.* § 841(b)(1)(A)(i).

20. See *id.* § 802 (1988); see also *Chapman v. United States* 111 S. Ct. 1919, 1925 (1991); *United States v. Rodriguez*, 975 F.2d 999, 1004 & n.9 (3d Cir. 1992); *United States v. Lopez*, 965 F.2d 1124, 1127 (1992) (citing *Chapman*, 111 S. Ct. at 1925).

21. 18 U.S.C.A. app. 4 § 2D1.1(c) (West Supp. 1993).

22. *Id.* § 2D1.1. See *id.* § 1B1.1 for the steps to be taken by the court in determining the sentence to be imposed. See also Victor Jay Miller, Note, *An End Run Around The Exclusionary Rule: The Use of Illegally Seized Evidence Under The Federal Sentencing Guidelines*, 34 WM. & MARY LAW REV. 241, 264-69 (1992) (explaining in more detail the steps in section 1B1.1 and giving examples on how to apply them).

23. See 18 U.S.C.A. app. 4 § 2D1.1(c) (West Supp. 1993).

24. See *supra* note 3.

25. See 18 U.S.C. § 3553(a)(4), (b) (1988); 18 U.S.C.A. app. 4 ch. 1, pt. A (West Supp. 1993) (stating that the court must impose a sentence from within the Guideline range unless the court finds aggravating or mitigating circumstances that were "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").

26. 18 U.S.C.A. app. 4 § 2D1.1, comment(n.1) (West Supp. 1993).

The conflict among the circuits arose because no definition of "mixture or substance" exists in the NPEA or in the Guidelines.<sup>27</sup> Therefore, the courts were left with the task of defining "mixture or substance" by examining the plain meaning of the words, the legislative intent, and the underlying purpose of the statutes.<sup>28</sup> To obtain a better understanding of Congress's intentions when promulgating the NPEA and the Guidelines, it is important to investigate their legislative histories.<sup>29</sup>

### B. *Legislative History of the Narcotics Penalties and Enforcement Act of 1986*

The original Act was called the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA).<sup>30</sup> This was a comprehensive Act designed to deal with the growing problem of drug abuse in the United States.<sup>31</sup> The CDAPCA consisted of

27. See *supra* notes 7-8 for conflicting court decisions.

28. See, e.g., *United States v. Acosta*, 963 F.2d 551, 553-56 (2d Cir. 1992); *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1233-37 (11th Cir. 1991); *Chapman v. United States*, 111 S. Ct. 1919, 1924-34 (1991).

29. In order to facilitate the understanding of the legislative history of the NPEA the following chart is included for reference:

Amendments	Comprehensive Act	Title of Act Pertaining to 21 U.S.C. § 841
Original Act	Comprehensive Drug Abuse Prevention and Control Act of 1970	Title II-Controlled Substances Act
1984 Amendments	Title II-Comprehensive Crime Control Act of 1984	Chapter V, Controlled Substances Penalties Amendments Act of 1984
1986 Amendments	Anti-Drug Abuse Act of 1986	Title I - Narcotics Penalties and Enforcement Act of 1986

This Comment will track the legislative history of the NPEA because it contains provision 21 U.S.C. § 841 which the Guidelines refer to when defining the phrase "mixture or substance". See *supra* note 26 and accompanying text. The middle column gives the name of the comprehensive statute which may have included several titles or chapters designed to deal with a variety of different problems. Each title or chapter is an act and has a name, such as the NPEA. The last column includes the title or chapter of the comprehensive act affecting provision 21 U.S.C. § 841 and its name.

30. Pub. L. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 18, 19, 21, 26, 31, 42, 46, and 49 of the U.S.C.) [hereinafter CDAPCA].

31. H.R. Rep. No. 1444, 91st Cong., 2d Sess. pt. 1, at 1 (1970). The Act purported to accomplish its goal of dealing with the growing drug problem: "(1) through providing authority for increased efforts in drug abuse prevention and re-

three titles.<sup>32</sup> Title I established drug abuse rehabilitation programs;<sup>33</sup> title II provided the Justice Department with authority for law enforcement to deal with drug abuse problems;<sup>34</sup> and title III covered provisions relating to importation and exportation of drugs subject to abuse.<sup>35</sup> Title II, which affected provision 21 U.S.C. § 841, was called the Controlled Substances Act (CSA).<sup>36</sup> The CSA classified drugs into five different schedules according to their potential for abuse.<sup>37</sup> This law did not penalize according to the amount of drug possessed, but rather according to whether the drug was classified as a narcotic.<sup>38</sup> The first major amendment to the CDAPCA came with the passage of the Comprehensive Crime Control Act of 1984 (CCCA).<sup>39</sup>

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habilitation of users, (2) through providing more effective means for law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs." *Id.*

32. *Id.* at 3.

33. *Id.*; see also CDAPCA, *supra* note 30.

34. H.R. Rep. No. 1444, 91st Cong., 2d Sess. pt. 1, at 3 (1970).

35. *Id.*

36. CSA, *supra* note 1; see also *supra* note 29.

37. CDAPCA, *supra* note 30, § 202(b), 84 Stat. at 1247 (codified as amended in 21 U.S.C. § 812 (1988)). The five different categories or schedules are known as schedules I, II, III, IV, and V. *Id.* § 202(a), 84 Stat. at 1247 (codified as amended in 21 U.S.C. § 812(a) (1988)). The pertinent schedules are:

Schedule I drugs are classified according to the following criteria:

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

*Id.* § 202(b)(1), 84 Stat. at 1247 (codified as amended in 21 U.S.C. § 812(b)(1) (1988)).

Schedule II drugs are classified according to the following criteria:

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
- (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

*Id.* § 202(b)(2), 84 Stat. at 1247 (codified as amended in 21 U.S.C. § 812(b)(2) (1988)).

38. *Chapman v. United States*, 111 S. Ct. 1919, 1925 (1991).

39. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 5, 7, 8, 16, 18, 18 App., 19, 21, 23, 26, 28, 28 App., 29, 31, 40, 42, 49 App., and 50 App. U.S.C. (1988)) [hereinafter CCCA].



Chapter V, of the CCCA amended the CSA.<sup>40</sup> Chapter V was known as the Controlled Substances Penalties Amendments Act of 1984 (CSPAA).<sup>41</sup> The CSPAA "made punishment[s] dependent upon the quantity of the controlled substance involved."<sup>42</sup> The purpose of the amendment was "to provide a more rational penalty structure for the major drug trafficking offenses punishable under the CDAPCA."<sup>43</sup> According to the Senate Report<sup>44</sup> the CSPAA was designed to focus on three major problems of the CSA.<sup>45</sup>

The first major problem of the CSA identified by the Senate Report was that the statute did not take into consideration the amount of the controlled substance that was being sold or transported.<sup>46</sup> The Senate Report noted that although the CSA considered the relative dangerousness of the drugs involved, it did not consider the amount of drugs involved in sentencing an offender.<sup>47</sup> According to the Senate Report it was important to include the amount of drugs involved in sentencing an offender because it found that the penalties for trafficking in large quantities under the CSA were often inadequate.<sup>48</sup> The second problem of the CSA identified by the Senate Report was that the fine levels for major drug offenses were also inadequate.<sup>49</sup> The CSPAA addressed this problem by increasing the fine levels.<sup>50</sup> The third and final problem of the CSA identified by the Senate Report was the disparate sentencing involving Schedule I and Schedule II substances.<sup>51</sup> Both Schedule I and Schedule II

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40. CSA, *supra* note 1.

41. Pub. L. No. 98-473, 98 Stat. 2068, ch. V (1984) (codified as amended in scattered sections of 21 U.S.C. (1988)).

42. *Chapman*, 111 S. Ct. at 1925.

43. S. Rep. No. 225, 98th Cong., 1st Sess. 255 (1983) (citation omitted).

44. *Id.*

45. *Id.* at 255-56.

46. *Id.* at 255.

47. *Id.* at 255-56.

48. *Id.* at 256. Under the Controlled Substances Act a person who was caught trafficking 500 grams of heroin would get the same penalty as someone who was caught trafficking 10 grams of heroin. *Id.* at 255.

49. *Id.* at 255-56.

50. *Id.* at 256.

51. *Id.* The punishment depended on whether the controlled substance involved was a narcotic or non-narcotic drug. *Id.* Offenses involving Schedule I and Schedule II narcotic drugs, such as opiates and cocaine, were punishable by a maximum of 15 years imprisonment and a \$25,000 fine while offenses involving all

drugs have a high potential for abuse, but there are several distinguishing factors: (1) Schedule I substances do not have any medical uses in treatment whereas Schedule II substances do; (2) Schedule I substances lack the requisite safety to be used under medical supervision; and (3) abuse of Schedule II substances can lead to psychological or physical dependence.<sup>52</sup> The CSPAA was to address this problem by removing the distinction between narcotic and non-narcotic controlled substances in schedules I and II for sentencing purposes.<sup>53</sup> The next major set of amendments to the CDAPCA involved the passage of the Anti-Drug Abuse Act of 1986 (ADAA).<sup>54</sup>

Subtitle A of the ADAA was called the Narcotics Penalties and Enforcement Act of 1986 (NPEA).<sup>55</sup> The NPEA amended the CSA by grading the punishments for drug trafficking according to the aggregate quantity distributed, rather than just the pure drug itself.<sup>56</sup> In developing this market-oriented approach Congress wanted to punish the managers of the retail level drug traffick severely even though they dealt in smaller amounts of pure drug, because these managers "kept the street markets going."<sup>57</sup> In order to carry out this market-oriented approach, Congress graded the penalties according to the weight of a "mixture or substance containing a detectable amount of" the controlled substance.<sup>58</sup>

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other Schedule I and Schedule II substances, which included such dangerous drugs such as phencyclidine (PCP) and LSD, were punishable by only a maximum of five years imprisonment and a \$15,000 fine. *Id.* PCP, an anesthetic used by veterinarians, is also used by drug abusers for its hallucinogenic properties. *STEDMAN'S MEDICAL DICTIONARY* 1068 (5th ed. 1982).

52. *See supra* note 37.

53. S. Rep. No. 225, 98th Cong., 1st Sess. 256 (1983).

54. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C. (1988)) [hereinafter ADAA].

55. NPEA, *supra* note 2; *see supra* note 29.

56. *Chapman*, 111 S. Ct. at 1925. The language of the CSA was amended so that the quantities referred to were "of mixtures, compounds or preparations that contain a detectable amount of the drug—these are not necessarily quantities of pure substance." H.R. Rep. No. 845, 99th Cong., 1st Sess. pt. 1, p. 12 (1986).

57. H.R. Rep. No. 845, 99th Cong., 1st Sess. pt. 1, p. 12 (1986); *see also Chapman*, 111 S. Ct. at 1925.

58. *See* 21 U.S.C. § 841(b) (1988).

### C. *Legislative History of Guidelines*

The CCCA,<sup>59</sup> in addition to amending the CDAPCA, also included the Sentencing Reform Act of 1984 (SRA).<sup>60</sup> The SRA represented the first comprehensive sentencing legislation for sentencing criminal offenders in the federal system.<sup>61</sup> The sentencing system introduced by this Act relies "upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing."<sup>62</sup> The Senate Report<sup>63</sup> stated that the primary goal of the Guidelines was to eliminate unwarranted sentencing disparities.<sup>64</sup> The Report also concluded that the disparity in criminal sentences was a major flaw in the system as it then existed and that the system was ripe for reform.<sup>65</sup>

In order to help achieve these goals the SRA created a United States Sentencing Commission in the judicial branch of the United States, which would be responsible for promulgating the Guidelines and the policy statements.<sup>66</sup> "The [Sentencing] Commission's initial [G]uidelines were submitted to Congress

59. CCCA, *supra* note 39.

60. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 16, 21, 26, 28, 42 and 49 of U.S.C. (1988)) [hereinafter SRA].

61. S. Rep. No. 225, 98th Cong., 1st Sess. 37 (1983) (quoting then Attorney General William French Smith).

62. *Id.* at 38. The Committee noted that under the former system, where the sentence was left to the discretion of the sentencing judge, the "[f]ederal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." *Id.* It later concluded, that the new system was "intended to treat all classes of offenses committed by all categories of offenders consistently." *Id.* at 51.

63. *Id.*

64. *Id.* at 52. Among the purposes of the Sentencing Commission is to:

(1) establish sentencing policies and practices for the Federal criminal justice system that—

...

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b)(1)(B) (1988).

65. S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983).

66. *Id.* at 63; see 28 U.S.C. § 994(a) (1988). The Sentencing Commission consists of seven voting members appointed by the President with the advice and consent of the Senate. *Id.* § 991(a). At least three of the members appointed to the

on April 13, 1987" and took effect on November 1, 1987.<sup>67</sup> In the Policy Statement of the Guidelines the Sentencing Commission recognized that it was important to focus on the three major objectives Congress sought to achieve in enacting the SRA in order to understand the Guidelines and their underlying rationale.<sup>68</sup> The first of these objectives recognized by the Sentencing Commission was honesty in sentencing.<sup>69</sup> The Sentencing Commission recognized that Congress sought to avoid the confusion caused by the existing sentencing system, which "required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison."<sup>70</sup> The second objective recognized in the Policy Statement of the Guidelines state that "Congress sought reasonable *uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.*"<sup>71</sup> Finally, the Sentencing Commission recognized that Congress sought a system that imposed sentences proportionately by imposing "appropriately different sentences for criminal conduct of differing severity."<sup>72</sup>

Having considered the background of the statutes involved and their legislative histories, it is now possible to focus on the Supreme Court decision that interpreted the phrase "mixture or substance" in a case involving blotter paper which contained the controlled substance LSD.

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Sentencing Commission are federal judges chosen by the President from a list of six judges recommended by the Judicial Conference of the United States. *Id.*

67. 18 U.S.C.A. app. 4, ch.1, pt. A (West Supp. 1993).

68. *Id.*

69. *Id.*

70. *Id.* The Sentencing Commission further recognized that this method of sentencing offenders "resulted in a substantial reduction in the effective length of the sentence imposed . . . often serving only one-third of the sentence imposed by the court." *Id.*

71. *Id.*; see also *Chapman v. United States*, 111 S. Ct. 1919, 1931 (1991) (quoting the Policy Statement in the *United States Sentencing Commission, Federal Sentencing Guidelines Manual* ch.1, pt. A (1991)) (emphasis added).

72. 18 U.S.C.A. app. 4, ch. 1, pt. A (West Supp. 1993).

## D. Chapman v. United States

1. *Facts*

Richard Chapman was convicted of selling ten sheets of blotter paper containing about 1,000 doses of LSD in violation of 21 U.S.C. § 841(a).<sup>73</sup> In a separate case Stanley J. Marshall was convicted and sentenced to twenty years imprisonment for conspiring to distribute, and distributing more than ten grams of LSD, enough for 11,751 doses.<sup>74</sup>

LSD is such a potent drug that to convert it into an easily ingestible form it must be diluted.<sup>75</sup> This is normally done by mixing the LSD with an alcohol solution and then placing drops of this solution on carriers, such as squares of paper, candy, or sugar cubes.<sup>76</sup> A person can then ingest the carrier or place it into his drink to release the LSD crystals.<sup>77</sup>

2. *District Court Decision*

The district court included the weight of the paper and the LSD itself in calculating the sentences.<sup>78</sup> The defendant, Marshall, argued that if the phrase "mixture or substance" were read to include the weight of the carrier medium the difference

73. Chapman v. United States, 111 S. Ct. 1919, 1922 (1991). "The weight of the LSD alone was approximately 50 milligrams" but the combined weight of the LSD and paper was 5.7 grams. *Id.*

74. United States v. Marshall, 908 F.2d 1312, 1314 (7th Cir. 1990). The table below illustrates the weight of the LSD alone, the weight of the LSD and the carrier (i.e., blotter paper), and the number of doses:

Government Exhibit No.	Net Weight of LSD Alone	Gross Weight of LSD and Carrier	LSD Dosage Units
1	137.93 mg	19.03 grams	1,999
2	173.38 mg	23.87 grams	2,502
3	284.96 mg	58.54 grams	5,999
4	48.00 mg	7.16 grams	752
5	26.45 mg	4.72 grams	499
TOTALS	670.72 mg	113.32 grams	11,751

United States v. Marshall, 706 F. Supp. 650, 651 (C.D. Ill. 1989).

75. Marshall, 706 F. Supp. at 652.

76. *Id.* The LSD retains its solid form in the alcohol solution but is dispersed within the solution. *Id.* The alcohol has a tendency to evaporate once drops of the solution are placed on the person's choice of medium (e.g., squares of paper, candy, or sugar cubes), leaving behind the LSD crystals. *Id.*

77. *Id.*

78. *Id.* at 654.

between a 20 year maximum sentence and a maximum sentence for life would turn on the distributor's choice of medium.<sup>79</sup>

The defendant also argued that the carrier should be considered the equivalent of a container, which is not a mixture or substance containing a detectable amount of controlled substance.<sup>80</sup> The court rejected defendant's arguments stating that it was not the job of the court to hypothecate situations in which the statute would obtain absurd results.<sup>81</sup> The court assumed that Congress was fully aware that a common way to produce ingestible LSD was to spray it onto paper as the defendant did here.<sup>82</sup> It noted that if the wording of the NPEA would have included only the word "mixture" then defendant's reading would be correct.<sup>83</sup> However, the court found that the addition of the phrase "or substance containing a detectable amount of" LSD clearly showed that Congress intended to include the weight of the medium in which the drug is ingested.<sup>84</sup> In examining the legislative history of the ADAA<sup>85</sup> the court concluded that Congress was aware of the way LSD was ingested.<sup>86</sup> Congress drafted the statute as a means of punishing the large-scale distributors and the court considered the defendant a large-scale distributor.<sup>87</sup> The court also concluded that the government's reading of the statute was more consistent with the

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79. *Id.* at 652.

80. *Id.* at 652-53.

81. *Id.* at 653.

82. *Id.*

83. *Id.*

84. *Id.* The court noted that in the provision of the statute dealing with PCP the statute read "100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)," 21 U.S.C. § 841(b)(1)(A)(iv), which went to show that Congress knew how to distinguish between the weight of the pure drug and the weight of a mixture or substance, and since the provision dealing with LSD speaks of only "mixture or substance" it could not have meant the weight of the pure LSD. *Marshall*, 706 F. Supp. at 653.

85. *See supra* section II.B.

86. *Marshall*, 706 F. Supp. at 653.

87. *Id.* The court described 11,571 hits of LSD, which is the amount that defendant was caught with, as a very large quantity. *Id.* Under the defendant's theory it would take 17,500 doses to meet the mid-tier sentencing enhancement and 170,000 hits to come within the high-tier enhancement. *Id.* at 653-54. Under the government's reading 100 hits would have been enough to subject the defendant to the mid-tier enhancement and just over 1000 hits to reach the high-tier enhancement. *Id.*

congressional intent than the defendant's reading.<sup>88</sup> Therefore, the court held that the weight of the carrier should be included in determining the appropriate sentence.<sup>89</sup>

### 3. *Court of Appeals Decision*

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's holding that the paper containing LSD is a "mixture or substance containing a detectable amount of" LSD.<sup>90</sup> The two cases involving Stanley J. Marshall and Richard L. Chapman were consolidated on appeal for this *en banc* decision.<sup>91</sup>

The court noted that if the carrier is included in the weight used to determine the appropriate sentence, "some odd things may happen."<sup>92</sup> For example, someone who sold 19,999 doses of pure LSD (at 0.05 mg per dose) could escape the five year mandatory minimum term set in 21 U.S.C. § 841(b)(1)(B)(v) and would be subject to no minimum sentence and a maximum of 20 years under 21 U.S.C. § 841(b)(1)(C).<sup>93</sup> At the same time, however, another person who sold one dose of LSD in a pitcher of orange juice could be exposed to a ten year mandatory minimum.<sup>94</sup> The court concluded that although 21 U.S.C. § 841 creates the possibility of erratic sentencing, the normal case does not involve either extreme (i.e., the 19,999 pure doses weighing less than one gram or the LSD in a pitcher of orange juice).<sup>95</sup> The court also noted that the NPEA speaks of a "mixture or substance containing a detectable amount" of a controlled substance, and that "detectable amount" was the opposite of pure.<sup>96</sup>

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88. *Id.* at 654.

89. *Id.* at 651, 654.

90. *United States v. Marshall*, 908 F.2d 1312, 1318 (7th Cir. 1990) (6-5 *en banc* decision), *aff'd sub nom. Chapman v. United States*, 111 S. Ct. 1919 (1991) (7-2 decision).

91. *Marshall*, 908 F.2d at 1314. *Marshall* was convicted and sentenced to 20 years imprisonment for conspiring to distribute and distributing more than 10 grams of LSD, enough for 11,571 doses. *Id.* *Chapman* was convicted and sentenced to 96 months imprisonment for selling 5.7 grams, 1,000 doses, of LSD. *Id.* at 1315.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1316-17.

96. *Id.* at 1317.

Because Congress included the words “detectable amount” in the NPEA, the court determined that it was not possible to read the statute as only including the weight of the pure drug.<sup>97</sup>

Although the language of the NPEA cannot be read to include only the weight of the pure drug, it still must be determined whether the LSD impregnated paper is a mixture or substance containing LSD.<sup>98</sup> The court concluded that the LSD solidified inside the paper and not on it.<sup>99</sup> Therefore, ordinary parlance allowed the court to call this association of LSD and paper a mixture.<sup>100</sup>

The defendants introduced evidence that the Chairman of the Sentencing Commission was not sure whether the weight of the carrier was to be considered packaging material or as a “diluent ingredient.”<sup>101</sup> The court did not find this argument persuasive, and it noted that statements made supporting proposals that have not yet been enacted into law do not help the court in interpreting the text of a law passed by an earlier Congress.<sup>102</sup>

The defendants next argued that even if the weights in the NPEA are read to include the carrier medium, the weights in the Guidelines do not.<sup>103</sup> The court rejected this argument and stated that “to conclude that the carrier medium is a statutory ‘mixture or substance’ is to conclude that its weight counts under the Guidelines as well.”<sup>104</sup> The majority was confronted

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97. *Id.* at 1317. The court examined the provision relating to PCP in order reach this conclusion. See *supra* notes 55-58 and accompanying text.

98. *Marshall*, 908 F.2d at 1317. The court stated that the phrase “mixture or substance” could not include all carriers. *Id.*

99. *Id.*

100. *Id.* The court noted that “immiscible substances” may not fall within the statutory definition of “mixture”. *Id.* The court seems to suggest that if the defendant could prove that the LSD crystals were on the paper instead of within the paper then the LSD and paper would not be considered a “mixture” within the meaning of the statute. *Id.*

101. *Id.* at 1318; see *infra* note 133 and accompanying text.

102. *Marshall*, 908 F.2d at 1318-19.

103. *Id.* at 1319. At this point the court examined the language in the footnote of the Guidelines and the language of application note one. *Id.*; see *supra* notes 3, 26 and accompanying text.

104. *Marshall*, 908 F.2d at 1319.



with strong dissents led by Judges Posner and Cummings respectively.<sup>105</sup>

Judge Posner noted that drugs are often sold and consumed in a diluted form.<sup>106</sup> Therefore, he concluded that Congress's adoption of a market-oriented approach designed to mete out heavy punishment to those who possessed large "street quantities" of controlled substance was well within its constitutional authority.<sup>107</sup> Judge Posner conceded that this system works well for drugs that are sold by weight, but argued that basing a person's sentence on the combined weight of the LSD and blotter paper was "like basing the punishment for . . . cocaine on the combined weight of the cocaine and vehicle used . . . to transport it."<sup>108</sup> Judge Posner realized that Congress may have wanted to base the sentence on the weight of the carrier because it would be too difficult to ascertain the weight of the pure LSD involved.<sup>109</sup> However, he did not accept this explanation because the weight of the pure LSD had been calculated and reported in every case that he had seen and therefore, he concluded that it could be determined readily enough.<sup>110</sup> Justice Posner concluded that "[t]o base punishment on the weight of the carrier makes about as much sense as basing punishment on the weight of the defendant."<sup>111</sup> Chapman petitioned for a writ of certiorari to the United States Supreme Court and it was granted.

#### 4. *Supreme Court Decision*

##### a. *Majority Opinion*

In the Supreme Court, Chapman argued that the weight of the blotter paper should not have been included in computing his sentence because LSD is sold by dose not by weight.<sup>112</sup>

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105. *Id.* at 1326-38. They were both joined by Judges Bauer, Cudahy and Wood. *Id.* at 1326, 1331.

106. *Id.* at 1331 (Posner, J., dissenting).

107. *Id.* "Street quantities" mean quantities of the diluted drug which is ready for sale. *Id.*

108. *Id.* at 1331-32.

109. *Id.* at 1333.

110. *Id.*

111. *Id.*

112. *Id.*

Therefore, he argued, the weight is irrelevant to culpability.<sup>113</sup> Chapman also asserted that including the weight of the carrier would lead to anomalous results because a person caught with pure LSD would get a less severe sentence than a person caught with the same number of doses incorporated in a carrier such as blotter paper.<sup>114</sup> Chapman believed that the weight of the pure LSD should be determined in order to compute his sentence.<sup>115</sup>

The Court rejected Chapman's arguments. It noted that in certain sections of the ADA Congress provided for a sentence based on either the weight of a mixture or substance containing a detectable amount of the drug or on the weight of the pure drug.<sup>116</sup> The Court also noted that with respect to LSD Congress only provided that the sentence should be based on the weight of a "mixture or substance."<sup>117</sup> The Court held that "if the carrier is a 'mixture or substance containing a detectable amount of the drug,' then under the language of the statute the weight of the mixture or substance, and not the weight of the pure drug, is controlling."<sup>118</sup>

The Court dismissed Chapman's argument that including the weight of the carrier medium would lead to anomalous results depending on the carrier medium chosen by stating that: "While hypothetical cases can be imagined involving very heavy carriers and very little LSD, those cases of are no import in considering a claim by persons . . . who used a standard LSD car-

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113. *Chapman v. United States*, 111 S. Ct. 1919, 1923 (1991).

114. *Id.* at 1923-24. Chapman specifically argued that including the weight of the carrier medium in LSD cases would lead to anomalous results because the sentence imposed would depend on the carrier medium chosen. *Id.* at 1923-24, 1924 n.2.

115. *Id.* at 1924.

116. *Id.* The Court specifically compared the reading of the statute concerning heroin, cocaine and LSD, which provided for mandatory minimum sentences involving the weight of a "mixture or substance" containing a detectable amount of the drugs, with phencyclidine (PCP) and methamphetamine, which provided for mandatory minimum sentences involving the weight of the pure drugs or a "mixture or substance" containing a detectable amount of the drugs. *Id.*; see 21 U.S.C. § 841(b)(1)(A)(i), (ii), (v) (1988) for the sections relevant to heroin, cocaine, and LSD; 21 U.S.C. § 841(b)(1)(A)(iv), (viii) (1988) for the sections relevant to PCP and methamphetamine.

117. *Chapman*, 111 S. Ct. at 1924; see 21 U.S.C. § 841(b)(1)(A)(v) (1988).

118. *Chapman*, 111 S. Ct. at 1925.

rier.”<sup>119</sup> The Court went on to note that blotter paper seemed to be the carrier medium of choice for LSD dealers; therefore, “the vast majority of cases [would] . . . do exactly what the sentencing scheme was designed to do — punish more heavily those who deal in larger amounts of drugs.”<sup>120</sup>

In examining the legislative history, the Court concluded that “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 the sentence.”<sup>121</sup> The Court stated that Congress “intended the penalties for drug trafficking to be graduated . . . in whatever form they were found—cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level.”<sup>122</sup>

After rejecting Chapman’s argument that the weight of pure LSD should be used in determining his sentence, the Court considered whether the LSD in the blotter paper was a “mixture or substance” within the meaning of the statute.<sup>123</sup> Because the statute itself did not define “mixture” the Court looked at two dictionary definitions of the word.<sup>124</sup> The Court defined “mixture” to include “a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence.”<sup>125</sup> According to the Court the term “may also consist of two substances blended together so that the particles of one are diffused among the particles of the other.”<sup>126</sup> Using these definitions, the Court concluded that the LSD crystals were commingled with the paper and that the LSD did not chemically combine with the paper.<sup>127</sup> Thus, the LSD retained a separate existence.<sup>128</sup> Therefore the paper con-

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119. *Id.* at 1928.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1924-26.

124. *Id.* at 1925.

125. *Id.* at 1926.

126. *Id.*

127. *Id.*

128. *Id.*

taining the LSD fell within both dictionary definitions of "mixture."<sup>129</sup>

b. *Dissenting Opinion*

In the dissenting opinion, Justice Stevens stated that: "[T]he majority's construction of the statute will necessarily produce sentences that are so anomalous that they will undermine the very uniformity that Congress sought to achieve when it adopted the Sentencing Guidelines."<sup>130</sup> Justice Stevens did not consider the LSD crystals within the paper a mixture. He stated that although ink which is absorbed by a blotter can be said to mix with it he "would not describe a used blotter as a 'mixture' of ink and paper."<sup>131</sup> Justice Stevens noted that the legislative history was sparse and went on to examine the subsequent legislative history.<sup>132</sup>

Justice Stevens considered the letter written by the Chairman of the Sentencing Commission, William W. Wilkens, Jr., to Senator Joseph R. Biden stating that "[w]ith respect to LSD, it is unclear whether Congress intended the carrier to be considered as a packaging material, or, since it is commonly consumed along with the illicit drug, as a diluent ingredient in the drug mixture . . .'"<sup>133</sup> This subsequent history demonstrates that the language of the statute is far from clear.<sup>134</sup>

Justice Stevens examined the congressional purpose behind the Guidelines by looking at the United States Sentencing Commission's, Federal Sentencing Guidelines Manual.<sup>135</sup> The manual stated that "'Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.'"<sup>136</sup> Using the majority's reading of the statute, the dissent concluded that "widely divergent sentences may be imposed for

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129. *Id.*

130. *Id.* at 1929.

131. *Id.* at 1930.

132. *Id.*

133. *Id.* at 1931 (quoting *United States v. Marshall*, 908 F.2d 1312, 1327-28 (7th Cir. 1990)).

134. *Id.* at 1931-32.

135. *Id.* at 1931.

136. *Id.* at 1931 (quoting *United States Sentencing Commission, Federal Sentencing Guidelines Manual* ch.1, pt. A (1991)).

the sale of identical amounts of a controlled substance simply because of the nature of the carrier.”<sup>137</sup>

In conclusion, Justice Stevens stated that “the Court today shows little respect for Congress’s handiwork when it construes a statute to undermine the very goals that Congress sought to achieve.”<sup>138</sup> Although the *Chapman* decision applies the literal meaning of “mixture or substance” with respect to cases involving LSD, the circuit courts of appeal are still split as to the interpretation of “mixture or substance” in cases involving other controlled substances.<sup>139</sup>

### E. *Circuits Including Weight of Uningestible Material*

The First, Fifth, and Tenth Circuit Courts of Appeal have concluded that the weight of uningestible material containing a detectable amount of controlled substance should be used in calculating the base offense level of a convicted drug trafficker.<sup>140</sup> The First Circuit, in *United States v. Mahecha-Onofre*,<sup>141</sup> held that the total weight of a suitcase made of a blend of cocaine and acrylic minus its metal parts was properly considered in determining the appropriate sentence.<sup>142</sup> The weight of the suitcase minus its metal parts was twelve kilograms and the weight of the cocaine alone was 2.5 kilograms.<sup>143</sup> The court considered the argument that only the weight of the cocaine should be used, which is almost identical to the argument used by the defendant in the *Chapman v. United States*.<sup>144</sup> Although, “[u]nlike blotter paper or cutting agents, the suitcase material obviously cannot be consumed; and the cocaine must be separated from the suitcase material before use . . . ,”<sup>145</sup> the court noted that this would not make a difference to the outcome because “‘ingestion’ would not seem to play a critical role in the

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137. *Id.* at 1932.

138. *Id.* at 1934.

139. *See supra* notes 7-8; *see also infra* Sections II(E), II(F).

140. *See supra* note 7; *see also* *United States v. Killion*, No. 92-3130, 1993 WL 408150 at \*5 (10th Cir. Oct. 13, 1993).

141. 936 F.2d 623 (1st Cir. 1991).

142. *Id.* at 625.

143. *Id.*

144. *Id.*

145. *Id.* at 626.

definition of 'mixture' or 'substance.'"<sup>146</sup> The court stated that "the suitcase/cocaine 'mixture' or 'substance' fits the statutory and Guideline definitions as the Supreme Court has recently interpreted them in *Chapman*."<sup>147</sup>

Similarly, in *United States v. Restrepo-Contreras*,<sup>148</sup> the same court held that the weight of beeswax in beeswax statues containing cocaine could be included in addition to the weight of the cocaine to determine the appropriate sentence.<sup>149</sup> The court treated the cocaine and beeswax statues as a "mixture" stating that "we can discern no meaningful difference between an acrylic-cocaine suitcase [in *Mahecha-Onofre*] and a beeswax-cocaine statue."<sup>150</sup>

The Tenth Circuit in *United States v. Fowner*<sup>151</sup> held that including twenty-four gallons of liquid mixture containing detectable amounts of methamphetamine<sup>152</sup> to determine the appropriate sentence was proper even though an expert testified that the liquid was waste.<sup>153</sup> The court found that "a determination of whether the liquid mixture was waste and intended to be discarded need not be made."<sup>154</sup> The court concluded that "under U.S.S.G. section 2D1.1 so long as the mixture contains a detectable amount, the entire weight of the mixture is included for purposes of calculating the base offense level."<sup>155</sup>

#### F. *Circuits Not Including Weight of Uningestible Material*

In contrast the Second, Third, Sixth, Ninth, and Eleventh Circuits have concluded that the weight of uningestible material containing a detectable amount of controlled substance should not be used in calculating the base offense level of a con-

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146. *Id.*

147. *Id.*

148. 942 F.2d 96 (1st Cir. 1991).

149. *Id.* at 99.

150. *Id.*

151. 947 F.2d 954 (10th Cir. 1991) (Table; text available in Westlaw at 1991 WL 225903), *cert. denied*, 112 S. Ct. 1998 (1992).

152. Methamphetamine is an "amine derivative of amphetamine that is used in the form of its crystalline hydrochloride as a stimulant." THE AMERICAN HERITAGE DICTIONARY 791 (2d College ed. 1985).

153. *Fowner*, 1991 WL 225903 at \*3.

154. *Id.* at \*4.

155. *Id.*

victed drug trafficker.<sup>156</sup> The Second Circuit Court of Appeals in *United States v. Acosta*<sup>157</sup> held that the weight of creme liqueur in which cocaine had been mixed should not be included in determining the appropriate sentence.<sup>158</sup> Here, the court noted the definition given to "mixture" by the Supreme Court in *Chapman v. United States*.<sup>159</sup> However, the court perceived a "functional difference between carrier mediums and the creme liqueur."<sup>160</sup> The court made the distinction that the "cocaine/creme liqueur was not an ingestible mixture" as was the blotter paper/LSD in *Chapman*.<sup>161</sup> The court reasoned that "because the creme liqueur [had to] be separated from the cocaine before the cocaine [could] be distributed, it [was] not unreasonable to consider the liqueur as the functional equivalent of packaging material which [was] not to be included in the weight calculation."<sup>162</sup>

Examining the legislative history, the court concluded that "Congress was concerned with mixtures that will eventually reach the streets, i.e., consumable mixtures."<sup>163</sup> Considering the market-oriented approach,<sup>164</sup> which *Chapman* stated that Congress adopted in enacting the NPEA, the court concluded that "there is no difference in culpability between individuals bringing the identical amount and purity of drugs to market but concealing the drugs in different amounts of unusable mixtures."<sup>165</sup> The court determined that under the market-oriented approach, there is no reason to sentence someone on the weight of uningestible mixture, because the mixture is not marketable and "the issue here is marketability, not purity."<sup>166</sup> The court stated that "even though the cocaine/creme liqueur may fall

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156. See *supra* note 8; see also *United States v. Killion*, No. 92-3130, WL 408150 at \*5 (10th Cir. Oct. 13, 1993).

157. 963 F.2d 551 (2d Cir. 1992).

158. *Id.* at 557.

159. 111 S. Ct. 1919 (1991).

160. *Acosta*, 962 F.2d at 552.

161. *Id.* at 554.

162. *Id.*; see *Chapman v. United States*, 111 S. Ct. 1919, 1926 (1991) (holding that the weight of packaging materials are not included in determining a sentence because they are clearly not mixed or combined with the drug).

163. *Acosta*, 963 F.2d at 554.

164. See *supra* notes 55-58 and accompanying text.

165. *Acosta*, 963 F.2d at 554.

166. *Id.* at 555.

within the dictionary definition of 'mixture', the legislative history convinces us that the weight of the creme liqueur must be excluded."<sup>167</sup>

The court concluded by stating that "it is not *how* one trafficks [sic] in the commodity (in this case mixing it with six, as opposed to sixteen or twenty-six, etc., bottles of liqueur) 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."<sup>168</sup>

In the Eleventh Circuit case of *United States v. Rolande-Gabriel*<sup>169</sup> the appellant, Rolande-Gabriel, was arrested in Miami for carrying sixteen plastic bags filled with a liquid substance that contained cocaine.<sup>170</sup> The Eleventh Circuit agreed with the Second Circuit in holding "that the term 'mixture' in [the Guidelines] does not include unusable mixtures."<sup>171</sup> In reaching this conclusion, the court examined the Guidelines, balancing the Policy Statement against the comment in application note one of section 2D1.1.<sup>172</sup> The comment states "that the term 'mixture' has the same meaning as it does in 21 U.S.C. § 841,"<sup>173</sup> which does not differentiate between usable and unusable mixtures."<sup>174</sup> The court held that strict adherence to the comment would lead to disparate and irrational sentences since all mixtures would have to be included.<sup>175</sup>

On the other hand, the court reasoned that "[i]f we read 'mixture' in conjunction with the purposes behind the Sentencing Guidelines, then section 2D1.1 should be applied in a manner which creates the greatest degree of uniformity and rationality in sentencing."<sup>176</sup> Since including the weight of

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167. *Id.* at 554.

168. *Id.* at 556 (emphasis in original).

169. 938 F.2d 1231 (11th Cir. 1991).

170. *Id.* at 1232. Lab tests showed that the liquid substance which contained the cocaine weighed 241.6 grams. *Id.* at 1233. The chemist then extracted a powder substance from the liquid which weighed 72.2 grams. *Id.* This powder was comprised of 7.2 grams of cocaine base and 65 grams of a cutting agent. *Id.*

171. *Id.* at 1238.

172. *Id.* at 1235; see *supra* text accompanying notes 26, 71 for the text of application note one and the Policy Statement of the Guidelines respectively.

173. See *supra* text accompanying note 26.

174. *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1235 (11th Cir. 1991).

175. *Id.*

176. *Id.*



unusable mixtures would lead to divergent sentences, which would conflict with the policy reasons for enacting the statute, the court concluded that the weight of such unusable mixtures should not be included in determining the appropriate sentence.<sup>177</sup>

In distinguishing *Chapman v. United States*<sup>178</sup> the court stated that although the "plain meaning interpretation of "mixture" does not create an irrational result in the context of LSD and standard carrier mediums,"<sup>179</sup> it would lead to irrational results in cases involving mixtures containing a detectable amount of controlled substance if the court does not distinguish between usable and unusable mixtures.<sup>180</sup> The court noted that the LSD/paper "mixture" in *Chapman* was usable while the mixture in this case was unusable while mixed with the liquid.<sup>181</sup> The court also noted that the liquid used in this case did not facilitate the use or the marketing access of the drug as the standard carrier mediums did in the *Chapman* case.<sup>182</sup> The court concluded that "it is fundamentally absurd to give an individual a more severe sentence for a mixture which is unusable and not ready for retail or wholesale distribution while persons with usable mixtures would receive far less severe sentences."<sup>183</sup>

In 1993, after all of the disparate sentences handed down by the circuit courts of appeal,<sup>184</sup> the United States Sentencing Commission finally promulgated amendments to the Federal Sentencing Guidelines.<sup>185</sup> However, it is still questionable whether these amendments will help eliminate the disparate sentencing in drug trafficking and drug manufacturing cases such as the ones mentioned in the previous two sections.

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177. *Id.*

178. 111 S. Ct. 1919 (1991).

179. *Rolande-Gabriel*, 938 F.2d at 1236.

180. *Id.*

181. *Id.* at 1237.

182. *Id.*

183. *Id.*

184. See *supra* notes 7-8 and sections II.E.-II.F.

185. 58 Fed. Reg. 27,148 (1993) (proposed May 6, 1993).

### G. *1993 Amendments to the Federal Sentencing Guidelines*

The Sentencing Commission submitted amendments to the Guidelines to Congress on April 29, 1993.<sup>186</sup> The amendments were to take effect November 1, 1993 absent any action by Congress to the contrary.<sup>187</sup> Most of the amendments approved by the Sentencing Commission were made in response "to calls for making the sentencing scheme more rational."<sup>188</sup> This section will concentrate on the amendments pertaining to the sentencing of drug traffickers and manufacturers.<sup>189</sup>

#### 1. *Amendments Regarding the Definition of Mixture or Substance*

The amendments regarding the phrase "mixture or substance" in section 2D1.1 of the Guidelines were designed to resolve the conflict caused by the different interpretations of that phrase by the circuit courts of appeal.<sup>190</sup> The amendments endorse the viewpoint of the Second, Third, Sixth, Ninth, and Eleventh Circuits, stating that the phrase "[m]ixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used."<sup>191</sup>

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186. *Id.* The Sentencing Commission is empowered to promulgate guidelines for use by a sentencing court to determine the sentence to be imposed in a criminal case. 28 U.S.C. § 994(a)(1) (1988). The Sentencing Commission also has the responsibility to periodically review and revise the Sentencing Guidelines and submit any amendments, along with a specified date which the amendments will take effect, to Congress no later than the first day of May of that year. *Id.* § 994(o), (p).

187. 58 Fed. Reg. 27,148 (1993) (proposed May 6, 1993).

188. Deborah Pines, *Amendments Approved To Sentencing Guidelines*, N.Y. L.J., April 20, 1993, at 1, col. 5.

189. Specifically, this section will examine the amendments to application note one of section 2D1.1 of the guidelines regarding the phrase "mixture or substance" and the added application notes and comments regarding LSD. See 58 Fed. Reg. 27,148, 27,155-56 (1993) (proposed May 6, 1993).

190. *Id.* at 27,155. See *supra* notes 3, 26 and accompanying text for use of the phrase "mixture or substance" by the Guidelines before the amendments. See *supra* sections II.E. and II.F. for examples of the inter-circuit conflict caused by the different interpretations of the phrase "mixture or substance".

191. 58 Fed. Reg. 27,148, 27,155 (1993) (proposed May 6, 1993). Application note one in section 2D1.1 of the sentencing guidelines is 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

The Sentencing Commission recognized two types of cases in which the interpretation of mixture or substance caused problems for the circuits.<sup>192</sup> The first type of cases involved controlled substances which were bonded to, or suspended in, other substances that rendered the controlled substance unusable until separated from the other substance.<sup>193</sup> Under this amendment the weight of the portions of the drug mixture that have to be separated before the controlled substance can be used is not to be included in determining a defendant's base offense level.<sup>194</sup> The second type of cases involved waste liquid produced by a laboratory used to manufacture a controlled substance, or chemicals which were confiscated before the chemical processing of the controlled substance was completed.<sup>195</sup> Such waste or chemicals usually contain small amounts of the controlled substance being produced but are not consumable.<sup>196</sup> Under this

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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.

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.* (emphasis added); see also *supra* section II.F. discussing the circuit court of appeals decisions which do not include the weight of the uningestible material when interpreting the phrase "mixture or substance."

192. 58 Fed. Reg. 27,148, 27,155 (1993) (proposed May 6, 1993).

193. *Id.* (citing *United States v. Mahecha-Onofre*, 936 F.2d 623, 624 (1st Cir.), *cert. denied*, 112 S. Ct. 648 (1991) (where cocaine was chemically bound to the acrylic of the suitcase); *United States v. Restrepo-Contreras*, 942 F.2d 96, 97 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 955 (1992) (where cocaine was mixed with beeswax in the form of statues)); see *supra* notes 141-50 for a more complete discussion of these cases.

194. 58 Fed. Reg. 27,148, 27,155 (1993) (proposed May 6, 1993); see *supra* note 6 for a definition of base offense level.

195. 58 Fed. Reg. 27,148, 27,155 (1993) (proposed May 6, 1993). In discussing the waste produced by a laboratory manufacturing controlled substances the Sentencing Commission stated that "[t]ypically, [the] small amount of controlled substance [that] remains in the waste . . . is too small to quantify and is listed as a trace amount (no weight given) in DEA reports. In these types of cases, the waste product is not consumable." *Id.*

196. *Id.* (citing *United States v. Sherrod*, 964 F.2d 1501 (5th Cir.), *cert. denied sub nom. Cooper v. United States*, 113 S. Ct. 832 (1992), (White and Blackmun,

amendment, the weight of the liquid waste and the chemicals used for processing the controlled substance, is not to be included when determining a defendant's base offense level.<sup>197</sup>

## 2. *Amendments Regarding LSD*

The Sentencing Commission also included amendments that were designed to deal with the special case of LSD.<sup>198</sup> The Sentencing Commission included these amendments despite the United States Supreme Court decision of *Chapman v. United States*,<sup>199</sup> which held that the weight of the carrier medium should be included for sentencing purposes in LSD cases.<sup>200</sup> The Sentencing Commission has included amendments changing the way in which the base offense level is to be calculated in cases which involve the controlled substance LSD.<sup>201</sup> The Sentencing Commission has amended the notes at the end of the Drug Quantity Table<sup>202</sup> to include the following statement: "In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table."<sup>203</sup> The Sentencing Commission has also added an application note in section 2D1.1 of the Guidelines to deal with the special circumstances where: (1) the number of doses are not clearly outlined on the blotter paper;<sup>204</sup> and (2) where the LSD is in liquid form.<sup>205</sup>

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JJ., dissenting from denial of *cert.*), and *cert. denied sub nom.* *United States v. Sewell*, 113 S. Ct. 1367 (1993) (White and Blackmun, JJ., dissenting from denial of *cert.*)).

197. 58 Fed. Reg. 27,148, 27,155 (1993) (proposed May 6, 1993).

198. *Id.*

199. 111 S. Ct. 1919 (1991).

200. See *supra* text accompanying notes 116-18, 124-29.

201. 58 Fed. Reg. 27,148, 27,155-56 (1993) (proposed May 6, 1993).

202. 18 U.S.C.A. app. 4 § 2D1.1(c) (West Supp. 1993).

203. 58 Fed. Reg. 27,148, 27,155 (1993) (proposed May 6, 1993).

204. *Id.* The pertinent part of application note 18 reads as follows:

LSD on blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each ¼ inch by ¼ inch section of the blotter paper is equal to one dose.

*Id.*

205. *Id.* The pertinent part of application note 18 reads as follows: "In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the

In promulgating this amendment the Sentencing Commission recognized that the weights of the carrier media for LSD vary widely, that they typically far outweigh the weight of the LSD, and that basing the offense level on the combined weight of LSD and its carrier medium leads to disparate sentencing.<sup>206</sup> Although the Drug Enforcement Administration Standard dosage for LSD is 0.05 milligrams (i.e., the actual amount of LSD per dose), the Sentencing Commission selected a weight of 0.4 milligrams per dose "in order to assign some weight to the carrier medium."<sup>207</sup>

The Sentencing Commission hopes that this method of calculating the base offense level will correct the disparity among offenses involving the same quantity of LSD but on different carrier media and sentences that are disproportionate to those for other more dangerous controlled substances.<sup>208</sup> Even though this amendment appears to render the *Chapman* definition of mixture or substance moot, the last sentence of the background commentary to section 2D1.1 states that "this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence."<sup>209</sup>

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weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted." *Id.*

206. *Id.* The Sentencing Commission also recognized that including the weight of the carrier medium in determining the base offense level in LSD cases leads to sentences that are disproportionate to other more dangerous controlled substances such as PCP. *Id.*

207. *Id.* The Sentencing Commission decided to include some weight attributable to the carrier medium because it recognizes:

(A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States* . . . . The weight of 0.4 milligrams per dose is also less than the weight per dose that would equate the offense level of LSD with that for the same number of doses of the more dangerous controlled substance PCP which assessments indicate is more likely to induce violent acts and ancillary crimes than LSD.

*Id.*

208. *Id.* at 27,156. For example, prior to the amendment, "100 grams of heroin or 500 grams of cocaine (weights that correspond to *several thousand doses* . . . ) resulted in the same offense level as *125 doses* of LSD on blotter paper (which has an average weight of 8 milligrams per dose) or *1 dose* of LSD on a sugar cube (2000 milligrams per dose)." *Id.* (emphasis added).

209. *Id.* (citing *Chapman*, 111 S. Ct. 1919 and 18 U.S.C.A. § 5G1.1(b) (West Supp. 1993)). Section 5G1.1(b) of the Guidelines reads as follows: "Where a statutorily required minimum sentence is greater than the maximum of the applicable

As of the writing of this comment at least two courts have recognized that the 1993 amendments regarding LSD would lead to shorter prison terms than those imposed under the pre-1993 Guidelines and *Chapman* rationales.<sup>210</sup>

In *United States v. Coohy*<sup>211</sup> the defendant, John Coohy, was convicted for conspiracy to distribute 5950 doses of LSD on blotter paper weighing approximately 6.5 milligrams per dose for a total of 38.675 grams.<sup>212</sup> Based on this weight and certain aggravating circumstances Coohy's base offense level was calculated to be thirty-eight.<sup>213</sup> Combined with Coohy's category III criminal history the applicable sentencing range was 292 to 365 months.<sup>214</sup> The court noted that pursuant to the 1993 amendments to the Guidelines "the weight of LSD for sentencing purposes is to be determined by treating each dose as weighing 0.4 milligrams."<sup>215</sup> Using this new standard the court stated that Coohy would have been responsible for 2.38 grams of LSD for sentencing purposes instead of the 38.675 grams he was charged with pursuant to the old Guidelines.<sup>216</sup> The court noted that "[t]his lower weight would make him eligible for a shorter prison term."<sup>217</sup>

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guideline range, the statutorily required minimum sentence shall be the guideline sentence." 18 U.S.C.A. app. 4 § 5G1.1(b) (West supp. 1993).

210. See *United States v. Coohy*, No. 93-1217, 1993 WL 495577 at \*3 (8th Cir. Dec. 3, 1993); *United States v. Holmes*, No. 93-2388, 1994 WL 4587 at \*5 (8th Cir. Jan. 11, 1994).

211. No. 93-1217, 1993 WL 495577 (8th Cir. Dec. 3, 1993).

212. *Id.* at \*1.

213. *Id.* Using a weight of 38.675 grams of LSD the base offense level would be 34. *Id.*; see also the Guidelines Drug Quantity Table. 18 U.S.C.A. app. 4 § 2D1.1(c)(5) (West Supp. 1993). Coohy's base offense level was escalated one level under section 2D1.2(a)(2) because he distributed LSD within 1000 feet of a school. *Coohy*, 1993 WL 495577 at \*1. Coohy's base offense level was further escalated three levels because of his role in the offense. *Id.*; see 18 U.S.C.A. app. 4 § 3B1.1(b) (West Supp. 1993).

214. *Coohy*, 1993 WL 495577 at \*1.

215. *Id.* at \*3.

216. *Id.* In determining that Coohy would only be responsible for 2.38 grams of LSD one need only to multiply the number of doses by the weight of 0.4 milligrams per dose established by the Sentencing Commission, i.e.- 5950 x 0.4 = 2,380 milligrams or 2.38 grams.

217. *Id.* The base offense level in this case would drop eight levels from level 34 to level 26. See 18 U.S.C.A. app. 4 § 2D1.1(c) (West Supp. 1993). Add in the four levels because of the aggravating circumstances mentioned above and the new base offense level would be thirty instead of thirty-eight. See *supra* note 213 and accompanying text. Using this new base offense level of thirty and Coohy's crimi-

In *United States v. Holmes*<sup>218</sup> the defendant, Jeremy Holmes, was sentenced to 120 months for distribution "of less than one gram of lysergic acid diethylamide (LSD) under 21 U.S.C. § 841(a)(1) (1988), conspiracy to distribute LSD under 21 U.S.C. § 846 (1988), and distribution of more than one gram of LSD within 100 feet of a video arcade facility under 21 U.S.C. § 860 (Supp. III 1991)."<sup>219</sup> Holmes was held responsible for one sheet of blotter paper containing thirteen doses and weighing 84.5 milligrams and one sheet of blotter paper containing 200 doses and weighing about 1.2 grams.<sup>220</sup> After dismissing Holmes' argument that the trial court erroneously included the weight of the blotter paper in determining his sentence the circuit court noted that the 1993 amendments to the Guidelines would produce a different result.<sup>221</sup> The court stated that pursuant to the 1993 amendments the total weight of the 213 doses of LSD for sentencing purposes would be .0852 grams resulting in a shorter prison term.<sup>222</sup>

It is too early to determine what effect these amendments will have on future court decisions. Although the amendments appear to eliminate the problem caused by the ambiguous phrase "mixture or substance" in LSD cases it is this author's position that the Sentencing Commission has included other ambiguous language which may lead to disparate sentencing in cases involving other controlled substances.<sup>223</sup>

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nal history category of III his new sentence range would be 121 to 151 months instead of the 292 to 365 months calculated pursuant to the pre-1993 Guidelines. See 18 U.S.C.A. app. 4, ch. 5, pt. A (West Supp. 1993) for an illustration of the sentencing table used in determining the sentence range.

218. No. 93-2388, 1994 WL 4587 (8th Cir. Jan. 11, 1994).

219. *Id.* at \*1.

220. *Id.* at \*2.

221. *Id.* at \*5.

222. *Id.* In determining that Holmes would only be responsible for .0852 grams of LSD one need only to multiply the number of doses by the weight of 0.4 milligrams per dose established by the Sentencing Commission, i.e.-  $213 \times 0.4 = 85.2$  milligrams or .0852 grams.

223. See *infra* section III.D.

## III. Analysis

A. *Effect of Chapman v. United States on Cases Involving Controlled Substances Other Than LSD*

The Supreme Court addressed the meaning of "mixture or substance" with regard to situations involving LSD and its carrier mediums in the *Chapman* case.<sup>224</sup> The *Chapman* Court interpreted this phrase literally, holding that the carrier medium should be included for sentencing purposes.<sup>225</sup> Although the case settled any dispute there might have been regarding what weight the court should use in sentencing defendants in cases involving LSD it did not settle any disparities in sentencing that existed due to the different weights of carrier media used.<sup>226</sup> However, the circuits were still split on the question of whether the weight of uningestible carrier mediums should be included for sentencing purposes in cases involving mixtures containing other controlled substances.<sup>227</sup>

The circuits that included the weight of uningestible carrier mediums in calculating the appropriate base offense level simply applied the Supreme Court's literal interpretation of "mixture or substance."<sup>228</sup> These circuits concluded that whether the carrier medium is ingestible or marketable is not an important factor in deciding whether to use its weight in calculating the base offense level.<sup>229</sup> If the court could determine that the carrier is a "mixture or substance that contained a detectable amount of" controlled substance its weight would be included in calculating the base offense level.<sup>230</sup>

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224. See *supra* section II.D.3.

225. See *supra* text accompanying notes 116-18, 124-29.

226. See, e.g., *United States v. Tracy*, 989 F.2d 1279, 1286 (1st Cir. 1993) (where the average weight per dose of two different sales of LSD ranged from .0055 grams to .0064 grams); *United States v. Martz*, 964 F.2d 787, 790 (8th Cir. 1992) (where the blotters containing LSD ranged in weight from .0055 grams per dose to .00692 grams per dose); *United States v. Andress* 943 F.2d 622, 623-24 (6th Cir. 1991) (where the chemist determined that 3,200 doses of LSD weighed 20.87 grams for an average weight of .0065 grams per dose); *United States v. Leazenby*, 937 F.2d 496, 497 (10th Cir. 1991) (where 40 doses of LSD were found to weigh .24 grams for an average weight of .006 grams per dose).

227. See *supra* notes 7-8 and accompanying text.

228. See *supra* note 7 and section II.E.

229. See *supra* text accompanying notes 145-46, 154.

230. See *supra* text accompanying notes 147-50, 155.



The circuits that did not include the weight of uningestible carrier mediums did not use a strict literal interpretation of "mixture or substance."<sup>231</sup> These circuits distinguished *Chapman*, which dealt with an ingestible carrier medium, blotter paper, from cases involving uningestible carrier mediums.<sup>232</sup> One reason these circuits placed greater emphasis on whether the mixture is ingestible or marketable is because not doing so would lead to disparate sentencing.<sup>233</sup> Another reason for this emphasis was because they concluded that this was an important factor to consider if Congress's market-oriented approach was to work.<sup>234</sup> In determining that the weight of uningestible or unmarketable mixtures should not be used these circuits examined the legislative histories of both the NPEA and the Guidelines.<sup>235</sup>

#### B. *Interpretation in Conjunction with Legislative Histories*

The legislative histories of both the NPEA and the Guidelines suggest that one of Congress's goals was to create a uniform sentencing system.<sup>236</sup> The legislative history of the NPEA also demonstrates that Congress did not intend to base the severity of the sentence solely on the weight of the pure drug.<sup>237</sup> Instead, Congress decided to take a market-oriented approach in punishing drug traffickers.<sup>238</sup>

If the phrase "mixture or substance" is taken literally it would disrupt one of Congress's major goals in creating the Guidelines, which was to promote uniform sentencing. The reason it would disrupt this goal is because offenders would be punished according to the weight of the carrier medium that they decided to use to smuggle or transport the controlled substance.<sup>239</sup> This type of interpretation would also conflict with

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231. See *supra* note 8 and section II.F.

232. See *supra* see text accompanying notes 161-66, 171, 181.

233. See *supra* text accompanying notes 177-80.

234. See *supra* text accompanying notes 163-68.

235. See *supra* text accompanying notes 163-68, 172-77.

236. See *supra* notes 43, 51, 61-65, 69-72 and accompanying text.

237. See *supra* notes 55-58 and accompanying text.

238. *Id.*

239. See *supra* section II.E. for examples of the results obtained when a literal interpretation of this phrase is used by the courts.

Congress's market-oriented approach because sentences would not be based on the amount of marketable drug.<sup>240</sup>

Congress's intention to create uniform sentencing must be considered along with its intention to punish drug traffickers according to the total quantity of controlled substance distributed, pure or impure. Interpreting this phrase with Congress's market-oriented approach in mind, it is rational to conclude that Congress intended to include the weight of certain cutting agents that are mixed with the controlled substance.<sup>241</sup> It is not rational to conclude that Congress intended the courts to use the weight of any mixture containing a detectable amount of controlled substance, which would lead to disparate sentences.<sup>242</sup>

The circuits that have used this approach have concluded that the weight of uningestible carrier mediums should not be included for purposes of ascertaining the appropriate sentence.<sup>243</sup> These circuits have concluded that uningestible mediums are better viewed as types of packaging that should not be included for sentencing purposes.<sup>244</sup>

### C. *Effectiveness of the Guidelines and the NPEA Prior to the 1993 Guideline Amendments*

Cases such as *Chapman* and those which applied a strict literal interpretation of the phrase "mixture or substance" led the public to conclude that the Guidelines system was a failure.<sup>245</sup> In spite of the Supreme Court's holding in *Chapman*, in cases involving LSD, an offender's sentence could have varied from ten to sixteen months to as much as 188-235 months, de-

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240. See *supra* text accompanying notes 164-65.

241. Pure drugs are usually "mixed" with cutting agents in order to make more "marketable" drugs. For example, ten kilograms of pure cocaine can be mixed with 20 kilograms of a cutting agent to make 30 kilograms of "marketable" cocaine. It is reasonable to include the entire 30 kilograms in determining the base offense level because the seller in this case was going to sell 30 kilograms of cocaine and not just 10 kilograms.

242. See *supra* text accompanying note 175.

243. See *supra* note 8.

244. See *supra* text accompanying note 162.

245. Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2. "The Sentencing Guidelines system is a . . . dismal failure, a fact well known and fully understood by virtually everyone who is associated with the federal justice system." *Id.*

pending on the weight of the carrier medium used.<sup>246</sup> Including the weight of uningestible carrier mediums for other controlled substances led to the same type of anomalous sentencing.<sup>247</sup>

The Supreme Court had opportunities to resolve this conflict but denied certiorari on several occasions leaving an unexplainable disparity in sentencing among the circuits.<sup>248</sup> Congress could have easily remedied the disparity by including a workable definition of "mixture or substance" which excludes uningestible materials in the NPEA.<sup>249</sup> In 1993, the Sentencing Commission took the initiative and promulgated amendments to the Guidelines designed to try to correct the disparity caused by the different interpretations of the phrase "mixture or substance".<sup>250</sup>

#### D. *Effect of the 1993 Amendments to the Federal Sentencing Guidelines*

##### 1. *Amendments Regarding the Definition of Mixture or Substance*

It is too early to ascertain what effect these amendments will have on future cases involving controlled substances. The Sentencing Commission has included language that could lead

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246. *Id.* A good illustration is shown on the chart below:

CARRIER	WEIGHT OF 100 DOSES	GUIDELINE RANGE
Pure LSD	5 milligrams	10-16 months
Gelatin Capsule	225 milligrams	2 ¼-2 ¾ years
Blotter Paper	1.4 grams	5 ¼-6 ½ years
Sugar Cube	227 grams	15 ½-19 ½ years

Jim Newton, *Long LSD Prison Terms — It's All In The Packaging; Drugs: Law Can Mean Decades In Prison For Minuscule Amounts. DEA Official Says No Change Is Needed*, L.A. TIMES, July 27, 1992, at A1.

247. See *supra* sections II.E. and II.F.

248. See, e.g., *Sewell v. United States*, 113 S. Ct. 1367 (1993); *Cooper v. United States*, 113 S. Ct. 832 (1992); *Walker v. United States*, 113 S. Ct. 443 (1992); *Fowner v. United States*, 112 S. Ct. 1998 (1992); *Beltran-Felix v. United States*, 112 S. Ct. 955 (1992); *Mahecha-Onofre v. United States*, 112 S. Ct. 648 (1991).

249. Senator Edward Kennedy proposed an amendment that would have clarified the language of 21 U.S.C. § 841(b)(1) by inserting a section which read: "(E) In determining the weight of a 'mixture or substance' under this section, the court shall not include the weight of the carrier upon which the controlled substance is placed, or by which it is transported." 136 Cong. Rec. S7069 (daily ed. May 24, 1990).

250. See *supra* notes 185-90 and accompanying text.

to more disparate sentencing. After stating that the "mixture or substance" does not include materials that must be separated from the controlled substance before it can be used, the Sentencing Commission, in application note one of section 2D1.1, stated that "[i]f 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 counted."<sup>251</sup> The phrase, "cannot be readily separated," is ambiguous because different courts can come to different conclusions as to what can and what cannot be easily separated. Furthermore, even if the courts agree as to what can and what cannot be easily separated, each may use "any reasonable method" to determine the weight to be used to calculate the offense level. Chances are that under this method people who are convicted for the same amount of controlled substance will receive disparate sentences depending on the "method" the courts choose.

It is also not clear from the 1993 amendments what materials "must be separated" from the controlled substance except for the specific examples given such as: "the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and the waste water from an illicit laboratory used to manufacture a controlled substance." It seems that a problem will still arise in situations such as when cocaine is mixed with alcohol in order to conceal it during transportation as was the case in *United States v. Acosta*.<sup>252</sup> In that case the majority held that the creme liquor in which the cocaine was mixed was not ingestible and was being used only to mask the cocaine being transported; therefore, its weight should not be included in determining the offender's sentence.<sup>253</sup> Circuit Judge Van Graafeiland disagreed and argued that the creme liquor was ingestible and that its weight should be included in determining the offender's sentence.<sup>254</sup>

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251. 58 Fed. Reg. 27,148, 27,155 (1993) (proposed May 6, 1993); see *supra* note 191 for exact text.

252. 963 F.2d 551 (2d Cir. 1992); see *supra* notes 157-68 and accompanying text for a full discussion of the case.

253. *Acosta*, 963 F.2d at 556-57.

254. *Id.* at 558 (Graafeiland, J., dissenting).

The Sentencing Commission also empowered the courts to grant an upward departure when the "mixture or substance . . . is combined with other non-countable material in an unusually sophisticated manner in order to avoid detection."<sup>255</sup> What is "an unusually sophisticated manner" must be determined by the courts. This can also lead to disparate sentences because one court may grant an upward departure for a method that it determines to be unusually sophisticated, while another court may not consider the same method unusually sophisticated and, therefore, not grant an upward departure.

## 2. Amendments Regarding LSD

The 1993 amendments concerning LSD seem to be less ambiguous than those concerning the phrase "mixture or substance". In situations involving LSD on a carrier medium the Sentencing Commission is clear that the courts are to use a weight of 0.4 milligrams per dose in calculating the base offense level.<sup>256</sup> In the two cases that have considered the effects of the 1993 amendments regarding LSD, the courts noted that the base offense levels determined pursuant to the pre-1993 Guidelines were much higher than they would have been if determined pursuant to the 1993 amendments.<sup>257</sup>

The two cases that have considered the effect of the 1993 amendments involved defendants who had already been sentenced pursuant to the pre-1993 Guidelines.<sup>258</sup> As of the writing of this note the author is unaware of any cases involving LSD on a carrier medium such as blotter paper that have been decided pursuant to the 1993 amendments to the Guidelines. Even though the sentences in *Coohey* and *Holmes* were decided using the pre-1993 Guidelines the courts' comments regarding the application of the 1993 amendments are promising. The courts' comments suggest that sentences involving LSD on a carrier medium will be more uniform and less harsh than they were under the pre-1993 Guidelines because the courts will treat each dose as weighing 0.4 milligrams.<sup>259</sup>

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255. *Id.*; see *supra* note 191 for exact text.

256. See *supra* note 203 and accompanying text.

257. See *supra* notes 210-22 and accompanying text.

258. See *Coohey*, 1993 WL 495577 at \*3; *Holmes*, 1994 WL 4587 at \*5.

259. See *supra* notes 215-17, 221-22 and accompanying text.

#### IV. Conclusion

The *Chapman* case has had almost no effect in helping to settle the current split among the circuit courts of appeal. Some circuits apply the Supreme Court's literal interpretation of "mixture or substance" to cases involving any controlled substance. Other circuits have simply distinguished *Chapman* as applying only to marketable or ingestible mixtures.

When interpreting the phrase "mixture or substance containing a detectable amount" of controlled substance, the courts should examine the Policy Statement of the Guidelines and the legislative history of the NPEA. The Policy Statement of the Guidelines promotes uniform sentencing and the legislative history of the NPEA supports a market-oriented approach in sentencing offenders. Balancing these two considerations would lead to more uniform sentencing in conformity with the Guidelines. This approach would also help to carry out Congress's market-oriented scheme in punishing offenders of the NPEA.

The disparate sentencing that resulted from a strict literal interpretation led many people to consider the Guidelines system a failure. The solution seemed to be a fairly simple one: Include a more workable definition of mixture or substance which excludes the weight of uningestible or unmarketable carrier mediums. In view of the Supreme Court's denials of certiorari in cases involving such carrier mediums, it is was up to Congress or the Sentencing Commission to rectify the conflict among the circuit courts of appeal.

Although the Sentencing Commission has attempted to include a more workable definition of the phrase "mixture or substance" it has in the process added more ambiguous language to the Sentencing Guidelines that may lead to disparate sentencing. The Sentencing Commission has done this by giving the courts a "way out" by giving them too much discretion when they determine that the mixture "cannot be readily separated" or when the controlled substance is combined "in an unusually sophisticated manner." This author believes that the amendment would have been much more effective if this language were eliminated. A simple definition that the phrase "mixture or substance" does not include materials that must be separated before the controlled substance can be used would have sufficed. This simple definition would have more thoroughly eliminated

the disparities in sentences caused by the ambiguity of the phrase "mixture or substance" without adding more ambiguous language to the Guidelines.

Although the author feels that the amendments will eliminate some of the disparity that was caused by the ambiguity of the phrase "mixture or substance" he believes that they will also add future disparate sentences because of the added ambiguous language. The Sentencing Commission could have better resolved the inter-circuit conflict with a more simple definition of "mixture or substance".

Offenders should be punished for the amount of marketable drugs being made or transported and not according to the method of transportation chosen. This would lead to more uniform sentencing for similar violations of the NPEA which is in accordance with the policy reasons set forth in the Guidelines.

*Joseph Rizzo\**

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\* This comment is dedicated to my mother Virginia Rizzo and my sister Emilia Rizzo whose love and support have made this endeavor possible. I would also like to express my deepest gratitude to N.T. for her love and friendship, which has literally carried me through the last three years.