1-1-1993

CRIMINAL LAW—SIFTING THROUGH THE “MIXTURE” PROBLEM TO DETERMINE A DRUG OFFENDER’S SENTENCE

Lisa A. Bongiovi

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.
CRIMINAL LAW—SIFTING THROUGH THE "MIXTURE" PROBLEM TO DETERMINE A DRUG OFFENDER'S SENTENCE

INTRODUCTION

In an effort to crack down on the sale and use of illegal drugs in this country, Congress revised the sentencing scheme for federally convicted drug offenders. Congress decided to take a hard line approach and sentence drug offenders based on the weight of drugs instead of just the classification of drugs. Moreover, Congress decided to include not only the weight of the drug itself, but also any additives.

1. In November of 1993, the United States Sentencing Commission plans to publish revisions to the Federal Sentencing Guidelines which will define "mixture." See Amendments to the Sentencing Guidelines for the United States Courts, 58 Fed. Reg. 27,148 (1993) (proposed May 6, 1993). These regulations provide for the following amendment:

Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

Id. at 27,155. The Commission is now accepting comments on this revision; thus, the amendment is subject to change. The Commission explains that the "amendment is designed to resolve an inter-circuit conflict regarding the meaning of the term 'mixture or substance,' as used in Section 2D1.1" of the Federal Sentencing Guidelines. The Commission has provided that only substances which "must be separated from the controlled substance" will not be weighed with the drug. Id. (emphasis added). A problem still exists with substances such as alcohol which do not have to be separated from cocaine before the drug could be used. See infra notes 153-91 and accompanying text for an analysis of usable mixture agents which should not be included with the weight of the drug.


While it is appropriate that the relative dangerousness of a particular drug should have a bearing on the penalty for its importation or distribution, another important factor is the amount of drug involved. Without the inclusion of this factor, penalties for trafficking in especially large quantities of extremely dangerous drugs are often inadequate.

Id.

4. For example, cocaine is usually mixed with lactose or dextrose to dilute its strength. This mixing process is called "cutting" the drug. See Gerald T. McLaughlin,
"mixed" with the drug. The intended result was for a drug dealer with more drugs to get a longer sentence than a drug dealer with less drugs.

A problem arose when a judge confronted a substance that could be considered a container and yet was "mixed" with the drug. For instance, in United States v. Mahecha-Onofre, the government confiscated cocaine which was chemically bonded to a suitcase. A suitcase would normally be thought of as a container in which drugs are placed. However, in this case, the cocaine was actually chemically bonded with the fabric of the suitcase and thus, the drug was "mixed" with the container. Should the suitcase be included in the weight of the drug for sentencing purposes? The United States Court of Appeals for the First Circuit answered this question in the affirmative. Conversely, the United States Courts of Appeals for the Second, Third, Ninth, and Eleventh Circuits have held that not all additives, which are chemically mixed with the drug, should be included with the weight of the drug for sentencing purposes.

The only United States Supreme Court case to address the issue of "mixtures" is Chapman v. United States. In Chapman, the Court

---


6. Chapman v. United States, 111 S. Ct. 1919, 1925 (1991). The Court held that "weights of containers and packaging materials generally are not included in determining a sentence for drug distribution, but that is because those items are also clearly not mixed or otherwise combined with the drug." Id. at 1926. However, it appears that neither Congress nor the Chapman Court foresaw the possibility of nonusable containers being mixed with the drug as they did not directly address this issue.


8. Mahecha-Onofre, 936 F.2d at 626.

9. Id.

10. See United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992) (holding that boric acid and cocaine chemically combined was not a mixture); United States v. Robins, 967 F.2d 1387 (9th Cir. 1992) (holding that cornmeal and cocaine did not constitute a mixture and that only the cocaine should be used in calculating the weight under the Federal Sentencing Guidelines); United States v. Bristol, 964 F.2d 1088 (11th Cir. 1992) (ruling that dissolving cocaine in wine did not produce a mixture); United States v. Acosta, 963 F.2d 551, 554 (2d Cir. 1992) (concluding that dissolved cocaine in creme liqueur was not an ingestible mixture and therefore the liqueur should not be included with the weight of the cocaine).

11. 111 S. Ct. 1919 (1991). See infra text accompanying notes 83-111 for a full discussion of the majority and dissenting opinions. There appears to be a disagreement among
attempted to clarify whether the term "mixture" required the weight of the "carrier medium" to be included in the total weight of the drug for sentencing purposes. The Court held that the blotter paper which was used as the "carrier medium" for the drug lysergic acid diethylamide (LSD) must be weighed with the pure LSD drug to calculate the defendant's sentence. Although the facts of Chapman deal only with the drug LSD, the analysis can be applied to any drug.

This Note analyzes the Chapman decision and suggests that Chapman set forth a "test" to define the term "mixture." This Note then discusses the relevant circuit court decisions which have applied Chapman, and then determines whether their approach follows the Chapman "test." Finally, this Note reaches two conclusions: first, the First Circuit's approach of including a suitcase with the weight of the cocaine for sentencing was erroneous; and second, the Second, Third, Ninth, and Eleventh Circuits reached the proper conclusion of excluding the weight of certain additives from sentencing, but should have used a different analysis to reach their conclusion.

the Supreme Court Justices as to whether the Supreme Court should hear this issue again. See Walker v. United States, 113 S. Ct. 443 (1992), in which Justice White and Justice Blackmun dissented from the denial of a writ of certiorari. The issue on appeal was whether the weight of waste product that is part of the by-product of the drug should be included in the weight of the drug for sentencing purposes. See infra note 14 for a discussion of this issue.

12. "Carrier medium" was the term used by the Supreme Court in Chapman to describe the blotter paper that the convicted drug dealer placed the dose of LSD onto so that the dealer could effectively distribute the LSD. Chapman, 111 S. Ct. at 1928. Because the dose of LSD is so small, the drug must be placed onto a "carrier." Id. See Michelle Rome Kallam, Note, Let the Punishment Fit the Crime: State v. Newton, Chapman v. United States and the Problem of Purity and Prosecutions, 52 LA. L. REV. 1267, 1282 (1992) for one commentator's analysis of the Supreme Court's handling of the term "carrier medium."

13. See infra text accompanying notes 153-88.

14. This Note will not address the issue of whether the liquid waste by-product from making laboratory drugs should be included in the weight as a "mixture." In United States v. Jennings, 945 F.2d 129, 131 (6th Cir. 1991), the defendant was convicted of manufacturing methamphetamine. The police raided the defendant's laboratory and confiscated a crockpot of chemicals containing a poisonous by-product with a small amount of methamphetamine. Id. at 134. A chemist testified that if the chemicals had completely reacted, they would have produced a much smaller amount of pure methamphetamine than was recovered. Id. Based on this testimony, the court reasoned that the entire mixture should not be weighed since the defendants could neither have produced that amount of methamphetamine or distributed the mixture in the form the police found the mixture. Id. at 136. This Note only addresses the issue of chemically combined additives with drugs. The circuit courts have reached different results on whether to include waste by-products. Compare United States v. Walker, 960 F.2d 409 (5th Cir.) (holding that including the weight of the liquid waste material of methamphetamine was proper because the waste was mixed with the drug when it was seized), cert. denied, 113 S. Ct. 443 (1992).
Section I.A analyzes the history and purpose of the Controlled Substances Act,\textsuperscript{15} the Comprehensive Crime Control Act of 1984,\textsuperscript{16} and the Narcotics Penalties and Enforcement Act of 1986\textsuperscript{17} to determine what Congress intended when it included the word "mixture." Section I.B discusses the majority and dissenting opinions of \textit{Chapman v. United States}.\textsuperscript{18} Section II discusses the conflicting circuit court opinions. Section III suggests that although never explicitly stated by the Supreme Court, the \textit{Chapman} decision defined a three prong "test" to lead lower courts to the proper analysis for considering "mixtures" for sentencing purposes.

\section{Background}

\subsection{Sentencing the Drug Offender}

Today, a judge may sentence a drug offender only within the dictates of the Federal Sentencing Guidelines\textsuperscript{19} ("Guidelines") and the Narcotics Penalties and Enforcement Act of 1986\textsuperscript{20} ("NPEA"). The Guidelines and the NPEA instruct a judge to calculate a sentence based on the weight of a "mixture" of drugs.\textsuperscript{21} However, the Guidelines and the NPEA do not explicitly define "mixture" or what types of additives should be included when weighing a drug.

The Controlled Substances Act ("CSA"),\textsuperscript{22} which was enacted in


\textsuperscript{22} Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as
1970, established the first comprehensive system for sentencing drug offenders. The CSA categorized drugs into five different schedules with the most dangerous drugs listed in Schedule I and the least dangerous drugs in Schedule V. Furthermore, within Schedule I and II, there were two additional classifications: narcotic or nonnarcotic. Under this classification system, a judge imposed a sentence based on the schedule and, if applicable, the classification of the particular drug. The amount of the drug that the defendant possessed was irrelevant. This legislation represented a comprehensive approach to control illegal as well as legal drug possession, manufacture, and distribution.

In 1984, Congress enacted the Comprehensive Crime Control Act of 1984 ("CCCA"). The CCCA made significant improvements in all areas of federal criminal laws. This Act replaced the CSA and substantially changed not only substantive criminal laws, but also criminal procedure and administration. The CCCA consisted of twelve chapters that covered such areas as bail, sentencing, violent crime, child pornography, bank fraud and wire taping. Two chapters specifically addressed sentencing drug offenders: Chapter Two—Sentencing Reform and Chapter Five—Drug Enforcement Amendments.


Id.


25. Id. For a more detailed description of this legislation see McLaughlin, supra note 4, at 568-71.


1. Chapter Two—Sentencing Reform

Chapter two, referred to as the Sentencing Reform Act of 1984,31 ("SRA") established the United States Sentencing Commission32 ("Commission") and charged the Commission with the task of writing the Federal Sentencing Guidelines. Through this Act, Congress intended to provide honesty, uniformity, and proportionality in the sentencing process.33 Congress highlighted the importance of these goals by explicitly including them within title 18, section 3553 of the United States Code.34

In the introduction to the Guidelines, the Commission defined honesty, uniformity, and proportionality. First, the Commission determined that Congress "sought honesty in sentencing . . . to avoid the confusion and implicit deception that arose out of the preguidelines 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

33. 28 U.S.C. §§ 991(b)(1)(B), 994(f) (1988). Specifically, Congress determined the following:
   A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity . . . . The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case.
34. 18 U.S.C. § 3553 (a)(5)-(6) (1988). The pertinent sections state:
   (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider— . . . .
   (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. [§ ] 994(a)(2) that is in effect on the date the defendant is sentenced;
   (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . .
   Id. See also, 28 U.S.C. §§ 991(b)(1)(B), 994(f) (1988) which specifically directed the Commission to promulgate guidelines which provide honesty, uniformity, and proportionality in sentencing.
serve in prison.”35 Second, the Commission found that “Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”36 Finally, the Commission determined that “Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”37

The Guidelines restructured the manner in which the CSA sentenced drug offenders and delineated a sentence for every possible drug, as well as precursor chemical ingredients for those drugs.38 The Guidelines provided a detailed drug table with increasing sentences based on the increasing weight of the drugs involved.39 Included in the drug tables, the Guidelines provided for sentences to be based on “mixtures” of drugs to be weighed to determine the drug offender’s sentence. By providing for the weight of “mixtures” of drugs, the Commission incorporated the goals of honesty, uniformity, and proportionality into the federal sentencing scheme.40

The Guidelines, however, do not define the term “mixture,” but instead refer the judge to title 21 section 841 of the United States Code for the definition.41 Unfortunately, Congress did not define “mixture” in section 841 or in any other federal statute. Therefore, a judge’s only guidance is to define “mixture” in a manner that furthers the goals explicitly stated by Congress in the statute, namely honesty, uniformity, and proportionality.

2. Chapter Five—Drug Enforcement Amendments

Chapter five, also known as the Controlled Substances Penalties Amendments Act of 198442 ("CSPAA"), focused on correcting the

35. U.S.S.G. Ch.1, Pt.A (n.3).
36. Id.
38. U.S.S.G. § 2D1.1 has a drug quantity table which categorizes the amount of drugs the convicted defendant possessed into a base offense level. Once a sentencing judge determines the base level offense, he or she will then turn to U.S.S.G. Ch. 5, Pt.A to determine the specific sentencing range.
40. See supra note 33.
41. See U.S.S.G. § 2D1.1, comment. (n.1).
42. Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473,
inadequacies of the CSA in punishing illicit drug trafficking. Congress noted that drug trafficking was one of the most serious problems faced by this country and the CSPAA focused on three areas. First, Congress shifted the basis of sentencing away from the classification of the drug and concentrated on the quantities of drugs involved. Second, by increasing the small statutory fine limits, Congress hoped to deter major drug traffickers with high incomes. Finally, the CSPAA eliminated any reference to a drug as being narcotic or nonnarcotic, as this classification failed to reflect the severity of such potent drugs as PCP, LSD and methamphetamine, all of which were labelled nonnarcotic.

In continuing with the CSPAA’s focus on drug dealers, Congress enacted the Narcotics Penalties and Enforcement Act of 1986 (“NPEA”). Congress consulted with drug enforcement agents and federal prosecutors to amend the CSPAA to more severely punish the major drug traffickers. In referring to the “mixture” in the legislative history of NPEA, Congress said that “mixture” did not necessarily mean the pure drug. Instead, Congress coined the phrase “market-oriented approach” which focused on the weight of the diluted form


Specifically, Congress stated the following:

The purpose of [the CSPAA] is to provide a more rational penalty structure for the major drug trafficking offenses punishable under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.). Illicit trafficking in drugs is one of the most serious crime problems facing the country, yet the present penalties for major drug offenses are often inconsistent or inadequate.

Id.

44. Id.

45. Id.


48. H.R. REP. NO. 845, 99th Cong., 2d Sess., pt. 1 at 11-12 (1986). But see Joseph B. Treaster, Two Judges Decline Drug Cases, Protesting Sentencing Rules, N.Y. TIMES, April 17, 1993, at 1, which describes how two judges, Jack B. Weinstein of Brooklyn and Whitman Knapp of Manhattan, joined about 50 out of the 680 Federal district judges in refusing to take drug cases. The two judges, who are senior judges and have more latitude in choosing their cases, are protesting the national drug policies and Federal Sentencing Guidelines as being unfair and overly cruel. They state that the sentencing rules have done nothing more than load up the prisons and have not improved the drug situation. See also Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681 (1992) for an in-depth look at the Guidelines and the problems associated with them.

49. H.R. REP. NO. 845, supra note 48, at 12 said:
of the drug as it reached the ultimate user market. Furthermore, this approach not only severely affected the major drug traffickers, but also the retail level dealer who kept the street markets going. Thus, all convicted drug offenders would be punished based on the weight of the pure drug plus any cutting agents or additives instead of on the weight of the pure drug alone. Unfortunately, the legislative history of the NPEA provided only a brief and albeit, confusing explanation as to why Congress decided to alter the sentencing scheme in this fashion.

The goals of the SRA, which is the authority for the Guidelines, and those of the CSPAA and the NPEA are not necessarily consistent. The goals of the SRA strived for honesty, uniformity, and proportionality. The goals of the CSPAA and the NPEA provided for a harsh, severe penalty scheme focused on major drug dealers. When sentencing a drug offender today, a judge must look to both the Guidelines and the drug statutes, as amended by the CSPAA and the NPEA, which both contain the word "mixture."

When construing the word "mixture," these two goals might seem to be in conflict. For example, in United States v. Mahecha-Onofre, the defendant had chemically combined 2.5 kilograms of cocaine with the fabric of a suitcase. The judge perhaps furthered the goals of the CSPAA and the NPEA by weighing the cocaine and the suitcase together; however, the goals of the SRA arguably were not

The Committee's statement of quantities is of mixtures, compounds or preparations that contain a detectable amount of the drug—these are not necessarily quantities of pure substance. One result of this market-oriented approach is that the Committee has not generally related these quantities to the number of doses of the drug that might be present in a given sample. The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

Id.

50. Id.
51. Id. at 11-12. See also Chapman v. United States, 111 S. Ct. 1919, 1925 (1991) which interprets Congress' legislative history.
52. A "cutting agent" is a product which is mixed with the drug to dilute its strength. See supra note 4.
53. H.R. REP. NO. 845, supra note 48, at 11-12. The exact language of the Committee report said that "[t]he Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." Id.
54. See supra notes 31-41 and accompanying text for a discussion of the goals of the Sentencing Reform Act.
55. See supra notes 42-53 and accompanying text for a discussion of the goals of the CSPAA and the NPEA.
57. Id. at 624.
furthered because only the 2.5 kilograms of cocaine would reach the market and therefore the defendant's sentence was disproportionate to any other dealer distributing the same amount of cocaine.58

The Supreme Court faced a similar "mixture" problem in Chapman v. United States.59 Although Chapman dealt only with the inclusion of blotter paper "mixed" with the drug LSD, the Court examined three factors that can be applied to any drug "mixture" problem to reconcile the goals of the SRA, the CSPAA, and the NPEA. Section B discusses the District Court, Court of Appeals and Supreme Court decisions in Chapman v. United States.

B. Chapman v. United States60

The Supreme Court defined the term "mixture" in Chapman. In this case, three defendants were each convicted under title 21 section 841 of the United States Code61 for selling ten sheets (1000 doses) of blotter paper containing LSD.62 The LSD alone weighed approximately 50 milligrams, while the combined weight of the blotter paper and LSD weighed 5,700 milligrams.63 The case presented the issue of whether the weight of the blotter paper should be included with the weight of the drug.

1. United States District Court for the Central District of Illinois

The district court, in United States v. Marshall,64 rejected the defendants' argument that the blotter paper was merely a container hold-
ing a dose of LSD and should not be included in the weight of the drug for sentencing purposes. The court concluded that the combined weight of the blotter paper and LSD must be used to calculate the defendants' sentences. Consequently, the judge sentenced the defendants to a minimum five year mandatory term. If the judge had considered only the weight of the LSD alone, the Guidelines would have required only an eighteen month sentence.

The district court noted that since LSD was too potent to be consumed in its pure form it had to be mixed with an alcohol solution. Because the alcohol solution had a tendency to evaporate, the alcohol/LSD mixture had to be sprayed onto a carrier-like paper in order to be consumed. The user would then eat the paper or lick the LSD off the paper. The defendant argued that absurd sentences would result if the blotter paper was included with the weight of the drug. The court rejected this argument because the defendant did not assert that his blotter paper was heavier or different from blotter paper normally used in the LSD drug trade. Thus, the issue of possible absurd sentences simply did not apply to this case.

The court examined the plain language of the statute and found no ambiguity. The court noted that although Congress included the word "mixture" for a judge sentencing a defendant with LSD, in the case of the drug phencyclidine (PCP), Congress allowed a judge to sentence a defendant based on either the pure drug PCP or a "mixture" including a detectable amount of PCP. Thus, the court con-

---

65. Id. at 654.
66. Id.
   (B) In case of a violation of subsection (a) of this section involving . . .
   (v) 1 gram or more of a mixture or substance containing a detectable amount of
   lysergic acid diethylamide (LSD);

   such persons shall be sentenced to a term of imprisonment which may not be less
   than 5 years and not more than 40 years . . . .

Id.
68. When calculating the defendant's sentence under the Guidelines based on the weight of the pure drug only, his base offense level was 14 which resulted in a sentencing range of 15-21 months. See U.S.S.G. § 2D1.1 and Ch.5, Pt.A.
70. Id.
71. Id.
72. Id. The defendant argued that if one "hit" of acid was on a heavy cardboard, it would create a harsher penalty than many hits of acid on a tissue paper. Id.
73. Id. at 653.
74. Id.
75. Id. For example, if a defendant was sentenced for PCP, the judge would refer to 21 U.S.C. § 841(b)(1)(A)(iv) (1988) which provided "100 grams or more of phencyclidine
cluded that because Congress did not provide for the same discretion with LSD, it must have intended to include the weight of the paper for sentencing purposes. 76

2. United States Court of Appeals for the Seventh Circuit

The Court of Appeals for the Seventh Circuit affirmed the district court's sentence and its interpretation of the word "mixture." 77 The court further noted that although the blotter paper and LSD might not technically be a "mixture," this was irrelevant because the combination of blotter paper and LSD was the ordinary usage of the drug. 78 As with cocaine, ordinary "mixtures" included white powders such as mannitol, quinine or lactose because those substances were the usual cutting agents for that drug. 79 Thus, the court looked to the ordinary "mixture" of a drug to determine a statutory "mixture." 80

The Court of Appeals then addressed the defendants' argument that inclusion of the blotter paper resulted in nonuniform sentences and thus was unconstitutional. 81 In rejecting this argument, the court held that the Constitution did not require a uniform sentence. Rather, the Constitution only required that a sentence bear a rational relationship to the offense. Moreover, Congress did have a rational basis for sentencing defendants based on the gross weight of the drug. 82 Thus, the Court of Appeals for the Seventh Circuit affirmed the decision to include the weight of the blotter paper in the total weight of the drug for sentencing purposes.

(PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phenycyclidine (PCP)." A conviction of possession of either the pure 100 grams or the 1 kg mixture containing PCP would result in a sentence of 10 years to life. Marshall, 706 F. Supp. at 653.

A 1990 amendment to 21 U.S.C. § 841(b)(1)(A)(viii) (1988 & Supp. II 1990) required methamphetamine to be weighed either by its pure weight or by its "mixture" of the pure methamphetamine plus any additives, just like PCP. When the Court of Appeals for the Seventh Circuit analyzed this statute, only PCP drug offenders could have their sentences determined by the pure weight of PCP without any additives. 76 Marshall, 706 F. Supp. at 653. The court found that Congress was aware that the sentencing scheme might not have always referred to the number of doses but that Congress instead focused on drug traffickers that dealt with a large quantity of drugs. Id. (referring to H.R. REP. NO. 845, 99th Cong., 2d Sess., pt. 1 at 12 (1986)). 77 United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990), aff'd sub nom., Chapman v. United States, 111 S. Ct. 1919 (1991).

76. Id. at 1317.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id. at 1324.
82. Id.
3. United States Supreme Court Majority Opinion

The Supreme Court affirmed the lower courts' holdings that the Guidelines and the NPEA\textsuperscript{83} required that the weight of the carrier medium (blotter paper) be included with the LSD when determining the defendant's sentence.\textsuperscript{84} The majority analyzed three factors to determine whether the blotter paper should be included with the weight of the LSD.\textsuperscript{85} One factor was whether the term "mixture" in its ordinary usage would include the blotter paper. The Court noted that neither Congress nor the common law had previously defined the term.\textsuperscript{86}

A "mixture" is defined 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." A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other.\textsuperscript{87}

The Court concluded that the LSD and the blotter paper fell within that definition.

LSD is applied to the blotter paper in a solvent, which is absorbed into the paper and ultimately evaporates. After the solvent evaporates, the LSD is left behind in a form that can be said to "mix" with the paper. The LSD crystals are inside the paper, so that they are commingled with it, but the LSD does not chemically combine with the paper . . . . The LSD is diffused among the fibers of the paper. Like heroin or cocaine mixed with cutting agents, the LSD cannot be distinguished from the blotter paper, nor easily separated from it.\textsuperscript{88}


\textsuperscript{84} Chapman v. United States, 111 S. Ct. 1919, 1929 (1991). The Supreme Court specifically restricted its holding in this case to LSD and blotter paper. Id. This is evidenced in the holding itself, where the Court specifically refers to "the" carrier medium rather than "a" or "any" carrier medium.

\textsuperscript{85} For clarification purposes, I have reorganized the way the Supreme Court discussed the three factors.


\textsuperscript{87} Chapman, 111 S. Ct. at 1926 (citations omitted) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986) and citing 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989)).

\textsuperscript{88} Id.
The second factor considered was whether the blotter paper was ingestible. The Court noted that a user will either lick the paper or eat it in order to ingest the drug. The Court also distinguished blotter paper from a container because blotter paper was ingestible and a container was not. The Court concluded that containers are not ingestible and would not be included in the weight of the drug for sentencing purposes.

The third factor was congressional intent. The Court noted that in 1984 Congress called for a more rational approach to sentencing convicted drug traffickers. The Court found that Congress restructured the penalties for drug distribution with a “market-oriented” approach. This new approach required a judge to sentence convicted drug offenders according to the total weight of the pure drug plus any additives that normally would be distributed to the retail customer. The Court also determined that Congress intended “the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found—cut or uncut, pure or unpure, ready for wholesale or [retail] distribution.” Thus, the Court concluded that including the weight of the blotter paper effectuated the goal of Congress’ “market-oriented” approach.

In summary, the Chapman decision found the LSD and blotter paper to be a “mixture” based on three criteria. First, the Court determined that LSD and the blotter paper constituted a “mixture” within the dictionary meaning. Second, Chapman found that the LSD and blotter paper combination was an ingestible “mixture.” Finally, the Court examined Congress’ legislative history and found that the LSD and blotter paper “mixture” fit within Congress’ “market-oriented” approach.

89. Id. at 1923.
90. Id. at 1926.
92. Id. (referring to H.R. REP. No. 845, 99th Cong., 2d Sess., pt. 1 at 11-12, 17 (1986)).
93. Id.
94. Id.
95. Id.
96. Id. at 1926.
97. Id.
98. Id. at 1925, 1927.
4. United States Supreme Court Dissenting Opinion

The dissent in Chapman called the majority’s decision “bizarre” and said that the majority’s construction of title 21 section 841 of the United States Code completely undermined Congress’ ultimate goal of uniformity. The dissent focused its argument on two points: (1) the lack of clarity in the statute and (2) the fact that the majority’s definition of “mixture” was contrary to the legislative history.

First, the dissenters determined that the statute was unclear because of the subsequent legislative history of the NPEA. Specifically, the dissent noted that in 1989, both Senator Biden and Senator Kennedy tried to clarify the definition of “mixture.” Both Senators presented legislation that would have excluded carrier mediums from the “mixture” definition. Congress, however, never adopted the legislation as law. Thus, the dissent argued, that “[a]lthough such subsequent legislation must be approached with circumspection be-

99. Justice Stevens and Justice Marshall both dissented from the majority opinion.
100. Chapman, 111 S. Ct. at 1929 (Stevens, J., dissenting).
101. Id.
102. Id. at 1931.
103. Id. at 1933-34.
104. Id. at 1930-31. The dissent noted, however, that “[o]f course subsequent legislative history is generally not relevant and always must be used with care in interpreting enacted legislation. It can, however, provide evidence that an effect of a statute was simply overlooked.” Id. at 1931 n.7 (citations omitted).
105. Id. at 1931. Senator Biden wrote a letter dated April 26, 1989 to the Chairman of the Sentencing Commission, William W. Wilkens, Jr. The relevant portion of the letter said:

“With 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 dilutant ingredient in the drug mixture . . . . The Commission suggests that Congress may wish to further consider the LSD carrier issue in order to clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture for punishment purposes.”

Id. (quoting United States v. Marshall, 908 F.2d 1312, 1327-28 (7th Cir. 1990), aff’d sub nom., Chapman v. United States, 111 S. Ct. 1919 (1991)). Senator Biden then offered an amendment to correct the inequity. His amendment was adopted as part of Amendment No. 976 to S.1711, but the bill never passed the House of Representatives. Id. Senator Kennedy proposed an amendment as follows:

“Section 841(b)(1) of title 21, United States Code, is amended by inserting the following new subsection at the end thereof: ‘[s]ec’t(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.’”

Id. (quoting 136 CONG. REC. S7069-70 (daily ed. May 24, 1990)).
106. Id.
cause it can neither clarify what the enacting Congress had contemplated nor speak to whether the clarifications will ever be passed, the amendments, at the very least, indicate that the language of the statute is far from clear or plain” as the majority seemed to suggest.107

Second, the dissenters noted that although Congress intended to punish drug traffickers severely, Congress also intended to punish drug traffickers who sell larger quantities of drugs more severely than those selling smaller quantities.108 This would suggest that the majority’s construction of “mixture” would punish more severely those who sell small quantities of LSD in weighty carriers, and instead of sentencing in comparable ways those who sell different types of drugs, the Court would sentence those who sell LSD to longer terms than those who sell proportionately equivalent quantities of other equally dangerous drugs. The Court today shows little respect for Congress’ handiwork when it construes a statute to undermine the very goals that Congress sought to achieve.109

The dissent pointed out that not including the carrier medium (blotter paper) would lead to more uniform results because the same amount of drugs still reached the market regardless of the weight of the “carrier medium.”110 They argued that since LSD is sold in doses, the medium on which it is placed would not increase the amount of drugs being trafficked to the user market.111

II. PRINCIPAL CASES

After the Chapman decision, the United States courts of appeals reached different results on the issue of whether a chemically combined container should be included in the calculation of the weight of

107. Id. at 1931.
108. Id. at 1933 (citing H.R. REP. No. 845, 99th Cong., 2d Sess., pt. 1 at 11-12 (1986)).
109. Id. at 1934 (footnotes omitted).
110. Id. at 1933. The majority included a table to show the sentencing variation with the different carrier mediums. Id. at 1924. The table is as follows:

<table>
<thead>
<tr>
<th>Carrier</th>
<th>Weight of 100 Doses</th>
<th>Base Offense Level</th>
<th>Guideline Range (months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sugar Cube</td>
<td>227 gr</td>
<td>36</td>
<td>188-235</td>
</tr>
<tr>
<td>Blotter Paper</td>
<td>1.4 gr</td>
<td>26</td>
<td>63-78</td>
</tr>
<tr>
<td>Gelatin capsule</td>
<td>225 mg</td>
<td>18</td>
<td>27-33</td>
</tr>
<tr>
<td>Pure [ ] LSD</td>
<td>5 mg</td>
<td>12</td>
<td>10-16</td>
</tr>
</tbody>
</table>

Id. (citing Brief for Petitioners).
111. Id. at 1933.
drugs for sentencing. To date, the Courts of Appeals for the Second, Third, Ninth, and Eleventh Circuits have held that a "mixture" should include only the drug and any "usable" additives when determining the total weight of a drug for sentencing purposes.\textsuperscript{112} However, the Court of Appeals for the First Circuit has held that any "mixture" must be included in determining the total weight of a drug, regardless of whether the additives are usable.\textsuperscript{113} Conflicting results occurred in the various circuits due to each court's emphasis on the different Congressional goals and each court's attempt to distinguish or follow the Chapman decision. In distinguishing or following Chapman, each court has placed a different emphasis on each of the Chapman factors: mixture, ingestibility, and marketability.

A. United States Court of Appeals for the Second Circuit

In United States v. Acosta,\textsuperscript{114} the Court of Appeals for the Second Circuit focused on Chapman's marketability factor. In Acosta, a defendant imported cocaine dissolved in creme liqueur.\textsuperscript{115} The court did not include the creme liqueur with the weight of the cocaine for sentencing. The cocaine without the liqueur weighed 2.245 kilograms which resulted in a sentencing range of 41-51 months.\textsuperscript{116} The cocaine with the liqueur weighed 4.662 kilograms and would have resulted in a sentencing range of 51-63 months.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{112} See supra note 10.
\item \textsuperscript{113} This section will only discuss the First, Second, and Ninth Circuit opinions because the other court opinions are based on similar fact patterns. For instance, both the Second Circuit and Eleventh Circuit addressed alcohol and cocaine mixtures and both courts concluded that the alcohol should not be weighed with the drug for sentencing purposes. The Third Circuit reached a similar conclusion as the Ninth Circuit. Both courts determined that the brick in which the drug dealer tried to trick the buyer into thinking was cocaine should not be weighed for sentencing purposes. See infra note 122 for a discussion of the Eleventh Circuit opinion and infra note 130 for a discussion of the Third Circuit opinion.
\item \textsuperscript{114} 963 F.2d 551 (2d Cir. 1992).
\item \textsuperscript{115} Id. at 552.
\item \textsuperscript{116} Id. The sentencing court imposed a sentence of 51 months. The Second Circuit footnoted the following explanation:

\begin{quote}
We note that the 51 month sentence imposed falls within the overlap of the two possibly applicable guideline ranges. We have held that when a sentence falls within the overlap and the sentencing judge makes clear that the same sentence would be imposed regardless of which of the two guideline ranges is applicable, we will not engage in the metaphysics of determining which is the appropriate range . . . . Here, the record is clear that Judge Glasser would have imposed a sentence less than 51 months had he believed the lower range was applicable, and, therefore, we address defendant's claim of error.
\end{quote}

\textit{Id.} at 553 n.2 (citations omitted).
\item \textsuperscript{117} \textit{Id.}
The court noted that the cocaine would have to be distilled out of the liqueur before distribution and that the liqueur, as even the government conceded, was merely a mask to conceal the cocaine. The court further noted that the government did not contest the defendant's argument that the creme liqueur was not ingestible. The majority found these factors to be important because if the liqueur was only a mask and the cocaine had to be distilled out of the liqueur before use, then the creme liqueur could be considered "unusable." The court reasoned that even though the cocaine and creme liqueur were technically a "mixture," the cocaine would have been extracted from the liqueur before being distributed to the market; therefore, "there [was] no reason to base a sentence on the entire weight of a useless mixture."

Furthermore, the majority determined that since Congress intended to create a "market-oriented" approach in the NPEA, the culpability of the defendant in Acosta was identical to individuals who did not conceal the drug in liqueur. Essentially, the same amount of drugs would reach the retail market. Thus, the court asserted that including the liqueur for sentencing purposes would violate the Guidelines' call for "uniformity and proportionality in sentencing." Finally, the Acosta court noted that its holding only applied to uningestible "mixtures." This holding would not apply to ingestible "mixtures" that contained cutting agents or dilutants.

In a dissenting opinion, Judge Van Graafeiland asserted that he believed that the majority inappropriately legislated and reached a result that was legally and factually incorrect. First, Judge Van Graafeiland said that the Government had not conceded that the co-

118. Id. See infra notes 123-28 and accompanying text for the dissent's discussion on how the majority came to the wrong conclusion of whether the creme liqueur was "usable."
119. Id. at 553.
120. Id. at 555.
121. Id. at 554.
122. Id. at 556. The Eleventh Circuit was faced with the identical issue in United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991). In that case, the defendant was convicted of importing cocaine into the country by dissolving it into a liquid substance. Id. at 1232. However, in Rolande-Gabriel, the court did not discuss whether the liquid substance was usable. Rather, it merely stated that the liquid substance was not usable. Id. at 1233. The court then stated that since the liquid substance was not usable, it was not includable in the weight of the drug. Id. at 1238. The court cited Chapman in support of this contention, stating that the distinction between whether a substance is usable or not determines whether to include the substance in the total weight under the Federal Sentencing Guidelines. Id. at 1236-38.
123. Acosta, 963 F.2d at 557 (Van Graafeiland, J., dissenting).
caine could not be distributed in its mixed form with the liqueur. Judge Van Graafeiland noted that the majority, and not the defendant's counsel, asserted that the "mixture" was not ingestible. Judge Van Graafeiland contended that the "mixture" of the liqueur and cocaine was ingestible and referred to drinks such as Vin Mariani and Coca Cola that contained cocaine at one time.

Second, Judge Van Graafeiland pointed out that the majority's focus on distribution to the user market was incorrect. Acosta was convicted of importing, rather than distributing, the cocaine; thus, the majority's discussion of marketability and distribution to the user market was wrong and irrelevant. Furthermore, even if distribution mattered, the court would still include the creme liqueur because Acosta was a drug dealer. Thus, the dissent concluded that the court should include the liqueur with the weight of the cocaine because Congress intended to impose a harsh sentence on drug dealers by including all "mixtures," without exception. The dissent also concluded that

124. Id.
125. Id. at 558. Judge Van Graafeiland said that [m]y colleagues' assertion that the Government "does not contest the defendant's argument that the creme liqueur was not ingestible" also is wide of the mark. [Acosta's] brief contains no mention whatever of lack of ingestibility. To the extent that there was any argument against ingestibility, it was my colleagues, not [Acosta's] counsel, who made it, and a poor argument it was.

126. Id. Judge Van Graafeiland takes issue with the majority's focus on the distribution aspect of the drugs. The dissent quotes the Ninth Circuit which stated, "[o]ur examination of the statute and its history underscores the strong congressional intent to criminalize all aspects of drug trafficking, and it compels us to reject an approach which focuses on sales or commercial transactions." Id. at 557 (quoting United States v. Palafox, 764 F.2d 558, 560 (9th Cir. 1985)). Thus, Judge Van Graafeiland determines that just because Acosta may not intend the "mixture" to reach the ultimate user market, this should not affect his sentence.

127. Judge Van Graafeiland also rejects the majority's reliance on uniformity and proportional sentencing. Id. at 560. He says that the uniformity and proportional principle were rejected by the Chapman Court and that it also has been rejected by numerous other courts. Id. (citing Chapman v. United States, 111 S. Ct. 1919, 1927-29 (1991)). He cites the following cases for support: United States v. Bishop, 894 F.2d 981, 985-96 (8th Cir.), cert. denied, 111 S. Ct. 106 (1990); United States v. Klein, 860 F.2d 1489, 1500-01 (9th Cir. 1988); United States v. Whitehead, 849 F.2d 849, 859-60 (4th Cir.), cert. denied, 488 U.S. 983 (1988); United States v. Holmes, 838 F.2d 1175, 1177-78 (11th Cir.), cert. denied, 486 U.S. 1058 (1988).

However, Chapman never explicitly rejected the uniformity and proportionality principles. See supra notes 83-98 and accompanying text for the Chapman discussion. See also supra note 19-41 and accompanying text for the discussion of the drug statutes which support the conclusion that Congress explicitly called for sentencing to remain uniform and proportional. Furthermore, the Supreme Court just recently decided that the commentary within the Guidelines is binding on the sentencing court. Stinson v. United States, 113 S. Ct. 1913 (1993). Specifically, the Court stated the following: "[w]e decide that commen-
the defendant was the kind of drug trafficker that Congress had referred to in creating the "market-oriented" approach.128

B. United States Court of Appeals for the Ninth Circuit

The Court of Appeals for the Ninth Circuit in United States v. Robins129 focused on the Chapman Court's ingestibility factor and concluded that cornmeal in which cocaine was stored should not be included in determining the total weight of cocaine for sentencing.130

In Robins, the defendant tried to trick the buyer into thinking that bricks of cornmeal wrapped in duct tape were actually solid cocaine.131 The defendant made V-shaped cuts into the bricks of cornmeal and poured the cocaine into the notches.132 When the buyer wanted to test the cocaine, the defendant punched holes in the bricks of cornmeal where the V-shaped notches contained the cocaine.133

In reaching its conclusion that the weight of the cornmeal should not be included in the weight of the cocaine, the court first noted that the cornmeal had to be separated from the cocaine before the cocaine could be consumed. The court made this determination because a forensic toxicologist testified that cornmeal was not a carrier medium134 or a cutting agent135 of cocaine. The court thus found that the cornmeal was more like a packaging material, which had been explicitly excluded from consideration in the Chapman decision.136

---

128. Acosta, 963 F.2d at 560.
129. 967 F.2d 1387 (9th Cir. 1992).
130. Id. at 1390-91. The Third Circuit was faced with a very similar issue in United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992). In that case, DEA agents seized packages of cocaine containing 2976 grams of boric acid and 65.1 grams of cocaine. Id. at 1001. The packages were made up of a compressed block of boric acid with a thin layer of cocaine spread on the surface. Id. The packages were constructed in this effort to trick unsuspecting customers into thinking that the whole brick was cocaine. Id. The court held that the boric acid should not be weighed along with the cocaine because the two substances were not mixed together. Id. at 1004-05. The court also determined that the boric acid was not used or intended to be a cutting agent. Id. at 1005. Thus, the court concluded that only the cocaine and not the boric acid should be weighed. Id. at 1007.
131. Robins, 967 F.2d at 1389.
132. Id. at 1388.
133. Id.
134. Id. at 1389; see supra note 12.
135. Robins, 967 F.2d at 1389; see supra note 4.
Second, the court determined that the cornmeal and cocaine were not a "mixture."

Since the cocaine was easily distinguished from the cornmeal and the cornmeal was not used as a cutting agent, there was no "mixture" of the two substances. Rather, the court concluded that the sole purpose of the cornmeal was to trick the buyer into thinking that the brick was made entirely of cocaine.

Finally, the Robins court distinguished its prior holding in United States v. Chan Yu-Chong. The court noted that in Chan Yu-Chong, the defendants were sentenced based on the total weight of heroin combined with an unidentified substance, which was most likely talcum powder. There was no evidence in Chan Yu-Chong "that the unidentified substance was not consumable by the ultimate user, e.g., that it was poisonous or that it would not dissolve as necessary for its ultimate injection." Thus, the Chan Yu-Chong court held that the heroin and talcum powder were a "mixture." In Robins, however, the court determined that since the cornmeal was not ingestible, nor actually mixed with the cocaine, the cornmeal should not be included with the weight of the drugs for sentencing purposes.

C. United States Court of Appeals for the First Circuit

The Court of Appeals for the First Circuit, in United States v. Mahecha-Onofre, focused on the Chapman Court’s definition of

137. Id.
138. Id. The cornmeal was easily distinguished because the cornmeal was yellow and the cocaine was white. The defendant also produced testimony by a forensic toxicologist who testified that cornmeal was not a carrier medium or a cutting agent of cocaine.
139. Id. at 1391.
140. Id. at 1390; see also United States v. Chan Yu-Chong, 920 F.2d 594 (9th Cir. 1990).
141. Robins, 967 F.2d at 1390. In Chan Yu-Chong, 920 F.2d at 596, the unidentified substance weighed 1920 grams while the heroin weighed 82.4 grams.
142. Robins, 967 F.2d at 1390 (quoting Chan Yu-Chong, 920 F.2d at 597).
143. Id.
144. Id. Specifically, the Robins court said:
Although cornmeal is consumable . . . it cannot reasonably be argued that Robins used the cornmeal to dilute the cocaine because the undisputed facts show that the sole purpose of the cocaine was to mask the identity of the cornmeal. Robins intended to pass off the cornmeal as cocaine by salting the mine in the area of the V-shaped cuts.
145. 936 F.2d 623 (1st Cir.), cert denied, 112 S. Ct. 648 (1991). Two other First Circuit cases which address the "mixture" problem are United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991) (ruling that cocaine mixed with beeswax should be weighed together) and United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir.) (affirming United States v. Mahecha-Onofre by holding that the weight of the suitcase should be in-
“mixture” to conclude that where cocaine was chemically combined with the fabric of a suitcase, the weight of the suitcase was properly added to the weight of the cocaine for sentencing purposes. The First Circuit concluded that Chapman stood for the proposition that any “mixture” that has a detectable amount of drugs in it must be included in the total weight of the drug mixture. The court focused on Chapman’s definition of “mixture” and held that cocaine which was chemically bonded to an acrylic suitcase was a “mixture,” and therefore, the total weight must be included for sentencing under the NPEA and the Guidelines. 146 Further, the court reasoned that although the suitcase could not be consumed, the Chapman Court’s discussion of ingestibility was unimportant to the outcome of Chapman and thus, ingestibility did not “play a critical role in the definition of ‘mixture.’ ” 147 The court explained that Congress considered not only the type of the drug but also the weight to be important, and thus, both should be considered when sentencing. 148 The court did not discuss or attempt to distinguish the marketability factor. The Court of Appeals for the First Circuit concluded that the chemically combined container must be included with the weight of the drug for sentencing purposes.

Conversely, the Courts of Appeals for the Second, Third, Ninth, and Eleventh Circuits, concluded that the chemically combined containers should not be included with the weight of the drug for sentencing. 149 Much of this confusion resulted from the various interpretations of the Chapman decision. In Chapman, the Supreme Court discussed three factors, but did not give any guidance as to how these factors should be applied when dealing with a “mixture” other than LSD and blotter paper. 151 As a result, each subsequent lower court opinion gave greater weight to the factors it determined were important and either attempted to distinguish the other factors or did not address them at all. 152 The solution to this

146. Mahecha-Onofre, 936 F.2d at 625-26 (referring to Chapman v. United States, 111 S. Ct. 1919, 1926 (1991)).
147. Id.
148. Id.
149. See supra note 10.
151. See supra notes 83-98 and accompanying text for a discussion of the United States Supreme Court opinion.
152. See supra notes 114-48 and accompanying text for a discussion of the circuit court opinions.
"mixture" problem is to create a consistent test that will incorporate Congress' intent for both the NPEA and the Guidelines.

III. ANALYSIS

The Supreme Court's factors in *Chapman v. United States* (153) can be used by the lower federal courts to further Congress' intent to provide honesty, uniformity, and proportionality (154) while also providing severe sentences for drug offenders. (155) Congress has the responsibility for defining "mixture" so that courts can sentence convicted drug offenders appropriately. (156) However, until Congress does define "mixture," the courts should follow the *Chapman* approach.

This section will discuss the Supreme Court's analysis of Congress' objectives and the three factors the Court examined to further these objectives. The three factors form a "test" under which each prong must be satisfied before something can constitute a "mixture." This section analyzes and applies each prong to the cases discussed earlier in this Note to demonstrate the following results: first, the First Circuit's approach of including a suitcase with the weight of the cocaine for sentencing is erroneous; and second, the other circuits' conclusions exclude the weight of certain additives from sentencing is correct, but their approach is incorrect because they did not follow the *Chapman* "test."

A. The Supreme Court's Analysis of Congress' Objectives

The *Chapman* majority concentrated its analysis on the legislative histories of the CSPAA and the NPEA amendments, (157) which called for a harsh penalty scheme for drug offenders. In using this approach, the majority determined that blotter paper must be included in the total weight of the LSD drug and that the possibility of disproportionate sentences was not at issue in that case. Indeed, the majority seemed unconcerned with the possibility that LSD could be placed on sugar cubes and lead to disproportionate sentencing. The majority said that since most LSD drug offenders use blotter paper to transport and consume LSD, proportional sentences would result among all dealers using blotter paper. (158) Thus, the majority would view its hold-
ing as conforming to the objectives of the SRA, the CSPAA, and the NPEA.

The dissent, on the other hand, focused its analysis on the SRA's legislative history, which called for uniform and proportional sentences. The dissent would have required that the "carrier" for LSD never be weighed, thus enabling uniform and proportional sentences at all times. The dissent asserted that construing the word "mixture" to include blotter paper completely undermined Congress' objectives of uniform and proportionate sentencing. Because of the possibility of disproportionate sentences when LSD was placed on sugar cubes, the dissent believed that the term "mixture" must be construed to never include a "carrier" when sentencing for LSD drug dealers. However, in construing "mixture" in this manner, the dissent did not provide for a harsh penalty scheme, thus ignoring the goals of the CSPAA and the NPEA.

The objectives of the SRA, CSPAA and NPEA can be met, however, by applying the Chapman factors to other cases. Although the majority restricted its holding specifically to LSD and blotter paper, the Court focused on several broad factors that may be applied in other sentencing contexts. The three factors that the Court examined to define "mixture" so as to further Congress' goals under the SRA, the CSPAA, and the NPEA were: (1) whether there was a "mixture" using the dictionary meaning for mixture, (2) whether the "mixture" was ingestible at the consumer level, and (3) whether the "mixture" was of the type that could be marketable at the consumer level. Each prong must be satisfied in order to effectuate the multiple goals of Congress: a harsh, but also uniform and proportional sentencing scheme.

1. Dictionary Meaning of Mixture

Because neither Congress nor the common law had ever specifically defined the word "mixture," the Court defined "mixture" using its dictionary meaning. Thus, whenever two substances are "blended together so that the particles of one are diffused among the particles of the other," they are considered mixed with one another.

159. Id. at 1931-33; see supra text accompanying notes 104-11.
161. Chapman, 111 S. Ct. at 1926; see supra notes 86-88 and accompanying text.
162. Chapman, 111 S. Ct. at 1925; see supra text accompanying notes 89-90.
163. Chapman, 111 S. Ct. at 1925; see supra text accompanying notes 91-95.
165. Id. at 1926.
The Court further elaborated that if a drug is not easily separated from or distinguished from another substance, it is “mixed” with the substance.\textsuperscript{166}

When applying this definition to the fact patterns in \textit{United States v. Acosta}\textsuperscript{167} and \textit{United States v. Mahecha-Onofre},\textsuperscript{168} both cases may be considered mixtures. \textit{Acosta} involved cocaine dissolved into creme liqueur so that the cocaine could be smuggled into the country.\textsuperscript{169} Since the cocaine was dissolved into the liquid, the particles of the creme liqueur and the particles of the cocaine were diffused among one another and neither substance retained a separate existence. To separate out the cocaine, the creme liqueur had to be evaporated, thus, the cocaine and the creme liqueur were not easily separated or distinguished from one another; thus, the cocaine and creme liqueur combination resulted in a “mixture.”

In \textit{Mahecha-Onofre}, the cocaine was chemically attached and diffused into the fabric of the suitcase and was not easily separated from the suitcase.\textsuperscript{170} Thus, the cocaine and the suitcase were “mixed” within the Court’s definition. Consequently, both \textit{Acosta} and \textit{Mahecha-Onofre} satisfy the first prong of the test.

In \textit{Robins},\textsuperscript{171} however, the two substances were probably not mixed within the above definition. The particles of cocaine arguably were not diffused among the particles of cornmeal. The cocaine retained a separate existence from the cornmeal because the cornmeal was only placed next to the cocaine.\textsuperscript{172} Because the cocaine was easily separated from and distinguishable from the cornmeal,\textsuperscript{173} the two substances never mixed within the Court’s definition. The \textit{Robins} court focused on ingestibility to determine that the cornmeal should not be included.\textsuperscript{174} However, this Note suggests that the two substances were not even mixed. Thus, the first prong of the test was not satisfied and

\begin{itemize}
  \item \textsuperscript{166} \textit{Id}.
  \item \textsuperscript{167} United States v. Acosta, 963 F.2d 551 (2d Cir. 1992).
  \item \textsuperscript{169} \textit{Acosta}, 963 F.2d at 552. See \textit{supra} notes 114-28 and accompanying text for a full discussion of the majority and dissenting opinions.
  \item \textsuperscript{170} \textit{Mahecha-Onofre}, 936 F.2d at 626. See \textit{supra} notes 145-48 and accompanying text for a full discussion of the opinion.
  \item \textsuperscript{171} United States v. Robins, 967 F.2d 1387 (9th Cir. 1992). See \textit{supra} notes 129-44 and accompanying text for a full discussion of the opinion.
  \item \textsuperscript{172} \textit{Robins}, 967 F.2d at 1388.
  \item \textsuperscript{173} See \textit{infra} note 188 for a discussion of whether to weigh the cornmeal with the cocaine if it were mixed together.
  \item \textsuperscript{174} \textit{Robins}, 967 F.2d at 1389; see \textit{supra} notes 129-44 and accompanying text.
\end{itemize}
the court’s analysis ends. The cornmeal would not be included with the weight of the cocaine for sentencing.

2. Ingestibility

Once Chapman established that a dictionary definition of mixture did exist under the first prong, the Court also analyzed whether the “mixture” was ingestible. The Court noted that the blotter paper carrying the LSD was ingested just like cutting agents mixed with cocaine and heroin.175

When applying this prong of the test to Acosta,176 the creme liqueur and cocaine constituted an ingestible mixture. Both the creme liqueur and cocaine were marketed to be ingested, albeit the former legally and the latter illegally. Moreover, when the two substances were mixed together, the combination also formed an ingestible substance. However, this Note’s analysis of ingestibility differs from the Acosta court’s analysis. In Acosta, the court stated that the cocaine and creme liqueur “mixture” were noningestible.177 The court made this statement so as to enable the district court to exclude the creme liqueur from the weight for sentencing purposes. However, under this Note’s analysis, cocaine and creme liqueur are an ingestible mixture; thus, the sentencing judge would move to the final step in the analysis.178

In Mahecha-Onofre,179 however, the suitcase and cocaine were not ingestible.180 The suitcase was not like the blotter paper because the user would not lick or eat the suitcase in order to ingest the drugs. Instead, the suitcase was just being used as a container to carry the cocaine, even though the cocaine and the suitcase were chemically combined. The Mahecha-Onofre court determined that the discussion of ingestibility was unimportant to the outcome of Chapman and thus

176. 963 F.2d 551 (2d Cir. 1992).
177. Acosta, 963 F.2d at 552. See supra notes 118-22 and accompanying text for a discussion of the majority court’s discussion of ingestibility. Compare notes 123-25 and accompanying text for the dissent’s criticism of the majority’s analysis.

Although United States v. Robins, 967 F.2d 1387 (9th Cir. 1992), failed the first prong and the judge would not proceed to the second step, the cornmeal and cocaine, if it were mixed, would be ingestible. The two substances mixed together could be consumed and thus would pass the second prong.

180. Id. at 625-26. See supra text accompanying notes 147-48 and accompanying text for the First Circuit’s analysis of ingestibility.
the court concluded that the suitcase should be included with the weight of the cocaine for sentencing purposes.\textsuperscript{181} This Note suggests that ingestibility is critical to the outcome of the Chapman decision and because the suitcase is not ingestible, Mahecha-Onofre fails the second prong. Thus, the judge would not include the weight of the suitcase with the weight of the cocaine for sentencing.

3. "Market-oriented" approach

The Chapman Court also used a "market-oriented" approach, which focused on the method of distribution of the drug to the user market. The Supreme Court found that LSD was usually attached to blotter paper and noted that although "hypothetical cases can be imagined involving very heavy carriers and very little LSD, those cases are of no import" for petitioner's claim.\textsuperscript{182} The Chapman court recognized blotter paper as the "carrier of choice" for LSD drug traffickers and thus, did not extend its holding to consider heavier carriers.\textsuperscript{183} Thus, a judge would focus on the typical method used by drug dealers to distribute a drug to the user market. To determine usual methods of distribution, a judge could refer to experts in the field.\textsuperscript{184}

Occasionally, a creative drug dealer may intend to distribute a drug to the user market in an unusual form; nevertheless, the judge will focus on the usual method that the drug is distributed to the market. Thus, the intent of the drug dealer, in the wholesale or retail market, is irrelevant to a judge's sentencing determination. This objective approach arguably would ensure that Congress' goals of honesty, uniformity, and proportionality are furthered when sentencing the drug offender.

In United States v. Acosta,\textsuperscript{185} the cocaine mixed with the creme liqueur was not the usual method of distribution for cocaine.\textsuperscript{186} In the retail market, the cocaine would typically be extracted and then deliv-

\textsuperscript{181} Mahecha-Onofre, 936 F.2d at 625-26; see supra notes 145-48 and accompanying text.
\textsuperscript{183} Id.; see supra text accompanying notes 91-95.
\textsuperscript{184} For example, in United States v. Robins, 967 F.2d 1387, 1389 (9th Cir. 1992), the court referred to a forensic toxicologist to determine that cornmeal was not a carrier medium or cutting agent for cocaine.
\textsuperscript{185} 963 F.2d 551 (2d Cir. 1992).
\textsuperscript{186} Id. at 554. The Second Circuit actually focused on whether the "mixture" was in a usable form. Because creme liqueur and cocaine are technically "usable," the Second Circuit's approach does not necessarily work. A better approach is to focus on whether the "mixture" was one that would "usually" reach the market in that form. See supra text accompanying notes 120-22 for the Second Circuit's discussion on marketability.
ered to the user in a powdery form. Acosta used the creme liqueur only as a method by which to smuggle the drug into the country and not as a method of distribution. Thus, a court would exclude the weight of the creme liqueur from the weight of the cocaine for sentencing purposes.

However, this conclusion was the result of fact finding by the judge. The sentencing judge may refer to experts in the field to determine, for example, if creme liqueur was typically used as a method of distribution. If so, then it would be included with the weight of the drug for sentencing.

B. Comparing Congress’ Objectives to the Results

Congress’ objectives of harsh yet honest, uniform, and proportional sentences, arguably are fulfilled by use of the three prong Chapman test. Therefore, unless Congress further defines “mixture,” a sentencing judge can utilize the Chapman test to achieve fair and uniform sentencing. The drug dealer who mixes cocaine with a common cutting agent will receive the same sentence as the drug dealer who distributes an equal weight of pure cocaine.

Moreover, this test will allow courts to avoid including a suitcase or creme liqueur in the weight of a drug when it is clear that those items are merely containers to bring the drug to the marketplace. Regardless of the increasing sophistication of drug smuggling, this test allows a judge to logically and coherently sift through complicated questions of fact to achieve a sentence that arguably relates to what


188. United States v. Robins, 967 F.2d 1387 (9th Cir. 1992), provided for an excellent example of using an expert to determine if cornmeal was typically used as a method of distribution. In that case, the forensic toxicologist testified that cornmeal was not normally used as a cutting agent for cocaine. Thus, the judge determined that the cornmeal should not be weighed with the cocaine. Hypothetically, if cocaine and cornmeal were mixed together, the judge could refer to forensic toxicologists to determine that the cornmeal would not be weighed with the cocaine even if the two products were mixed together because cornmeal was not the typical cutting agent for cocaine. However, if cornmeal begins to become a typical method of distribution, then the judge could include it with the weight of the drug for sentencing.

189. See supra text accompanying notes 31-53 for a discussion of the definition of Congress’ objectives.

190. See supra note 1 for an explanation of how the United States Sentencing Commission is addressing this problem. Furthermore, the United States Sentencing Commission plans to publish revisions and define “mixture” in November of 1993.

191. See supra note 4 for an explanation of “cutting” a drug.
Congress intended when it mandated that sentences for drugs should include the entire weight of substances mixed with drugs.

CONCLUSION

Without express direction from Congress, the judiciary has struggled to sentence drug offenders within the conflicting objectives of the Narcotics Penalties and Enforcement Act of 1986 ("NPEA") and the Guidelines. Congress desires uniform and proportional sentences for all federal convicts under the Guidelines, but also intends to "throw the book" at drug offenders with stiff jail sentences under NPEA.

The potential conflict between these objectives surfaces when a judge must sentence a drug offender based on a drug "mixture." The sophisticated smuggling methods of drug dealers highlight the dilemma: what substances should a court include with the drug when weighing for sentencing? The Supreme Court's analysis in Chapman provides a clear path for federal judges immersed in the murky area of sentencing drug offenders. First, is the "mixture" a mixture within the dictionary definition? This establishes the essential groundwork. Second, is the "mixture" ingestible? Since the nature of drugs is to consume them in some fashion, Congress could only have intended to include ingestible "mixtures." Moreover, if the "mixture" is not ingestible, it is most likely a container whose purpose is to transport and conceal the drug. Finally, will the drug "mixture" reach the user market in its present form? This final prong prevents judges from weighing those additives that will pass the first two prongs, but will not be brought to the ultimate user in that form. This method provides a coherent approach to sentencing drug offenders which arguably fulfills Congressional intent in the use of the word "mixture" in the sentencing statutes.

Lisa Anne Bongiovi