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WRITING SAMPLE

I originally wrote this brief for the Petitioner for my legal research and writing course in Spring 2011. The question on writ included in our joint appendix (cited to as “JA”) was “[w]hether the Second Circuit erred in holding that title 21 section 841(b)(1)(B)(iii) of the United States Code, which provides for the punishment of, *inter alia*, possession with the intent to distribute 28 or more grams of a substance containing ‘cocaine base,’ applies to substances other than ‘crack cocaine.’”

The assignment was modeled on *DePierre v. United States*, and in June 2011 the Supreme Court ruled that “cocaine base” refers to all forms of cocaine in its chemically basic form (131 S.Ct. 2225).

In the

Supreme Court of the United States

Carleton L. Benjamin,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Congress enacted the Anti-Drug Abuse Act (ADAA) of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in part at 21 U.S.C. § 841 (2006)), in response to an emerging crack cocaine epidemic, yet established harsher penalties for a subset of offenses involving “cocaine base.” The statute neither defines “cocaine base” nor makes any explicit mention of crack cocaine. Did the Second Circuit err in holding that “cocaine base” as used in § 841(b) broadly encompasses all substances with the chemical formula $C_{17}H_{21}NO_4$?

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STATEMENT OF THE CASE

A. Proceedings Below

Dr. Carleton Benjamin was indicted for possession with intent to distribute a substance containing cocaine base in violation of § 841(a)(1) after police found 32 grams of cocaine paste in his backpack. JA 2. A jury in the United States District Court for the Southern District of New York found Benjamin guilty, JA 4, and he was sentenced to five years imprisonment, the mandatory minimum for violations involving more than five grams of a substance containing cocaine base according to § 841(b)(1)(B)(iii)¹. Benjamin objected to the jury instructions in the district court, contending that “cocaine base” refers only to crack cocaine, but the court denied his motion. JA 4. Benjamin appealed in the Second Circuit Court of Appeals, assigning error to the district court for improper jury instructions. JA 2-3. The court of appeals affirmed his conviction and sentence on the grounds of Second Circuit precedent that “cocaine base” does not exclusively refer to crack cocaine. JA 3. Benjamin then filed a writ of certiorari to this Court to determine if “cocaine base” includes substances other than crack cocaine. JA 1.

B. Scientific Background

Cocaine hydrochloride, freebase cocaine, and crack cocaine are all derivatives of the alkaloid, or base, found in coca leaves. *United States v. Brisbane*, 367 F.3d 910, 911 (D.C. Cir. 2004). Production of these substances begins by mashing the coca leaves together with an alkali, an acid, and a solvent to create cocaine paste. *Id.* While smoking cocaine paste may be popular in South America, it is unusual in the United States; most often, manufacturers process the paste with hydrochloric acid to create a salt – cocaine hydrochloride, also called cocaine powder – before importing it. *Id.* Cocaine powder can then be consumed as is, or used to create freebase

¹ The Fair Sentencing Act of 2010 revised the quantities of cocaine and cocaine base that trigger mandatory minimum sentences, but the modifications are irrelevant to the issue before the Court. JA 2; *See* Fair Sentencing Act of 2010, Pub. L. No. 110-220, 124 Stat. 2372.

cocaine (by combining the powder with water, ammonia, and ether) or crack cocaine (by cooking the powder with water and sodium bicarbonate). U.S. Dep't of Justice, Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties 2-3 (2002). The basic cocaine alkaloid exists at all three stages of production, and the chemical formula changes only slightly. *United States v. Barbosa*, 271 F.3d 438, 462 (3d Cir. 2001). The chemical formula for cocaine paste, freebase cocaine, and crack cocaine is $C_{17}H_{21}NO_4$; since cocaine powder has the addition of hydrochloric acid, the formula is $C_{17}H_{21}NO_4HCl$. *Id.* Users typically insufflate cocaine powder but smoke freebase and crack; this method of consumption leads to a faster, more intense high. *Kimbrough v. United States*, 552 U.S. 85, 94 (2007).

During Petitioner's trial in the Southern District Court of New York, Dr. Wilma Langley, a professor of chemistry and neurochemistry at SUNY Downstate Medical Center, identified the substance in Benjamin's bag as $C_{17}H_{21}NO_4$ – "cocaine." JA 6:2. Langley further testified that "cocaine base" is not a scientific term, because "[c]ocaine in its natural state is a base. . . what is commonly called crack cocaine is cocaine salt that has been converted back into base. . . ." JA 6:6-13. Langley's testimony was undisputed in the lower courts. JA 2. Since the chemical formula for cocaine paste, freebase, and crack is identical, courts allow experienced expert witnesses to identify the specific substance, based on its appearance and texture. *United States v. Bryant*, 557 F.3d 489, 499-500 (7th Cir. 2009).

C. Statutory History

The Anti-Drug Abuse Act was passed in 1986 amidst a "national sense of urgency surrounding drugs generally and crack cocaine specifically." U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 5 (2002) [hereinafter *2002 U.S.S.C. Report*]; *Brisbane*, 367 F.3d at 913. This Court found that at that time, Congress was more

concerned with crack cocaine than powder cocaine due to beliefs about the exceptionally addictive nature of crack, its potential to cause societal and personal harm, and the drug's increasingly widespread popularity. *Kimbrough*, 552 U.S. at 95-96. Statements from both House and Senate members indicate Congress' primary concern was crack. *See, e.g.*, 132 Cong. Rec. 22,667 (1986) (statement of Rep. Traficant, former drug counselor and former sheriff) ("Cocaine is no longer a drug of the affluent. A new form of freebase cocaine called crack is now becoming a major problem in many cities."); 132 Cong. Rec. S16449 (daily ed. Oct. 15, 1986) (statement of Sen. Chiles) ("[W]e are going to get tough. To do that we have very strong penalties, mandatory sentences for the use of crack in small amounts; we distinguish crack and make it one of the most dangerous drugs."). As a result of these sentiments, the House and Senate each advanced a bill to amend § 841(b). *See United States v. Shaw*, 936 F.2d 412, 415-16 (9th Cir. 1991) ("The House version provided tougher penalties for 'cocaine freebase,' H.R. 5394, 99th Cong., 2d Sess. § 101 (1986), while the Senate version provided penalties for 'cocaine base,' S. 2878, 99th Cong., 2d Sess. § 1002, 132 Cong. Rec. S13649 (daily ed. Sept. 25, 1986)."). Congress enacted the Senate version, using the term "cocaine base." *Id.*

While the ADAA provides mandatory minimum sentences for some offenses, the U.S. Sentencing Commission promulgates more expansive sentencing guidelines. *Kimbrough*, 552 U.S. at 96. The Sentencing Commission applies ongoing research and empirical data "in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like." *Id.* at 96 (quoting *Rita v. United States*, 551 U.S. 338, 349 (2007)). The first iteration of the Sentencing Guidelines for violations of § 841(a) adopted the minimum sentences, penalty structure, and terminology of the ADAA. *See id.* at 97. However, in a 1993 amendment the Sentencing Commission specifically defined cocaine base as crack for purposes

of the sentencing guidelines. Amendments to the Sentencing Guidelines for United States Courts, 58 Fed. Reg. 27,148, 27,156 (May 6, 1993) (“‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.”). Congress has not amended § 841 to include this or any definition of cocaine base. *See Barbosa*, 271 F.3d at 463. There is a division among the circuit courts of appeal about how to interpret this term².

ARGUMENT

I. THE TERM “COCAINE BASE” IN § 841(b) REFERS TO CRACK COCAINE, FREEBASE COCAINE, AND OTHER CHEMICALLY IDENTICAL SUBSTANCES DERIVED FROM COCAINE HYDROCHLORIDE.

“Cocaine base” does not have a plain, unambiguous scientific meaning that applies in the context of § 841. The legislative history and implied purpose of the ADAA confirms that Congress intended to establish enhanced penalties for violations involving crack cocaine, freebase cocaine, and similarly dangerous substances rendered from cocaine powder. If “cocaine base” is broadly defined to include any substances that share the chemical formula $C_{17}H_{21}NO_4$, a grievous ambiguity remains in the statute and the rule of lenity should apply to the Petitioner. The Court should apply a de novo standard of review for the issue of pure law in this case. *See generally Abbott v. United States*, 131 S. Ct. 18 (2010).

² Five circuits have adopted a broad interpretation, defining “cocaine base” according to the chemical formula $C_{17}H_{21}NO_4$. *See, e.g., United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001); *United States v. Palacio*, 4 F.3d 150 (2d Cir. 1993); *United States v. Lopez-Gil*, 965 F.2d 1124 (1st Cir. 1992); *United States v. Easter*, 981 F.2d 1549 (10th Cir. 1992); *United States v. Thomas*, 932 F.2d 1085 (5th Cir. 1991). Four circuits hold that “cocaine base” refers only to crack cocaine. *See, e.g., United States v. Gonzalez*, 608 F.3d 1001 (7th Cir. 2010); *United States v. Higgins*, 557 F.3d 381 (6th Cir. 2009); *United States v. Fisher*, 58 F.3d 96 (4th Cir. 1995); *United States v. Munoz-Realpe*, 21 F.3d 375 (11th Cir. 1994). Two circuits concluded that “cocaine base” refers to smokable cocaine. *See, e.g., United States v. Brisbane*, 367 F.3d 910 (D.C. Cir. 2004); *United States v. Shaw*, 936 F.2d 412 (9th Cir. 1991). Most courts conclude that the term “cocaine base” includes crack, at a minimum.

A. Textual and structural analysis proves a purely scientific definition is insufficient to resolve the ambiguity in § 841(b).

Statutory interpretation begins with the plain meaning of the text, *see Dean v. United States*, 129 S. Ct. 1849, 1853 (2009), derived from the language and structure of the statute as a whole, *Deal v. United States*, 508 U.S. 129, 132 (1993). Congress did not define “cocaine base” in the ADAA, nor in any of the amendments to § 841. The text relevant to the Petitioner provides in part,

- (B) In the case of a violation of subsection (a) of this section involving – . . .
 - (ii) 500 grams or more of a mixture or substance containing a detectable amount of – . . .
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; . . .
 - (iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base

§ 841(b)(1)(B). The statute assigns the same penalty to violations involving 500 grams of “cocaine” as violations involving a mere 28 grams of “cocaine base,” but does not offer any explanation of the factors that warrant an equally severe punishment for a fraction of the quantity of “cocaine base” as “cocaine.” *See United States v. Booker*, 70 F.3d 488 (7th Cir. 1995). In *Booker*, three experts – an expert for the defense, a court expert, and an expert for the government – concurred that “cocaine” and “cocaine base” both refer to a base with the chemical formula $C_{17}H_{21}NO_4$. *Id.* at 492. Expert testimony in the earlier proceedings of this case provided that “cocaine base” is not a scientific term at all. *See* JA 6:4-13. Defining cocaine base as any substance with the chemical formula $C_{17}H_{21}NO_4$ would nullify § 841(b)(1)(B)(ii) since the chemical formula for cocaine is identical; all offenses involving 500 grams of cocaine would necessarily involve 28 grams of cocaine base. *Brisbane*, 367 F.3d at 913; *United States v. Edwards*, 397 F.3d 570, 575 (7th Cir. 2005).

In accordance with this Court's holding that "[i]t is our duty to give effect, if possible, to every clause and word of a statute," *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal citation omitted), it is clear there is no plain meaning of "cocaine base." Applying the purported scientific meaning frustrates the distinction between clause (ii) and clause (iii). *United States v. Fisher*, 58 F.3d 96, 99 (4th Cir. 1995). Eliminating the textual ambiguity by distinguishing the substances requires consideration of Congress's intent.

B. The legislative history confirms that Congress intended to target crack cocaine and other cocaine hydrochloride derivatives in § 841(b)(1)(B)(iii).

Here, there is no plain meaning of "cocaine base," and using a scientific meaning would contravene Congress' intent in enacting § 841(b). As this Court held, plain meaning of the text is most persuasive, but "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling," *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

The legislative history of the ADAA is sparse since it was so rapidly enacted, 2002 U.S.S.C. Report to Congress, *supra*, but the existing documentation confirms that Congress intended to target crack cocaine. *Booker*, 70 F.3d at 492-93. While the dangers involved in producing freebase cocaine limited its appeal, producing crack cocaine was cheap and relatively easy; crack use seemed increasingly popular, particularly among teenagers. *Kimbrough*, 552 U.S. at 96. Despite the discussions of crack, Congress ultimately chose to assign the enhanced penalties in clause (iii) to violations involving "cocaine base" without any reference to crack. *See supra* p. 2; *Barbosa*, 271 F.3d at 466. In addition to statements of individual legislators, committee hearings and the Sentencing Commission's Reports to the Congress confirm that the legislature intended to target crack. *See, e.g., "Crack" Cocaine, Hearing Before the Permanent*

Subcomm. on Investigations of the S. Comm. On Governmental Affairs, 99th Cong. 4 (1986) (opening statement of Sen. Nunn); *2002 U.S.S.C. Report to Congress*, *supra* p. 2.

The federal courts of appeals are generally divided among three interpretations of “cocaine base,” *supra* note 2, but none of these interpretations comport with the legislature’s intent. The majority of circuits hold “cocaine base” to mean “crack cocaine,” as in the Sentencing Guidelines, U.S. Sentencing Guidelines Manual § 2D1.1(c) n.D (2010); *see supra* note 2, but Congress purposefully chose a more flexible term for two reasons. First, an adaptable term could prevent drug traffickers from making minor adjustments to their products to evade the enhanced penalties. *Brisbane*, 367 F.3d at 914; *United States v. Stephenson*, 557 F.3d 449, 453 (7th Cir. 2009). Second, the legislature was keenly aware that illegal drugs evolve as their popularity and availability fluctuates. *See United States v. Lopez-Gil*, 965 F.2d 1124, 1134-35 (1st Cir. 1992) (opinion on rehearing) (“The fact that we are not aware of the existence of a new derivative form of cocaine base that is separate and distinct from crack, does not mean that there is no such substance.”).

The D.C. Circuit and Ninth Circuit distinguished “cocaine base” as smokable cocaine, *supra* note 1, but this approach – shifting the focus to the mode of consumption – could increase the difficulty for prosecutors to meet their burden of proof at trial. The remaining circuits that have addressed this term employ the broadest definition, holding “cocaine base” is any substance formulated as $C_{17}H_{21}NO_4$, effectively reading clause (ii) out of the statute. *See supra* discussion pp. 4-5.

Since these three interpretations fail, the Petitioner respectfully requests this Court adopt a two-part definition of “cocaine base” that considers the chemical formula but emphasizes the substance’s production and properly applies the stiffer penalties in clause (iii) only to cocaine

hydrochloride derivatives. *See Bryant*, 557 F.3d at 500 (“Crack is not defined merely by its secondary ingredients; it is a ‘product[.]’ . . .”). Congress did not provide any indication that “cocaine base” should be a proxy for a precise chemical formula, especially since substances that share this formula can only be distinguished by expert analysis. *United States v. Robinson*, 144 F.3d 104, 109 (1st Cir. 1998). It seems certain that Congress intended that the enhanced penalties apply to crack, but not while excluding other drugs that could emerge that warrant similar concerns. The available legislative history also consistently demonstrates a secondary concern about freebase cocaine, another derivative of cocaine hydrochloride that shares the chemical formula $C_{17}H_{21}NO_4$. While cocaine paste also shares this chemical formula, it fails the second prong of the proposed test: it is typically a precursor to cocaine hydrochloride, not a derivative like crack and freebase.

C. If any ambiguity remains, this Court should apply the rule of lenity in favor of the Petitioner.

This Court recently reaffirmed that the rule of lenity should apply if a grievous ambiguity exists in the statute after analysis of its language, structure, history, and purpose. *Barber v. Thomas*, 130 S.Ct. 2499, 2508-09 (2010). If such an ambiguity exists in either the criminal prohibition or its penalties, *Bifulco v. United States*, 447 U.S. 381, 387 (1980), the rule of lenity would resolve it in favor of the defendant with the less severe penalty. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). If this Court chooses to define “cocaine base” broadly, as any substance with the chemical formula $C_{17}H_{21}NO_4$, grievous ambiguity remains. Applying this definition within the structure of § 841(b) would cause uncertainty at a minimum, and this interpretation is not in accord with the legislative history or purpose of the ADAA. If then this Court finds the statute is ambiguous, the rule of lenity suggests the most narrow reading would be correct, so the case should be remanded for further proceedings.

* * *

Analysis of the statutory language and legislative history demonstrates that “cocaine base” is an ambiguous term. The structure of § 841(b) proves that Congress intended to target a subset of substances with enhanced penalties, and the legislative history supports the proposed two-part test that asks first if the chemical formula of the substance is $C_{17}H_{21}NO_4$ and second whether the substance is a derivative of cocaine hydrochloride. This test would distinguish “cocaine base” as the substances that Congress intended to harshly penalize.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court reverse the judgment of the court of appeals and remand the case for further proceedings.

Respectfully submitted,

March 4, 2011

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