

2010

CRIMINAL LAW—All Mixed Up and Don't Know What To Do: A Review of the Tenth Circuit's Approach to Sentencing in Federal Methamphetamine Production Cases; *United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996) (en banc)

Kevin L. Daniels

Follow this and additional works at: <http://repository.uwyo.edu/wlr>



Part of the [Law Commons](#)

Recommended Citation

Kevin L. Daniels, *CRIMINAL LAW—All Mixed Up and Don't Know What To Do: A Review of the Tenth Circuit's Approach to Sentencing in Federal Methamphetamine Production Cases; United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996) (en banc), 10 WYO. L. REV. 339 (2010).

Available at: <http://repository.uwyo.edu/wlr/vol10/iss1/14>

This Case Notes is brought to you for free and open access by Wyoming Scholars Repository. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Wyoming Scholars Repository. For more information, please contact scholcom@uwyo.edu.

CASE NOTE

CRIMINAL LAW—All Mixed Up and Don't Know What To Do: A Review of the Tenth Circuit's Approach to Sentencing in Federal Methamphetamine Production Cases; *United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996) (en banc)

*Kevin L. Daniels**

INTRODUCTION

Methamphetamine, the substance at issue in *United States v. Richards*, is a burgeoning epidemic in the states that comprise the Tenth Circuit, including Wyoming.¹ The National Institute of Drug Abuse describes methamphetamine as a “powerfully addictive stimulant that dramatically affects the central nervous system.”²

The issue presented in *Richards*—whether it is proper to include the by-product of methamphetamine production when determining the drug quantity for sentencing purposes—is still relevant today.³ The present circuit split—centered

* Candidate for J.D., University of Wyoming, 2011. I would like to thank my wife Trisha and my son Porter for their love and support throughout the course of this project. Special thanks to Dean Stephen Easton and Lisa Rich for their assistance with this note.

¹ 87 F.3d 1152, 1152 (10th Cir. 1996) (en banc); see U.S. Sentencing Commission, 2008 Datafile, at 1, available at <http://www.usc.gov/JUDPACK/2008/10c08.pdf>. According to statistics compiled by the United States Sentencing Commission, in fiscal year 2008, twenty-two percent of federally sentenced defendants in the states that comprise the Tenth Circuit committed drug offenses. *Id.* Thirty-five percent of these involved methamphetamine. *Id.*; see also U.S. Sentencing Commission, 2008 Datafile, at 1, available at <http://www.usc.gov/JUDPACK/2008/wy08.pdf>. In Wyoming, forty-seven percent of federally sentenced defendants committed drug offenses. *Id.* Nearly seventy-five percent of these involved methamphetamine. *Id.*

² National Institute on Drug Abuse, Methamphetamine (2008), at 1–2, available at http://www.npaihb.org/images/epicenter_docs/Meth/RRMetham.pdf. According to the Institute:

[Methamphetamine] is a white, odorless, bitter tasting crystalline powder that easily dissolves in water or alcohol. The drug was developed early last century from its parent drug, amphetamine, and was originally used in bronchial inhalers. Like amphetamine, methamphetamine causes increased activity and talkativeness, decreased appetite, and a general sense of well-being. However, methamphetamine differs from amphetamine in that at comparable doses, much higher levels of methamphetamine get into the brain, making it a more potent stimulant drug. It also has longer lasting and more harmful effects on the central nervous system.

Id.

³ Petition for Writ of Certiorari at 17, *Clarke v. United States*, No. 09-455, 2009 WL 3341929 (Oct. 14, 2009), *cert. denied*, No. 09-455, 2009 WL 3344912 (U.S. Nov. 16, 2009) (asserting the need for the Court to resolve the existing circuit split); see *Richards*, 87 F.3d at 1152 (“Methamphetamine is commonly synthesized via a process that yields methamphetamine in a liquid solution. Operators of clandestine methamphetamine labs attempt to extract the pure methamphetamine from the liquid mixture.”).

on interpretations of *Chapman v. United States*—indicates a continuing chasm which must be resolved in order for uniformity and consistency in sentencing to occur as we work through today’s epidemic.⁴

The Drug Enforcement Agency has noted the increase of methamphetamine production in the United States.⁵ This increase in methamphetamine production—combined with the lack of resolution surrounding the circuit split—highlights the need to address the issue of whether it is proper to include the by-product of methamphetamine production when determining the drug quantity for sentencing purposes.⁶ Recently, the United States Supreme Court denied a petition for a writ of certiorari centered on this issue.⁷ Despite the denial, the petition for a writ of certiorari illustrates the sentencing issues surrounding the production of methamphetamine are still prevalent today.⁸ *Richards* is the controlling precedent in the Tenth Circuit for determining whether it is proper to include by-products of methamphetamine production in determining drug quantity for sentencing purposes.⁹

On August 10, 1990, law enforcement arrested Larry D. Richards for possession of a liquid mixture containing detectible amounts of methamphetamine.¹⁰ Richards pleaded guilty to possession of 1,000 grams or more of a liquid mixture containing a detectible amount of methamphetamine, with intent to manufacture methamphetamine in violation of 21 U.S.C. § 841.¹¹ Based upon the entire weight of the substance, Richards received a sentence of 188 months imprisonment.¹² The district court later reduced Richards’s sentence to 60 months imprisonment.¹³ A divided panel of the Tenth Circuit affirmed the sentence reduction and held Richards responsible for only 28 grams of methamphetamine, not the 32

⁴ See *Chapman v. United States*, 500 U.S. 453, 453 (1991) (holding blotter paper and LSD constitute a “mixture” under the plain meaning of the term because LSD crystals are diffused among the fibers of the blotter paper); *infra* note 97 and accompanying text.

⁵ U.S. Dep’t of Just., National Drug Threat Assessment (2009), available at <http://www.justice.gov/ndic/pubs32/32166/overview.htm#Outlook> (stating methamphetamine production will likely increase).

⁶ *Id.*; see *supra* notes 3–5 and accompanying text.

⁷ *Clarke*, 564 F.3d 949 (8th Cir. 2009), *cert. denied*, No. 09-455, 2009 WL 3344912 (U.S. Nov. 16, 2009).

⁸ *Id.* at 4–5.

⁹ *Richards*, 87 F.3d at 1152.

¹⁰ *Id.* at 1153.

¹¹ *Id.*; see 21 U.S.C. § 841(a) (2006) (“It shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .”).

¹² *Richards*, 87 F.3d at 1153.

¹³ *Id.* at 1154.

kilograms he was originally responsible for.¹⁴ The Tenth Circuit granted en banc review in order to clarify whether the United States Sentencing Guidelines or the statutory definition of mixture or substance controlled.¹⁵

This note will first argue the United States Supreme Court's precedent in *Chapman*, in defining the phrase "mixture or substance" as contained in § 841(b), is the only way to satisfy congressional intent with respect to methamphetamine drug trafficking.¹⁶ This analysis will reinforce the importance of giving statutes their plain and ordinary meaning when Congress does not provide a statutory definition.¹⁷ Second, this note will argue that non-consumable waste products of methamphetamine production should be included—as opposed to the market-oriented approach adopted in some circuits—when determining drug weight for sentencing purposes.¹⁸ Third, this note will challenge the success of United States Sentencing Guidelines § 2D1.1 (U.S.S.G. § 2D1.1) application note 1 in resolving circuit conflicts surrounding this issue and instead argue that application note 1 directly conflicts with congressional intent as interpreted in *Chapman*.¹⁹ Additionally, vague and ambiguous language in U.S.S.G. § 2D1.1 application note 1 serves as a harbinger of continued confusion.²⁰ Finally, this note will endorse the plain language approach adopted by the Tenth Circuit in dealing with by-products of methamphetamine production and determining drug quantity for sentencing purposes.²¹

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Chapman*, 500 U.S. at 453 (holding blotter paper and LSD constitute a "mixture" under the plain meaning of the term because LSD crystals are diffused among the fibers of the blotter paper); see *infra* notes 110–25, 131–33, 136 and accompanying text.

¹⁷ See *infra* notes 110–25, 131–33, 136 and accompanying text.

¹⁸ See *infra* notes 109–25, 131–33, 137 and accompanying text.

¹⁹ *Chapman*, 500 U.S. at 458–63; see *infra* notes 126–32, 134–35 and accompanying text.

²⁰ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008) (stating phrases such as, "if such material cannot readily be separated from the mixture or substance" and "the court may use any reasonable method to approximate the weight of the mixture or substance to be counted" lead to confusion due, in part, to their ambiguity). It then becomes the responsibility of the court to determine what can be "easily separated." *Id.* Additionally, allowing the courts to "use any reasonable method" nullifies the purposes of the guidelines: uniformity, honesty, and consistency in sentencing. *Id.*

²¹ *United States v. Trefl*, 447 F.3d 421, 428–29 (5th Cir. 2006) (holding the weight of liquid containing trace amounts of methamphetamine could be considered for sentencing purposes); *Richards*, 87 F.3d 1152, 1152; *United States v. Sherrod*, 964 F.2d 1501, 1509 (5th Cir. 1992) ("[The] consideration of the total weight of a substance containing a detectable amount of methamphetamine is proper in determining the defendant's sentence.").

BACKGROUND

Legislative History of 21 U.S.C. § 841

The legislative history behind the issue of whether it is proper to include by-products of methamphetamine production in determining the drug quantity for sentencing purposes began with the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA).²² Congress constructed the CDAPCA to combat the growing drug abuse problem in the United States.²³ In 1984 Congress amended the CDAPCA with the passage of the Comprehensive Crime Control Act of 1984 (CCCA).²⁴ The two most relevant provisions of the CCCA are Chapter V, titled the Controlled Substances Penalties Amendments Act of 1984 (CSPAA), and the Sentencing Reform Act of 1984 (SRA).²⁵ The CSPAA made “punishment dependent upon the quantity of the controlled substance involved.”²⁶ The CSPAA also removed, for sentencing purposes, the distinction between narcotic and non-narcotic substances in Schedules I and II.²⁷

The Sentencing Reform Act of 1984 represented the first global attempt by Congress to enact legislation regarding sentencing criminal offenders within the federal system.²⁸ The senate report accompanying the SRA expressed Congress’s desire to eliminate sentencing disparities within the federal system.²⁹ One of the

²² Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (1970).

²³ H.R. REP. NO. 91-1444, pt. 1 (1970). The CDAPCA contained three titles: Title I set up drug abuse rehabilitation programs; Title II bestowed law enforcement authority upon the Department of Justice to address problems associated with drug abuse; and Title III dealt with the exportation and importation of drugs subject to abuse. *Id.* Title II, titled the Controlled Substances Act, affected 21 § U.S.C. 841 by classifying drugs into five different schedules based on the likelihood of abuse. *Id.* The law set punishments based on whether a drug was classified as a narcotic under the Act. *Id.* Drug weight, at this point, was irrelevant in determining an offender’s punishment. *Id.*

²⁴ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, ch. V, 98 Stat. 1976, 2068 (1984) (codified as amended in various sections within 21 U.S.C. (2006)).

²⁵ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2068 (1984) (codified as amended in various sections within 21 U.S.C. (2006)); *see also* Comprehensive Crime Control Act, Pub. L. No. 98-473, S. REP. NO. 98-225, at 255 (1983). The purpose of the CSPAA was to address three major problems arising out of the existing Controlled Substance Act (CSA). S. REP. NO. 98-225. First, the Senate Report noted that the CSA lacked any consideration as to the amount of the controlled substance involved in a particular offense, only accounting for the nature of the drug for sentencing purposes. *Id.* Second, the Senate report noted that the CSA did not set adequate fine levels. *Id.* The last problem mentioned in the Senate Report, lack of uniformity in sentencing when Schedule I and Schedule II drugs were involved, needed resolution. *Id.*

²⁶ *Chapman v. United States*, 500 U.S. 453, 460 (1991).

²⁷ *Id.* at 460–61.

²⁸ Sentencing Reform Act of 1984, Pub. L. No. 98-473, Ch. 2, 98 Stat. 1837 (1984).

²⁹ S. REP. NO. 98-225.

primary vehicles Congress created—within the SRA—to meet this goal was the United States Sentencing Commission.³⁰ The primary purpose of the Sentencing Commission is to promulgate a set of sentencing guidelines and policy statements to aid in eliminating sentencing disparity.³¹

The next piece of legislation aimed at combating the drug problem in the United States was the Anti-Drug Abuse Act of 1986 (ADAA).³² The ADAA amended the Controlled Substances Act by setting the sentences for drug trafficking based upon the aggregate quantity of the drug distributed.³³ Congress, by setting the penalties according to the weight of a “mixture or substance containing a detectable amount” of a controlled substance, adopted an approach designed to disable all levels of the drug market.³⁴ Within the framework of this approach, Congress determined the best way to combat drug abuse in the United States was to punish those “responsible for creating and delivering very large quantities of drugs.”³⁵ Congress also determined it was vital to target the “managers of retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping PCP in aluminum foil, and doing so in substantial street quantities.”³⁶

Chapman v. United States

Congress, in its legislation, never explicitly defined “mixture or substance.”³⁷ As a result, ambiguity regarding what constitutes a “mixture or substance” for

³⁰ *Id.*

³¹ U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, introductory cmt. (2008). Congress saw a need, in creating the Sentencing Commission, to address a pre-Guidelines sentencing system where a defendant was subject to an “indeterminate sentence of imprisonment” that could later be greatly modified by the parole commission. *Id.* This practice often led to defendants only serving approximately one-third of their original sentence imposed by the court. *Id.* Second, Congress sought to narrow the wide disparities in sentences imposed “for similar criminal offenses committed by similar offenders.” *Id.* Third, “Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.” *Id.* The Sentencing Commission, through the authority given it by Congress, addressed each of the three objectives by producing a Sentencing Guidelines manual that could be used by all of the federal court system. *Id.* The inaugural Guidelines were submitted to Congress on April 13, 1987 and took effect on November 1, 1987. *Id.* In the Policy Statement created by the Sentencing Commission, the Commission outlined three objectives that, if met, would serve to fulfill the intent of Congress in enacting the SRA which was to “enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.” *Id.*

³² Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

³³ H.R. REP. NO. 99-845, pt. 1, at 14–15 (1986).

³⁴ H.R. REP. NO. 99-845, at 14–15, 18; *see* 21 U.S.C. § 841(b) (2006).

³⁵ H.R. REP. NO. 99-845, at 14; *United States v. Richards*, 87 F.3d 1152, 1152 (10th Cir. 1996) (en banc).

³⁶ H.R. REP. NO. 99-845, at 14; *accord Chapman*, 500 U.S. at 461–62; *Richards*, 87 F.3d at 1156.

³⁷ *See* 21 U.S.C. § 841.

purposes of sentencing under § 841(b) continued until the United States Supreme Court decided *Chapman v. United States*.³⁸ Prior to *Chapman*, there were great disparities in sentencing under § 841(b).³⁹ In *Chapman*, the Court addressed whether it is proper to include the weight of blotter paper containing LSD or the weight of pure LSD alone in determining a defendant's eligibility for a mandatory minimum sentence under § 841(b).⁴⁰ The Court held the phrase "mixture or substance" must be given its ordinary meaning.⁴¹ The Court also held the phrase "mixture or substance" was not ambiguous and that including the weight of the blotter paper for sentencing purposes would not lead to an absurd result.⁴² The Court noted that Congress did not offer distinctions between the varying types of mixtures and instead 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."⁴³ The Court then concluded by unequivocally stating, "So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence."⁴⁴

Neal v. United States

In 1996, the Court solidified its position in *Neal v. United States*.⁴⁵ The defendant in *Neal* argued the Sentencing Commission's definition of "mixture or substance" should be the controlling definition when determining drug quantity for sentencing purposes under § 841(b).⁴⁶ The Court rejected this argument and held *Chapman's* plain meaning definition of "mixture or substance" is controlling.⁴⁷

The Court, in reaching its decision in *Neal*, affirmed that *Chapman* set forth the controlling definition of "mixture or substance" for sentencing under § 841.⁴⁸ It is also important to note that the defendant in *Neal* asserted the Sentencing Commission's amended commentary to U.S.S.G. § 2D1.1 controlled the mandatory minimum calculation under § 841(b).⁴⁹ However, the Court rejected

³⁸ *Chapman*, 500 U.S. 453.

³⁹ *Id.* at 458–59.

⁴⁰ *Id.* at 461–62.

⁴¹ *Id.* at 468.

⁴² *Id.* at 454.

⁴³ *Id.* at 461.

⁴⁴ *Id.* at 459.

⁴⁵ 516 U.S. 284 (1996).

⁴⁶ *Id.* at 285–87.

⁴⁷ *Id.* at 290; see also Julie S. Thomerson, *Drug Sentencing*, 74 DENV. U. L. REV. 435, 438–39 (1997) (describing the rationale of the *Neal* Court in affirming the holding in *Chapman*).

⁴⁸ *Id.*

⁴⁹ *Id.* at 289–90.

this argument and reiterated its commitment to the doctrine of stare decisis.⁵⁰ As such, the Court was bound to follow the definition of “mixture or substance” as articulated in *Chapman*.⁵¹

Circuit Split Surrounding Interpretation of Chapman

Following the clearly articulated decisions in *Chapman* and *Neal*, the federal courts nevertheless failed to uniformly determine drug weights for sentencing purposes.⁵² This lack of uniformity can be traced to the various courts’ interpretations of *Chapman*.⁵³ After *Chapman*, the Second, Third, Sixth, Seventh, and Eleventh Circuits held “only usable or consumable mixtures or substances are included in the drug quantity for sentencing purposes.”⁵⁴ Throughout this note, the approach of these circuits will be termed the market-oriented approach.

By contrast, two circuits, the First and Tenth, adopted a two-step approach to determining whether to include nonmarketable waste products in calculating drug weight for sentencing purposes.⁵⁵ First, the sentencing court determines whether the defendant is subject to a mandatory minimum term of incarceration.⁵⁶ That determination is made using the gross weight, including unmarketable material.⁵⁷ Second, if the defendant is not subject to a mandatory minimum, the sentencing court determines the guideline offense level by using the net weight, excluding

⁵⁰ *Id.* at 290.

⁵¹ *Id.*

⁵² See *infra* note 97 and accompanying text.

⁵³ *Chapman*, 500 U.S. at 453–54 (holding the words “mixture or substance” in § 841 had to be given their ordinary meaning because Congress did not provide a statutory definition). The Court went on to determine the ordinary meaning of “mixture” includes:

[A] portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly comingled are regarded as retaining a separate existence. *Webster’s Third New International Dictionary* 1449 (1986). A “mixture” may also consist of two substances blended together so that the particles of one are diffused among the particles of the other. 9 *Oxford English Dictionary* 921 (2d ed. 1989).

Id. at 454; see also *infra* notes 54–60 and accompanying text.

⁵⁴ *United States v. Stewart*, 361 F.3d 373, 377–79 (7th Cir. 2004) (stating only usable or consumable mixtures or substances can be used in determining drug quantity under § 841(b)); accord *United States v. Johnson*, 999 F.2d 1192, 1195–96 (7th Cir. 1993); *United States v. Rodriguez*, 975 F.2d 999, 1006–07 (3d Cir. 1992); *United States v. Acosta*, 963 F.2d 551, 554–55 (2d Cir. 1992); *United States v. Jennings*, 945 F.2d 129, 135 (6th Cir. 1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1237–38 (11th Cir. 1991).

⁵⁵ FED. SENT. L. & PRAC. § 2D1.1 (2009 ed.).

⁵⁶ *Id.*

⁵⁷ *Id.*

unmarketable waste material.⁵⁸ Because the case at hand deals with § 841(b), only the first step in this process will be examined in this note. The Fifth and Eighth Circuits also include *any* detectable waste products pursuant to the plain language of § 841(b).⁵⁹ For the purposes of this note, the approach taken by the First, Fifth, Eighth, and Tenth Circuits will be designated as the plain language approach. As the various circuit splits show, the issue of what to include when determining drug quantity for sentencing purposes remains.⁶⁰ This was the primary issue at hand when the Tenth Circuit ruled, en banc, in *United States v. Richards*.⁶¹

PRINCIPAL CASE

United States District Court for the District of Utah

On August 10, 1990, law enforcement arrested Larry D. Richards for possession of a liquid mixture containing detectable amounts of methamphetamine.⁶² Law enforcement seized the 32 kilogram solution before Richards could separate the 28 grams of pure methamphetamine suspended in the liquid.⁶³

Pursuant to the United States Sentencing Guidelines in effect at the time, the United States District Court for the District of Utah sentenced Richards to 188 months of imprisonment.⁶⁴ Pursuant to U.S.S.G. § 2D1.1, which then called for the use of the entire mixture as part of the calculation, the court calculated the sentence using the entire 32 kilogram mixture rather than the amount of pure methamphetamine it contained.⁶⁵ Richards did not appeal his sentence.⁶⁶ Instead,

⁵⁸ *Id.* (illustrating the second step is only to be used when a defendant is not subject to a mandatory minimum sentence); see Brief of Appellant at 25–26, *United States v. French*, 200 Fed. App'x 774 (10th Cir. 2006) (No. 04-5168), 2005 WL 3657815 (distinguishing the holding in *Richards* because French was charged under a statute lacking a mandatory minimum).

⁵⁹ 21 U.S.C. § 841(b); *United States v. Clarke*, 564 F.3d 949, 954–56 (8th Cir. 2009); *United States v. Treft*, 447 F.3d 421, 422 (5th Cir. 2006); *United States v. Kuentler*, 325 F.3d 1015, 1023 (8th Cir. 2003).

⁶⁰ Petition for Writ of Certiorari at 17, *Clarke v. United States*, No. 09-455, 2009 WL 3341929 (Oct. 14, 2009), *cert. denied*, No. 09-455, 2009 WL 3344912 (U.S. Nov. 16, 2009).

⁶¹ *Richards*, 87 F.3d at 1153.

⁶² *United States v. Richards*, 87 F.3d 1152, 1153 (10th Cir. 1996) (en banc).

⁶³ *Id.*

⁶⁴ *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1990). At the time of Richards's sentencing, the Guidelines were mandatory. *Booker v. United States*, 543 U.S. 220, 222 (2005). In 2005, the Supreme Court determined the guidelines violated a defendant's Sixth Amendment right to have a jury determine the facts which lead to a greater sentence. *Id.* In doing so, the Court rendered the guidelines effectively advisory. *Id.*

⁶⁵ *Richards*, 87 F.3d at 1153.

⁶⁶ *Id.*

he filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255.⁶⁷ The court denied that motion.⁶⁸ Richards filed a second § 2255 motion arguing the court misapplied the Guidelines when it sentenced him according to the entire weight of the liquid and not merely the 28 grams of pure methamphetamine.⁶⁹ The district court granted this motion and ordered Richards's sentence vacated.⁷⁰

United States Court of Appeals for the Tenth Circuit: Panel Decision

The United States Court of Appeals for the Tenth Circuit reversed the district court and ruled granting the motion to be an abuse of the writ.⁷¹ However, the court noted a pending Sentencing Commission amendment to the commentary to U.S.S.G. § 2D1.1 could afford Richards relief if adopted and applied retroactively.⁷² The amendment proposed to exclude waste materials requiring separation from the pure drug prior to use from the drug weight calculation required under U.S.S.G. § 2D1.1.⁷³ The amended commentary took effect November 1, 1993.⁷⁴ The Sentencing Commission designated the amendment for retroactive effect.⁷⁵

⁶⁷ *Id.* at 1153; *see also* 28 U.S.C. § 2255 (2006). A writ under 28 U.S.C. § 2255 provides a prisoner in custody with the ability to move the court which imposed the sentence to vacate, set aside or correct the sentence if the sentence was in violation of the Constitution, in violation of the laws of the United States, the sentence was in excess of what was permissible by the law, or the court lacked jurisdiction to impose the sentence. 28 U.S.C. § 2255.

⁶⁸ *Richards*, 87 F.3d at 1153.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (stating Richards's 28 U.S.C. § 2255 motion is an abuse of the writ).

⁷² *Id.* Congress gave the Sentencing Commission authority to set its own effectiveness dates:

The Commission . . . may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments.

28 U.S.C. § 994(p) (2006).

⁷³ *Richards*, 87 F.3d at 1154. Specifically, the amendment provides:

"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot be readily be separated from the mixture or substance that is appropriately 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.

U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008).

⁷⁴ U.S. SENTENCING GUIDELINES MANUAL app. C.

⁷⁵ *Richards*, 87 F.3d at 1153. Congress gave the Sentencing Commission authority to make its amendments retroactive by providing:

Based on the amended commentary to U.S.S.G. § 2D1.1, Richards sought a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2).⁷⁶ Richards asserted the amended commentary to U.S.S.G. § 2D1.1 required the court to exclude the liquid by-products seized by law enforcement and recalculate his sentence based only upon the 28 grams of pure methamphetamine.⁷⁷ Richards conceded the mandatory minimum under § 841(b) still applied.⁷⁸ The government challenged the reduction, asserting the amended commentary failed to alter the definition of “mixture or substance” in § 841, which set the statutory penalties for methamphetamine trafficking.⁷⁹ Based on this theory of statutory construction, the government argued Richards’s sentence should be no less than 120 months.⁸⁰

The district court reduced Richards’s sentence to sixty months, concluding § 841 and U.S.S.G. § 2D1.1 should be subject to a congruent interpretation in order to avoid inconsistent results.⁸¹ Thus, the district court interpreted § 841’s phrase “mixture or substance” consistent with the amended Guidelines definition and sentenced Richards based on 28 grams of methamphetamine, instead of 32 kilograms of a mixture containing methamphetamine.⁸²

If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

28 U.S.C. § 994(u); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 (stating a reduction in term of imprisonment as a result of an amended guideline range occurs in cases “in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines”).

⁷⁶ *Richards*, 87 F.3d at 1153–54; *see also* 18 U.S.C. § 3582(c)(2) (2006). A court may modify a term of imprisonment “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” § 3582(c)(2).

⁷⁷ *Richards*, 87 F.3d at 1154.

⁷⁸ *Id.* The mandatory minimums for methamphetamine apply as follows:

50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life.

21 U.S.C. § 841(b)(1)(A)(viii) (2006).

⁷⁹ *Richards*, 87 F.3d at 1154.

⁸⁰ *Id.*; *see also* 21 U.S.C. § 841(b)(1)(A)(viii).

⁸¹ *Richards*, 87 F.3d at 1153–54.

⁸² *Richards v. United States*, 796 F. Supp. 1456, 1461–62 (D. Utah 1992) (holding a sentence for possession of controlled substance should have been based on actual detectable amount of methamphetamine and any standard carrier medium, and not on entire weight of mixture where mixture contained unusable, uningestible, or poisonous materials that rendered the mixture unmarketable).

A divided panel of the United States Court of Appeals for the Tenth Circuit agreed, refusing to sentence Richards based upon the entire 32 kilogram solution.⁸³ The panel reasoned that sentencing Richards according to the 32 kilogram solution would contradict congressional intent by ignoring the panel's interpretation of the Supreme Court's holding in *Chapman v. United States*.⁸⁴ The divided panel interpreted *Chapman* as holding "Congress's 'market-oriented' approach dictates that we not treat unusable drug mixtures as if they were usable."⁸⁵

The United States Court of Appeals for the Tenth Circuit Rehearing En Banc

Majority Opinion

The United States Court of Appeals for the Tenth Circuit granted en banc review in order to determine whether the Guideline or statutory definition of "mixture or substance" controlled.⁸⁶ The *Richards* court, after hearing arguments from both parties, deemed it necessary to interpret the phrase "mixture or substance" as found in § 841.⁸⁷ The court recognized that while Congress left "mixture or substance" undefined, the court was bound to the interpretation articulated in *Chapman*.⁸⁸ The *Chapman* Court concluded the phrase "mixture or substance" must be given its plain and ordinary meaning because Congress was silent regarding the definition.⁸⁹

Richards argued the Tenth Circuit should follow the reasoning of the Second, Third, Sixth, Seventh, and Eleventh Circuits.⁹⁰ These circuits—centered on a market-oriented approach—hold that only usable and marketable materials should be used when calculating drug quantity for sentencing purposes under § 841(b). The Tenth Circuit rejected Richards's argument based on its holding that *Chapman's* definition of what constitutes a "mixture or substance" is controlling.⁹¹ Additionally, the Tenth Circuit refused to adopt the version of the market-oriented approach Richards advocated because it disregards the congressional intent to target offenders involved in the large-scale manufacturing and trafficking of methamphetamine.⁹²

⁸³ *Richards*, 87 F.3d at 1153–54.

⁸⁴ *Id.*; see *Chapman v. United States*, 500 U.S. 453, 453 (1991) (holding blotter paper and LSD constitute a "mixture" under the plain meaning of the term because LSD crystals are diffused among the fibers of the blotter paper).

⁸⁵ *Richards*, 87 F.3d at 1153–54; see *Chapman*, 500 U.S. 453, 453.

⁸⁶ *Richards*, 87 F.3d at 1154. Circuit Judge Baldock wrote the majority opinion. *Id.* at 1152.

⁸⁷ *Id.* at 1154.

⁸⁸ *Id.* at 1155.

⁸⁹ *Chapman*, 500 U.S. at 461–62.

⁹⁰ *Richards*, 87 F.3d at 1154–55.

⁹¹ *Id.* at 1157–58.

⁹² *Id.*

The Tenth Circuit held that any substance chemically bonded to the pure drug should be included in the base sentencing weight.⁹³ The majority rejected the market-oriented approach by stating that a “detectable amount”—as opposed to an ingestible or marketable amount—is the nexus of what constitutes a “mixture or substance.”⁹⁴ The court noted that the plain language of 21 U.S.C. § 841(b)(1)(A)(viii), indicating that a “mixture or substance containing a *detectable* amount of methamphetamine,” was incongruent with the amended commentary adopted by the Commission in its 1993 amendment to U.S.S.G. § 2D1.1.⁹⁵ The nexus of the incongruence is the word “detectable” as noted in § 841(b)(1)(A)(viii) and the explicit statement of the Commission—“mixture or substance does not include materials that must be separated from the controlled substance before the substance can be used. Examples of such materials include . . . waste water from an illicit laboratory used to manufacture a substance.”⁹⁶ As a result of this incongruence, the issue of whether to include waste water for purposes of calculating drug weight varies throughout the federal court system.⁹⁷

The *Richards* court also held that applying the plain meaning of “mixture or substance” would mean liquid by-products containing a detectable amount of methamphetamine constitute a “mixture or substance” when determining drug quantity for sentencing purposes under § 841.⁹⁸ Following this line of reasoning, the en banc court held *Richards* responsible for the entire 32 kilogram mixture, thus putting him in violation of § 841(b)(1)(A)(viii) and subjecting him to a mandatory minimum prison sentence of ten years.⁹⁹

⁹³ *Id.* at 1157.

⁹⁴ *Id.*

⁹⁵ *Id.* (emphasis added).

⁹⁶ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1.

⁹⁷ *Richards*, 87 F.3d at 1152–54. The Second, Third, Sixth, Seventh, and Eleventh Circuits do not count waste water or liquid by-products of drug production when determining drug quantity for purposes of sentencing under 21 U.S.C § 841(b). *E.g.*, *United States v. Johnson*, 999 F.2d 1192, 1196–97 (7th Cir. 1993); *United States v. Rodriguez*, 975 F.2d 999, 1006–07 (3d Cir. 1992); *United States v. Acosta*, 963 F.2d 551, 553–54 (2d Cir. 1992); *United States v. Jennings*, 945 F.2d 129, 136–37 (6th Cir. 1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1237–38 (11th Cir. 1991). The Fifth, Eighth, Ninth, and Tenth Circuits hold it proper to include waste water or liquid by-products of drug production when determining drug quantity for purposes of sentencing under 21 U.S.C § 841(b). *E.g.*, *United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003); *United States v. Sherrod*, 964 F.2d 1501, 1510–11 (5th Cir. 1992); *United States v. Walker*, 960 F.2d 409, 412–13 (5th Cir. 1992); *United States v. Beltran-Felix*, 934 F.2d 1075, 1076 (9th Cir. 1991).

⁹⁸ *Richards*, 87 F.3d at 1157–58.

⁹⁹ *Id.*

Furthermore, the Tenth Circuit noted neither § 841 nor its legislative history mentions the words “marketable,” “usable,” or “consumable.”¹⁰⁰ Therefore, the *Richards* court held the phrase “detectable amount”—not “usable,” “consumable,” or “marketable”—is the hallmark of the phrase “mixture or substance” under § 841(b).¹⁰¹

Dissenting Opinion

The dissenting opinion in *Richards* expressed four primary objections. First, the dissent opined the majority’s interpretation of the plain language of § 841 will lead to a result that is “demonstrably at odds with the intentions of the statute’s drafters.”¹⁰² Second, the dissent concurred with other circuits by holding Congress intended the phrase “mixture or substance” in § 841(b) to refer to a marketable or usable mixture.¹⁰³ Third, the dissent believed that while the majority was correct in holding *Chapman* was controlling precedent in the case at hand, the dissent believed the majority “divorced the holding in *Chapman* from its underlying circumstances and rationale.”¹⁰⁴ Finally, the dissent asserted Congress designed the Sentencing Commission to create and promulgate sentencing policy and practices for the federal system, and the amended commentary to U.S.S.G. § 2D1.1 unambiguously excluded the weight of waste water from the measurement of a “mixture or substance.”¹⁰⁵ Along these lines, the dissent noted that unnecessary conflict and confusion would result from the adoption of any interpretation contrary to that of the Sentencing Commission.¹⁰⁶

ANALYSIS

The United States Court of Appeals for the Tenth Circuit applied the correct reasoning in *United States v. Richards* and reached the correct conclusion regarding the proper determination of methamphetamine drug weight for sentencing purposes. First, the court properly rejected Richards’s reliance on the market-oriented approach of the Second, Third, Sixth, Seventh, and Eleventh Circuits.¹⁰⁷

¹⁰⁰ *Id.* at 1158.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1158–59 (Seymour, J., dissenting) (citing *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989)). Chief Judge Seymour’s dissenting opinion was joined by Circuit Judges Porfilio and Henry. *Id.* at 1158.

¹⁰³ *Id.* at 1158–59; see *supra* note 97 and accompanying text.

¹⁰⁴ *Richards*, 87 F.3d at 1158–59.

¹⁰⁵ *Id.* at 1160.

¹⁰⁶ *Id.*

¹⁰⁷ See *infra* notes 109–25, 131, 132–33, 137 and accompanying text.

Second, the court correctly held *Chapman's* plain meaning interpretation of “mixture or substance” controls and is congruent with congressional intent.¹⁰⁸ Finally, the court correctly rejected Richards’s assertion that § 841 should be defined in accordance with U.S.S.G. § 2D1.1 application note 1.¹⁰⁹

In contrast to the holding of the court in *Richards*, the Second, Third, Sixth, Seventh, and Eleventh Circuits adhere to a much different version of the market-oriented approach.¹¹⁰ Under the approach adopted by these circuits “only usable or consumable mixtures or substances are included in the drug quantity for sentencing purposes.”¹¹¹ Under this approach to sentencing defendants under § 841, many offenders involved in large-scale methamphetamine production will not be punished in accordance with Congressional intent.¹¹²

The legislative history for § 841(b) illustrates Congress intended to punish drug traffickers through the plain language approach adopted by the First, Fifth, Eighth, and Tenth Circuits.¹¹³ The Court remarked that Congress constructed § 841(b) in a manner that would penalize drug offenders based on the weight of the “mixture or substance containing a detectable amount” of the drugs.¹¹⁴ Congress, in enacting § 841, desired to combat the drug problem in the United States by targeting both the major traffickers and those participating in the drug market on the retail or manufacturing level.¹¹⁵

In light of Congress’s desire to disable both the major traffickers and those involved on retail or manufacturing levels, it is necessary to consider the role liquid by-products play in the production and distribution of methamphetamine.

¹⁰⁸ See *infra* notes 110–25, 130–32, 136 and accompanying text.

¹⁰⁹ See *infra* notes 126–32, 134–35 and accompanying text.

¹¹⁰ *United States v. Richards*, 87 F.3d 1152, 1152–53 (1996) (en banc); see *supra* note 97 and accompanying text (identifying circuits excluding by-products of methamphetamine production for sentencing purposes).

¹¹¹ *United States v. Stewart*, 361 F.3d 373, 377 (7th Cir. 2004).

¹¹² *Id.*; see H.R. REP. NO. 99-845, at 14 (1986) (asserting law enforcement ought to focus efforts on disabling “major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs”).

¹¹³ *Id.* (“[Q]uantities . . . of mixtures, compounds, or *preparations* that contain a *detectable* amount of the drug—these are not necessarily quantities of pure substance.”) (emphasis added). Congress’s utilization of the word “preparation” seems to indicate a desire, with respect to methamphetamine, to disable those involved in the preparation of the drug. *Id.* Methamphetamine, being produced via liquid synthesis, requires major traffickers and producers to mix a variety of chemicals in order to reach a street-market product. *Id.*

¹¹⁴ *Chapman v. United States*, 500 U.S. 453, 459 (1991); 21 U.S.C. § 841(b) (2006).

¹¹⁵ H.R. REP. NO. 99-845, at 14; see also *supra* notes 110–11.

Every major method of producing methamphetamine involves the use of some type of liquid.¹¹⁶ Therefore, if liquid by-products are excluded when determining drug quantity for the purposes of sentencing, those offenders who Congress intended to disable would be given lenient sentences that would not reflect their roles in the drug market.¹¹⁷ Typically, those involved in the manufacture of methamphetamine do not wish to exclusively create a supply to meet their personal demand; instead, they are seeking to profit from the promulgation of the drug.¹¹⁸ Therefore, the plain language of the phrase “mixture or substance,” as provided in *Chapman*, should be used when determining whether to include liquid by-products of methamphetamine production when calculating drug quantity for sentencing purposes.¹¹⁹

Opponents of the plain language approach argue inclusion of by-products of methamphetamine production will lead to absurd results.¹²⁰ Adopting the plain language meaning of “mixture or substance” would not lead to absurd results—such as the inclusion of packing agents when determining drug quantity for sentencing purposes.¹²¹ There is a glaring difference between liquid by-products of methamphetamine production and packing agents such as a plastic container used to carry marijuana from one place to another.¹²² Under the definition of “mixture or substance,” the liquid by-product containing a “detectable” amount of methamphetamine should be included when calculating drug quantity for sentencing purposes due to the nature of the methamphetamine production

¹¹⁶ See *United States v. Brown*, 400 F.3d 1242, 1245–48 (10th Cir. 2005); see, e.g., *United States v. Layne*, 324 F.3d 464, 467–71 (6th Cir. 2003).

¹¹⁷ *United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003) (stating “market oriented” analysis supports finding liquid solutions in clandestine laboratories as constituting a “mixture or substance” containing methamphetamine). The *Kuenstler* court further noted “the market for this type of methamphetamine is based on its manufacture in labs . . . and that process involves creation of a liquid solution . . . a process that results in a product for distribution.” *Id.*

¹¹⁸ *Id.* at 1018, 1023; see also, e.g., *United States v. Clarke*, 564 F.3d 949, 954–56 (8th Cir. 2009); *United States v. Trefl*, 447 F.3d 421, 422 (5th Cir. 2006); *United States v. Sherrod*, 964 F.2d 1501, 1511 (5th Cir. 1992).

¹¹⁹ See *Chapman*, 500 U.S. at 454 (“Since neither the statute nor the Sentencing Guidelines define ‘mixture,’ and it has no established common-law meaning, it must be given its ordinary meaning, which is ‘a portion of matter consisting of two or more components . . . that however thoroughly commingled are regarded as retaining a separate existence’ . . .”) (citations omitted).

¹²⁰ *United States v. Johnson*, 999 F.2d 1192, 1196 (7th Cir. 1993) (providing an example of an absurd result from following the plain language approach). “[I]magine a marijuana farmer who harvests his crop, leaving a few traces of the illegal plants on the ground. The farmer then plows his field to prepare for next year’s crop and in so doing mixes the traces of marijuana with the soil.” *Id.*

¹²¹ *United States v. Innis*, 7 F.3d 840, 847 (9th Cir. 1993) (“[U]nlike a mere packing agent like crème liqueur . . . or cornmeal . . . the entire liquid mixture can be said to facilitate the distribution of methamphetamine because the methamphetamine could not have been produced without it.”).

¹²² *Id.*; see *infra* notes 121–25 and accompanying text.

process.¹²³ However, the plastic container would not be subject to the same inclusion because the bowl and the marijuana do not “consist of two substances blended together so that the particles of one are diffused among the particles of the other.”¹²⁴ The definition provided by the *Chapman* Court for the phrase “mixture or substance” would prevent such items as the plastic container or a car used to transport cocaine from being included to determine the weight of a substance for sentencing purposes.¹²⁵ This interpretation is in line with both a plain language interpretation of § 841 and the intent of Congress.¹²⁶

With the enactment of the Sentencing Reform Act of 1984 and the establishment of the Sentencing Commission, Congress created an entity meant to provide consistency, fairness, and clarity to the federal sentencing process.¹²⁷ For the most part, the Sentencing Commission accomplished these goals; however, in the case of the amended commentary to U.S.S.G. § 2D1.1, the Sentencing Commission created confusion instead of clarity.¹²⁸ The Sentencing Commission stated in application note 1 to U.S.S.G. § 2D1.1 that “‘mixture or substance’ as used in this guideline has the same meaning as in 21 U.S.C § 841, except as expressly provided.”¹²⁹ The application note expressly states “waste water from an illicit laboratory used to manufacture a controlled substance” should be excluded from the definition of “mixture or substance” under § 841(b).¹³⁰

The exclusion of waste water from drug quantity calculation is incongruent with the time-honored practice of statutory construction and illustrates a complete disregard for the plain language definition of “mixture or substance” determined by the United States Supreme Court in *Chapman*.¹³¹ Legislative history reflects

¹²³ *Innie*, 7 F.3d at 847.

¹²⁴ *Chapman*, 500 U.S. at 454, 462 (“Using the dictionary definition would not allow the clause to be interpreted to include LSD in a bottle or in a car, since, unlike blotter paper, those containers are easily distinguished and separated from LSD.”).

¹²⁵ *Id.*

¹²⁶ *Id.*; see *supra* notes 110–24 and accompanying text.

¹²⁷ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2008).

¹²⁸ See Matthew Thomas Geiger, Note, *Diagram of a Drug Sentence—Defining “Mixture or Substance” on the Basis of Utility in United States v. Richards*, 51 OKLA. L. REV. 119, 131–32 (1998) (noting the amended language in the Guidelines is in direct conflict with the Tenth Circuit’s holding in *Richards*); cf. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008) (stating materials that cannot be readily separated should not be included when determining drug quantity for sentencing purposes).

¹²⁹ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008).

¹³⁰ *Id.*; see also 21 U.S.C. § 841(b).

¹³¹ *Chapman*, 500 U.S. at 462–66.

the intentions of Congress when dealing with controlled substances that could be subject to the phrase “mixture or substance.”¹³² Congress was cognizant of the nature of drug trafficking and the different methods employed, depending on what type of drug was being produced.¹³³

The current split among the circuits regarding this issue must be resolved to provide uniformity and consistency within the federal sentencing system.¹³⁴ The disconnect between the *Chapman* definition of “mixture or substance” and the alternative definition presented in U.S.S.G. § 2D1.1 application note 1 must be reconciled.¹³⁵ Due to the disparate treatment of methamphetamine offenders, the following steps should be taken. First, the Sentencing Commission should repeal U.S.S.G. § 2D1.1 application note 1 and reinstitute the Guideline scheme in operation prior to 1993.¹³⁶ Second, Congress should amend 21 U.S.C. § 841(b) to expressly define what is meant by “mixture or substance.”¹³⁷ Third, the United States Supreme Court should grant certiorari the next time a case dealing with the issue presented in *Richards* arises.¹³⁸

CONCLUSION

Given the plain language of § 841, its legislative history, and the substantial body of case law indicating the necessity of including liquid by-products of methamphetamine production, the en banc court in *Richards* correctly held it

¹³² *Id.*

¹³³ See *supra* notes 110–12 and accompanying text.

¹³⁴ See Petition for Writ of Certiorari at 17, *Clarke*, No. 09-455, 2009 WL 3341929 (Oct. 14, 2009) (asserting the need for the Court to resolve the existing circuit split).

¹³⁵ See *Chapman*, 500 U.S. at 462; *Innie*, 7 F.3d at 847 (suggesting the pre-1993 amendment Guidelines were “consistent with Congress’s directive to impose sentences based on quantity rather than purity”). The court’s holding in *Innie* suggests there was uniformity between the pre-1993 amendment Guidelines and the congressional intent behind § 841. *Innie*, 7 F.3d at 847; U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008).

¹³⁶ See *supra* notes 126–32 and accompanying text.

¹³⁷ *Freeborn v. Smith*, 69 U.S. 160, 175 (1864) (opining that legislative action to correct mistakes and provide remedies are peculiar subjects of legislation and lay outside the providence of the judiciary).

¹³⁸ Petition for Writ of Certiorari at 17, *Clarke*, No. 09-455, 2009 WL 3341929 (Oct. 14, 2009), *cert. denied*, 2009 WL 3344912 (U.S. Nov. 16, 2009); see also *Richards*, 87 F.3d 1153, *cert. denied*, 519 U.S. 1003 (1996); *Walker*, 960 F.2d 409, *cert. denied*, 506 U.S. 967 (1992); *Fowner v. United States*, 947 F.2d 954 (10th Cir. 1991), *cert. denied*, 504 U.S. 933 (1992). Justice White, in the *Fowner* dissent, expressed concern that the issue of whether waste by-products of methamphetamine production should be included in calculating the weight of a “mixture or substance” for purposes of sentencing is a recurring one. *Fowner*, 504 U.S. at 933–35 (White, J., dissenting). Justice White also noted the conflict among the circuits: “identical conduct in violation of the same federal laws may give rise to widely disparate sentences in different areas of the country.” *Id.*

proper to include liquid by-products of methamphetamine production when determining drug quantity for sentencing purposes under § 841.¹³⁹ First, the en banc court in *Richards* correctly held Congress intended to adopt the plain language approach as interpreted by the First, Fifth, Eighth, and Tenth Circuits to drug sentencing as opposed to the market-oriented approach adopted by other circuits.¹⁴⁰ Second, the plain language of § 841 is indicative of Congress's desire to include liquid by-products of methamphetamine production for sentencing purposes.¹⁴¹ Finally, the en banc court in *Richards* correctly held § 841 should not be defined in conformity to U.S.S.G. § 2D1.1 application note 1.¹⁴² The split among the various circuits surrounding this issue should compel the United States Supreme Court to revisit this issue and grant certiorari.¹⁴³ If certiorari is not granted, the lack of uniformity will continue to result in disparate sentences and defendants will not be afforded any degree of certainty when engaged in the federal criminal justice system.¹⁴⁴

¹³⁹ See *supra* notes 109–37 and accompanying text.

¹⁴⁰ See *supra* notes 109–25, 131–33, 137 and accompanying text.

¹⁴¹ See *supra* notes 110–25, 130–32, 136 and accompanying text (arguing it is proper to include non-ingestible waste products of methamphetamine production when determining drug quantity for sentencing purposes).

¹⁴² See *supra* notes 126–32, 134–35 and accompanying text (arguing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 should be revised in accordance with the plain language of § 841).

¹⁴³ See *supra* notes 3, 7, 133 and accompanying text.

¹⁴⁴ See *supra* notes 126–32 and accompanying text.