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NOTES

Criminal Law: Diagram of a Drug Sentence — Defining "Mixture or Substance" on the Basis of Utility in *United States v. Richards*

I. Introduction

Ancient civilizations contemplated the ideal attributes of justice with prophetic clarity. The Egyptian story of final judgment provides a particularly instructive example.¹ According to Egyptian religious doctrine, souls of the deceased presented their hearts to the deity Anubis.² The heart was then weighed on a scale opposite a single feather in the Hall of Two Truths.³ If the heart was lighter than the feather, the soul was judged to be pure.⁴ The story suggests the Egyptians understood the heart to be the essential element of human good or evil. Therefore, the lifeless mortal body was irrelevant to the calculation of salvation or damnation. Its inclusion would simply corrupt a fair and uniform belief in the method of final judgment.

Although centuries old, the tale frames an unresolved criminal sentencing issue in the American justice system. Under the Anti-Drug Abuse Act of 1986,⁵ narcotics offenders are subject to mandatory minimum sentences for possession of "a mixture or substance containing a detectable amount" of illegal drugs.⁶ Defining the allowable contents of a "mixture or substance" marks the point of controversy. According to judicial interpretations, "mixture or substance" may include: (1) *any substance* chemically bonded to the pure drug;⁷ (2) any substance chemically bonded to the pure drug *for the purpose of facilitating street sales*;⁸ or (3) any *ingestible* substance chemically bonded to the pure drug.⁹ Building upon the Egyptian analogy, American courts are confused about what to place on the scale opposite the feather. The figurative "heart" at issue is the mixture or substance of illegal narcotics.

The United States Court of Appeals for the Tenth Circuit first considered the issue in *United States v. Richards*.¹⁰ Larry Richards was arrested while chemically synthesizing methamphetamines through a process which yields the drug in a liquid

1. See ALAN W. SHORTER, *THE EGYPTIAN GODS* 54 (1937).

2. See THOMAS BULFINCH, *BULFINCH'S MYTHOLOGY* 884 (Gramercy Books 1979) (1855).

3. See SHORTER, *supra* note 1, at 54.

4. See *id.*

5. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in various sections of 18 U.S.C. and 21 U.S.C.).

6. 21 U.S.C. § 841(b) (1994).

7. The First, Fifth, and Tenth Circuit Courts of Appeal apply this plain meaning approach.

8. The Second, Third, Sixth, and Ninth Circuit Courts of Appeal apply this functional approach.

9. The Seventh and Eleventh Circuit Courts of Appeal apply this consumption approach.

10. 87 F.3d 1152 (10th Cir.), *cert. dismissed*, 117 S. Ct. 540 (1996).

wastewater solution. Although the amount of ingestible or marketable drug in the mixture weighed only twenty-eight grams, the entire solution weighed thirty-two kilograms.¹¹ As sentences are based upon drug weight, Larry Richards would spend a difference of decades in prison depending on the Tenth Circuit's characterization of a "mixture or substance."

Two conflicting policies shaped the controversy for the Tenth Circuit. Legislative history to the Anti-Drug Abuse Act of 1986 reveals that Congress intended to render federal drug sentences based upon the form of narcotics as they appear in the marketplace.¹² In other words, base sentencing weights should include carrier mediums, or substances chemically bonded to the pure drug to enhance marketability or consumption. However, this market-oriented approach conflicts with the objective of uniform sentencing advanced by the United States Sentencing Commission (the Sentencing Commission).¹³ Absolute uniformity is only possible where base sentencing weight includes the pure drug alone. Substances chemically bonded to the narcotic may vary in weight, leading to different sentences for essentially the same offense. Therefore, a balance must be struck between the market-oriented approach and uniformity objective.

The Tenth Circuit advanced neither policy by sentencing Larry Richards based upon the entire thirty-two kilogram solution.¹⁴ The solution was neither marketable nor ingestible when seized by law enforcement. Further, adoption of a base sentencing weight which includes the byproducts of manufacture limits the uniformity objective beyond the intent of Congress. Basing its decision on Supreme Court holdings involving entirely different facts,¹⁵ the Tenth Circuit adopted an overly broad definition of "mixture or substance" which fails to make the necessary distinction between byproducts of manufacture and carrier mediums used to facilitate consumption or sale.¹⁶ This note explores the interpretive lapse by the *Richards* court.

First, this note will challenge implementation of Supreme Court holdings without contemplation of the underlying rationale. Second, this note will emphasize the distinction between unmarketable waste materials and carrier agents used to market the narcotic or facilitate ingestion. Third, this note will criticize the application of plain meaning definitions in the presence of clear congressional intent. Finally, this note will endorse a congruent approach which reconciles the objectives of Congress

11. *See id.* at 1153.

12. *See* H.R. REP. NO. 99-845, at 11-12, 17 (1986). Congress expressly intended for narcotics dealers to be punished based on the quantity of diluted drugs actually sold rather than the purity of the illegal substance. Congress designated this the market-oriented approach. *Id.*

13. *See* U.S. SENTENCING COMM'N, FEDERAL GUIDELINES MANUAL 2D1.1 (1995) [hereinafter FEDERAL GUIDELINES MANUAL].

14. *See Richards*, 87 F.3d at 1153.

15. *See id.* at 1157.

16. Carrier mediums are substances chemically bonded with the pure narcotic to assist marketing or consumption of the narcotic. Dealers use carrier mediums to conceal, transport and distribute a greater number of drug units. To be classified as a carrier medium, the accompanying substance must place the drug in marketable form and not require chemical extraction of the narcotic prior to use. *See United States v. Chapman*, 500 U.S. 453, 466 (1991).

and the Sentencing Commission, as well as the reasoning of Supreme Court precedent.

II. *The Law Preceding United States v. Richards*

The development of definitive case law regarding the "mixture or substance" controversy necessarily begins with passage of the Anti-Drug Abuse Act of 1986.¹⁷ With regard to mandatory minimum sentencing, the Act adopted the market-oriented approach but failed to clearly define the phrase "mixture or substance containing a detectable amount (of narcotics)."¹⁸ Without a clear definition of "mixture or substance," courts lacked the legislative guidance to distinguish between byproducts of manufacture and carrier mediums used to facilitate consumption or sale. The United States Sentencing Commission¹⁹ attempted clarification, proposing mandatory minimum sentences based upon the entire weight of a mixture or substance.²⁰

The Supreme Court addressed the "mixture or substance" controversy²¹ in *Chapman v. United States*.²² This case involved a mandatory minimum sentence calculation based upon lysergic acid diethylamide (LSD) and its carrier medium.²³ The Supreme Court agreed with the Sentencing Commission that the entire weight of a "mixture or substance containing a detectable amount (of narcotics)" determined the sentence, based upon adherence to a plain meaning interpretation of "mixture or substance."²⁴ The Court further held the construction consistent with the congressional market-oriented approach.²⁵

Writing for the majority, Chief Justice Rehnquist reasoned that Congress intended to address narcotics as they would be sold on the streets.²⁶ Blotter paper "makes LSD easier to transport, store, conceal and sell. It is a tool of the trade for those who traffic in the drug, and therefore it was rational for Congress to set penalties based

17. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in various sections of 18 U.S.C. and 21 U.S.C.).

18. See *supra* note 12 and accompanying text.

19. The Sentencing Commission was a component of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3625, 3673, 3742, and 28 U.S.C. § 991-998 (1994 & Supp. I 1995)).

20. The current application notes instructed "in case of a mixture or substance containing methamphetamine, use the offense level determined by the entire weight of the mixture or substance." See *Richards*, 87 F.3d at 1153.

21. See *supra* note 16.

22. 500 U.S. 453 (1991).

23. See *id.* at 453. Minute dosages of pure LSD are typically dissolved and sprayed onto blotter paper for retail distribution. The paper is then cut into squares for ingestion. *Id.*

24. *Id.* at 454. Mixture was defined as "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." *Id.* at 462 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986)). The Court also defined mixture as "two substances blended together so that the particles of one are diffused among the particles of the other." *Id.* (citing 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989)). The court noted that packaging materials were not within the dictionary definition of a mixture. See *id.* at 462-63.

25. See *id.* at 461.

26. See *id.* at 465.

on this chosen tool."²⁷ Because blotter paper was a carrier agent used to facilitate the retail distribution and consumption of LSD, inclusion of its weight in sentencing would provide greater deterrence in the actual marketplace.²⁸

Justice Marshall joined Justice Stevens in a dissent criticizing divergence from uniform sentencing.²⁹ Focusing on relative culpability, Justice Stevens argued that a dealer who happens to use a heavier blotter paper should not receive a more severe punishment than a dealer who distributes a greater quantity of the pure drug.³⁰

Recognizing the possibility of widespread sentencing disparities, the Sentencing Commission amended the commentary to United States Sentencing Guideline 2D1.1 following *Chapman*.³¹ The amendment excluded from sentence calculation any materials requiring separation from the controlled substance prior to use.³² The Supreme Court then considered the relationship between the *Chapman* holding and the commentary amendment to the Guidelines in *Neal v. United States*.³³

The petitioner in *Neal* was also sentenced based upon the total weight of LSD and a carrier medium under facts similar to *Chapman*.³⁴ Following the commentary amendment to the Guidelines, the petitioner filed a motion to modify his sentence in the United States District Court for the Central District of Illinois.³⁵ The district court refused to modify the sentence,³⁶ and the United States Court of Appeals for the Seventh Circuit affirmed.³⁷ The Supreme Court agreed with the lower courts, rejecting the argument that priority should be given to the more specific Guidelines rather than the general statutory construction in *Chapman*.³⁸ The Court instead relied upon the doctrine of stare decisis to preserve the *Chapman* interpretation and include substances chemically bonded to the pure drug in sentence calculations.³⁹

Emerging conflict between the Supreme Court and the Sentencing Commission placed congressional intentions at apparent odds. Congress created the Sentencing Commission in 1984 to provide for uniform sentences. Congress then mandated a market-oriented approach in 1986, which would inevitably result in sentencing disparities. The absence of clarity has led to three different interpretations among

27. *Id.* at 466.

28. *See id.*

29. *See id.* at 468 (Stevens, J., dissenting).

30. *See id.* at 473 (Stevens, J., dissenting).

31. *See* FEDERAL GUIDELINES MANUAL, *supra* note 13, at 2D1.1 amend. 488). The commentary listed "waste water from an illicit laboratory used to manufacture a controlled substance" as an example of excluded materials in the sentencing calculations. *Id.*

32. *See id.*

33. 116 S. Ct. 763 (1996).

34. *See id.* at 763.

35. *See id.* at 765.

36. *See* United States v. Neal, 846 F. Supp. 1362 (C.D. Ill. 1994).

37. *See* United States v. Neal, 46 F.3d 1405 (7th Cir. 1995).

38. *See Neal*, 116 S. Ct. at 766.

39. *See id.* at 768-69. The Supreme Court invoked the doctrine of stare decisis based upon the authority of *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

federal appellate courts, forcing a choice between uniformity, market-oriented sentencing or a balance between the objectives.⁴⁰

The Sixth, Seventh, and Eleventh Circuit Courts of Appeal follow the consumption approach, which limits the base sentencing weight to ingestible "mixtures or substances."⁴¹ The consumption approach conforms to market-orientation because sentences are rendered based upon the form of the drug immediately prior to use. However, the consumption approach is underinclusive because it overlooks a mixture or substance which may assist in transportation or concealment of the narcotic but not consumption.

The Second, Third, and Ninth Circuit Courts of Appeal address the oversight by expanding the definition of "mixture or substance" to include any chemically bonded material which assists retail marketability in some sense.⁴² This functional approach includes both ingestible and non-ingestible carrier mediums, most accurately reflecting the market-oriented intentions of Congress. Uniformity is sacrificed to a greater extent under the functional approach, however, because a wider range of materials may be included in the base sentencing weight. Nonetheless, the functional approach appears to recognize congressional intent while balancing a uniformity objective.

Finally, the First, Fifth, and Tenth Circuit Courts of Appeal apply a plain meaning definition to "mixture or substance."⁴³ Relying on dictionary definitions where clear statutory language is absent, this plain meaning approach includes in base sentencing weight any material chemically bonded with the pure drug. Application of the plain meaning approach in *Richards* failed to advance uniformity or market-orientation objectives. While the market-orientation objective only contemplates the inclusion of carrier mediums used to facilitate consumption or sale, the plain meaning approach excessively includes any substance chemically bonded to the drug. The broader inclusion of any possible bonding substance necessarily results in greater sentencing disparities. Accordingly, the *Richards* decision reflects the danger of applying dictionary definitions without careful consideration of policy underpinnings and the specific facts at issue.

III. Onslaught of a National Methamphetamine Epidemic

Methamphetamine is the particular narcotic at issue in *United States v. Richards*, making the case particularly significant in Oklahoma and the Midwest. Methamphetamine is a potent central nervous system stimulant.⁴⁴ Otherwise known as speed

40. See *supra* notes 7-9.

41. See *United States v. Johnson*, 999 F.2d 1192 (7th Cir. 1993); *United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991).

42. See *United States v. Acosta*, 963 F.2d 551 (2d Cir. 1992); *United States v. Rodriguez*, 975 F.2d 999 (3d Cir. 1992); *United States v. Robins*, 967 F.2d 1387 (9th Cir. 1992).

43. See *United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996); *United States v. Mahecha-Onofre*, 936 F.2d 623 (1st Cir. 1991); *United States v. Baker*, 883 F.2d 13 (5th Cir. 1989).

44. See *Angie Cannon, Justice Department Cracks Down on Meth in Midwest, Rockies*, DENVER POST, Sept. 27, 1996, at A9.

or crank, the narcotic accelerates heart rate, elevates blood pressure and increases body temperature to produce a euphoric sensation.⁴⁵ Immediate side effects include irritability, paranoia, and nervousness.⁴⁶ One Drug Enforcement Agency (DEA) officer characterized the user of methamphetamines as an individual who "mows his lawn at 3 a.m."⁴⁷

Arrests for methamphetamine related offenses have tripled in the Midwest and Rocky Mountain region since 1992, resulting in a sense of recent urgency by the Justice Department.⁴⁸ In fact, the same day judgment was rendered in *United States v. Richards*, newspapers reported the arrests of a prominent Oklahoma City television anchor⁴⁹ and suburban Tulsa police chief⁵⁰ for possession and distribution of methamphetamines. Therefore, the sentencing procedures analyzed in *United States v. Richards* have immediate relevance to Oklahoma law enforcement.

IV. Statement of the Case

In *Richards*, law enforcement officials arrested Larry D. Richards for possession of a liquid mixture containing detectable amounts of a controlled substance.⁵¹ Police seized the thirty-two kilogram solution before Richards could separate twenty-eight grams of usable pure methamphetamine suspended in the liquid.⁵² On August 10, 1990, Richards pled guilty to manufacturing a controlled substance with intent to distribute.⁵³ The charge carried a mandatory minimum prison term of ten years.⁵⁴

45. See *id.* The drug is commonly ingested by inhalation, injection, or swallowing.

46. See *id.*

47. George F. Will, *Levees Against the Drug Storm*, TULSA WORLD, Sept. 17, 1996, at A14. Discussing the widespread accessibility of methamphetamine, Will noted the recipe is available on the Internet. See *id.*

48. See Phillip Brashear, *Midwest Targeted in Justice Department Anti-Drug Campaign*, ASSOCIATED PRESS, Sept. 26, 1996. Attorney General Janet Reno announced a coordination of efforts including public education, shared intelligence on drug traffickers and special law enforcement training in 14 states. *Id.*

49. See Ed Godfrey, *Ex-TV Anchor Pleads Guilty To Drug Charge*, DAILY OKLAHOMAN, June 28, 1996, at 14. Jerry Adams pleaded guilty to possession of methamphetamine with intent to distribute, receiving in exchange a five-year deferred sentence. Adams anchored newscasts in the Oklahoma City market since 1974.

50. See Mark A. Hutchison, *Police Chief Accused of Stealing Drugs*, DAILY OKLAHOMAN, June 28, 1996, at 14. Collinsville police chief Donald Abel was suspended without pay after he was arrested for allegedly stealing a gram of methamphetamine from a police evidence locker. Federal authorities claimed Abel then attempted to exchange the drugs for sex with a former police dispatcher.

51. See *United States v. Richards*, 87 F.3d 1152, 1153 (10th Cir. 1996).

52. See *id.* Synthesis of the narcotic yields a liquid solution. Methamphetamine is then extracted from the mixture for distribution in powder form, leaving a waste water byproduct.

53. See 21 U.S.C. § 841(a) (1994). "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance" *Id.*

54. See 21 U.S.C. § 841(b)(1)(A)(viii) (1994). "(A)ny person who violates subsection (a) of this section involving (viii) 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine . . . shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life" *Id.*

The United States District Court for the District of Utah applied Sentencing Guideline 2D1.1⁵⁵ and sentenced Richards to 188 months imprisonment. The court based the sentence upon the entire thirty-two kilogram mixture rather than the amount of pure methamphetamine.⁵⁶ Richards then filed two motions to vacate his sentence,⁵⁷ the second of which was granted by the district court.⁵⁸

The Tenth Circuit Court of Appeals ruled the motion an abuse of discretion and reversed.⁵⁹ However, the court noted that a pending amendment to the commentary of Sentencing Guideline 2D1.1 afforded Richards relief if adopted and applied retroactively.⁶⁰ As discussed in *Chapman*, the amendment would exclude from sentence calculation waste materials requiring separation from the pure drug prior to use.⁶¹ The Sentencing Commission amended the commentary effective November 1, 1993,⁶² expressly making the amendment retroactive.⁶³

Based on the amended commentary to Sentencing Guideline 2D1.1, Richards returned to the district court seeking a reduction in his sentence from 188 months to sixty months pursuant to 18 U.S.C. § 3582(c)(2).⁶⁴ The government challenged the reduction, arguing that the amended commentary failed to alter the actual definition of "mixture or substance" in the Anti-Drug Abuse Act.⁶⁵ Absent the change in construction, the government asserted that Richards' sentence must be no less than 120 months under the Act.⁶⁶

The district court, however, reduced Richards' sentence to sixty months, reasoning that Sentencing Guideline 2D1.1 and the Anti-Drug Abuse Act should receive a congruent interpretation to avoid inconsistent results.⁶⁷ A divided panel of the Tenth Circuit Court of Appeals agreed, embracing the lower court's congruent approach and refusing to sentence Richards based on the entire thirty-two kilogram solution.⁶⁸ The Tenth Circuit reasoned that the market-oriented approach contemplated by Congress prohibited the treatment of unusable drug mixtures as usable.⁶⁹

55. See *supra* note 18.

56. See *Richards v. United States*, 796 F. Supp. 1456, 1457 (D. Utah 1992). Adding additional local significance, Richards was incarcerated at El Reno, Oklahoma.

57. See 28 U.S.C. § 2255 (1994). A prisoner claiming his sentence exceeded the maximum authorized by law "may move the court which imposed the sentence to vacate, set aside or correct the sentence." *Id.*

58. See *Richards*, 796 F. Supp. at 1457.

59. See *United States v. Richards*, 5 F.3d 1369, 1370 (10th Cir. 1993).

60. See *id.* at 1371.

61. See *id.*

62. See *supra* note 18.

63. See FEDERAL GUIDELINES MANUAL, *supra* note 13, at 1B1.10(c).

64. See *United States v. Richards*, 67 F.3d 1531, 1532 (10th Cir. 1995). The Anti-Drug Abuse Act provides a mandatory minimum five-year prison term for possession with intent to manufacture 10 grams or more of methamphetamine. See 21 U.S.C. § 841(b)(1)(B)(viii) (1994).

65. 21 U.S.C. § 841(b) (1994).

66. See *Richards*, 67 F.3d at 1532.

67. See *id.* at 1537.

68. See *id.*

69. See *id.* at 1536.

The Tenth Circuit Court of Appeals then granted en banc review to determine the controlling definition of "mixture or substance."⁷⁰ Writing for the majority, Judge Baldock held that any substance chemically bonded to the pure drug should be included in base sentencing weight.⁷¹ Although *Chapman* only considered a carrier medium used to facilitate sale or consumption, the Tenth Circuit held *Chapman* controlling under the doctrine of stare decisis.⁷² The majority further rejected the market-oriented approach, citing "detectable amount" (rather than ingestible or marketable amount) as the hallmark of a "mixture or substance."⁷³ Finally, the majority rejected the authority of the Sentencing Commission to affect judicial statutory constructions.⁷⁴

Writing for the dissent, Chief Judge Seymour accused the majority of divorcing the holding in *Chapman* from its "underlying circumstances and rationale to produce a result which in this case is directly at odds with that rationale."⁷⁵ The dissent reasoned that although the methamphetamine solution at issue fit the dictionary definition of "mixture or substance," the majority had produced a ruling in conflict with congressional intent.⁷⁶ Additionally, the dissent cited authority from a majority of appellate courts which refused to treat unusable mixtures as usable.⁷⁷ The dissent concluded with an endorsement of the Sentencing Commission's amended commentary, suggesting a congruent ruling which places the Sentencing Guidelines in agreement with congressional intent.⁷⁸

V. Analysis

A. Inappropriate Application of Supreme Court Definitions

Supreme Court holdings cannot properly be applied to a given set of facts without initial consideration of the Court's underlying rationale. As suggested by Chief Judge Seymour, the Tenth Circuit Court of Appeals expanded the definition of "mixture or substance" beyond the scope of *Chapman* and *Neal*. Although a solution of methamphetamine and waste water seems analogous to LSD and blotter paper within the proposed definition, *Richards* presents a factual distinction prohibiting such application and revisiting the focal issue of congressional intent.

As previously discussed, a single dose of LSD is so minute that it must be reduced to liquid form and sprayed on a carrier medium of blotter paper. The paper facilitates marketability by concealing the drug, and the paper may be directly ingested. Accordingly, the Supreme Court developed its interpretation of "mixture or

70. See *United States v. Richards*, 87 F.3d 1152, 1152 (10th Cir.), cert. dismissed, 117 S. Ct. 540 (1996).

71. See *id.* at 1157.

72. See *id.* at 1156-57.

73. See *id.* at 1158.

74. See *id.* at 1157.

75. *Id.* at 1158.

76. See *id.*

77. See *id.* at 1159-60.

78. See *id.* at 1160.

substance" with facts clearly contemplated by the congressional market-oriented approach. In contrast, the methamphetamine seized in *Richards* was awaiting extraction from a waste water solution. The solution was neither marketable nor ingestible in its current phase of production, so the Supreme Court holdings were inapplicable.

At the time *Chapman* and *Neal* were considered, the Court was not compelled to distinguish carrier mediums from waste materials because only a carrier medium was before the Court. In *Richards*, it was inadequate to merely adopt this analysis from previous Supreme Court holdings. It was the responsibility of the Tenth Circuit to consider the unique factual circumstances, advance the analysis and make the necessary distinction required to maintain the intent of Congress.

B. Carrier Mediums Distinguished from Waste Materials

The majority of United States Courts of Appeal have recognized that Congress intended to elevate mandatory minimum sentences only in the presence of a carrier medium used to facilitate sale or ingestion of a controlled substance. As such, these courts have excluded waste materials from the statutory construction of "mixture or substance." Despite the Tenth Circuit's position, the prevailing view simply refuses to include worthless byproducts in a sentencing scheme based upon market-orientation.

Cases factually similar to *Richards* have consistently excluded the weight of waste water from sentencing determinations. In *United States v. Johnson*,⁷⁹ the Seventh Circuit reasoned that waste water from a cocaine solution failed to increase the amount of drug available at the retail level.⁸⁰ In a particularly instructive hypothetical, the court questioned the fate of a marijuana farmer who harvested his crop and dropped a few of the illegal plants on the ground. If the farmer then plowed his field and mixed traces of the plants into the soil, "would the farmer be accountable for all the marijuana harvested as well as the weight of the topsoil?"⁸¹ Obviously the results of such a sentence would be preposterous, but the extreme nature of the example reflects the immense potential for complete absence of uniformity if the market-oriented approach is disregarded.

In *United States v. Jennings*,⁸² the defendant was apprehended for possession of a methamphetamine mixture found cooking in a Crockpot.⁸³ The Sixth Circuit held that inclusion of the liquid waste materials in sentencing calculation "would both produce an illogical result and be contrary to the legislative intent underlying the statute."⁸⁴ The defendant was not attempting to increase the amount of methamphetamine available for sale with the addition of a carrier medium.

79. 999 F.2d 1192 (7th Cir. 1993).

80. *See id.* at 1196. Stating the obvious, the court noted that waste water itself has no market value. Accordingly, there is no rational basis to a sentence based on the entire weight of a useless mixture. *See id.*

81. *Id.*

82. 945 F.2d 129 (6th Cir. 1991).

83. *See id.* at 134.

84. *Id.* at 136.

Rather, he was distilling the narcotic from otherwise useless byproducts of manufacture.⁸⁵ In such circumstances the distinction between a marketable and useless "mixture or substance" was brought to light.⁸⁶

In *United States v. Rolande-Gabriel*,⁸⁷ the Eleventh Circuit held the inclusion of waste materials irrational to sentence calculation.⁸⁸ The Third Circuit agreed in *United States v. Rodriguez*,⁸⁹ ruling that a combination of cocaine and boric acid did not constitute a "mixture or substance."⁹⁰ The Third Circuit likened the boric acid to a container or packaging material, which *Chapman* expressly excluded from weight calculation.⁹¹

The argument may be advanced that packaging materials are functionally equivalent to carrier mediums. However, packaging materials may suspend or house the narcotic in a non-marketable state. Carrier agents, in contrast, are mixed with the drug to assist retail distribution or ease ingestion. The tendency of courts to treat packaging materials the same as waste materials based upon their mutual absence of marketability is further illustrated by authority from the Second Circuit.⁹²

For example, creme liqueur may provide a solvent for cocaine during temporary transportation.⁹³ To reduce the cocaine to a marketable or ingestible state, it must first be distilled from the creme liqueur.⁹⁴ Congressional rationale warrants penalizing the defendant for the entire amount of the mixture only after the cocaine reaches marketable form.⁹⁵ In contrast, blotter paper and other carrier mediums are necessary to the distribution and consumption of LSD and appropriately included in the sentencing weight under a market-oriented approach.⁹⁶

Materials chemically bonded to facilitate consumption or marketability of the pure drug represent controlled substances as they appear on the street. Both the consumption and functional approaches honor congressional intent for a market-oriented sentencing scheme. Accordingly, the distinction between consumption

85. *See id.* at 137. At the time of arrest, Richards was engaged in the same stage of methamphetamine production. *See United States v. Richards*, 87 F.3d 1152, 1153 (10th Cir. 1996).

86. *See Jennings*, 945 F.2d at 137.

87. 938 F.2d 1231 (11th Cir. 1991).

88. *See id.* at 1237. The instant cocaine mixture "was not ready for retail at the street-level or for wholesale by the big-time drug kingpin" and therefore not a carrier agent contemplated by the Supreme Court. *See id.*

89. 975 F.2d 999 (3d Cir. 1992).

90. *See id.* at 1001.

91. *See id.* at 1006. "The compressed boric acid was not used . . . as a cutting agent . . . for the cocaine such that its proximity to the cocaine here would constitute a 'mixture' as *Chapman* elucidates that term." *Id.* at 1005.

92. *See United States v. Acosta*, 963 F.2d 551 (2d Cir. 1992).

93. *See id.* at 552.

94. *See id.* at 553.

95. *See id.* at 556-57. The defendant's culpability is based upon the amount of usable drugs brought to the market, whether operating in wholesale, retail or importation. *See id.*

96. *See id.* at 556.

and marketability is inconsequential, provided unmarketable and non-consumable substances are not considered in sentence calculation. The avoidance of a distinction between ingestion and marketability is based largely on practicality, as the two concepts overlap. Blotter paper, for example, facilitates marketability and may be directly consumed. Furthermore, the materials a drug addict might consume would be difficult to predict at best.

C. Dictionary Reliance and Plain Meaning Interpretation

Despite widespread recognition of the carrier medium and waste material distinction, the Tenth Circuit Court of Appeals instead focused upon the plain meaning interpretation presented by the Supreme Court in *Chapman*.⁹⁷ According to the Court, absence of a congressional interpretation of "mixture or substance" required the application of dictionary definitions.⁹⁸ In *Chapman*, the Court determined blotter paper and LSD to constitute a mixture under the plain meaning of the term because the LSD crystals diffused among the fibers of the blotter paper.⁹⁹ The Tenth Circuit applied the same analysis in *Richards*, reasoning that liquid byproducts and methamphetamine particles were a "mixture or substance" by dictionary definition.¹⁰⁰

The Tenth Circuit supported its plain meaning analysis by focusing on the statutory language "mixture or substance containing a detectable amount (of narcotics)."¹⁰¹ In their opinion, "detectable amount"¹⁰² was the hallmark of a mixture or substance under the Anti-Drug Abuse Act.¹⁰³ Absent a limiting modifier such as "marketable," "consumable" or "usable" in the statutory language, the entire weight of the methamphetamine solution determined Richards' sentence. The Tenth Circuit openly admitted the sentencing disparities which would result from their interpretation, discounting the problem as a responsibility of the legislative branch to revise statutes.¹⁰⁴

The dissent opined, however, that "our job in construing statutes is to effectuate the intent reflected in the language of the enactment and the legislative process."¹⁰⁵ As such, the Tenth Circuit was not required to draft a ruling demonstrably at odds with congressional intent.¹⁰⁶

97. See *United States v. Richards*, 87 F.3d 1152, 1155 (10th Cir. 1996).

98. See *Chapman v. United States*, 500 U.S. 453, 462 (1991).

99. See *Richards*, 87 F.3d at 1155.

100. See *id.* at 1158. The Tenth Circuit Court of Appeals further cited *Johnson v. Sawyer*, 4 F.3d 369, 385 n.82 (5th Cir. 1993) (ruling that circuit courts of appeal are bound by the decisions of the Supreme Court regarding the interpretation of federal statutes).

101. See *Richards*, 87 F.3d at 1158.

102. 21 U.S.C. § 841(b) (1994).

103. See *Richards*, 87 F.3d at 1158.

104. See *id.*

105. *Id.* (Seymour, C.J., dissenting).

106. See *id.* (Seymour, C.J., dissenting); see also *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (dispelling plain meaning constructions which violate the intent of statutory drafting); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (cautioning against absurd literal results where alternative interpretations are consistent with legislative purpose).

Chief Judge Seymour borrowed the words of Learned Hand to convey the sentiments of the dissent: "One of the surest indexes of a mature judiciary [is] not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."¹⁰⁷ It only follows that functionally distinct concepts cannot be placed under the same definitive label. A substance chemically bonded to a pure drug to facilitate consumption or sale is not the same "mixture or substance" as an incomplete and unmarketable drug solution in the early stages of production.

In *Chapman*, the Supreme Court arrived at a plain meaning definition of "mixture or substance" in compliance with the congressional market-oriented approach.¹⁰⁸ Blotter paper is a carrier agent, which becomes a "mixture or substance" by dictionary definition when combined with LSD.¹⁰⁹

Methamphetamine and its liquid byproduct also satisfy the plain meaning construction of "mixture or substance" but fail to comply with the market-oriented approach. Therefore, it was improper for the Tenth Circuit to rely upon a definition provided by the Supreme Court without insuring the "mixture or substance" at issue was in fact the same. Only in the presence of a carrier medium used to facilitate sale or ingestion can both the plain meaning interpretation and market-oriented approach be implemented.

Following the same line of reasoning as the Tenth Circuit, the First Circuit stretched the limits of *Chapman's* plain meaning analysis beyond any reasonable intentions of Congress. In *United States v. Restrepo-Contreras*,¹¹⁰ the defendant was arrested for the importation of eleven beeswax statues containing cocaine.¹¹¹ Although the statues represented a classic example of packaging material, the First Circuit sentenced the defendant to 360 months in prison based upon the total twenty-six kilogram weight of the statues.¹¹² To arrive at this result and still recognize the market-oriented approach suggests that Congress anticipated unique artistic mediums such as the beeswax statue to facilitate the sale or ingestion of cocaine.

In *United States v. Lopez-Gil*,¹¹³ the First Circuit determined that cocaine chemically bonded to a fiberglass suitcase constituted a "mixture or substance," and accordingly the weight of the entire piece of luggage was used to calculate the mandatory minimum sentence.¹¹⁴ The First Circuit relied on precedent involving an acrylic suitcase, but there the court excluded the luggage's metal

107. *Richards*, 87 F.3d at 1161 (Seymour, C.J., dissenting) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)).

108. *See Chapman v. United States*, 500 U.S. 453, 465-66 (1991).

109. *See id.* at 462.

110. 942 F.2d 96 (1st Cir. 1991).

111. *See id.* at 97.

112. *See id.* at 98.

113. 965 F.2d 1124 (1st Cir. 1992).

114. *See id.* at 1126.

frames from net weight calculation.¹¹⁵ In his dissent, Judge Brown noted the possibility that the metal was excluded because it was less chewable than the fiberglass.¹¹⁶ With a hint of sarcasm, Judge Brown was able to capture the judicial problems which follow an overly broad interpretation of "mixture or substance."¹¹⁷

The decisions of the First and Tenth Circuits illustrate the limited applicability of plain meaning analysis only where a carrier medium is present in the "mixture or substance." Generalization of "mixture or substance" to include unusable waste or obvious packaging materials leads to precisely the inaccurate statutory definitions which concerned Learned Hand.

D. An Appeal for Reasonably Compatible Sentences and Objectives

Absolute uniformity in mandatory minimum sentencing is possible only where the weight of the pure drug alone is considered. The Anti-Drug Abuse Act¹¹⁸ eliminates absolute uniformity with congressional adoption of the market-oriented sentencing approach. Under the market-oriented approach, carrier mediums of different weights will result in varying sentences for sale or possession of the same drug amounts. The congruent approach strikes a balance between section 841 and the uniformity objective advanced by Sentencing Guideline 2D1.1, placing Congress, the Supreme Court and the Sentencing Commission in agreement. Excluding the weight of waste materials while including the weight of ingestible or marketable carrier mediums honors congressional intent while maximizing uniformity under the circumstances.

As previously discussed,¹¹⁹ the Sentencing Commission altered commentary to the Guidelines after *Chapman* to exclude "[m]aterials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include . . . waste water from an illicit laboratory used to manufacture a controlled substance."¹²⁰ The amended language specifically endorses the exclusion of waste materials from calculation and accordingly conflicts with the Tenth Circuit in *Richards*. However, the supportive strength of the Guidelines to the current analysis depends upon the scope of their authority.

The Supreme Court in *Neal* ruled the Sentencing Guidelines incapable of altering judicial statutory construction.¹²¹ On other occasions, however, the Supreme Court has held commentary promulgated by the Sentencing Commission to be authoritative unless unconstitutional¹²² or a clearly erroneous interpretation

115. See *Mahecha-Onofre*, 936 F.2d at 625.

116. See *Lopez-Gil*, 965 F.2d at 1132 (Brown, J., dissenting).

117. See *id.* (Brown, J., dissenting).

118. 21 U.S.C. § 841(b) (1994).

119. See *supra* text accompanying notes 31-32.

120. FEDERAL GUIDELINES MANUAL, *supra* note 13, at 2D1.1 amend. 488.

121. See *Neal v. United States*, 116 S. Ct. 763, 766 (1996).

122. See *Chapman v. United States*, 500 U.S. 454 (1991). The Supreme Court dispensed with the constitutionality issue in *Chapman*, finding the penalty scheme of 21 U.S.C. § 841 (1994) supported by

of the instant guideline.¹²³ The Court reasoned: "Amended commentary is binding on the courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation that satisfies the standard we set forth today."¹²⁴

The United States Circuit Courts of Appeal have generally agreed that while the commentary does not possess the force of law, it is an "important interpretive aid entitled to considerable respect."¹²⁵ Courts should defer to commentary if the guideline interpretation is reasonable¹²⁶ because it constitutes a contemporaneous explanation by the authors.¹²⁷ The Tenth Circuit opposes this position, refusing to follow amended commentary that is inconsistent with circuit precedent.¹²⁸

As prior analysis reflects, the intent of Congress and reasoning of the Supreme Court provided ample guidance for the Tenth Circuit to sentence Richards. The Sentencing Guidelines were not essential to arrive at the suggested conclusion that waste materials are excludable from sentencing calculation. Nonetheless, the amended commentary to the Guidelines are at the very least persuasive influence of the congressionally intended approach. Given the greatest possible authority afforded by a court, the commentary is unconditionally controlling.¹²⁹ Even the Tenth Circuit has recognized the merits of a congruent approach under analogous circumstances, suggesting harmony between the Guidelines and a statutory interpretation regarding the commission of an offense during the term of a previously imposed sentence.¹³⁰

E. Balance with Unavoidable Inequities

As previously suggested, the inclusion of ingestible or marketable carrier mediums in base sentencing weights does not result in absolute uniformity. It is merely a balance between the conflicting congressional intentions of uniformity and market-orientation in narcotics sentencing. Even under the congruent

a rational basis. *See Chapman*, 500 U.S. at 465, 467-68. It is noteworthy that this rational basis depended upon maintenance of the market-oriented approach. *See id.* at 465.

123. *See Stinson v. United States*, 508 U.S. 36, 40-41 (1993); *see also United States v. Fountain*, 83 F.3d 946, 951 (8th Cir. 1996) (defining guideline commentary consistent with the guideline as controlling).

124. *Stinson*, 508 U.S. at 46.

125. *United States v. Weston*, 960 F.2d 212, 219 (1st Cir. 1992).

126. *See United States v. Joshua*, 976 F.2d 844, 855 (3d Cir. 1992).

127. *See United States v. White*, 888 F.2d 490, 497 (7th Cir. 1989).

128. *See United States v. Saucedo*, 950 F.2d 1508, 1515 (10th Cir. 1991) (holding that guideline interpretations by the Tenth Circuit Court of Appeals carry the force of law until the Sentencing Commission or Congress change the actual text of the guideline); *see also United States v. Silver*, 84 F.3d 1317, 1325 (10th Cir. 1996) (ruling that the Sentencing Commission does not have the authority to override or amend a statute).

129. *See Mistretta v. United States*, 488 U.S. 361, 391 (1989) (observing that the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases).

130. *See United States v. Shewmaker*, 936 F.2d 1124, 1128 (10th Cir. 1991); *see also United States v. Shorthouse*, 7 F.3d 149, 152 (9th Cir. 1993) (ruling that the statutory scheme of sentencing, including the Guidelines, must be construed harmoniously as a whole).

approach, one who uses a heavier carrier medium may still receive a lengthier sentence than a dealer who sells greater quantities of the pure drug. For Congress to correct this inequity, representatives and senators will have to decide collectively that uniform sentencing is a greater national priority than attacking drug dealers with a market-oriented approach. This is unlikely for three reasons.

First and most importantly, the defendants subject to mandatory minimum sentences have been found guilty of a narcotics offense. Relative culpability is only a matter of degree. Second, uniformity is observed to a substantial extent by limiting the definition of "mixture or substance" to carrier mediums used to facilitate consumption or sale. Divergent sentences resulting from the inclusion of waste and packaging materials would be excluded from the equation. Third, the market-oriented approach to the drug trade is more aggressive and politically appealing than a sentencing scheme based only upon the weight of the pure drug.

With the Justice Department embarking on regional programs to combat methamphetamine distribution throughout Oklahoma and the Midwest, the market-oriented approach is a necessary response to a growing problem. Nevertheless, some measure of uniformity may be maintained while observing the intentions of Congress, the Supreme Court and the Sentencing Commission.

VI. Conclusion

The Tenth Circuit Court of Appeals failed to recognize the necessary distinction between carrier mediums and waste materials in *United States v. Richards*. Accordingly, the court expanded the scope of a section 841 "mixture or substance" beyond the intention of Congress, the Supreme Court or the Sentencing Commission. Narcotics sentences were intended to include the weight of carrier mediums used to facilitate sale or ingestion, not the weight of waste materials or their equivalents. A sentencing scheme based upon market-orientation must by its plain definition address the realities of the drug trade as it exists on the streets.

Returning to the analogous Egyptian tale, it is clearly illogical for Anubis to weigh the entire body against a single feather to render a person's final judgment. The relevant measurement of guilt or innocence is the heart, and only its weight need be considered. Congress, the Sentencing Commission and the Supreme Court have determined that pure narcotics and their carrier agents are the relevant components for calculating mandatory minimum drug sentences. To summarize the analogy with a modified cliché, *United States v. Richards* is a good case to throw the body out with the waste water.

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