A Circuit Split over Statutory Interpretation

Andrew King

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol48/iss1/6

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

I. INTRODUCTION ................................................................. 105

II. THE CIRCUIT SPLIT OVER THE MEANING OF "COCAINE BASE" .......................................................... 107
    A. Circuits Adopting a Broad Definition ......................... 108
    B. The Circuit Adopting an Intermediate Definition .......... 111
    C. Circuits Adopting a Narrow Definition ...................... 113

III. ADVOCATING THE BROAD DEFINITION .............................. 116

IV. A CALL TO ACTION ....................................................... 120

I. INTRODUCTION

During the mid-1980's, a growing drug problem in the United States, particularly with crack cocaine, became an increasing matter of public and congressional concern. 1 In response to this perceived crack epidemic, Congress passed the Anti-Drug Abuse Act of 1986. 2 As part of this statute, Congress enacted enhanced minimum and maximum sentences for crimes involving "cocaine base." 3 Under the sentencing scheme enacted by Congress, a person convicted of a crime involving a far smaller amount of "cocaine base" falls within the same minimum and maximum sentencing range as a person convicted of a crime involving a much larger amount of "cocaine, its salts, optical and geometric isomers, and salts of isomers." 4 Congress has failed to define either "cocaine" or

---

3. Kimbrough, 552 U.S. at 95. Congress enacted these enhanced penalties because it: apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular. Id. at 95-96.
4. 21 U.S.C. § 841(b)(1) (2006). Section 841(b)(1) contains a two-tier sentencing scheme for crimes involving different forms of cocaine. It imposes a minimum ten-year and
maximum life sentence for crimes involving "5 kilograms or more of a mixture or substance containing a detectable amount of ... cocaine, its salts, optical and geometric isomers, and salts of isomers" or "50 grams or more of a mixture or substance ... which contains cocaine base." Id. § 841(b)(1)(A)(ii), (iii). Section 841(b)(1) also imposes a minimum sentence of 5 five years and a maximum sentence of forty years for crimes involving "500 grams or more of a mixture or substance containing a detectable amount of ... cocaine, its salts, optical and geometric isomers, and salts of isomers" or "5 grams or more of a mixture or substance ... which contains cocaine base." Id. § 841(b)(1)(B)(ii), (iii).

The language of section 841(b)(1) has sparked challenges in every circuit that it has void for vagueness due to the similarity of terms "cocaine" and "cocaine base." However, all of the circuits have addressed this vagueness challenge, and each one has rejected it. See United States v. Barnes, 890 F.2d 545, 552-53 (1st Cir. 1989); United States v. Collado-Gomez, 834 F.2d 280, 281 (2d Cir. 1987); United States v. Jones, 979 F.2d 317, 319-20 (3d Cir. 1992); United States v. Wallace, 22 F.3d 84, 88 (4th Cir. 1994); United States v. Thomas, 932 F.2d 1085, 1090 (5th Cir. 1991); United States v. Levy, 904 F.2d 1026, 1032-33 (6th Cir. 1990); United States v. Collins, 272 F.3d 984, 988-89 (7th Cir. 2001); United States v. Reed, 897 F.2d 351, 352-53 (8th Cir. 1990); United States v. Van Hawkins, 899 F.2d 852, 853-54 (9th Cir. 1990); United States v. Easter, 981 F.2d 1549, 1557-58 (10th Cir. 1992); United States v. Williams, 876 F.2d 1521, 1525 (11th Cir. 1989); United States v. Brown, 859 F.2d 974, 976 (D.C. Cir. 1988).


6. Based upon the opinions addressing this issue, cocaine is also known as cocaine hydrochloride and has the chemical formula of C_{17}H_{21}NO_{4} or C_{17}H_{21}NO_{4}HCl. United States v. Jackson, 968 F.2d 158, 161 (2d Cir. 1992); United States v. Barbosa, 271 F.3d 438, 462 (3d Cir. 2001); United States v. Booker, 70 F.3d 488, 491 (7th Cir. 1995); Easter, 981 F.2d at 1558; United States v. Sloan, 97 F.3d 1378, 1381 (11th Cir. 1999). Cocaine hydrochloride derives from the natural cocaine base in the coca leaf, and it is produced through a two-step process. The first step involves mashing the coca leaves with a strong alkali, like baking soda or lime; a solvent, like kerosene; and water. United States v. Higgins, 557 F.3d 381, 393 (6th Cir. 2009); Booker, 70 F.3d at 490; United States v. Hollis, 490 F.3d 1149, 1156 (9th Cir. 2007); United States v. Brisbane, 367 F.3d 910, 911 (D.C. Cir. 2004). The resulting paste is then dissolved in hydrochloric acid and water. Higgins, 557 F.3d at 393; Booker, 70 F.3d at 490; Hollis, 490 F.3d at 1156; Sloan, 97 F.3d at 1381; Brisbane, 367 F.3d at 911. The substance created by this process, a salt, has a white and powdery appearance that is familiarly known as cocaine to the general public. Higgins, 557 F.3d at 393; Booker, 70 F.3d at 490-91; Hollis, 490 F.3d at 1156; Sloan, 97 F.3d at 1381; Brisbane, 367 F.3d at 911. Cocaine hydrochloride, unlike cocaine base, is water soluble. Barnes, 890 F.2d at 552; Barbosa, 271 F.3d at 462; Higgins, 557 F.3d at 393; Booker, 70 F.3d at 491; Sloan, 97 F.3d at 1381; Brisbane, 367 F.3d at 911. Due to its chemical properties, cocaine hydrochloride is typically snorted or dissolved and injected. Barnes, 890 F.2d at 552; Barbosa, 271 F.3d at 462; Higgins, 557 F.3d at 393; Booker, 70 F.3d at 491; Sloan, 97 F.3d at 1381; Brisbane, 367 F.3d at 911. Users cannot smoke cocaine hydrochloride because the chemicals that cause the "high" users feel decompose near the temperature at which it evaporates. Barbosa, 271 F.3d at 462; Booker, 70 F.3d at 491; Sloan, 97 F.3d at 1381; Brisbane, 367 F.3d at 911.

Cocaine base, on the other hand, is a substance with the chemical formula of C_{17}H_{21}NO_{4}. Jackson, 968 F.2d at 161; Barbosa, 271 F.3d at 462; Booker, 70 F.3d at 490-91; Easter, 981 F.2d at 1558; Sloan, 97 F.3d at 1381-82. Unlike cocaine hydrochloride, cocaine base cannot dissolve in water, and users typically smoke cocaine base. Barnes, 890 F.2d at 552; Higgins, 557 F.3d at 393; Booker, 70 F.3d at 491; Brisbane, 367 F.3d at 911. Because users can smoke cocaine base it creates a faster and more intense high than cocaine hydro-
This comment will examine the resulting circuit split over the meaning of “cocaine base” for the purposes of applying section 841(b)(1). It will further outline why the broad definition of “cocaine base” adopted by six of the twelve circuits is the best interpretation under the current language of the statute and the absence of congressional guidance. This comment will conclude by calling on either Congress or the Supreme Court of the United States to resolve this circuit split.

II. THE CIRCUIT SPLIT OVER THE MEANING OF “COCAINE BASE”

Since the passage of section 841(b)(1), the circuits have adopted various interpretations of the term “cocaine base” when applying the statute. With the United States Court of Appeals for the Sixth Circuit’s 2009 decision in United States v. Higgins, each circuit has addressed the issue, with no clear majority forming. Of the twelve circuits, six—the First, Second, Third, Fourth, Fifth, and Tenth Circuits—have adopted a broad definition of “cocaine base,” defining the term to encompass all cocaine bases, including crack. Five other circuits—the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits—have adopted a narrow definition of “cocaine base,” limiting the term to only certain forms of cocaine base.

chloride, making cocaine base the more addictive of the two. Higgins, 557 F.3d at 393; Brisbane, 367 F.3d at 911. Cocaine base occurs in several forms, one of which is the type found in the coca leaf, which is commonly used to produce cocaine hydrochloride. Barbosa, 271 F.3d at 462; Higgins, 557 F.3d at 393; Booker, 70 F.3d at 490; Hollis, 490 F.3d at 1156; Sloan, 97 F.3d at 1381; Brisbane, 367 F.3d at 911. It is also manufactured in a number of ways. The first type of manufactured cocaine base, better known as freebase, became available in the 1970’s and is made by dissolving cocaine hydrochloride in ammonia and an organic solvent. Higgins, 557 F.3d at 393; Booker, 70 F.3d at 491; Hollis, 490 F.3d at 1156; Brisbane, 367 F.3d at 911. However, due to high production costs and the risk of explosion during the manufacturing process, crack cocaine quickly replaced freebase as the most prevalent cocaine base in the 1980’s and beyond. Higgins, 557 F.3d at 393; Hollis, 490 F.3d at 1156; Brisbane, 367 F.3d at 911. Crack cocaine is produced by dissolving cocaine hydrochloride in baking soda and water and boiling the resulting substance until it dries and forms a solid material. Barbosa, 271 F.3d at 462; Booker, 70 F.3d at 491; Hollis, 490 F.3d at 1156; Sloan, 97 F.3d at 1382. The resulting crack “rocks” became a cheap, highly-addictive drug of choice for young and poor Americans. Higgins, 557 F.3d at 393; Brisbane, 367 F.3d at 912.

7. 557 F.3d at 395.
10. Barbosa, 271 F.3d at 467.
13. Easter, 981 F.2d at 1558 n.7.
15. Booker, 70 F.3d at 494.
Ninth, and Eleventh Circuits—adopted a narrow definition, interpreting “cocaine base” to include only crack cocaine for the purposes of section 841(b). The remaining circuit—the District of Columbia Circuit—adopted an intermediate definition, interpreting “cocaine base” to encompass crack and other forms of smokable cocaine base.

A. Circuits Adopting a Broad Definition

Six circuits have broadly defined “cocaine base” to include all cocaine bases for the purposes of section 841(b). The United States Court of Appeals for the First Circuit became the first appellate court to adopt this broad definition in its 1992 opinion of United States v. Lopez-Gil. The First Circuit, sitting en banc, determined that the term “cocaine base” does not apply solely to crack cocaine for the purpose of section 841(b)(1). The Lopez-Gil court reasoned that, although Congress enacted the enhanced penalties for “cocaine base” in section 841(b)(1) mainly to combat the growing use of crack cocaine in the country, other forms of cocaine base may exist or could exist in the future. After deciding Lopez-Gil, the First Circuit has continued to define “cocaine base” as applying to all cocaine bases for section 841(b)(1) purposes.

The United States Court of Appeals for the Second Circuit quickly joined the First Circuit in adopting the broad definition of “cocaine base.” In United States v. Jackson, the Second Circuit interpreted section 841(b)(1) to apply to all cocaine bases, not just crack. The Jackson court reasoned that “[w]hile we believe that Congress contemplated that ‘cocaine base’ would include [crack...
cocaine], Congress neither limited the term to that form [of cocaine base] in the plain language of the statute nor demonstrated an intent to do so in the statute's legislative history." 26 The Second Circuit determined that Congress chose to use "cocaine base" as "a term of art that should be defined by reference to the scientific community from which it derives," which includes, but is not limited to, crack cocaine. 27 Since first addressing the issue in Jackson, the Second Circuit has applied this broad definition of "cocaine base" to section 841(b)(1) cases. 28

Within a year of the Second Circuit deciding Jackson, the United States Court of Appeals for the Tenth Circuit followed suit in United States v. Easter. 29 Citing to Jackson, the Tenth Circuit stated that "[w]hile the legislative history of [section] 841(b)(1) indicates that Congress amended the statute due to its concern over the increasing abuse of crack cocaine, nothing in the legislative history indicates that Congress intended 'cocaine base' to be limited to crack cocaine." 30 Just as the Second Circuit had done months earlier, the Tenth Circuit interpreted section 841(b)(1) literally and held that "cocaine base" applies to all cocaine bases, not just crack cocaine. 31

Several months after the Tenth Circuit decided Easter, the United States Court of Appeals for the Fifth Circuit addressed the issue of defining the term "cocaine base" in section 841(b)(1) in United States v. Butler. 32 The Butler court noted that while "cocaine base" includes crack cocaine, the Fifth Circuit "ha[d] not held that crack cocaine is the only form of cocaine base." 33 The Butler court adopted the broad definition of "cocaine base," holding that "[a]lthough a substance does not appear to be crack cocaine, it may nevertheless be cocaine base within the meaning of § 841(b)." 34

26. Id. at 162.
27. Id. at 163. The Jackson court stated that the scientifically accepted chemical formula for cocaine base is C17H21NO4 while the formula for cocaine is C17H21NO4HCl. Id. at 161.
28. See United States v. Palacio, 4 F.3d 150, 151 (2d Cir. 1993) (noting that the 1993 amendment to the Sentencing Guidelines that defines "cocaine base" to mean only crack cocaine does not change the broad interpretation of "cocaine base" in section 841(b)(1) adopted by the Second Circuit in Jackson); United States v. Snow, 462 F.3d 55, 65 (2d Cir. 2006); United States v. Fields, 113 F.3d 313, 324-25 (2d Cir. 1997).
29. 981 F.2d at 1558.
30. Id. at 1558 n.7 (internal citations omitted).
31. Id. at 1558.
32. 988 F.2d at 541-43.
33. Id. at 542.
34. Id. at 543.
Following \textit{Butler}, no circuit joined the ranks of those broadly defining "cocaine base" until 2001. In \textit{United States v. Barbosa}, the United States Court of Appeals for the Third Circuit, noting the lack of any congressional guidance on the issue, sought to determine the meaning of "cocaine base" in section 841(b)(1).\textsuperscript{35} The \textit{Barbosa} court began its analysis by noting the competing viewpoints advocated in other circuits: one defined the term "cocaine base" as referring to "all forms of cocaine base, including crack," and the other "restricted the definition of cocaine base to crack only."\textsuperscript{36} The Third Circuit found the Second Circuit's broad interpretation of the statute persuasive, as "neither the plain language of 21 U.S.C. § 841(b)(1) nor the statute's legislative history reveals that Congress limited the term 'cocaine base' to crack."\textsuperscript{37} The \textit{Barbosa} court further rejected the notion that the 1993 amendment to the Sentencing Guidelines, which narrowly defined "cocaine base," had any effect on its interpretation of section 841(b)(1).\textsuperscript{38} It held that while the Sentencing Commission has the power to affect the judicial interpretation of the Sentencing Guidelines, "its wisdom is not germane to our construction of [the] . . . mandatory minimum sentences in the drug statute itself."\textsuperscript{39} The \textit{Barbosa} court concluded that "'cocaine base' encompasses all forms of cocaine base . . . when the mandatory minimum sentences under 21 U.S.C. § 841(b)(1) are implicated."\textsuperscript{40}

The United States Court of Appeals for the Fourth Circuit became the last circuit to broadly define the term "cocaine base" in \textit{United States v. Ramos},\textsuperscript{41} although it was not the first case in that circuit to address this issue. Prior to \textit{Ramos}, in \textit{United States v. Fisher}, the Fourth Circuit appeared to interpret the term "cocaine base," for the purposes of section 841(b)(1), to refer to only crack

\textsuperscript{35} 271 F.3d at 461-64.
\textsuperscript{36} Id. at 463-64. The \textit{Barbosa} court specifically referred to the Second Circuit's \textit{Jackson} and \textit{Palacio} opinions supporting a broad definition and the Eleventh Circuit's \textit{Munoz-Realpe} opinion adopting a narrow definition. \textit{Id.} \textit{See infra} notes 62-65 and accompanying text (discussing the Eleventh Circuit's holding in \textit{Munoz-Realpe}).
\textsuperscript{37} \textit{Barbosa}, 271 F.3d at 466.
\textsuperscript{38} \textit{Id.} at 465-66. In 1993, the Sentencing Commission amended the Sentencing Guidelines to define "cocaine base" to mean crack cocaine. \textit{U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) n.D (2009)}.
\textsuperscript{39} \textit{Barbosa}, 271 F.3d at 466. The \textit{Barbosa} court rejected the idea that Congress approved of a singular definition of "cocaine base" for the purposes of both the Sentencing Guidelines and section 841(b)(1) when it allowed passed the 1993 amendment to the Sentencing Guidelines to pass. \textit{Id.}
\textsuperscript{40} \textit{Id.} at 467.
\textsuperscript{41} 462 F.3d at 333-34.
However, the Ramos court, agreeing with the analysis used by the Second Circuit in Jackson, decided to define “cocaine base” as encompassing all cocaine bases for the purpose of section 841(b)(1). After adopting the broad definition of “cocaine base,” the Ramos court attempted to reconcile its holding with its earlier Fisher opinion. The Ramos court stated that the court in Fisher merely “equate[d] cocaine base with crack,” inferring that the Fisher court only made the limited holding that “cocaine base” included crack cocaine, and not that “cocaine base” referred solely to crack cocaine for the purposes of section 841(b)(1). Since the Ninth Circuit decided Ramos, no other circuit has interpreted “cocaine base” in section 841(b)(1) to mean all cocaine bases when applying the statute.

B. The Circuit Adopting an Intermediate Definition

One circuit, the United States Court of Appeals for the District of Columbia Circuit, has adopted an intermediate definition for “cocaine base,” defining it as crack and other forms of smokable cocaine base. When the D.C. Circuit first addressed the issue of defining the term “cocaine base” in section 841(b)(1), it determined that “cocaine base,” at the very least, included crack cocaine. The D.C. Circuit did not reexamine the meaning of cocaine base for another 15 years after this first foray into the issue. In 2004, the D.C. Circuit again addressed the issue in United States v. Brisbane. After examining the broad and narrow approaches to defining “cocaine base,” the court advocated a third approach. The Brisbane court rejected the broad approach because of ambiguity between the terms “cocaine” and “cocaine base,” and also due to some of the unusual outcomes that can re-

---

42. 58 F.3d 96, 99 (4th Cir. 1995). The Fisher court determined that the "legislative history demonstrate[d] that Congress intended, with the enactment of [section 841(b)(1)(A)(iii) and (B)(iii)], to penalize more severely violations involving crack cocaine." Fisher, 58 F.3d at 99. Interpreting the sections of 841(b)(1) dealing with "cocaine" and "cocaine base" together, the Fisher court determined that "the only rational interpretation that we can give [section 841(b)(1)] as a whole is to conclude that clause (ii) addresses cocaine powder and the other forms of cocaine identified therein, except for 'crack' cocaine which is expressly separately addressed in clause (iii)." Id.
43. Ramos, 462 F.3d at 333-34.
44. Id. at 334 n.2.
45. Lawrence, 471 F.3d at 138. The Ninth Circuit also defined "cocaine base" as smokable cocaine at one time, but it eventually adopted a narrow definition. See infra notes 74-77 and accompanying text.
46. Brown, 859 F.2d at 976.
47. 367 F.3d at 911-14.
48. Id. at 913-14.
suit from imposing such a broad definition of "cocaine base." The Brisbane court also cited flaws in the narrow approach due to the plain language of the statute, as well as the potential for some new, highly-addictive form of cocaine base to appear in the future. The Brisbane court advocated an intermediate approach, defining "cocaine base" to "mean[] any cocaine that is smokable." The Brisbane court supported this definition, which would include forms of cocaine base other than just crack, because it "avoids the difficulties inherent in the [broad] approach while not unduly narrowing the operation of the statute." Also, this intermediate definition punishes only smokable cocaine more severely, a characteristic that renders cocaine more potent and addictive than other non-smokable forms of cocaine. While the Brisbane court advocated an intermediate definition of "cocaine base," it failed to adopt any definition. The drug involved in Brisbane was neither smokable nor crack, so the court held that it would have reached the same outcome regardless of whether it adopted the narrow or intermediate definition.

Following Brisbane, the D.C. Circuit continued to advocate an intermediate definition of "cocaine base," but failed to adopt it until United States v. Lawrence. In Lawrence, the D.C. Circuit adopted the intermediate definition of "cocaine base." The Lawrence court held that, under its prior Brisbane opinion, the enhanced penalties for "cocaine base" under section 841(b)(1) apply to smokable cocaine, including crack. The D.C. Circuit continues

---

49. Id. at 913. The Brisbane court specifically cited to the disparity of imposing the same sentence for a small amount of cocaine base which requires further processing versus a much larger amount of market-ready cocaine powder. Id.

50. Id. at 914. The Brisbane court stated that "[g]iven the statute's use of the broad term 'cocaine base,' it is unlikely Congress intended to limit the enhanced penalty provisions to one manufacturing method." Id.

51. Id.

52. Brisbane, 367 F.3d at 914. The Brisbane court stated that "[i]n addition to crack, [this intermediate definition] includes . . . 'traditional' freebase cocaine and cocaine paste." Id.

53. Id. at 914. The Brisbane court determined that smokability "was extremely important [to Congress] in distinguishing crack from powdered cocaine." Id.

54. Id.

55. 471 F.3d at 138. Following Brisbane but prior to Lawrence, the D.C. Circuit addressed the issue again, but, as it did in Brisbane, it failed to define "cocaine base," this time because the defendant possessed crack cocaine. United States v. Johnson, 437 F.3d 69, 74 (D.C. Cir. 2006).

56. Lawrence, 471 F.3d at 138.

57. Id.
to apply this interpretation of Brisbane, which defines "cocaine base" as meaning smokable cocaine.\textsuperscript{58}

C. \textit{Circuits Adopting a Narrow Definition}

Five circuits have concluded that the term "cocaine base" in section 841(b)(1) refers to only crack cocaine.\textsuperscript{59} In its 1989 opinion of \textit{United States v. Williams}, the United States Court of Appeals for the Eleventh Circuit became the first circuit to do so.\textsuperscript{60} In Williams, the Eleventh Circuit narrowly defined "cocaine base" as referring to crack cocaine only. The Williams court determined that "those concerned with the relevant legislation understood cocaine base to refer to crack."\textsuperscript{61}

Following Williams, the Eleventh Circuit reexamined the meaning of "cocaine base" in section 841(b)(1), this time after the Sentencing Guidelines were amended to define "cocaine base" as referring to crack only.\textsuperscript{62} In \textit{United States v. Munoz-Realpe}, the Eleventh Circuit again concluded that "cocaine base" refers to only crack cocaine for the purposes of section 841(b)(1).\textsuperscript{63} The Munoz-Realpe court reasoned that "[b]y allowing the amendment [to the Sentencing Guidelines] to take effect, Congress has given its [approval] to the new definition of 'cocaine base'; Congress indicated that it intends the term 'cocaine base' to include only crack cocaine."\textsuperscript{64} The court further stated that Congress gave no indication that "cocaine base" should have a different meaning under section 841(b)(1) than under the Sentencing Guidelines.\textsuperscript{65} Since deciding Munoz-Realpe, the Eleventh Circuit has continued to narrowly define "cocaine base."\textsuperscript{66}

The United States Court of Appeals for the Seventh Circuit became the next circuit to adopt the narrow definition of "cocaine

\begin{footnotes}
\item\textsuperscript{58} See United States v. Powell, 503 F.3d 147, 148 (D.C. Cir. 2007) (holding that crack cocaine, under Brisbane, is "cocaine base" for the purposes of section 841(b)); United States v. Lacey, 511 F.3d 212, 215 (D.C. Cir. 2008) (holding that Brisbane defined "cocaine base" to mean crack or smokable cocaine); United States v. Pettiford, 517 F.3d 584, 593 (D.C. Cir. 2008) (same); United States v. Johnson, 519 F.3d 478, 485 (D.C. Cir. 2008) (same).
\item\textsuperscript{59} See supra notes 14-18 and accompanying text.
\item\textsuperscript{60} 376 F.2d at 1525.
\item\textsuperscript{61} Id.
\item\textsuperscript{62} See supra note 38.
\item\textsuperscript{63} 21 F.3d 375, 377 (11th Cir. 1994).
\item\textsuperscript{64} Munoz-Realpe, 21 F.3d at 377. In reaching this conclusion, the Munoz-Realpe court rejected the Second Circuit's conclusion in Palacio that "Congress has not provided guidance by approving the amendment [to the Sentencing Guidelines]." Id. at 378.
\item\textsuperscript{65} Id. at 378.
\item\textsuperscript{66} See Sloan, 97 F.3d at 1383.
\end{footnotes}
base.” In United States v. Booker, the Seventh Circuit concluded, based on the legislative history of section 841(b)(1), that “cocaine base” refers to only crack cocaine. The Booker court provided three reasons why the legislative history supported this conclusion: (1) “a number of legislators applauded the [Anti-Drug Abuse Act] and related legislation for providing enhanced penalties for offenses involving crack”; (2) “Congress held hearings where experts testified concerning the emergence of crack cocaine and the dangers that it poses”; and (3) “[m]embers of the Senate and the House of Representatives gave much attention to the necessity of addressing the problem of crack cocaine.” Since deciding Booker, the Seventh Circuit has continued to define “cocaine base” to include only crack cocaine for the purposes of section 841(b)(1). It has rejected adopting the broader definition of “cocaine base,” concluding that defining “cocaine base” to include all cocaine bases would create ambiguity between the “cocaine” and “cocaine base” clauses of section 841(b)(1).

The United States Court of Appeals for the Eighth Circuit soon followed the Seventh Circuit in defining “cocaine base” as meaning only crack cocaine, although it failed to do so the first time it addressed the issue. When the Eight Circuit first applied the “cocaine base” clauses of section 841(b)(1) in United States v. Jackson, the court did not determine the meaning of “cocaine base” for the purposes of the statute; however, the Jackson court did apply the “cocaine base” provision of section 841(b)(1) to crack cocaine. When the Eight Circuit next addressed the issue in United States v. Crawford, it adopted the Seventh Circuit’s holding from Booker that “cocaine base” refers to only crack cocaine.

67. 70 F.3d at 494. The Booker court specifically held that “the enhanced penalties apply to crack cocaine, and the lesser penalties apply to all other forms of cocaine.” Id.
68. Id. at 492-93.
69. See United States v. Stephenson, 557 F.3d 449, 455 (7th Cir. 2009); United States v. Padilla, 520 F.3d 766, 769 (7th Cir. 2008); United States v. Kelly, 519 F.3d 355, 362 (7th Cir. 2008); United States v. Morris, 498 F.3d 634, 644 (7th Cir. 2007); United States v. Cannon, 429 F.3d 1158, 1159 (7th Cir. 2005); United States v. Edwards, 397 F.3d 570, 571-72, 575-77 (7th Cir. 2005) (thoroughly discussing the circuit split over the definition of “cocaine base”); United States v. Arrington, 73 F.3d 144, 146 (7th Cir. 1996); United States v. Reddrick, 90 F.3d 1276, 1282 (7th Cir. 1996).
70. Edwards, 397 F.3d at 575. The Edwards court specifically stated that “[i]f any form of cocaine base (not just crack) qualifies for the enhanced penalties in [section 841(b)], then subsection (ii) swallows subsection (ii), because ‘cocaine base’ (subsection (ii)) is chemically the same as ‘cocaine’ (subsection (ii)).” Id.
71. 64 F.3d 1213, 1220 (8th Cir. 1995).
72. 83 F.3d at 966. The Crawford court specifically stated it was “persuaded” by the holding in Booker that “Congress intended the term cocaine base to refer to ‘crack.’” Id. (citing Booker, 70 F.3d at 491, 493).
Eighth Circuit continues to apply this narrow definition of “cocaine base.”

In 2007, the United States Court of Appeals for the Ninth Circuit became the next circuit to define “cocaine base” in section 841(b)(1) as meaning only crack cocaine in United States v. Hollis. However, Hollis was not the first occasion that the Ninth Circuit had to define “cocaine base” for the purposes of section 841(b)(1). Prior to Hollis, the Ninth Circuit adopted an intermediate definition of “cocaine base” in United States v. Shaw. The Shaw court defined the term to mean “cocaine that can be smoked,” which included crack cocaine. The Shaw court reached its conclusion based on “the sponsor’s statements[,] . . . the legislative history, dictionary definitions, and the Sentencing Commission’s interpretation.” The Ninth Circuit continued to use this intermediate definition of “cocaine base” until it reexamined the issue in Hollis.

The Ninth Circuit in Hollis overturned these earlier cases, holding that “cocaine base” meant only crack cocaine when applying section 841(b)(1). The Hollis court based this conclusion on the narrow definition of “cocaine base” adopted by the Sentencing Guidelines. The court reasoned that the Sentencing Guidelines and section 841(b)(1) define “cocaine base” in the same way, which caused it to adopt the narrow definition of “cocaine base.” The Hollis court reconciled its holding with the Ninth Circuit’s earlier holding in Shaw, stating that Shaw held that the term “cocaine base” meant the same thing for both statutory and guideline purposes. Because Shaw was decided prior to the 1993 amendment to the Sentencing Guidelines and, according to the Hollis court, it

73. See United States v. Cole, 537 F.3d 923, 926 (8th Cir. 2008); United States v. Robinson, 462 F.3d 824, 825-26 (8th Cir. 2006); United States v. Vesey, 330 F.3d 1070, 1073 (8th Cir. 2003).
74. 490 F.3d at 1155-57.
75. 936 F.2d 412 (9th Cir. 1991).
76. Shaw, 936 F.2d at 416.
77. Id.
78. See United States v. Jackson, 84 F.3d 1154, 1160 (9th Cir. 1996) (holding that “cocaine base” means smokable cocaine under section 841(b)(1)); United States v. Davis, 36 F.3d 1424, 1434 (9th Cir. 1994) (holding that “cocaine base” includes crack cocaine, but not holding that the term is limited to only crack cocaine).
79. 490 F.3d at 1156.
81. Hollis, 490 F.3d at 1156 n.4.
82. Id. The Hollis court stated that “[t]he Shaw court ‘construe[d] the statute and the guidelines to be consistent with each other in their use of the term ’cocaine base.’” Id. (quoting Shaw, 936 F.2d at 415).
merely held that “cocaine base” includes crack cocaine, the Hollis court viewed Shaw as “consistent” with its holding.\textsuperscript{83}

The Sixth Circuit became the final circuit to take a position on the meaning of “cocaine base” in 2009. In \textit{United States v. Higgins}, the Sixth Circuit joined those circuits defining “cocaine base” narrowly by holding that “the phrase ‘cocaine base’ in [section] 841 means ‘crack cocaine.’”\textsuperscript{84} The Higgins court reached this conclusion based on three reasons. First, the court stated that “it is clear that Congress intended that the enhanced penalties for ‘cocaine base’ would apply to crimes involving ‘crack cocaine.’”\textsuperscript{85} Second, according to the court in Higgins, section 841(b)(1) is facially ambiguous, punishing “the possession of chemically identical substances, cocaine and cocaine base, differently.”\textsuperscript{86} The Higgins court concluded that defining “cocaine base” as referring to only crack cocaine “resolve[d] the ambiguity.”\textsuperscript{87} Finally, the court noted that adopting a narrow definition “create[d] consistency between the [Sentencing] Guidelines and [section 841(b)(1)].”\textsuperscript{88} With the Sixth Circuit’s Higgins decision, every circuit had now weighed in on the issue, and no clear majority opinion on the issue had emerged.

\section*{III. ADVOCATING THE BROAD DEFINITION}

Broadly interpreting “cocaine base” as applying to all cocaine bases for section 841(b)(1) purposes provides the best definition of the term. I base this interpretation on not only the plain language of the statute, but also on Congress’s failure to indicate that the term should have some narrower application. As the Supreme Court of the United States has held, “in every case involving the construction of a statute, our starting point must be the language employed by Congress.”\textsuperscript{89} When interpreting that language, one must “start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.”\textsuperscript{90} A person interpreting a statute should not deviate from this assumption unless Congress indicated that the language of the statute should

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1156, 1156 n.4.
\item 557 F.3d at 395.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Richards v. United States, 369 U.S. 1, 9 (1962).
\end{enumerate}
\end{footnotesize}
not have its "ordinary, contemporary, common meaning." Further, one should not interpret a section of a statute by looking to that section alone; rather, a person should "look to the provisions of the whole law."

Beginning with the plain language of section 841(b)(1), only the broad interpretation of "cocaine base" takes into account the ordinary meaning of the term as used by Congress. Congress enacted section 841(b)(1) with its enhanced penalty provision applying to "a mixture or substance described in clause (ii) which contains cocaine base." Both the Sentencing Commission and many of the circuits defining cocaine base have agreed that cocaine base comes in three forms: (1) coca paste, which is derived from coca leaves; (2) freebase cocaine, which is made from powder cocaine; and (3) crack cocaine, which is also produced from powder cocaine. Further, these authorities tend to agree that cocaine base and cocaine are chemically distinguishable. First, cocaine base and cocaine

93. 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii) (2009). Clause (ii) of sections 841(b)(1)(A) and (B) applies to:

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III).

94. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, ch. 2 (Feb. 1996), available at http://www.ussc.gov/crack/exec.htm [hereinafter SENTENCING REPORT 1]; Barbosa, 271 F.3d at 462; Higgins, 557 F.3d at 393; Booker, 70 F.3d at 490-91; Hols, 490 F.3d at 1156; Sloan, 97 F.3d at 1381-82; Brisbane, 367 F.3d at 911-12.
95. Several circuits—the Sixth, Seventh, and D.C. Circuits—have contended that cocaine and cocaine base have the same chemical makeup. Higgins, 557 F.3d at 392, 95; Booker, 70 F.3d at 492; Brisbane, 367 F.3d at 912. However, all three of these circuits have noted distinct chemical differences between cocaine and cocaine base in their opinions. All three have mentioned that cocaine hydrochloride and cocaine base vaporize at different temperatures. Higgins, 557 F.3d at 393; Booker, 70 F.3d at 491; Brisbane, 367 F.3d at 911. The Seventh Circuit noted not only the different vaporizing temperatures of the two substances, but also that cocaine hydrochloride "is easily dissolved in water," while cocaine base "is not water soluble." Booker, 70 F.3d at 490-91.

In addition to mentioning chemical differences between the two substances, both the Sixth and D.C. Circuits have also noted a difference in the ordinary meanings of cocaine hydrochloride and cocaine base. Both circuits stated that cocaine hydrochloride "is known
have different chemical formulas.\textsuperscript{96} Next, cocaine base, unlike cocaine, cannot dissolve in water.\textsuperscript{97} Finally, users can smoke all three forms of cocaine base because they have a lower temperature at which they vaporize, whereas they cannot smoke cocaine.\textsuperscript{98} Based on these various sources, “cocaine base” ordinarily refers to a chemically distinct, smokable, and non-water soluble substance that includes coca paste, freebase cocaine, and crack cocaine.

Any interpretation of section 841(b)(1) should not deviate from this common definition of “cocaine base” because Congress has not indicated that the term “cocaine base” should carry anything other than its ordinary meaning. As both the Supreme Court and most of the circuits addressing this issue have noted, it is clear that the crack epidemic of the 1980's played an important role in Congress enacting the enhanced penalty provisions applying to “cocaine base.”\textsuperscript{99} However, Congress did not use the term “crack cocaine” or “smokable cocaine base” when it enacted section 841(b)(1) with its two-tier sentencing scheme.\textsuperscript{100} Nor did it provide any guidance or impose any limitation indicating that “cocaine base” referred to only crack cocaine or smokable forms of cocaine base.\textsuperscript{101} Instead,
Congress adopted the broad term “cocaine base” in the statute without defining or limiting it.\textsuperscript{102} Had Congress wanted the enhanced penalty provisions to have a narrower construction, it could have easily used the term “crack cocaine” or “smokable cocaine base” in the statute or restricted the definition of “cocaine base” for section 841(b)(1) purposes.\textsuperscript{103} Because Congress failed to do so, the principles of statutory construction require “cocaine base” to carry its ordinary, broad meaning for the purposes of section 841(b)(1). Therefore, based on the common language of the statute, neither the narrow nor intermediate interpretations of “cocaine base” should survive statutory scrutiny in the absence of congressional guidance or action to the contrary.

Reading section 841(b)(1) as a whole only serves to strengthen my position that those circuits adopting the broad definition of “cocaine base” chose the best interpretation under the circum-

\textsuperscript{102} See 21 U.S.C. § 841(b)(1). The Second Circuit confirmed this congressional inaction on the issue, stating that “Congress used the chemical term ‘cocaine base’ without explanation or limitation.” \textit{Jackson}, 968 F.2d at 162.

\textsuperscript{103} See \textit{Smith v. United States}, 508 U.S. 223, 229 (1993). The \textit{Smith} court, examining the meaning of the term “use” of a firearm for the purposes of a drug trafficking statute, stated that “[h]ad Congress intended [a] narrow construction [of a statute], it could have so indicated.” \textit{Smith}, 508 U.S. at 229. Because Congress failed to do so, the Court “decline[d] to introduce that [narrow construction] on [its] own.” \textit{Id.}

In the case of section 841(b)(1), Congress failed to adopt a narrow construction of the term “cocaine base.” See \textit{supra} note 100 and accompanying text. It not only had the opportunity to do so when it enacted the statute, but it in fact rejected one such possible narrow construction prior to enacting the statute. \textit{Id.} This further strengthens the argument to interpret “cocaine base” broadly because Congress had the opportunity to adopt a narrow construction and failed to do so on its own.
stances. In clause (ii) of subsections 841(b)(1)(A) and (B), Congress adopted three very specific instances in which the statute applies. Clause (ii) applies to any “mixture or substance containing a detectable amount of”: (1) coca leaves, unless the “cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed”; (2) “cocaine, its salts, optical and geometric isomers, and salts of isomers”; or (3) “ecgonine, its derivatives, their salts, isomers, and salts of isomers.” Clause (iii) then imposes the enhanced penalties of section 841(b)(1) on any “mixture or substance described in clause (ii) which contains cocaine base.” The language of clause (iii) prevents courts from applying any narrow definition of cocaine base. As it currently stands, clause (iii) applies to any mixture or substance specified in clause (ii) that contains cocaine base. This means any substance that might otherwise fall into clause (ii), such as coca paste or freebase cocaine, is subject to the enhanced penalty provisions of clause (iii) because it is a substance that contains cocaine base. If Congress had wanted clause (iii) of subsections 841(b)(1)(A) and (B) to apply to only crack cocaine or smokable cocaine, then it would not have adopted the all encompassing language it did in clause (iii). Therefore, defining “cocaine base” to apply to all cocaine bases is the best interpretation of the section 841(b)(1) as it is currently enacted.

IV. A CALL TO ACTION

In 2009, the Sixth Circuit became the twelfth and final circuit to interpret the term “cocaine base” for the purposes of applying section 841(b)(1). As it now stands, three different interpretations of “cocaine base” are used in the twelve circuits concerned with

105. 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii) (emphasis added).
106. See supra note 94 and accompanying text.
107. Although broadly defining “cocaine base” is the best interpretation based on the current language of the statute and the absence of congressional guidance on the issue, it might not provide the best practical definition of “cocaine base.” Broadly defining “cocaine base” can lead to some unusual results. As the D.C. Circuit noted, a person in possession of coca paste or some other form of cocaine base that has minimal use and value without further processing will receive a much stiffer sentence than a person possessing the same amount of market-ready cocaine powder. Brisbane, 367 F.3d at 913. It is doubtful Congress intended such a disparity in sentences when it enacted section 841(b)(1). However, no matter how unusual the results, the current language establishing section 841(b)(1)’s two-tier sentencing scheme only permits a broad interpretation of the statute.
108. Higgins, 557 F.3d 381.
Defining "Cocaine Base"

This split among the circuits means that two offenders possessing the same amount of the same substance can receive vastly different sentences based solely upon the circuit in which they go to trial. It is precisely this irregularity in sentencing that had previously caused Congress to reform the sentencing scheme.

As both the First and Seventh Circuits have suggested, either Congress or the Supreme Court of the United States must intervene on this issue. The Supreme Court can intercede and adopt an interpretation that will apply to all the circuits, removing the disparity that this circuit split has created. Preferably, Congress can step in and remove any uncertainty as to the interpretation of the statute. It can either amend the language of the statute if it prefers some narrower construction or provide some guidance within section 841(b)(1) to indicate how broadly or narrowly courts should define the term "cocaine base." No matter which body

109. See supra notes 8-19 and accompanying text. Six circuits decided to define "cocaine base" in the enhanced penalty clause of section 841(b)(1) as applying to all cocaine bases, five other circuits chose to only apply the enhanced penalty clause to crack cocaine, while a single circuit interpreted "cocaine base" as encompassing crack cocaine and smokable cocaine base. Id.

110. As a hypothetical example of this disparity, consider a defendant arrested for possession of 500 grams of freebase cocaine. If the defendant is convicted of the crime in a court in the Seventh Circuit, which narrowly defines "cocaine base" in section 841(b)(1), he would receive a sentence in the range of five to forty years as imposed by section 841(b)(1)(B)(ii). See 21 U.S.C. § 841(b)(1)(B)(ii); Booker, 70 F.3d at 494. Had the defendant instead been convicted in the Third Circuit, which broadly defines "cocaine base" when applying section 841(b)(1), he would face a sentence of 10 years to life under section 841(b)(1)(A)(iii). See 21 U.S.C. § 841(b)(1)(A)(iii); Barbosa, 271 F.3d at 467.

111. Mistretta, 488 U.S. at 366. The Supreme Court stated that Congress had enacted sweeping sentencing reform in 1984 in response to "[f]undamental and widespread dissatisfaction with the uncertainties and the disparities" of the sentencing scheme. Id. In fact, Congress expressly stated within the Sentencing Reform Act that during sentencing courts should consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (2009).


113. Two sources have even suggested modifying or entirely eliminating section 841(b)(1)'s two-tiered sentencing scheme. The Sentencing Commission has not sought to eliminate the two-tier scheme but has suggested modifying the cocaine to crack cocaine ratio to no more than twenty-to-one rather than the statute's current 100-to-one ratio. SENTENCING REPORT, supra note 112, Chapter 8. In April 2009, the Justice Department endorsed a plan that would eliminate the two-tier sentencing scheme of section 841(b)(1) altogether and punish cocaine and cocaine base possession equally. Carrie Johnson, Justice Department Backs Plan to Eliminate Cocaine Sentencing Disparity, WASH. POST, Apr. 30,
ultimately intervenes, it is clear that this issue is ripe for intervention.

Andrew King