

Before the

UNITED STATES SENTENCING COMMISSION

Washington, DC

In the Matter of

PROPOSED AMENDMENT TO INCREASE THE PENALTIES FOR
METHAMPHETAMINE OFFENSES IN RESPONSE TO THE INCREASED
MANDATORY MINIMUM PENALTIES MADE BY THE METHAMPHETAMINE
TRAFFICKING PENALTY ACT OF 1998

Comments of Joseph R. Meiss

This comment is in response to the United States Sentencing Commission's proposed amendment to increase the penalties for methamphetamine offenses in response to the increased mandatory minimum penalties made by the Methamphetamine Trafficking Act Penalty Enhancement Act.

The comment recommends that the Commission should only change the calculations in the Drug Quantity Table in Sec. 2D1.1 for methamphetamine substance to conform the quantities for those drugs to the quantities that now trigger the statutory five- and ten-year mandatory minimums.

Synopsis

The effects and spread of methamphetamine use are documented in various studies. Although the United States Sentencing Commission should make every effort to help prevent the further growth of the problems associated with the drug, any attempt by the Commission must conform to legislative intent. Congress's latest legislation to suppress the illicit drug trade of methamphetamine indicates that the legislators want methamphetamine offenders' sentences calculated by using either the weight of a mixture or substance containing a detectable amount of the drug or the weight of the drug in its pure form. The current proposed amendment to base the accused sentence solely on the weight of pure methamphetamine is not only in direct conflict with the intentions of Congress, but precedent is established that will complicate the sentencing scheme by creating two concurrent systems for

determining an offender's sentence. Until Congress, who is entrusted with the responsibility of revising a statute's structure and policy, amends the criteria used for calculating a methamphetamine offender's sentence, the Commission should not significantly alter the current method. Consequently, the Commission should only modify the Drug Quantity Table for methamphetamine-actual to conform to the 1998 statutory amendment affecting the mandatory minimum sentences for methamphetamine offense, and increase the methamphetamine-mixture to reflect a presumptive purity greater than 10 percent.

I. Introduction

A. What Is Methamphetamine?

The National Institute of Drug Abuse (NIDA) describes methamphetamine as "a powerfully addictive stimulant that dramatically affects the central nervous system."¹ It is closely related chemically to amphetamine, but increases the activities of certain systems in the brain more dramatically. "It is a white, odorless, bitter-tasting crystalline powder that easily dissolves in water or alcohol."² The drug comes in many forms and can be smoked, snorted, orally ingested, or injected.³ The drug is commonly known by various names depending on the methods of ingestion. Thus, Methamphetamine may be referred to as "speed" or "crystal" when it is swallowed or sniffed; as "crank" when it is injected; or as "ice" or "glass" when it is smoked.

B. What Are the Effects of Methamphetamine Use?

Although some of the immediate physiological effects of methamphetamine differ slightly depending upon how the drug was used,⁴ the central nervous system generally experiences similar reactions to the drug regardless of how it was ingested. Ordinarily, the drug causes increased wakefulness, increased physical activity, decreased appetite, increased respiration, irritability, confusion, tremors, anxiety, and/or paranoia. In addition, the prolonged use of even a moderate amount of methamphetamine may produce mental confusion, physical dependence, and even death. Due to these intense reactions to methamphetamine, experts

¹ National Institute on Drug Abuse (NIDA), National Institute of Health (NIH), *Methamphetamine Abuse and Addiction*, Pub. No. 98-4210 (April 1998).

² *Id.*

³ *Id.*

⁴ "Immediately after smoking the drug or injecting it intravenously, the user experiences an intense rush or 'flash' that lasts only for a few minutes and is described as extremely pleasurable. Snorting or oral ingestion produces euphoria - a high but not an intense rush. Snorting produces effects within 3 to 5 minutes, and oral ingestion produces effects within 15 to 20 minutes." *Id.*

have discovered that users are easily susceptible to becoming highly dependent upon the drug.

Because the drug has a high potential for abuse, many methamphetamine users become addicted resulting in many damaging long-term effects. "Chronic methamphetamine abusers exhibit symptoms that can include violent behavior, anxiety, confusion and insomnia. They also display a number of psychotic features, including paranoia, auditory hallucinations, mood disturbances ... [which] can result in homicidal as well as suicidal thoughts."⁵ In addition, the chronic use of methamphetamine causes the users to develop a tolerance, which may cause him or her to take higher doses of the drug, take it more frequently, or change their method of drug intake to intensify the desired effect. "In some cases, abusers forego food and sleep while indulging in a form of bingeing known as a 'run,' injecting as much as a gram every 2 to 3 hours over several days until the user runs out of the drug or is too disorganized to continue. [This] chronic abuse can lead to psychotic behavior, characterized by intense paranoia, visual and auditory hallucinations, and out-of-control rages that can be coupled with extremely violent behavior."⁶ As expected, the continual and gradual increased use of the drug produces various physiological complications as well, including brain⁷ and cardiovascular problems. Not only does the chronic methamphetamine user encounter significant brain cell damage, but he or she also will experience "rapid heart rate[s], irregular heartbeat[s], increased blood pressure, irreversible, and stroke-producing damage to small blood vessels in the brain."⁸ These various physiological and psychological effects demonstrate the seriousness of

⁵ Id.

⁶ Id.

⁷ "In scientific studies examining the consequences of long term methamphetamine exposure in animals, concerns have arisen over the toxic effects on the brain. Researchers have reported that as much as 50 percent of the dopamine-producing cells, [which are important in the body's regulation of pleasure], can be damaged after prolonged exposure to relatively low levels of methamphetamine. Researchers also have found that serotonin-containing nerve cells may be damaged even more extensively." Id.

⁸ Id.

methamphetamine use, and the need of the government to seriously consider any changes to the policies concerning the regulation of methamphetamine offenders.

C. What Is the Status of Methamphetamine Use in the United States?

Traditionally, methamphetamine use had been a small problem limited to the Western portion of the United States.⁹ Methamphetamine was typically confined to outlaw motorcycle gangs who generally manufactured, used, and distributed the drug. Although it would be ideal to assume that the effects of methamphetamine are still restrained to such a small percentage of the population, recent data has indicated a dramatic increase in methamphetamine use throughout the country. Although the problem still seems to be isolated in the West, Southwest, and Midwest segments of the United States, there is little doubt that methamphetamine use is escalating at an alarming rate.

According to the United States Sentencing Commission's own reports, "the number of methamphetamine drug-trafficking cases received by the Commission from fiscal year 1992 through the fiscal year 1998 has increased steadily from 630 cases in 1992 to 2,234 cases in 1998, an increase of over 250 percent in the past seven years."¹⁰ Although the Commission's policy team recognizes and admits the limited reliability of its conclusions, other independent data sources reflect similar trends in the intensifying methamphetamine dilemma. The National Household Survey on Drug Abuse indicates a steady incline in methamphetamine use in the United States. From 1994 to 1996, the number of people who have admitted to using the drug has increased from an estimated 3.8 million or approximately 1.8 percent of the population to an estimated 4.9 million or 2.3 percent of the population. This is an increase of 1.1 million people in just 2 years. In addition to these startling statistics, the Substance Abuse and

⁹ See *Id.*

¹⁰ The Final Report of the Informal Methamphetamine Policy Team (1999).

Mental Health Services Administration also reports a dramatic incline in the number of admissions for methamphetamine treatment. "In a January report, the [administration recorded] that there were 14,400 admissions for methamphetamine treatment in 1992, 20,512 in 1993, 32,917 admissions in 1994, 47,410 admissions in 1995, and 42,330 admissions in 1996."¹¹ These selected findings are just a few of the hundred of other reports that indicate the growth of methamphetamine use in this country.¹²

II. Public Comments to Only Modify the Drug Quantity Table for Methamphetamine-actual to Conform to the 1998 Statutory Amendment Affecting the Mandatory Minimum Sentences for Methamphetamine Offense, and Increase the Methamphetamine-mixture to Reflect a Presumptive Purity Greater than 10 Percent.

A. The Continuing Use of Basing Sentences on the Weight of the Methamphetamine Mixture or the Weight of the Pure Methamphetamine Conforms the Guidelines to Congressional Intent.

The continual use of considering either the total weight of methamphetamine mixture or the weight of the pure methamphetamine in considering the drug offender's sentence is more consistent with congressional intent. The plain language of 21 U.S.C. § 841 and § 2D1.1 of the Federal Sentencing Guidelines clearly indicates that Congress intended sentencing to be based on the quantity of the control substance rather than its purity. As these two provisions read, the defendant's sentence is largely determined by the amount of a drug attributed to him or her including "any mixture or substance containing a detectable amount of the controlled substance." Thus, "[s]o

¹¹ The Final Report of the Informal Methamphetamine Policy Team (1999) (quoting the National Institute on Drug Abuse, *Assessing Drug Abuse Within and Across Communities: Community Epidemiology Surveillance Network on Drug Abuse*, NIH Pub. No. 98-3614 (April 1998)).

¹² For additional findings marking the incline of methamphetamine use and trafficking in the United States consider the reports from: The United States Sentencing Commission's Methamphetamine Policy Team, The Drug Abuse Warning Network, and The National Institute on Drug Abuse's Community Epidemiology Work Group.

long as [the contraband] contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence."¹³

If Congress intended the sentencing scheme to be based only on the purity of the control substance rather than its quantity, the provisions in question could have been easily drafted to reflect this intent. In fact, with regards to methamphetamine, Congress explicitly dictated that the sentencing for this particular drug be based on either the weight of a mixture containing a detectable amount of the drug, or on the lower weight of the pure substance.¹⁴ This language expressly declares that Congress determined the sentencing for methamphetamine offenses is different than that of other controlled substances by specifically providing the judiciary with an alternative for deciding the offense level of the accused. Any attempts to promulgate regulations that base the sentencing of methamphetamine offenders on only the pure form of the drug are clearly contrary to the legislator's intent.

Moreover, a closer examination of the statute's structure further illustrates that Congress did not intend methamphetamine sentencing to be solely based on the pure form of the drug. "With respect to various drugs, including heroin, cocaine, and LSD, [the statute] provides for mandatory minimum sentencing for crimes involving certain weights of a 'mixture or substance containing a detectable amount' of the drugs."¹⁵ While on the other hand, "with respect to other drugs, namely phencyclidine (PCP) or methamphetamine, it provides for a mandatory minimum sentence based either on the weight of a mixture or substance containing a detectable amount of the drug, or on lower weights of pure PCP or methamphetamine."¹⁶ "Thus, with

¹³ *Chapman v. United States*, 500 U.S. 453 (1991) (holding that LSD required the weight of the carrier medium be included when deterring an offender's sentence).

¹⁴ See generally 21 U.S.C. § 841(b).

¹⁵ *Chapman*, 500 U.S. at 459.

¹⁶ *Id.* (emphasis added).

respect to [various drugs, including heroin, cocaine, and LSD], Congress declared that the sentence should be based exclusively on the weight of the mixture or substance."¹⁷ But with respect to methamphetamine, Congress clearly indicated that the pure drug or a mixture or substance containing a detectable amount of the pure drug is the basis for sentencing. A comparison of these two provisions reveals that Congress intended two different criteria for use in sentencing depending on the type of the illicit drug involved. The drafting of these two provisions in such a manner was not an error by legislature, but rather, reflects a deliberate effort by Congress to ensure that methamphetamine sentences are based on either the weight of the mixture or substance containing the drug or its pure form.

As illustrated by the drafting of the legislation for heroin, cocaine, and LSD, Congress knew how to limit the basis for sentencing to either the weight of the mixture or substance or the weight of the pure drug. However, Congress consciously chose not to exclusively use the weight of pure methamphetamine for determining sentencing. By drafting the legislation in this fashion, Congress has deliberately intended to base methamphetamine sentencing on the weight of the mixture containing the drug or the weight of the pure drug. Since Congress intended to use both criteria as a basis for sentencing methamphetamine offenders, eliminating the use of the weight of a mixture or substance containing methamphetamine from the sentencing guidelines would be in conflict with congressional intentions.

B. Basing All Methamphetamine Sentencing on the Amount of Pure Methamphetamine Would Be in Direct Conflict with the Mandatory Minimum Statutes.

Because the statute provides for a mandatory minimum sentence based on either the weight of a mixture or substance containing a detectable amount of methamphetamine, or on lower weights of pure methamphetamine, any revision to the

sentencing guidelines that determines the offender's sentence on only pure methamphetamine would be in direct conflict with the statutory minimums. Since the Sentencing Commission has no power to directly amend these statutes, the proposed change to the sentencing guidelines would create two different methods for determining methamphetamine offenders' sentences. Courts would be able, and as some circuits have interpreted bound, to base the offender's sentence on the "mixture or substance" approach when it would result in triggering the statutory minimum, and in addition, concurrently apply the purity approach in all other situations. Such a sentencing method would be inconsistent with policy of the sentencing guidelines to establish a scheme that was supposed to embrace honesty, uniformity and proportionality in sentencing.¹⁸

An example of the inconsistency that may develop is depicted by the current predicament caused by a similar amendment to the sentencing guidelines. In 1993, the Sentencing Commission attempted to resolve an inter-circuit conflict that had developed over the interpretation of what constituted a 'mixture or substance' under 21 U.S.C. § 841 and § 2D1.1 of the federal sentencing guidelines. Although the amendment was promulgated to alleviate disparity in sentencing that had developed, the result of the change complicated sentencing by creating a dual system for calculating drug weights. Similar to this prior modification of the sentencing guidelines, the current proposed amendment to base methamphetamine sentences solely on the pure weight of the drug would likewise cause the development of two concurrent systems for determining the appropriate penalty for methamphetamine offenders.

Prior to 1991, the phrase 'mixture or substance' under 21 U.S.C. § 841 and § 2D1.1 of the Federal

¹⁸ See Todd E. Gonyer, Comment, *Federal Sentencing in a Post-Chapman World: What is a 'Mixture or Substance' Anyway?*, 46 U. Kan. L. Rev. 983 (1998) (citing Lisa A. Bongiovanni, Note, *Criminal Law-Sifting Through the "Mixture" Problem to Determine a Drug Offender's Sentence*, 15 W. New Eng. L. Rev. 11993).

Sentencing Guidelines was never defined. Even though a universal definition of this phrase was crucial for sentencing uniformity, Congress and the Sentencing Commission had failed to explicitly define these terms. Consequently, several of the circuits had developed various approaches for determining its meaning, which resulted in inconsistent sentencing because an offender's sentence is largely based on the quantity of the drug possessed by or attributed to him or her.

Largely because of the sentencing discrepancy that had developed due to the lack of congressional guidance, the Supreme Court tried to eliminate the conflict by judicially interpreting the phrase "mixture or substance." In 1991, the Court, attempting to alleviate the disparity in sentencing, granted certiorari to authoritatively construe the statute's terms. In *Chapman v. United States*,¹⁹ the defendants violated U.S.C. 21 § 841(a) by selling 10 sheets (1000 doses) of blotter paper containing LSD.²⁰ Although the weight of the LSD alone was only approximately 50 milligrams, the District Court combined the total weight of the paper and LSD in determining the weight of the drug to be used for calculating petitioners' sentences.²¹ Consequently, the total weight of LSD and the blotter paper resulted in the imposition of the mandatory minimum sentence of five years required by § 841(b)(1)(B)(v) for distributing more than 1 gram of a mixture or substance containing a detectable amount of LSD.²² The Court of Appeals for the Seventh Circuit concurred with the rationale of the lower court and subsequently upheld the basing of the offenders' sentences on the combined weight of the blotter paper and LSD.

Affirming the Seventh Circuit, the Supreme Court determined that Congress intended to include the

¹⁹ *Id.*

²⁰ *See Id.* at 455.

²¹ *See Id.*

²² *See Id.* at 456.

weight of the blotter paper or any other carrying agent for computing the sentence of a defendant convicted of distributing LSD. Despite the defendants' arguments that including the weight of the carrier agent would lead to anomalous results,²³ the majority of the Court found support for its interpretation in the other provisions of § 841, and in the relevant statutory history.

Following the Chapman decision, the issue of what constitutes a "mixture or substance" was settled at least as far as LSD sentencing was concerned. However, a new dilemma quickly arose with regard to other drugs because the Court's opinion ambiguously focused its discussion entirely on LSD violations.²⁴ In an attempt to resolve the ever-expanding confusion of what constitutes a "mixture or substance," the Sentencing Commission subsequently amended § 2D1.1 of the sentencing guidelines. Among various other changes,²⁵ the Commission revised the method of calculating the weight of LSD in order to promote uniformity in sentencing.²⁶ In contrast to its

²³ The defendants essentially contented that including the weight of the drug medium was irrational because LSD is independently sold by the dose without regards to the agent used for transporting the drug. To emphasize the illogical results of the lower court's conclusions, the defendants posed a hypothetical situations where "a major wholesaler caught with 19,999 doses of pure LSD would not be subject to the 5-year mandatory minimum sentence, while a minor pusher with 200 doses on blotter paper, or even one dose on a sugar cube, would be subject to the mandatory minimum sentence." *Id.* at 548.

²⁴ Although the direct holding of the case is easily applicable to subsequent LSD violations (i.e., the weight of the carrying agent containing LSD, and not the weight of the pure LSD determines eligibility for the minimum sentence), the Court's opinion did not sufficiently explain the basis for reaching its decision. Thus, another split developed among the circuits as to whether the decision was grounded in the plain meaning of the phrase "mixture or substance" or whether the fact that the carrier medium was consumable and aided in the marketability and distribution of the drug. See Gonyer, *supra* note 18 at 993.

²⁵ Although the Commission revised various provisions of the sentencing guidelines, for purposes of this comment, only the provisions that are needed to support the above stated position will be discussed in turn.

²⁶ The Commission determined "that because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled

prior approach of weighing the entire weight of the mixture or substance containing LSD, the Sentencing Commission amended guidelines to give each dose of LSD on a carrier medium a constructive or presumptive weight of 0.4 milligrams. Although the new amendment provided a basis for uniform sentencing, the alternative approach initially furthered the perplexity of the guidelines because courts were now in conflict over the effect the revision had on the statutory provisions of 21 U.S.C. § 841.

To resolve this latest problem with the interpretation of the phrase "mixture or substance," the Court granted certiorari in *Neal v. United States*²⁷ in hopes of establishing the uniformity in sentencing that Congress had sought.

In *Neal*, "the petitioner was arrested for selling 11,456 doses of LSD on blotter paper. The combined weight of the LSD and the paper was 109.51 grams. Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted of one count of possession of LSD with the intent to distribute it, in violation of 21 U.S.C. § 841, and one count of conspiracy to possess LSD with the intent to distribute it, in violation of 21 U.S.C. § 846. At the initial sentencing, the method for determining the weight of the illegal mixture or substance was the same under the guidelines and the statute directing minimum sentences. The determinative amount was the whole weight of the blotter containing the drug. Because the total weight of the LSD and the blotter paper exceeded 10 grams, the District Court found the petitioner subject to the 10-year mandatory minimum sentence specified in 21 U.S.C. § 841(b)(1)(A)(v),"²⁸ and

substance itself, ... basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD ... as well as sentences disproportionate to those for other more dangerous controlled substances." 1995 USSG § 2D1.1, comment, backg'd.

²⁷ *Id.*

²⁸ *Id.* 516 U.S. at 286.

imposed concurrent sentences of 192 months on both counts.²⁹

Because the Sentencing Commission subsequently revised the method of calculating the weight of LSD in the Sentencing Guidelines,³⁰ the petitioner filed a motion to modify his sentence in accordance with the new retroactive amendment. Petitioner argued that "the weight of the LSD attributed to him under the amended Guidelines was 4.58 grams (11,456 x 0.4 milligrams)," and that the appropriate sentence should be 70 to 84 months instead of the statutory 10-year (120 months) minimum period.³¹ In order for the sentence to be reduced, the petitioner contended that the 10-year statutory minimum of § 841(b)(1)(A)(v) was no bar to the modification because the presumptive-weight method of the Guidelines should also control the mandatory minimum calculations.³² The District Court, as affirmed by the Court of Appeals for the Seventh Circuit, rejected petitioner's assumption, and held that the mandatory minimum sentence of 10 years is still applicable notwithstanding the sentencing range under the Guidelines.³³ The courts reasoned that since the Guidelines no longer authorize a sentence above the statutory minimum, the sentence should only be reduced to 120 months. In essence, the courts asserted that a dual system prevailed in calculating LSD weights, one for determining the weight of LSD for purposes of the statutory mandatory minimums, and one for calculating sentencing for when the statutory minimums did not apply.

In *Neal*, the Supreme Court granted certiorari to resolve the conflict over whether the revised Guidelines govern the calculation of the weight of LSD for purposes of § 841(b)(1). Although the

²⁹ *Id.*

³⁰ See *supra* text accompanying notes 23-26.

³¹ *Neal*, 516 U.S. at 287.

³² See *Id.*

³³ See *Id.*

Court acknowledged the Commissions expertise and even conceded that the Guidelines may be of potential weight and relevance in other contexts, the Court nevertheless concluded that the revised method for weighing LSD did not effect the interpretation of the statute in Chapman.³⁴ After first deducting that the Commission did not intend, and in fact had no authority to displace the actual-weight method that Chapman requires for statutory minimum sentences, the Court, for argument's sake, authoritatively concluded that the principles of stare decisis required it to adhere to the earlier decision.³⁵

The precedent set forth in this line of cases, especially the Neal decision, is of particular importance to the current proposed amendment by the Commission. Because any revision to the sentencing guidelines will not supplant the statutory method for determining minimum sentencing, the proposed regulation to base methamphetamine offender's sentence on only the pure amount of the drug will create a dual system for determining sentencing similar to that which has developed in the area of LSD offenders. The result of such a scheme would greatly complicate the calculations for sentencing, which is contrary to the objectives of the sentencing guidelines.

Although Chapman and its progeny deal with LSD violations, the discrepancy in sentencing that has resulted from the prior amendments to the Sentencing Guidelines may be clearly illustrated by cases involving methamphetamine offenses. In 1996, the Court of Appeals for the Tenth Circuit relied on Neal to reverse the decision of the lower court to exclude the weight of liquid by-products for determining the base level offense of the accused. In *Richards v. United States*,³⁶ law enforcement officials arrested the defendant before he was able to complete the process of

³⁴ See *Id.* at 290.

³⁵ See *Id.* at 294-95.

³⁶ *Richards v. United States*, 87 F.3d 1152 (10th Cir. 1996).

manufacturing pure methamphetamine. When the accused was arrested, he possessed thirty-two kilograms of a liquid mixture containing twenty-eight grams of pure methamphetamine.³⁷ Applying U.S.S.G. § 2D1.1, the court, using the entire weight of the thirty-two kilogram liquid mixture, sentenced the Defendant to 188 months imprisonment.³⁸ Upon announcement of the sentence, the Defendant instantly filed a motion for modification of his sentence, arguing that the court misapplied the sentencing guidelines by including both the weights of the liquid by-product and extractable methamphetamine in determining his base level offense.³⁹ Relying on the guidelines' 1993 retroactive amendment that explicitly excluded the weight of waste water from being used in calculating the offender's sentence,⁴⁰ the District Court granted the defendant's motion, and resented him to 60 months imprisonment.⁴¹

The lower court reasoned "that § 2D1.1 and § 841 should 'be interpreted harmoniously where reasonably possible,' because, to give the statute a different meaning than the guidelines would produce illogical and inconsistent results."⁴² Thus, the District Court displaced the prior statutory interpretation of "mixture or substance" with the subsequent definition promulgated by the Commissions. On appeal, the Court of Appeals for the Tenth Circuit affirmed the decision by

³⁷ See *Id.* at 1153.

³⁸ See *Id.*

³⁹ See *Id.*

⁴⁰ In the 1993 amendment, the Sentencing Commission attempted to uniformly define the phrase, "mixture or substance," by excluding any "material that must be separated from the controlled substance before the controlled substance can be used." "Examples of such material include ... waste water from an illicit laboratory used to manufacture a controlled substance." U.S.S.G. § 2D1.1 application note 1; See also *supra* text accompanying notes 23-26.

⁴¹ *Richards*, 87 F.3d at 1154.

⁴² *Id.*

"holding that the Supreme Court's 'recognition of Congress' market-orientation approach, [in Chapman], dictates that [the courts] not treat unusable drug mixtures as if they were usable;' and that, under a congruent approach, § 841 should be interpreted consistent with the construction provided by the Sentencing Commission."⁴³

Recognizing the importance of the divided panel's decision, the Tenth Circuit "granted en banc review to determine whether the Sentencing Commission's amended construction of 'mixture or substance' authoritatively defined the terms 'mixture or substance' in § 841, or whether the statutory terms retain their plain meaning as construed by the Supreme Court in Chapman."⁴⁴ Notwithstanding the recent amendment to the sentencing guidelines, the en banc court held that the plain meaning of § 841 and the Supreme Court precedent compelled it to hold that the combined weight of the liquid by-product containing methamphetamine and the pure methamphetamine was to be used as the basis for calculating the defendant's sentence.⁴⁵ According to the court, Chapman defined the terms mixture or substance for purposes of § 841, and "'once [the Court] has determined a statute's meaning, [the judiciary must] adhere to [the] ruling under the doctrine of stare decisis.'"⁴⁶ The court reinstated the strict interpretation of the statute over the separate determinations of the Sentencing Commission because, as the court emphasized, once the Supreme Court has supplied a definition of a statute, the Sentencing Commission has no authority to override or amend that statutory definition.⁴⁷ The court reiterated that as long as the defendant possesses the specified quantity of a mixture or substance

⁴³ Id. (citing *United States v. Richards*, 67 F.3d 1531, 1536 (10th Cir. (1995))).

⁴⁴ Id.

⁴⁵ See Id. 87 F3d at 1157-58.

⁴⁶ Id. 87 F.3d at 1156-57 (citing *Neal*, 516 U.S. at 295).

⁴⁷ Id.

as interpreted by the Supreme Court, Congress requires the courts to apply the mandatory minimum sentence. Although acknowledging that the incongruent interpretation might produce disparate sentences, the Court concluded that Congress, and not the Judiciary, has the responsibility to review the statute's policies and revise it.

As illustrated by these cases, any revision to the Sentencing Guidelines that deviates for the statutory mandatory minimum sentences under § 841 will produce two concurrent systems for calculating a drug offender's sentence. Because the Sentencing Commission has no power to affect the definition of the statute as determined by the Supreme Court, courts will continually be able to apply the mixture or substance approach when the statutory minimums are triggered. Although such a dual scheme may simplify the "apparent unwarranted disparity of whether to use meth-mix or meth-actual to determine the guideline sentence for meth-offenders," the proposed amendment does not solve a problem, but only shifts the disparity to whether to use the mixture or purity approach as a basis for calculating sentences.⁴⁸ The proposed revision to base all methamphetamine sentences on the pure weight of the drug only perpetuates the unwarranted complexity in this area of the law. Because the current "minimum [statutes] are both structurally and functionally at odds with the sentencing guidelines and the goals the guidelines seek to achieve," no major changes should be made to the guidelines until this discrepancy is resolved.⁴⁹ As noted by the Court in *Neal*, Congress is entrusted with the power to determine its statutes' policies and constructions, and it is their responsibility to revise their prior determinations if the results of their decisions do not conform to legislator's intent.⁵⁰ Until Congress decides to correct the developing

⁴⁸ The Final Report of the Informal Methamphetamine Policy Team (1999).

⁴⁹ *Neal*, 516 U.S. at 291-92 (citing *United States Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal System* 26 (Aug. 1991)).

⁵⁰ See *Id.* 516 U.S. at 296.

problems associated with this particular legislation, the Commission should only modify the guidelines to conform to the 1998 legislation, and not alter the basis for determining the sentences of methamphetamine offenders.

C. The Continuing use of Basing Sentences on the Weight of the Methamphetamine Mixture or the Weight of the Pure Methamphetamine Conforms the Guidelines with Congress's 'Market Oriented' Approach for Punishing Drug Trafficking.

The history of the legislation promulgated to combat the ongoing drug war clearly indicates that Congress currently intended drug offenders be sentenced according to the total quantity of the drug rather than its purity. In prior congressional efforts to control the illicit drug trade in the United States, Congress attempted to use various schemes to penalize drug offenders. In one of its earlier schemes, Congress tried to curb illegal drug distribution by basing penalties on the classification of the drug within the statute.⁵¹ Because of the Act's failure to unify sentencing among similar offenders, Congress amended the statute to provide for sentencing based on the pure weight of the drug.⁵²

Unsatisfied with the results of their latest legislation, Congress once again amended the statute to reflect the current penalties used for narcotic transgressions.⁵³ In 1986, Congress promulgated the Anti-Drug Abuse Act, which adopted a 'market oriented approach' for calculating sentencing. Under the market oriented approach, the offender's sentence length is determined primarily by the "amount of the total quantity of

⁵¹ See, The Comprehensive Drug Abuse Prevention and Control Act of 1970, (Pub.L. 91-513, 84 Stat. 1236).

⁵² See, The Controlled Substance Penalties Amendment Act of 1984, (Pub. L. 98-473, 98 Stat. 2068).

⁵³ See, Anti-Drug Abuse Act of 1986, (Pub.L. 99-570, 100 Stat. 3207).

what is distributed, rather than the amount of the pure drug involved."⁵⁴

Congress adopted this approach, because they found that "focussing on the pure [weight of the] drug often allowed retail traffickers, who supplied street markets with mixed or diluted drugs ready for consumption, to receive lighter sentences than what Congress deemed necessary."⁵⁵ This amendment intended "the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found--cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level."⁵⁶ Thus, this 'street effect' solution ensures that penalties are in accordance with specific minimum quantities of a mixture or substance that would be indicative of a major trafficker, manufacturer or retailer.⁵⁷ Consequently, "Congress set mandatory minimum sentences corresponding to the 'weight or substance' containing a detectable amount of the various controlled substances" to implement this principle.⁵⁸

The current proposal to base all methamphetamine offenders on only the pure weight of the drug is in direct conflict with the legislator's "market oriented approach." Although the purity method for calculating sentencing would produce uniformity among similar offenders, the proposed method would not establish penalties in accordance with the illicit drug market. As Congress discovered with the enactment of the Controlled Substance Penalties Amendment Act of 1984, the basing of sentencing on only the pure form of the drug resulted in retail traffickers receiving a lesser sentence than intended. Consequently,

⁵⁴ Chapman 500 U.S. at 461 (citing H.R.Rep., No. 99-845, pt. 1, pp. 11-12, 17 (1986)).

⁵⁵ Neal, 516 U.S. at 289-90.

⁵⁶ Id. (citing H.R. Rep. No. 99-845, supra, at pt.1,p.12).

⁵⁷ Richards, 87 F.3d at 1156.

⁵⁸ Chapman, 500 U.S. at 461.

Congress explicitly amended the statute to include the weight of an entire mixture or substance containing a detectable amount of a controlled drug for calculating an offender's penalty to ensure that all offenders will receive just punishment regardless of the degree in which they are involved in the drug violation. This action by Congress demonstrated that the legislators no longer desired drug offenders' sentences to be based on only the pure weight of the drug. Thus, any attempt by the Sentencing Commission to alter this determination for sentencing purposes would be in direct conflict with the legislator's objectives. Therefore, the Commission should only modify the drug quantity table for methamphetamine-actual to conform to the 1998 statutory amendment affecting the mandatory minimum sentences because such a result will guarantee that the intentions of Congress are followed.

III. Conclusion

Methamphetamine is a dangerously potent and addictive drug with very serious psychological and physiological effects. As indicated by various studies, the one-time minor problems associated with the drug have dramatically magnified. Because of this alarming increase in methamphetamine use, great effort should be employed by the Commission to help control this epidemic. However, any measures taken by the Commission should conform to congressional intent.

Congress's latest attempt to control the illicit drug trade of methamphetamine indicates that the legislators want the offenders' sentences to be based on either the weight of a mixture or substance containing a detectable amount of the drug or on the weight of the drug in its pure form. The current proposed amendment to base the accused sentence solely on the weight of pure methamphetamine is not only in direct conflict with the intentions of Congress, but precedent is established that will complicate the sentencing scheme by creating two concurrent

systems for determining an offender's sentences. Until Congress changes the criteria used for calculating sentences, the Commission should not significantly alter the method used for computing sentences under the guidelines. Thus, the Commission should only modify the Drug Quantity Table for methamphetamine-actual to conform to the 1998 statutory amendment affecting the mandatory minimum sentences for methamphetamine offense, and increase the methamphetamine-mixture to reflect a presumptive purity greater than 10 percent.