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# **BREAKING BAD IN THE ELEVENTH CIRCUIT: ASSESSING THE TOTAL WEIGHT OF METHAMPHETAMINE FOR SENTENCING PURPOSES**

*Richard Pallas, Jr.\**

## **I. INTRODUCTION**

The production and distribution of methamphetamine both financially and physically plagues the population of the United States. While the narcotic's prevalence was limited to the West Coast during the early 1990s, its use expanded east later in the decade.<sup>1</sup> Surveys reveal that 1.2 million people used the narcotic in 2011.<sup>2</sup> Furthermore, reports estimate that methamphetamine abuse cost the nation approximately \$23.4 billion.<sup>3</sup> This narcotic "has a high potential for abuse and addiction."<sup>4</sup> Because of methamphetamine's "intoxicating effects," use of the narcotic may result in altered judgment, reduced inhibitions, and participation in unsafe behaviors.<sup>5</sup> Negative health effects from its use include: "sleeplessness, loss of appetite, increased blood pressure, paranoia, psychosis, aggression, disordered thinking, extreme mood swings, and sometimes hallucinations."<sup>6</sup>

Emergency department visits concerning methamphetamine-related injuries have risen "from 67,954 in 2007 to 102,961 in 2011."<sup>7</sup> This data seems to indicate "that increasing numbers of people are using this highly addictive drug."<sup>8</sup> Narcotic's users are not the only people at risk of injury; in fact, methamphetamine production is dangerous enough to cause a home to explode.<sup>9</sup> According to DEA statistics, 3990 and 4622 people were arrested for methamphetamine drug offenses in 2013 and 2012 respectively.<sup>10</sup> In order to combat the manufacture of methamphetamine, Congress

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1. See Substance Abuse and Mental Health Services Association, *Emergency Department Visits Involving Methamphetamine: 2007 to 2011*, THE DAWN REPORT, June 19, 2014, at 1 [hereinafter SAMHSA].

2. See Nora D. Volkow, M.D., *Letter from the Director*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/research-reports/methamphetamine/letter-director> (last updated September 2013).

3. *Id.*

4. SAMHSA, *supra* note 1, at 1.

5. See *id.*

6. *Methamphetamine Facts*, DRUGPOLICY.ORG, <http://www.drugpolicy.org/drug-facts/methamphetamine-facts> (last visited Jan. 10, 2015).

7. SAMHSA, *supra* note 1, at 1.

8. *Id.* at 4.

9. See, e.g., Kevin P. Connolly, *Meth-Lab Explosion Sends Baby, 2 Adults and 2 Deputies to Hospital*, ORLANDO SENTINEL (Feb. 4, 2015), <http://www.orlandosentinel.com/news/breaking-news/os-meth-lab-explosion-baby-deputies-20150204-story.html> ("Two adults, a baby and two deputies were rushed to a local hospital after a suspected meth-lab explosion near Daytona Beach.").

10. *Why the Number of Meth Labs Is Increasing*, CHOICES RECOVERY (Oct. 28, 2014) <http://crehab.org/blog/category/meth/>.

included sentencing instructions regarding the narcotic's production under the Food and Drug Statute.<sup>11</sup>

Congress supplied the courts with guidelines to sentence anyone who cooks this methamphetamine product, but the statute's language has caused uncertainty among the courts. Amidst the numerous methods to cook methamphetamine, there exists the "one pot method."<sup>12</sup> One cooks the necessary components to cause a chemical reaction that creates the methamphetamine.<sup>13</sup> Eventually, both a toxic bilayer solution and a solvent layer that contains methamphetamine are produced by the chemical reaction.<sup>14</sup> While the latter solution is useable to sell the narcotic, the former portion is considered "essentially waste byproduct."<sup>15</sup> The waste byproduct is the center of the controversy addressed in this note.

The statute, for two separate quantities, hands out a minimum sentence for the possession of "a mixture or substance containing a detectable amount of methamphetamine."<sup>16</sup> The federal circuit courts are currently split as to whether the waste byproduct in a methamphetamine solution should be included in the total weight for sentencing purposes; in other words, the courts fail to agree whether the waste byproduct qualifies as "a mixture or substance containing a detectable amount of methamphetamine."<sup>17</sup> Publications already exist that either predict how the United States Supreme Court and certain federal circuit courts would rule regarding this controversy, or that propose how the sentencing provisions of the statute could be revised.<sup>18</sup>

Presently, "the Eleventh Circuit has not yet decided this precise issue."<sup>19</sup> This note will analyze whether the United States Circuit Court of Appeals for the Eleventh Circuit would include the waste byproduct formed by the production of methamphetamine to be included in the drug's weight calculation for sentencing purposes. This note will first confront the statute and methamphetamine process as the background of the issue. Then it will address both the majority and minority views. It will then justify how the Eleventh Circuit would decide the issue by

11. 21 U.S.C. § 841 (2014).

12. See *United States v. Long*, 958 F. Supp. 2d 1334, 1336 (M.D. Fla. 2013).

13. *Id.*

14. *Id.*

15. *Id.*

16. 21 U.S.C. § 841(b)(1)(B)(viii) (2014).

17. See *United States v. Sherrod*, 964 F.2d 1501 (5th Cir. 1992); *United States v. Kuenstler*, 325 F.3d 1015 (8th Cir. 2003); *United States v. Beltran-Felix*, 934 F.2d 1075 (9th Cir. 1991); *United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996); *United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991), *opinion clarified*, 966 F.2d 184 (6th Cir. 1992); *United States v. Stewart*, 361 F.3d 373 (7th Cir. 2004).

18. See Daniel S. Roberts, *Uniformity Under the United States Sentencing Guidelines and the D-/L-Methamphetamine Circuit Split*, 8 S. CAL. INTERDISC. L. J. 285 (1998); Richard Belfiore, *Under What Circumstances Should Total Weight of Mixture or Substance in Which Detectable Amount of Controlled Substance Is Incorporated Be Used in Assessing Sentence Under United States Sentencing Guideline § 2d1.1—Post—Chapman Cases*, 113 A.L.R. FED. 91 (1993); Kyle Graham, *Sorry Seems to Be the Hardest Word: The Fair Sentencing Act of 2010, Crack and Methamphetamine*, 45 U. RICH. L. REV. 765 (2010); 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 Cases*, 10 WYO. L. REV. 339 (2010); *United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996) (en banc); Thomas J. Meier, *A Proposal to Resolve the Interpretation of "Mixture or Substance" Under the Federal Sentencing Guidelines*, 84 J. CRIM. L. & CRIMINOLOGY 377 (1993).

19. *Long*, 958 F. Supp. 2d at 1340.

analyzing the court's findings on similar issues, the findings from district courts within the Eleventh Circuit, and the notes from the United States Sentencing Commission. Based on the following analysis, the Eleventh Circuit would most likely exclude the waste byproduct from methamphetamine weight calculation.

## II. BACKGROUND

### A. Statute

The statute states that “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 . . . .”<sup>20</sup> While the statute's subsections address a plethora of narcotics, the courts debate two subsections following this opening phrase in methamphetamine cases.<sup>21</sup> The first subsection states that

[i]n the case of a violation of subsection (a) of this section involving . . . 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . .<sup>22</sup>

This particular subsection represents the harsher penalty for a larger amount of methamphetamine. The second subsection is less harsh:

In the case of a violation of subsection (a) of this section involving . . . 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years . . . .<sup>23</sup>

While between fifty and just under five hundred grams guarantees the offender a five-year sentence, the sentence doubles whenever an offender is arrested for at least 500 grams. If the solution is less than fifty grams, the defendant will not suffer the minimum prison sentence. If a hypothetical methamphetamine supplier is arrested for the manufacture of the drug, but is found to be cooking less than the minimum amounts, then that supplier avoids the minimum penalty. Unfortunately for most offenders, the amount of a solution that is in the process of “cooking” is usually more than fifty grams.<sup>24</sup> If the solution barely contains any methamphetamine, and a court refuses to allow the waste byproduct to be measured

20. 21 U.S.C. § 841(a)(1) (2014).

21. *Id.*

22. *Id.* § 841(b)(1)(A)(viii).

23. *Id.*

24. *See, e.g., Long*, 958 F. Supp. 2d at 1337 (defendant charged with an 85.8 gram solution that detected some amount of methamphetamine).

for sentencing, the defendant has a better chance to avoid the minimum penalty. However, if a court includes the waste byproduct, the defendant will most likely suffer the consequences set out in the statute.

### B. Methamphetamine Process

DEA chemists are capable of finding the purity of methamphetamine within the mixtures that create the narcotic.<sup>25</sup> The chemical reactions that create the methamphetamine also yield the aforementioned waste byproduct.<sup>26</sup> The waste byproduct that forms is useless to the narcotic's manufacturer; furthermore, if the entire solution were ingested, one would experience sickness rather than the requisite high associated with methamphetamine.<sup>27</sup> To profit from the "one pot method," one must precipitate the usable methamphetamine from the solution and reduce it to powder form.<sup>28</sup>

Both sides of the controversy have valid points regarding the inclusion of the waste byproduct. Courts that include the total solution are simply punishing an offender for attempting to make the narcotic. If the solution is incomplete, or it was not cooked properly and yielded lower methamphetamine, the defendants should not be rewarded for their timing or skill. On the other hand, courts that refuse to include the waste byproduct provide a fairer system for the defendants. The victims of drug sales are the actual buyers and users. These customers do not purchase any waste byproduct; they only purchase the usable narcotic.

### III. MAJORITY VIEW

The majority of federal circuit courts have ruled that the total solution should be measured for sentencing purposes, so the waste byproduct would count against the defendants.<sup>29</sup> These cases tend to expand upon *Chapman v. United States*, which implemented a plain meaning and "market approach" regarding sentencing under the statute.<sup>30</sup> In *Chapman*, the Court was dealing with LSD rather than methamphetamine.<sup>31</sup> The defendant in this case was spraying the hallucinogenic drug solution on paper, cutting the paper into "one-dose" squares, and then selling the paper to LSD users.<sup>32</sup> These users could swallow, lick, or drop the piece of LSD-tainted into a beverage in order to use the drug.<sup>33</sup> The defendants in this case were convicted of selling ten sheets of the "blotter paper containing LSD;" while the pure LSD only weighed fifty milligrams, the total weight that included the paper was 5.7

25. *Id.* at 1336.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* *United States v. Sherrod*, 964 F.2d 1501, 1509 (5th Cir. 1992); *United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003); *United States v. Beltran-Felix*, 934 F.2d 1075, 1076 (9th Cir. 1991); *United States v. Richards*, 87 F.3d 1152, 1153 (10th Cir. 1996).

30. *Chapman v. United States*, 500 U.S. 453, 461–62 (1991).

31. *Id.* at 455.

32. *Id.* at 457.

33. *Id.*

grams.<sup>34</sup> The statute in question required only one gram of an LSD mixture or substance to receive the five-year minimum sentence.<sup>35</sup>

The Supreme Court began its analysis by acknowledging that earlier congressional statutes “adopted a ‘market-oriented’ approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence.”<sup>36</sup> The Court reasoned that less purity on the same amount of paper should not be punished less severely, for traffickers of the less pure drug still keep street markets going.<sup>37</sup> The Court found the LSD-blotted paper to be a mixture, and also differentiated the paper carrier from other possible carriers “like a glass vial.”<sup>38</sup> Since the LSD could not be taken without the paper, the Court found the blotter paper to be a “mixture” within the plain meaning of the term.<sup>39</sup> While the majority of courts carry this ruling over to cases involving methamphetamine mixtures, certain dicta within this case regarding the digestibility of LSD seems to suggest that perhaps a total methamphetamine solution would be inappropriate to measure in its entirety.<sup>40</sup> If one could not ingest the entire methamphetamine mixture, but he can ingest an entire LSD-blotted sheet of paper, these two types of drugs cases could potentially be found distinguishable.

The previous observation aside, the Fifth Circuit extended *Chapman* and its market-oriented approach to the measuring of a cocaine solution for sentencing purposes.<sup>41</sup> In this case, the defendant was arrested for transporting cocaine through an airport in aerosol cans.<sup>42</sup> After his arrest, the airport inspectors discovered two bottles filled with a cocaine-distilled liquid.<sup>43</sup> The defendant disputed the cocaine quantity calculation.<sup>44</sup> The statute required a cocaine base of thirty grams; while the total weight of the mixture resulted in a base of the requisite weight, the removal of the waste liquid would have lowered the defendant’s sentence, for it would result in twenty-eight grams (which allows a less harsh sentence).<sup>45</sup> The defendant argued that the waste should have been removed; in his favor the Fifth Circuit applied the market-oriented approach.<sup>46</sup>

The liquid would need to be separated from the cocaine before it could be sold and used, so the Fifth Circuit recognized that the liquid was not part of the marketable mixture.<sup>47</sup> Because the liquid from the bottles would not reach the market, the court found that it should not have been a factor in the quantity calculation; therefore, the

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34. *Id.* at 455.

35. 21 U.S.C. § 841(b)(1)(B)(v) (2014).

36. *Chapman*, 500 U.S. at 461.

37. *Id.*

38. *Id.* at 462.

39. *Id.* at 461–62.

40. *Id.* at 463.

41. *See United States v. Palacios-Molina*, 7 F.3d 49 (5th Cir. 1993).

42. *Id.* at 50.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Palacios-Molina*, 7 F.3d at 54.

47. *Id.*

court reversed the case.<sup>48</sup> While the Fifth Circuit applied the market-oriented approach to cocaine, it refused to apply it to methamphetamine.<sup>49</sup> In *Sherrod*, the court found that methamphetamine found in its formative stage should be calculated by its total weight.<sup>50</sup> Agents raided the laboratory and collected samples from mixtures.<sup>51</sup> The methamphetamine mixtures were eventually measured at 17.5 grams.<sup>52</sup> The court rationalized that the mixture did not contain waste because it was in its formative stages, and would eventually become pure methamphetamine.<sup>53</sup>

In *United States v. Kuenstler*, the Eighth Circuit found that the mixture containing methamphetamine constituted a “mixture” under both the plain meaning of the statute and *Chapman*’s market-oriented approach.<sup>54</sup> Law enforcement discovered a methamphetamine lab in the defendants’ attic that contained a solution that weighed 92.43 grams of the narcotic’s mixture.<sup>55</sup> While the court found that the mixture satisfied the plain meaning of the statute because it contained methamphetamine, it further found that it satisfied the “market-oriented” approach because “[t]he market for this type of methamphetamine is based on its manufacture in labs like that of the conspirators, and that process involves creation of liquid solutions like those seized here, a process that results in a product for distribution.”<sup>56</sup>

The Ninth Circuit also ruled in favor of the inclusion of the waste byproduct.<sup>57</sup> The defendant in this case was arrested by police officers while he was in the process of cooking.<sup>58</sup> Despite the interruption, the defendant was still apprehended with possession of methamphetamine in its early stage.<sup>59</sup> The solution totaled 192 grams.<sup>60</sup> The defendant argued that the solution of methamphetamine “was not in a distributable state.”<sup>61</sup> Because the product was not “marketable,” the defendant argued that he should not have been sentenced for possessing over 100 grams.<sup>62</sup>

Unfortunately for the defendant, the court applied the plain meaning of the statute to the facts of the case; they found that “a mixture . . . containing a detectable amount of methamphetamine” meant any mixture including the one at trial.<sup>63</sup> The court remarked that “marketable” is not found anywhere in the statute or the legislative history.<sup>64</sup> The Ninth Circuit not only rejected the market-oriented

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48. *Id.* at 55.

49. *United States v. Sherrod*, 964 F.2d 1501, 1510 (5th Cir. 1992).

50. *Id.* at 1511.

51. *Id.* at 1505.

52. *Id.* at 1508.

53. *See id.* at 1510–11.

54. *United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003).

55. *Id.* at 1018.

56. *Id.* at 1023.

57. *See United States v. Beltran-Felix*, 934 F.2d 1075, 1077 (9th Cir. 1991).

58. *Id.* at 1076.

59. *Id.*

60. *Id.*

61. *Id.* (emphasis removed).

62. *Beltran-Felix*, 934 F.2d at 1076.

63. *Id.*

64. *Id.*

approach; it also adopted the most literal definition of the term mixture within the meaning of the statute.<sup>65</sup>

In *United States v. Richards*, the Tenth Circuit applied the plain meaning and rulings by the Supreme Court to justify including the waste byproduct in the weight of the methamphetamine.<sup>66</sup> The defendant was arrested close to the end of the manufacture of the narcotic; before he was able to remove the pure methamphetamine from the solution, law enforcement apprehended him.<sup>67</sup> His methamphetamine solution contained thirty-two grams of pure methamphetamine, but the entire solution contained over 1000 grams.<sup>68</sup> The defendant was sentenced under the harsher statutory penalty, and eventually found himself before the court for an en banc review of whether the plain meaning should be adopted.<sup>69</sup>

The court adopted the meaning of “mixture or substance” as defined in *Chapman*.<sup>70</sup> The Supreme Court first defined a mixture as “a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence.”<sup>71</sup> The Supreme Court further found that “a ‘mixture’ may also consist of two substances blended so that the particles of one are diffused among the particles of the other.”<sup>72</sup> The Tenth Circuit found that these definitions used by the Supreme Court as the plain meaning for an LSD mixture could also apply to a methamphetamine mixture.<sup>73</sup> While the court ruled against the defendant, three of the circuit judges did dissent that Congress meant “mixture of substance” as “a marketable or usable mixture.”<sup>74</sup> The dissent argued that the “market-oriented” approach appropriately empowers the courts to refuse treating “unusable drug mixtures as if they were usable.”<sup>75</sup>

#### IV. MINORITY VIEW

The minority of federal jurisdictions have ruled that the waste byproduct should not be included in the drug’s total weight.<sup>76</sup> The Sixth Circuit ruled that the legislative intent of the sentencing statute was to deny an entire mixture.<sup>77</sup> This case involved the government’s chemist terminating the methamphetamine’s cooking process, and subsequently measuring the amount of the narcotic once the solution

65. *Id.* at 1076–77.

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

67. *Id.*

68. *Id.*

69. *Id.* at 1154.

70. *Id.* at 1155.

71. *Richards*, 87 F.3d at 1155 (quoting *Chapman v. United States*, 500 U.S. 453, 462 (1991) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986))).

72. *Id.* (quoting *Chapman*, 500 U.S. at 462 (quoting 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989))).

73. *Id.* at 1156.

74. *Id.* at 1158 (Seymour, C.J., dissenting).

75. *Id.* at 1159 (emphasis removed).

76. *United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991), *opinion clarified*, 966 F.2d 184 (6th Cir. 1992); *United States v. Stewart*, 361 F.3d 373 (7th Cir. 2004).

77. *Jennings*, 945 F.2d at 136.



cooled.<sup>78</sup> The defendants were charged with possession of 4180 grams of a methamphetamine mixture that only contained 1.67% of the narcotic.<sup>79</sup>

The defendants argued “that had the manufacturing been allowed to progress to completion, a much smaller amount of pure methamphetamine would have actually been produced . . . .”<sup>80</sup> They further argued “that the mixture, in the form in which it was found, contained only a small amount of methamphetamine along with unreacted chemicals and by-products both of which are poisonous if ingested.”<sup>81</sup> The Sixth Circuit found that “interpreting the statute to require the inclusion of the entire contents of the Crockpot for sentencing in this case would both produce an illogical result and be contrary to the legislative intent underlying the statute.”<sup>82</sup>

The court factored the district court’s assumption that the Crockpot had a detectable amount of methamphetamine, the government chemist’s testimony that a complete cook would have yielded less pure methamphetamine, and the inability of the defendants to distribute the solution to remand the case.<sup>83</sup> The court found that using the entire weight of the solution found in the Crockpot would be contrary to the legislative intent.<sup>84</sup> It referenced an observation from *Chapman* to justify this finding: “Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes. Inactive ingredients are combined with pure [forms of the illegal drug], and the mixture is then sold to consumers as a heavily diluted form of the drug.”<sup>85</sup> The court differentiates the diluted drugs referenced in *Chapman* from methamphetamine: many drug substances can be diluted in order to sell more of the narcotic to consumers, but methamphetamine cannot be distributed in this way.<sup>86</sup> The defendants’ efforts to “distill methamphetamine from the otherwise uningestable byproducts of its manufacture.”<sup>87</sup> The court remanded the case to the district court to hold an evidentiary hearing regarding the chemical properties of the mixture.<sup>88</sup>

The Sixth Circuit contains a case where the defendant was found guilty of possession, with intent to distribute, methamphetamine.<sup>89</sup> The defendant in this case was arrested with a jar that was revealed to contain 308 grams of a mixture containing methamphetamine.<sup>90</sup> The defendant appealed with a claim that the solution contained unusable byproducts, but the court distinguished this case from *Jennings*, for there was no cooking process taking place.<sup>91</sup> Because the mixture was

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78. *Id.* at 134.

79. *Id.*

80. *Id.* at 135.

81. *Id.*

82. *Jennings*, 945 F.2d at 136.

83. *Id.* at 137.

84. *Id.*

85. *Id.* (quoting *Chapman v. United States*, 500 U.S. 453, 459 (1991)).

86. *Id.*

87. *Jennings*, 945 F.2d at 137.

88. *Id.*

89. *See United States v. Webb*, 77 F. App’x 786, 786 (6th Cir. 2003).

90. *Id.* at 787.

91. *Id.*

in a jar, suitable for distribution, and not in the cooking process, the court ruled against the defendant, but remanded consistent with its precedent.<sup>92</sup>

The Seventh Circuit also takes the minority position.<sup>93</sup> The defendant in *Stewart* was arrested in his vehicle; law enforcement also found a thermos that contained ingredients to make methamphetamine.<sup>94</sup> The ingredients included, “crushed pseudoephedrine tablets, anhydrous ammonia, lithium strips from batteries . . . .”<sup>95</sup> Additional steps and ingredients were required to complete a chemical reaction that would create methamphetamine.<sup>96</sup> The investigating agents of the case weighed the contents of the mixture at 825 grams.<sup>97</sup> However, the mixture only contained 2.4 grams of pure methamphetamine.<sup>98</sup> The defendant was also arrested with eighteen grams of processed methamphetamine.<sup>99</sup>

The district court found that the methamphetamine solution was a mixture that should be weighed.<sup>100</sup> The court rationalized the solution could have been sold to someone who could finish the reaction, or poured in some kind of drink to ingest it.<sup>101</sup> However, the Seventh Circuit refuted this finding.<sup>102</sup> The government tried arguing that the solution was “marketable,” for it could be sold to another who could finish the processing.<sup>103</sup> The Seventh Circuit refused to accept this argument; if the mixture was “unusable and unconsumable,” it would not be considered marketable.<sup>104</sup> Furthermore, the court stressed that a “marketable” methamphetamine mixture means “‘usable’ or ‘consumable’ or ‘ingestible.’”<sup>105</sup> The court ultimately ruled, “only the amount of pure drug contained in an unusable solution, or the amount of usable drug that is likely to be produced after that unusable solution is fully processed, may be included in the drug quantity under the statute.”<sup>106</sup>

## V. PROPOSED VIEW OF THE ELEVENTH CIRCUIT

### A. Findings on Similar Issues

The Eleventh Circuit has not yet addressed the waste byproduct sentencing issue. Based on some of its prior rulings, one could predict that it would rule that the

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- 92. *Id.*
  - 93. *See* United States v. Stewart, 361 F.3d 373, 373 (7th Cir. 2004).
  - 94. *Id.* at 374.
  - 95. *Id.*
  - 96. *Id.*
  - 97. *Id.*
  - 98. *Stewart*, 361 F.3d at 374.
  - 99. *Id.*
  - 100. *Id.* at 375.
  - 101. *Id.*
  - 102. *Id.*
  - 103. *Stewart*, 361 F.3d at 381–82.
  - 104. *Id.* at 382.
  - 105. *Id.*
  - 106. *Id.*

narcotic's weight should be calculated without the byproduct.<sup>107</sup> *Jackson* involved the distribution of cocaine.<sup>108</sup> A package containing 1014.4 grams of white powder was found near the defendant when he was arrested.<sup>109</sup> After proper analysis, the package was revealed to only carry approximately ten grams of cocaine (about one percent of the entire package).<sup>110</sup> Although two experts in cocaine remarked that there was too much sugar for it to be considered a proper cutting agent, the defendant was still convicted under the statute.<sup>111</sup>

The Eleventh Circuit vacated the sentence after reviewing the evidence.<sup>112</sup> Amidst the evidence, the chemist had testified, "the package was probably constructed so that 'the cocaine present was originally contained in an area at the surface of the block.'"<sup>113</sup> The court concluded that the sugar was not a cutting agent, but actually a ploy to fool a purchaser into thinking that the package contained cocaine.<sup>114</sup> In the end, it appeared that the Eleventh Circuit was focused on whether the package was consumable or usable as cocaine.<sup>115</sup>

In *Rolande-Gabriel*, the Eleventh Circuit again refused to include unusable substances in the weighing of cocaine.<sup>116</sup> Customs officials searched the defendant's car at an airport after a canine patrol detected drugs on her.<sup>117</sup> Plastic bags filled with a liquid and cocaine mixture were found.<sup>118</sup> The weight of the liquid was 241.6 grams, but the powder weighed 72.2 grams once removed.<sup>119</sup> Furthermore, the powder could be divided into 7.2 grams of cocaine and 65 grams of a substance used for cutting; however, the district court calculated the entire amount of the mixture for sentencing purposes.<sup>120</sup> Applying *Chapman* and the Federal Sentencing Guidelines, the Eleventh Circuit ruled that the original mixture was not usable, and remanded the case for the defendant to be sentenced for only the 72.2 grams of powder.<sup>121</sup>

The Eleventh Circuit also distinguished containers from cutting agents when dealing with heroin.<sup>122</sup> In *Borque*, the defendant violated § 841 when he "transported heroin from the Dominican Republic by ingesting 48 pellets of drugs."<sup>123</sup> While the mixture and substance containing heroin was 587 grams, the defendant argued that

107. See *United States v. Jackson*, 115 F.3d 843 (11th Cir. 1997); *United States v. Newsome*, 998 F.2d 1571 (11th Cir. 1993); *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991); *United States v. Segura-Baltazar*, 448 F.3d 1281 (11th Cir. 2006); *United States v. Borque*, 262 F. App'x 924, 928 (11th Cir. 2008).

108. *Jackson*, 115 F.3d at 843.

109. *Id.* at 844.

110. *Id.*

111. *Id.* at 844–45.

112. *Id.* at 849.

113. *Jackson*, 115 F.3d at 848.

114. *Id.*

115. See *id.*

116. *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1238 (11th Cir. 1991).

117. *Id.* at 1232.

118. *Id.*

119. *Id.* at 1232–33.

120. *Id.* at 1233.

121. *Rolande-Gabriel*, 938 F.2d at 1238.

122. See *United States v. Borque*, 262 F. App'x 924, 928 (11th Cir. 2008).

123. *Id.* at 925.

he should only be charged with the usable 6.4 grams.<sup>124</sup> He claimed the remainder “was diluted and unusable non-narcotics caffeine, aspirin, and acetaminophen.”<sup>125</sup> Because the substance was a cutting agent and “not used as a container,” the court refused to extend *Jackson* and *Rolande-Gabriel* to this case.<sup>126</sup> Therefore, the court affirmed that the defendant was responsible for the full amount of drugs.<sup>127</sup>

Any convictions regarding methamphetamine sentencing in the Eleventh Circuit have only been affirmed due to an adequate presence of methamphetamine or cutting agents. In *Newsome*, despite the large amount of methamphetamine oil found in the defendant’s car, lab reports indicated that the majority of the solution was the narcotic.<sup>128</sup> In *Segura-Baltazar*, “the methamphetamine was combined with dimethyl sulfone, a common cutting agent.”<sup>129</sup> The defendant’s 1200 grams of methamphetamine, according to the Eleventh Circuit, are easily more than enough to satisfy the statute.<sup>130</sup> The court observed that “Congress has made the policy decision that purity is not an element of § 841(b)(1)(A)(viii),” and concluded that the cutting agent still left the methamphetamine mixture marketable.<sup>131</sup> The Eleventh Circuit consequently held that the district court “correctly considered the combined weight of the methamphetamine and the cutting agent” and properly found that the minimum detectable amount of the narcotic was established.<sup>132</sup>

*United States v. Hoehn* came close to deciding the issue of waste byproduct in weight sentencing, but a lack of evidence caused the Eleventh Circuit to pass on the issue.<sup>133</sup> The defendant was arrested in a hotel room for possession of firearms and methamphetamine.<sup>134</sup> The North Florida District Court measured the quantity of methamphetamine at 734.2 grams for sentencing purposes.<sup>135</sup> Because the defendant did not argue that the drug quantity was incorrect at trial, the court applied a plain-error standard of review.<sup>136</sup> Citing the United States Sentencing Guidelines, the court acknowledged, “[T]he entire weight of drug mixtures which are *usable* in the chain of distribution should be considered in determining a defendant’s sentence.”<sup>137</sup>

Evidentiary findings of the district court included a police investigator’s testimony; it was revealed that liquids from six different sources were recovered from the hotel room.<sup>138</sup> The police sent a select 468.2 grams of the liquids to a crime lab, and every source tested positive for methamphetamine.<sup>139</sup> Based on the record,

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124. *Id.*

125. *Id.*

126. *Id.* at 928.

127. *Borque*, 262 F. App’x at 928.

128. *United States v. Newsome*, 998 F.2d 1571, 1577–78 (11th Cir. 1993).

129. *United States v. Segura-Baltazar*, 448 F.3d 1281, 1293 (11th Cir. 2006).

130. *Id.*

131. *Id.* (quoting *United States v. Gori*, 324 F.3d 234, 239 (3d Cir. 2003)).

132. *Id.* at 1294.

133. *United States v. Hoehn*, 572 F. App’x 835, 838–39 (11th Cir. 2014).

134. *Id.* at 837–38.

135. *Id.* at 838.

136. *Id.* (citing *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005)).

137. *Id.* (citing *United States v. Jackson*, 115 F.3d 843, 847 (11th Cir. 1997)).

138. *Hoehn*, 572 F. App’x at 838.

139. *Id.*

it is possible that some of the 734.2 grams may not be usable product.<sup>140</sup> “Erroneous calculation” can only be speculated at this point in the case, for there is no evidence to prove the total amount of liquid was less than 500 grams; furthermore, the effect of any error in this case would be “uncertain or indeterminate,” so since the defendant could not prove “that her sentence would have been different but for the error,” the challenge to the Eleventh Circuit failed under plain-error review.<sup>141</sup> While the court punted the issue as to whether to include any waste byproduct due to lack of evidence and the plain-error standard of review, one could argue that its mention of the Federal Sentencing Guidelines and hesitance to discount waste byproduct indicates that the court is leaning towards the minority rule.

### B. Findings from District Courts Within the Eleventh Circuit

One federal district court in Florida has attempted to predict how the Eleventh Circuit would rule on this issue.<sup>142</sup> The defendant of this case alleged that the methamphetamine mixture would weigh less than fifty grams once the waste byproduct was removed.<sup>143</sup> DEA agents testified at the evidentiary hearing about how the defendant would manufacture his methamphetamine.<sup>144</sup> The solution in controversy of this case was taken from a soda bottle.<sup>145</sup> The mixture containing the narcotic weighed 85.8 grams, but the amount of methamphetamine was limited to 0.0034 grams.<sup>146</sup> This portion of the narcotic that coated the bottom layer of the bottle made up only 0.004% of the total solution.<sup>147</sup>

The court considered the Eleventh Circuit’s prior rulings on holding that waste byproduct from mixtures containing other drugs should not be included as a “mixture.”<sup>148</sup> It also focused on the Eleventh Circuit’s rationale that unusable substances in the mixture, when the actual solution has not yet finished, should not be measured.<sup>149</sup> The Middle District also remarked on the parallel views of the United States Sentencing Commission and the minority rule following districts.<sup>150</sup> While the court acknowledged that the guidelines were not binding in terms of interpreting the statute, it still found “it persuasive that were the Court addressing the toxic, unusable waste product at issue in this case under the Guidelines, the weight of the waste product would not be counted toward the total drug weight

140. *Id.* at 839.

141. *Id.* (citing *United States v. Davila*, 749 F.3d 982, 995 (11th Cir. 2014)).

142. *See United States v. Long*, 958 F. Supp. 2d 1334, 1334 (M.D. Fla. 2013).

143. *Id.* at 1335.

144. *Id.* at 1336.

145. *Id.*

146. *Id.* at 1337.

147. *Long*, 958 F. Supp. 2d at 1337.

148. *Id.* at 1341 (citing *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1238 (11th Cir. 1991) (holding that the term ‘mixture’ in U.S.S.G. § 2D1.1 does not include unusable mixtures)).

149. *Id.* at 1342 (citing *United States v. Newsome*, 998 F.2d 1571, 1579 (11th Cir. 1993) (holding that “the gross weight of ‘unusable mixtures’ should not be equated with the weight of a controlled substance for sentencing purposes”)).

150. *Id.* at 1342–43. (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1993)).

calculation.”<sup>151</sup> The court in *Long* ultimately chose to follow the minority opinion and imposed no minimum penalty.<sup>152</sup>

### C. United States Sentencing Commission

The Sentencing Commission has released information that appears to favor the minority of opinions:

[t]he waste product is typically water or chemicals used to either remove the impurities or form a precipitate (the precipitate, in some cases, being the controlled substance). Typically, a small amount of controlled substance remains in the waste water; often this amount is too small to quantify and is listed as a trace amount (no weight given) in DEA reports. In these types of cases, the waste product is not consumable.<sup>153</sup>

The Commission went far enough to also address the minimum sentencing statute. It provided that:

“[m]ixture 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 readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.<sup>154</sup>

## VI. CONCLUSION

Based on the foregoing authorities, the United States Circuit Court of Appeals for the Eleventh Circuit would likely ignore the waste byproduct formed by the production of methamphetamine when calculating the narcotic’s weight for sentencing purposes. The federal circuit courts remain split as whether to apply either a plain meaning or a market-oriented approach to interpretation of the statute under consideration. While each defendant in the previous cases has committed a crime, either by attempting to manufacture methamphetamine, failing to make the solution

151. *Id.* at 1343.

152. *Long*, 958 F. Supp. 2d at 1343–44.

153. *Id.* at 1343 (quoting Amendment 484, U.S. SENTENCING GUIDELINES MANUAL app. C (1993)).

154. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2014) (emphasis added).

effectively, or cutting the solution, the consequences of possessing the drug can be catastrophic to the defendant depending on the jurisdiction.

Majority rule circuit courts of appeal would automatically send a defendant from *Long* to a five-year term of imprisonment. Regardless of the solution's uselessness to both dealers and users, one receives quite the harsh penalty. These minimum sentences may be effective to prevent people from manufacturing methamphetamine, but the minority opinion appears closer to the legislative intent of the minimum sentencing statute. Minority jurisdictions define the "mixture" under the statute as the usable portions of methamphetamine solution, many applying the market-oriented analysis. Until the Eleventh Circuit rules on this particular issue, federal prosecutors and defense attorneys will have to argue the majority and minority rules respectively.

Because of the Eleventh Circuit's prior rulings on other controlled substances, one could predict that the court would most likely exclude the waste byproduct from methamphetamine weight calculation for sentencing purposes.