Oral argument has not yet been scheduled

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-3013

United States,

Appellee,

vs.

Bobby A. Holton,

Appellant.

On Appeal from
The U.S. District Court
For the District of Columbia
91-Cr-677

Brief of Appellant

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Filed: December 19, 1996

Consolidated with No. 96-3049

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI.

Appellants Bobby A. Holton and Dennis Davis, and Appellee the United States of America, appeared in the United States District Court for the District of Columbia. They are the only parties to appear before this Court. Codefendant Vincent Jones was acquitted on all counts.

B. RULINGS UNDER REVIEW

At issue before this Court is Holton's conviction November 9, 1995 by a jury and the sentence handed down by Judge Harris January 16, 1996. The Judgment of Conviction is reproduced in the Appendix at C.

C. RELATED CASES

This case was previously before this Court as 92-3211, in which Holton's conviction was vacated and the case was remanded for a new trial. The Court has consolidated Holton's appeal (96-3013) with the appeal filed by Davis (96-3049).

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of conviction and imposition of a sentence to 363 months in prison in the U.S. District Court for the District of Columbia, which had jurisdiction pursuant to 18 U.S.C. § 3231. A Notice of Appeal was filed within 10 days of judgment in compliance with FED. R. APP. P. 4(b) and this Court has jurisdiction pursuant to 18 U.S.C. § 1291. The Notice of Appeal is reproduced in Appellant's Appendix at D.

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QUESTIONS PRESENTED

1. Whether permitting unsupervised jurors to read disputed transcripts, which were not in evidence, of largely inaudible, unintelligible body wire recordings, while listening to the recorded evidence during deliberations violated Appellant's Fifth Amendment guarantee of due process of law and the Federal Rules of Evidence, and whether the presence of the Trial Court's law clerk during deliberations about the tapes violated the sanctity of the jury process?
2. Whether the Trial Court violated Appellant's Sixth Amendment right to a fair trial by an impartial jury by refusing to conduct a *voir dire* to determine whether any jurors saw or heard about a highly prejudicial national news broadcast in which several members of Congress expounded on the perils to society of crack cocaine and violence associated with its distribution; and a prominent D.C. Superior Court judge stated that, in his experience, incarceration of individuals convicted of selling crack had resulted in a reduction of the murder rate in the District of Columbia?
3. Whether the mandatory-minimum sentencing structure embodied in 21 U.S.C. § 841(b)(1) violates the Equal Protection Clause of the Fifth Amendment because Congress lacked a rational basis for imposing sentences on individuals convicted of selling crack cocaine that are 100 times as severe as sentences imposed on those convicted of selling powder cocaine, in the absence of evidence demonstrating that the former is a more dangerous form of the same drug?

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, **APPELLEE,** vs. **BOBBY A. HOLTON,** **APPELLANT.**	No. 96-3013 (91-CR-677)

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Appellant Bobby A. Holton was arrested October 30, 1991 on a warrant along with co-appellant Dennis Davis and Brenda Smith. R. 18.[1] At his arraignment the following day he was ordered held without bond, as was Dennis Davis. R. 19. Holton was indicted November 26, 1991 on one count of conspiracy to distribute and possess with intent to distribute cocaine base in violation of 21 U.S.C. § 846 (Count 1), four counts of distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii) (Counts 2, 6, 10, 13), four counts of distributing cocaine base within 1,000 feet of a playground or school in violation of 21 U.S.C. § 860(a) (Counts 3, 7, 11, 14), and one count of using a communication facility to distribute cocaine base in violation of 21 U.S.C. § 843 (Count 12). Dennis Davis, his brother Brian Davis, Smith and Vincent Jones were indicted as well. R. 20. *See App. B.*

Holton was arraigned December 11, 1991 along with Dennis Davis and at the hearing the Government informed the Court that Smith had been killed. R. 21. Brian Davis was arraigned December 12, *Id.*, and Vincent Jones was arraigned January 21, 1992. R. 24.

[1] Entries in the record will be designated by "R." followed by the page number. References to Appellant's Appendix will be designated by "App." followed by the appropriate tab letter, i.e. App. A. The record is included in Appellant's Appendix as App. A. References to transcripts of proceedings will be designated by "Tr." followed by the date of the proceeding and the page number, i.e. Tr. 4/23/91, 10.

Holton moved to exclude "body recordings" of conversations he allegedly had with government agents, and to require the Government to provide agreed-upon transcripts of the recordings. R. 25. The Trial Court denied these motions in orders issued April 16, 1992. R. 26-27. In a status hearing prior to trial the Government stated that it would play tape recordings of telephone conversations Det. Michael J. Quander allegedly had with Dennis Davis and Holton in efforts to set up drug transactions, but it would not play the body-wire recordings for the jury because the quality of the recordings was too poor to transcribe accurately. Instead, it would put the body-wire recordings in evidence so jurors could listen to them if they chose to during deliberations. The case against Dennis Davis, Holton, Brian Davis and Jones proceeded to trial April 21. R. 27. After 10 days of trial, the jury began deliberating May 5, 1992, and the following day found Dennis Davis, Holton and Jones guilty of all charges. R. 30. Brian Davis was acquitted of all charges.

Holton was sentenced August 13, 1992 to 363 months incarceration on counts 1, 3, 7, 11 and 14 for violating 21 U.S.C. § 860(a), and 48 months on count 12 for violating 21 U.S.C. § 843, with all terms running concurrently. R. 33. The Court placed him on supervised probation following release from prison for periods ranging from five to 10 years on all of those counts, with the probationary periods running concurrently. It ordered Holton to pay $50 special assessments on each count. The Trial Judge granted the Government's motion to dismiss counts 2, 6, 10 and 13, violations of 21 U.S.C. § 841, because they are lesser included offenses.

Holton filed a timely Notice of Appeal August 21, 1992. R. 34. His appeal, 92-3211, was consolidated with those of Dennis Davis, 92-3002, and Jones, 92-3003, and in an Order issued November 23, 1994, this Court vacated their convictions and remanded their cases for a new trial. R. 39.

The Trial Court granted Holton's motion to adopt and conform motions, including the motions concerning the body-wire recordings, filed in the first trial. R. 40. It later denied all of the pretrial motions.

The second trial began October 3, 1995. R. 47. On October 5, defense counsel objected to the Government's announced intention to play portions of the body-wire recordings during Quander's testimony. Tr. 10/5/95, 3-9. Before calling Quander as a witness, the Government said it had not yet prepared transcripts to aid jurors while listening to the tapes. Tr. 10/6/95, 90. Defense counsel then argued that the Court needed to rule on the admissibility of the tapes and whether the Government could provide transcripts for jurors' use. The trial was recessed for all of October 10 and a portion of October 11 while Government and defense counsel listened to the body-wire recordings and debated the accuracy of the Government's proposed transcripts, particularly attributions to speakers Quander made in them.[2] Despite disagreement over the accuracy of the transcripts, and its own finding that much of the recorded material was unintelligible, the Trial Court ruled that the tapes were admissible and that the Government could provide jurors with its transcripts from October 4, 16, 23 and 30. Tr. 10/11/95, 52-71.

The defense case began October 31, and when court convened November 1, Holton's counsel asked the Judge to *voir dire* the jury, arguing that ABC News' *Nightline* program the preceding evening had been about crack cocaine and the 100:1 differential in sentencing between those convicted of offenses involving powder cocaine and defendants convicted of offenses involving crack cocaine. Tr. 11/1/95, 6. *See App. H.* Among the individuals interviewed on the program were D.C. Superior Court Judge Reggie Walton and Michelle Roberts, the lawyer who had represented Dennis Davis at the first trial. *See App. G.* The Court refused to *voir dire* the jury to determine whether any jurors had seen the program or heard about it. *Id.* 10.

Over defense counsel's objections, the Trial Court announced November 7 that if jurors asked to listen to the tape recordings during deliberations they would be given the transcripts, which had previously been marked as exhibits but had not been admitted into evidence. Tr. 11/7/95, 3. Jurors sent a note to the Judge November 8 asking to hear the tapes, *See App. F*, but making no mention of the transcripts. Following an off-the-record, *in camera* discussion with

[2] For example, in Gov't Exh. 10-G-1 at pg. 6 there is a point at which Quander is engaged in conversation with at least three people and there is a sound on the tape which is identified as "Bee: (spits)."

counsel, the Trial Court accommodated this request, providing the transcripts to jurors while they listened. Tr. 11/9/95, 5. Jurors continued to listen to the tapes while reading the transcripts November 9, and the Court permitted defense counsel to put their objections to the procedure on the record that day.

The jury convicted Dennis Davis and Holton November 9, 1995 on all counts against them and acquitted Jones of all charges. R. 54.

Holton was resentenced January 16, 1996, and received the same sentence as had been imposed following the first trial. R. 56. He filed a timely notice of Appeal January 25.

STATEMENT OF FACTS

The Government presented its case against Holton and his codefendants mainly through the testimony of Sgt. John Brennan of the Metropolitan Police Department's Narcotics and Special Investigation Division, who supervised the investigation leading to their arrests, and Det. Michael J. Quander, an undercover officer assigned to NSID in the fall of 1991, who testified that he purchased crack cocaine on six occasions in October 1991 in the 1300 block of Stevens Road, S.E.

According to Brennan, police learned from Dirk Wright, a drug dealer who had been arrested earlier in 1991, that Dennis Davis was selling narcotics in Barry Farms. NSID devised a plan under which Wright would introduce Quander, masquerading as a drug dealer named Darnell, to Dennis Davis, and Quander would attempt to buy PCP from Davis. Tr. 10/4/95, 123. The broad objective of the investigation was to identify individuals in Barry Farms involved in drug sales and the apartments used for the operation, Brennan said. *Id.* at 133. Another objective was to enhance the sentences imposed on individuals charged in the case by making multiple purchases that would bring the total amount of drugs involved above limits established in 21 U.S.C. § 841(b), Brennan admitted on cross examination. *Id.* at 171.

THE OCTOBER 3, 1991 TRANSACTIONS

Quander testified that he and Wright drove to Barry Farms in the early evening of October 3, 1991 to locate Dennis Davis. Tr. 10/6/95, 114. He said they encountered Brian Davis in the 1300 block of Stevens Road, S.E., who said Dennis was in an unspecified house in the courtyard. *Id.* at 118. Quander and Wright then started up a path, the "cut," leading into the courtyard, and Dennis approached them, ordering them back to the sidewalk. *Id.* at 122. Wright introduced Quander as his brother Darnell. During this time Brian Davis, Holton and Jones were making street sales of small quantities of crack to people who drove up to them, according to Quander. *Id.* at 119, 128.

In response to Wright's request to buy PCP, Dennis Davis said he did not deal in it anymore, but a source could get it for them in Virginia. Tr. 10/6/95, 129. After waiting for some

time for the PCP, Quander and Wright told Dennis Davis they would go have a beer and return later. As they were leaving, Wright asked for two "working 50s" of crack. *Id.* at 133. Quander said Davis called to Holton to give him the narcotics, but Holton said he did not have any "working 50s." *Id.* at 134. Quander said Holton gave Dennis Davis the freezer bag from which he, Brian Davis and Jones had been selling, and Dennis gave the undercover officer five ziplocks from it in exchange for $100. *Id.* at 135.

Quander and Wright then met with Brennan and other NSID officers before returning to Barry Farms later in the evening. When they met Dennis Davis again he told them he could not get the PCP, but he agreed to sell them an ounce of crack for $1,000. *Id.* at 141. He went into a house facing the courtyard to get the drugs, and when he returned Quander paid him $900 for a bag containing crack.[3] Dennis Davis also gave Quander and Wright a pager number before they left. *Id.* at 160-61.

THE OCTOBER 4, 1991 TRANSACTION

Quander testified that late in the afternoon October 4, 1991 he paged Dennis Davis from a pay phone near the market at Florida Avenue and 5th Streets, N.E., but did not get a call back. Tr. 10/6/95, 172. Nonetheless, Quander and Wright drove to the 1300 block of Stevens Road with $2,000 to purchase two ounces of crack, but did not stop because they saw uniformed police officers in the area. Tr. 10/11/95, 72. Quander again paged Dennis Davis from a pay phone, and in the return phone call, which was not recorded, Davis told Quander to return to Barry Farms to complete the deal. *Id.* at 77.

When they met, according to Quander, he gave Dennis Davis the money and the latter said he wanted larger bills. After an exchange of currency Davis told Holton to count the money while he went to a house on the courtyard to get the drugs, Quander testified. He added that after some time Dennis Davis returned with the drugs, Holton nodded to him that the money was correct, and Quander and Wright left with the package received from Davis. *Id.* at 79.

[3] The five ziplocks from the first transaction and the quantity Dennis delivered in the second were supposed to total an ounce.

THE OCTOBER 16, 1991 TRANSACTION

Quander and Wright returned to the 1300 block of Stevens Road October 16, 1991 and while they were standing near the street a gray Cadillac pulled up. *Id.* at 96. Brian Davis was driving, Dennis Davis was in the rear seat and several other men were in the car as well. He added that Jones was on the street and Holton was not present. Quander said he made a hand signal indicating he wanted to buy two ounces of crack. The car then drove up an alley behind 1361 Stevens Road. *Id.* at 97.

While he and Wright were waiting for Dennis Davis to return, Holton approached and asked if he could help them, Quander testified. Tr. 10/11/96, 98. When told that Dennis was already helping them, Holton left. Dennis Davis returned to where Quander and Wright were standing after about 15 minutes, and they exchanged $2,000 for narcotics. *Id.* at 99.

THE OCTOBER 23, 1991 TRANSACTION

Quander said he called the beeper number from a pay phone October 23, 1991, shortly before 5 p.m. and the call was returned by a person who identified himself as "Bee-Bee." Quander claimed he recognized the voice as that of Holton. Tr. 10/11/91, 112. But Bee-Bee did not understand who Darnell was until Quander said he was the person driving the white Nissan 280Z, the car Quander and Wright had used in the three previous trips to Barry Farms to buy drugs. *Id.* at 114. Quander said he wanted to buy three ounces of crack. Bee-Bee told him Dennis had been incarcerated on a probation violation, but that he would be released in a few days.

About 30 minutes later Quander and Det. Gary Curtis, another undercover officer, arrived in the 1300 block of Stevens Road in a blue Pathfinder. *Id.* at 119. He said Curtis stayed in the parked car as he met Holton on the street and the latter told him it was "hot out," meaning the police were around. *Id.* at 122. Quander said he obeyed an instruction to get back in the car and wait, and Holton walked up an alley. Several minutes later Holton waved from the courtyard near 1361 Stevens Road, indicating that Quander should join him, Quander said. *Id.* at 123.

According to Quander, when he arrived Holton knocked on the door of 1361, and a woman leaned out a window to hand Holton a bag containing crack. *Id.* at 124. At that point Quander exchanged $3,000 for the bag of narcotics. *Id.* at 125.

Quander said he told Holton that Curtis, who sat in the car more than 100 feet away throughout the alleged transaction, was his "boy," someone he was introducing to the business. *Id.* at 129.

THE OCTOBER 30, 1991 TRANSACTION

Sgt. Brennan testified that NSID had decided to end the investigation October 30, 1991 after making one more buy. It had obtained warrants to arrest Dennis Davis and Holton, and to search houses at 1351 and 1361 Stevens Road, S.E.; the former was the Davis family residence.

Quander called Dennis Davis' pager from a pay phone for the last time October 30, 1991, and Davis returned the call, which was recorded. Tr. 10/12/91, 21. They discuss Quander's interest in buying three ounces of crack and Davis' incarceration a week earlier.

When Quander and Curtis arrived in the 1300 block of Stevens Road at about 5:30 p.m. Dennis Davis was sitting on a retaining wall near the street. He demanded to know who Curtis was, because they had never been introduced. *Id.* at 27-28. During the entire transaction, Curtis was sitting in the car, which was parked at considerable distance and was facing away from where Quander and Davis were transacting their business. Holton was seated in an Acura some distance away and Jones was seated on the wall near Davis, Quander said. *Id.* at 25. Dennis Davis demanded repeatedly to know whether the two undercover officers were "the feds." *Id.* at 30. He then told Jones to ask whether Quander was a "fed." *Id.* at 34. According to Quander, Davis pulled up his sweatshirt to reveal the butt of a 9 mm handgun. *Id.* at 35. In an effort to move the transaction along, Quander handed $3,000 to Davis, who counted it and said it "Looks like that police shit, police money." *Id.* at 40-41.

According to Quander, Dennis Davis motioned for Jones to come closer, and after a brief exchange Jones got into a blue Jeep Cherokee and went around the block. *Id.* at 42. When Jones returned he looked at Davis and shook his head, and Davis walked up toward 1361 Stevens Road. Jones went and sat in the Acura with Holton. *Id.* at 44. According to Quander, Davis never returned, but a woman came down the alley and gave a bag to Holton, saying "Dennis said you'd

know who to give this to." Quander testified that Holton took the bag from the woman, looked inside, and handed it to the undercover officer. *Id.* at 45.

Quander then walked toward the Pathfinder and broadcast a lookout over the transmitter he was wearing for Dennis Davis, Bee, and the woman who brought the bag down the alley, who was later identified as Brenda Smith. A second lookout included a description of Jones.

At that point the search and arrest teams moved in. Holton and Jones were stopped near the Acura. Holton was arrested and police obtained identification information from Jones before releasing him. Smith and several other individuals were arrested inside 1361 Stevens Road. Dennis Davis was arrested after he jumped out a second-story window of that dwelling, Government witnesses claimed.

SUMMARY OF THE ARGUMENT

In this case, which took more than a month to try, the Government relied heavily on body-wire recordings made by an undercover detective during six alleged drug transactions in October 1991. In Holton's first trial the Government did not play the tapes for the jury because it concluded they were of such poor quality that accurate transcripts could not be produced, but after the beginning of the second trial it announced that it would play the tapes for the jury.

The Trial Court ruled over defense objections that the tapes were admissible. Despite further objections that the text of the transcripts and the attributions were not accurate, the Court ruled that jurors would be provided the Government's transcripts as aids to listening when recordings were played in open court. The transcripts were marked as exhibits, but were not admitted into evidence.

When jurors asked during deliberations to listen to the tapes the Judge permitted them to read the transcripts as the tapes were played by his law clerk, again over defense objections. Furthermore, it appears jurors were permitted to deliberate in the courtroom while the law clerk was present. Neither appellants, their lawyers, nor the Judge was present to ensure that jurors did not misuse the transcripts, give undue emphasis to portions of the tapes, or that the sanctity of the jury room was maintained. This procedure violated Appellant's Fifth Amendment right to due process of law and the "best evidence rule." Under the circumstances it is extremely likely that the clearly-typed transcripts, which were inadmissible as evidence, supplanted the garbled conversations on the tapes as the evidence against Holton.

After four weeks of trial, on the day the defense began presenting its case, the ABC News program *Nightline* aired a 30-minute program about mandatory-minimum sentencing in crack cocaine cases. It focused on Washington, D.C., and included interviews with several members of Congress, who said crack is the most dangerous drug available, and a prominent D.C. Superior Court judge, who said crack is responsible for violence and murder here.

The Trial Court denied defense counsel's request for a *voir dire* to determine whether any jurors had seen the program or heard about it. This refusal to take even minimal precautions to

protect Holton's Sixth Amendment right to a fair trial by an impartial jury was constitutional error, which cannot be considered harmless error.

Finally, upon conviction Holton received a mandatory-minimum sentence pursuant to 21 U.S.C. § 841(b)(1) for distribution of more than 50 grams of crack cocaine. The U.S. Sentencing Commission has concluded that there is no rational basis for the statute's 100:1 disparity in sentencing between the two forms of cocaine, but Congress has refused to amend the statute and blocked amendment of the Sentencing Guidelines to eliminate the disparity imposed on individuals convicted of simple possession. Furthermore, analysis of scientific data about crack and powder cocaine by independent researchers supports the Sentencing Commission's conclusion. As such, the 100:1 disparity violates the Equal Protection Clause of the Fifth Amendment. As a result, this Court should remand Holton's case for resentencing under the guidelines applicable to those convicted of distributing less than 500 grams of powder cocaine.

ARGUMENT

EXPOSING JURORS AT TRIAL TO LARGELY UNINTELLIGIBLE TAPE RECORDED EVIDENCE WAS AN ABUSE OF DISCRETION, AND PERMITTING THEM DURING UNSUPERVISED DELIBERATIONS TO USE CONTESTED TAPE TRANSCRIPTS NOT IN EVIDENCE WAS CONSTITUTIONAL ERROR REQUIRING REVERSAL

The Government announced on the eve of trial that it intended to play for jurors tape recordings of four drug transactions made during the undercover investigation, despite its determination before Appellant's first trial that the tapes were so unintelligible that accurate transcripts could not be produced. Tr. 4/15/92, 7-10. When it made the announcement, the Government had not yet completed the transcripts it intended to provide to jurors as aids to understanding the garbled conversations, Tr. 10/6/95, 90, and did not make them available for review by defense counsel until October 10, the fourth day of trial. Tr. 10/10/95, 15-16.

Placed in the hands of unsupervised jurors during deliberations, it is beyond question that Quander's clear, typewritten text with attributions to specific individuals, although inadmissible as evidence, supplanted the garbled words of disembodied, unrecognizable voices as the evidence against Appellant.

This brief will focus on the constitutional error resulting from permitting jurors access to the transcripts during deliberations. To avoid duplication, Appellant Holton anticipates that he will adopt the arguments of counsel for Appellant Davis regarding constitutional and evidentiary errors committed in admitting the tapes into evidence, denying defense counsel the means to adequately cross examine Det. Quander about the tapes, and permitting jurors to use the transcripts during the trial.

Standard of Review

Permitting jurors during deliberations to review exhibits not in evidence, which the defense objected to below, was a structural error in the trial because the judge abdicated control over the process. *United States v. Noushfar,* 78 F.3d 1442, 1445 (9th Cir. 1996)(under circumstance of case requiring defendant to show prejudice or government to show lack of prejudice is meaningless); *Riley v. Deeds,* 56 F.3d 1117, 1120 (9th Cir. 1995). But, even if the

Court were to find no structural error, the procedure adopted by the trial court was constitutional error requiring reversal of Appellant's conviction unless the Government can show beyond a reasonable doubt that the error was harmless. *See, United States v. Brown,* 832 F.2d 128, 130 (9th Cir. 1987).

Permitting Unsupervised Jurors To Read Tape Transcripts During Deliberations Deprived Appellant of Due Process

Audiotape recordings made surreptitiously by police during investigations are frequently placed in evidence at trial, but transcripts of such recordings are not admissible unless both prosecution and defense stipulate to their accuracy. *United States v. McMillan,* 508 F.2d 101, 106 (8th Cir. 1974), *cert. denied,* 421 U.S. 916 (1975); *United States v. Bryant,* 480 F.2d 785, 791 (2d Cir. 1973); *United States v. Brandenburg,* 155 F.2d 110 (3d Cir. 1946). Absent a stipulation as to admissibility, placing the transcripts in evidence when the recording is available violates the best evidence rule, Fed. R. Evid. 1004. *McMillan,* 508 F.2d at 105. This Court has ruled that admission of the transcript into evidence was error for another very significant reason, because it "creat[ed] a risk that the jurors may have relied on the government's version of the conversations, set out in the transcript, without simultaneously listening to the authenticated tapes to verify." *United States v. Strothers,* 77 F.3d 1389, 1392, 316 U.S. App. D.C. 210 (1996).

The Court stated in *United States v. Dallago,* 427 F.2d 546, 553, 138 U.S. App. D.C. 276 (D.C. Cir. 1969) that "the jury room must be kept free of evidence not received during trial, and that its presence, if prejudicial, will vitiate the verdict." *See, also, United States v. Sawyer*, 303 F.2d 392, 395, 112 U.S. App. D.C. 381 (D.C. Cir. 1962)(sending to jury room exhibits court had refused to admit in evidence was error).

In Holton's case, before counsel made final arguments the Judge raised the issue of what would occur if jurors asked to hear the tapes. Tr. 11/7/95, 3. Holton's counsel clearly stated her objection to jurors being provided transcripts as an aid to listening to the tapes during deliberations. The Court did not rule at that point. In his final instructions the Judge told jurors that if they wanted to listen to tapes during deliberations: "the courtroom, in effect, would

become an extension of the jury room. . . . Nobody else will be in here, except for my law clerk after meeting with the lawyers and figuring out what the counter numbers are, and she would play whatever it is that you want to hear played." Tr. 11/7/95, 99.

In a note sent to the Trial Judge at noon November 8, 1995 the jury requested permission to listen to the tapes. *App. F-1*. The Judge held an off-the-record, *in camera* meeting with counsel, after which he responded that

> During the trial, portions of the tapes were played. There is so much "down time" (that is, time during which either nothing is said or nothing is heard) on the tapes that it takes nearly three hours to play them all. . . .
>
> If you do wish to hear them all, just confirm that and it will be done. If you wish to hear portions only, let me know what portions and that will be done.

App. F-2. A subsequent note sent out at 2:10 p.m. stated:

> It is the wish of the jury to hear the tapes in chronological order beginning with October 3, 1991. After listening to each tape we would like time to deliberate in the Court Room—our extended jury room. We will follow this procedure until we hear all the tapes. . . .

App. F-3. Following a second off-the-record meeting with counsel, the Judge responded that jurors would be brought to the courtroom to listen to the tapes and stated:

> When portions were played during the trial, transcripts of those portions were provided to you. As you recall (and is set forth on p. 19 of the instructions, which I ask you to review), the transcripts are not evidence, but are more aids in listening to the tapes, with the tapes themselves having been received in evidence. Before each tape is played for you in its entirety, the transcripts of the portions previously played will be given to you, as before to assist you. After each tape has been played, the transcripts once again will be collected from you.

App. F-4.

The next morning the Court held a hearing in which defense counsel were permitted to put their objections on the record concerning the decision to let jurors read transcripts while the tapes were played. At the hearing, at which the defendants were not present despite counsel's assertion of their Sixth Amendment rights, Tr. 11/9/95, 5, Holton's counsel argued that the transcripts were not in evidence and, like other exhibits marked but not admitted, should not go to the jury. *Id.* at 13. She noted that this was a "one witness case," and the transcripts are prior consistent

statements of Det. Quander, who recites in the transcripts what is on the tapes and assigns names to the voices. *Id.* at 14. Dennis Davis' counsel noted that jurors did not ask for the transcripts and that during gaps in conversations on the tapes, which the judge had highlighted in his first response to the jurors' request, the jurors would read the transcripts through.[4] *Id.* at 19.

The net effect of permitting jurors access to the transcripts while listening to the tapes in deliberations was to give them the opportunity to read and reread the Government's version of what was on the tapes during long periods when no intelligible conversation was being played. The procedure adopted by the judge was no less damaging to Appellant than the admission into evidence of the transcripts in *Strothers*. *See, also, United States v. Robinson*, 707 F.2d 872, 878 (6th Cir. 1983)(distinction between evidence, aid to jury becomes nebulous where evidence unintelligible, and practical effect is that aid becomes evidence).

Furthermore, the Trial Court's procedure for permitting jurors to rehear the tapes during deliberations failed to protect Holton's Fifth Amendment right to due process. The Court concluded in *United States v. Sobamowo*, 892 F.2d 90, 96, 282 U.S. App. D.C. 74 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 825, 111 S.Ct. 78, 112 L.Ed. 2d 51 (1990), that it was harmless error to exclude defendants when tape recorded evidence was replayed for jurors during deliberations because defense counsel were present at all times to protect their clients' due process rights. The Court said jury deliberations are not part of the trial and, therefore, Fed. R. Crim. P. 43(a), requiring the defendant's presence at all stages of the trial did not apply. This holding conflicts with the long-held position of the Ninth Circuit that deliberations are part of the trial and, therefore, defendants have a right to observe while jurors replay tape recorded evidence. *United States v. Felix-Rodriguez*, 22 F.3d 964, 967 (9th Cir. 1994); *United States v. Kupau*, 781 F,2d 740 (9th Cir.), *cert. denied*, 479 U.S. 823, 107 S.Ct. 93, 93 L.Ed.2d 45 (1986). Nonetheless,

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[4] While Holton's counsel was cross examining on the tapes the Judge interrupted to instruct the jury:

> When we first started to play the tapes, I told you that only the tapes themselves come into evidence and that you would have the transcript to assist you in evaluating what is said on the tape. . . . *But you will not have the transcripts as exhibits when you become a deliberating jury.*

Tr. 10/13/95, 118 (emphasis added).

both courts agree that permitting jurors to listen to the tapes without supervision, as occurred in Holton's case, places the defendant's rights in jeopardy, and failure to protect those rights, at least by having defense counsel present, cannot be considered harmless error.

The Judge's response to the request to listen to the tapes was constitutionally infirm in several respects: it created the risk that jurors would place greater emphasis on the tape recorded evidence in its most intelligible form, the transcripts; it destroyed the sanctity of the jury room; and it failed to ensure that jurors were adequately instructed.

In *Felix-Rodriguez, supra*, at 966, the Ninth Circuit asserted that replaying taped evidence creates a danger that jurors will place undue emphasis on that evidence. In that case the Court found no error because the trial judge supervised the replaying after giving defense counsel an opportunity to object. The judge, his law clerk, the courtroom clerk and the court reporter were present, and with defense counsel's approval jurors were permitted to read an English translation of the recorded conversation, which was in Spanish. *Id.* The judge instructed jurors that the transcripts were not evidence, there was a record of what transpired in the courtroom during the replaying, and jurors returned to the jury room to continue deliberations.

In Holton's case, although jurors initially said they wanted to play the tapes through one at a time, there is no record of whether they stopped the tape and replayed portions multiple times, either in an attempt to understand the garbled words or to compare it to their recollections of Quander's testimony or to the transcripts. Because no one was present in the courtroom to prevent jurors from listening to the tapes multiple times, it is impossible to tell whether they placed undue emphasis on portions. On the other hand, if the judge had instructed his clerk to make decisions about whether to acquiesce to juror requests to replay portions, or to deny such requests, permitting the clerk to exercise such discretion would be an abdication of the judge's responsibility to protect Holton's right to due process and possibly his Sixth Amendment confrontation right. *See, e.g., Noushfar, supra*, 78 F.3d at 1445 (structural error where court abdicated control by failing to preside during playing of tape recordings during deliberations);

Riley, supra, 56 F.3d at 1119-20 (replay of tape recorded evidence without judge present and with law clerk "presiding" is structural error which is reversible *per se*).

If jurors followed the procedure outlined in their second note and stopped after each tape was played to deliberate in the courtroom, and the law clerk remained in the room during those deliberations, the sanctity of the deliberations was seriously jeopardized, if not destroyed. In *Kupau, supra*, at 742, the Ninth Circuit noted that "[a]fter a case has been submitted to a jury, there are serious concerns about any outside contact with the jury," because of the risk that the outsider will say or do something that will influence the outcome. *See, also, Brown, supra,* 832 F.2d at 130 (contact may be subtle, a nod unintended or unnoticed by person playing tape). That is why, in Holton's first trial, counsel for Dennis Davis noted that jurors should not deliberate in the courtroom while listening to the tapes, but should first return to the jury room. Tr. 5/4/92, 43. This Court stated that "A cardinal rule of our jurisprudence is that the sanctity of the jury room must remain inviolate. The right to trial by jury becomes the more fragile as leeway for an improperly influenced verdict is permitted to widen." *Dallago, supra*, 427 F.2d at 556.

The trial judge's note directing jurors to reread the instruction he had given prior to deliberations that the transcripts were not evidence did not cure the problems discussed above. First, there is no guarantee that the jury reread the instruction. *See, e.g., Guam v. Marquez,* 963 F.2d 1311, 1315 (9th Cir. 1992). This is particularly true in Holton's case because the instructions given by the judge throughout the trial were wholly inadequate.[5]

[5] The instruction given roughly parallels the pattern jury instruction, *Criminal Jury Instructions for the District of Columbia*, 4th Ed., § 2.30:

> Now, Tape recordings of conversations identified by witnesses have been received in evidence. Transcripts of these tape recordings, recorded conversations, were furnished for your convenience and guidance as you listened to the tapes to clarify portions of the tapes which are difficult to hear and to help you identify speakers.
>
> Tapes, however, as I told you, are evidence in the case; the transcripts are not evidence. If you perceived any variation between the transcripts and the tapes as to the words spoken or the speakers, you must be guided solely by the tapes and not by the transcripts.
>
> If you cannot determine from the tape that particular words were spoken, you must disregard the transcript insofar as those words are concerned.

One reason this Court did not find reversible error in *Strothers*, *supra*, 77 F.3d at 1393, was that "jurors were on notice that the accuracy of the transcript was disputed." In *United States v. Slade*, 627 F.2d 293, 200 U.S. App. D.C. 240 (D.C. Cir.), *cert. denied*, 449 U.S. 1034 (1980), the Court ruled that juror access to government-prepared transcripts was not reversible error because "through defense objections and the court's cautionary instructions, the jury was made aware that the transcripts offered only the government's interpretations." *Id.* at 303. In Holton's case the Trial Court insisted that counsel argue objections at the bench, preventing jurors from learning the basis for defense objections to the tapes and transcripts, and the cautionary instructions were silent on the dispute. *See, also*, *Bryant*, *supra*, 480 F.2d at 791 (instruction that jurors should cross out on transcript any statements they did not personally hear put them on notice that transcripts might be inaccurate); *United States v. Onori*, 535 F.2d 938, 948-9 (5th Cir. 1976)(jury should be told of dispute over accuracy of transcripts, given reasons for dispute and allowed to determine accuracy).

APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

Nearly a month into the trial, on the night of October 31, 1995, ABC News *Nightline* aired *Crack and Powder Cocaine: Unequal Justice*, a half-hour program examining the effects of crack in Washington, D.C., as well as the 100:1 disparity in sentencing for the two forms of cocaine. *See below at 28.* Anchor Ted Koppel interviewed several members of Congress involved in the debate over drug sentencing, including Rep William McCollum, Rep. Charles Rangel and Sen. Orrin Hatch, along with D.C. Superior Court Judge Reggie Walton and Michelle Roberts. On October 30, the President had signed a bill blocking implementation of U.S. Sentencing Commission recommendations that would have abolished the sentencing disparity embodied in U.S.S.G. 2D1.1.

At the beginning of the program Rep. McCollum asserted that "Crack cocaine is more deadly, it is more addictive, it is more damaging, it is more harmful to society than powder." *App. G-1*. Sen. Hatch stated, "These people are killing our kids. These people are disrupting society. These people are wrecking our society." *Id.* A short time later in the program ABC showed coverage of the death in 1986 of University of Maryland and NBA basketball star Len Bias, which had erroneously been attributed to crack, and Sen. Sam Nunn stating, "Do you know that people are dying or getting very sick from crack? Do you know that crack is quite possibly the most addictive drug on earth?" *Id.* According to Sen. Dianne Feinstein, "I've seen it destroy neighborhoods. I believe it's synonymous with guns, gangs, violence." *Id.* at 2.

Koppel asked Judge Walton whether "there is a direct correlation between the sale and . . . use of crack cocaine and violence, more of a correlation than there is between the use of powdered cocaine and violence?" *Id.* at 3. "I think, unfortunately, that's true. I think there has been a pattern of violent behavior related to the crack cocaine trade that you . . . don't see in reference to the sale of other drugs." Walton later stated, " . . . I know that the homicide rate is down here in the District of Columbia, and it's down significantly, and I believe that to a certain degree, having gotten some of the individuals involved in [the crack trade] off the street has contributed to a lower homicide rate here in Washington." *Id.* at 4.

The next morning Holton's trial counsel asked that the Judge conduct a *voir dire* to determine whether any of the jurors saw the program or heard about it. She said "about three quarters of the show, dealt expressly with the relationship between crack dealing and violence, even homicide. It was a very powerful show to me as an attorney, and it got pretty localized." Tr. 11/1/95, 3, *See App. H*.

The following colloquy then occurred.

> The Court: Well, I don't know why you're picking out that one. Of course, there have been a number of stories recently, a number of editorials, and quite a bit of commentary on the subject of sentencing and crack.
>
> Ms. D'Antuono: Well, I think that it's somewhat easier to pass over the newspaper articles . . . but this show was fully and exclusively devoted to that principle. . . . 1 really believe that it stands a very, very, very good chance of having an impact on the ability of sitting jurors in this case at this time under the facts of this case, particularly since there's an allegation that Dennis Davis had a gun and displayed it, to inhibit jurors' ability to be fair. And my request is that just my client is entitled to be judged by jurors who are—all of them—impartial and that the court inquire of the jury if anybody saw the show.
>
> . . . and if anyone did see the show, then have further discussion with the juror about whether or not that would affect the juror's ability to be fair in this case.
>
> The Court: Well, of course, the whole purpose of the *voir dire* process was to get people who would be fair and impartial. And they have been told multiple times not to decide the case based on anything other than what they hear in the courtroom and follow my instructions on the law, in any event.
> . . .
>
> Ms. D'Antuono: But my request is that we make sure that we've got a fair and impartial jury and they haven't been tainted, any of them, by watching this show.
> . . .
>
> The Court: Well, I think it's adequately covered in what we've gone through so far and what we will cover in the instructions; so I am going to decline to get into it . . . .
>
> Ms. Sonenberg: . . . I didn't see the program but I do know that frequently before "Nightline" comes on, there's a trailer either during the 10:00 to 11:00 slot—I think it's actually frequently in that time period, maybe even earlier—to suggest what the program

is about and frequently talks about it, gives a sort of synopsis.[6]

. . .

It's not as if we're talking about Los Angeles, Chicago, or some other city; we're talking about the very city in which this trial is taking place and which this jury lives and in which these events occurred.

. . .

Mr. Wilhite: . . . [A]lthough I didn't view the program last night, I certainly heard about it by 9:00 o'clock this morning. And the reasons that I heard about it were that particularly Judge Walton's remarks seemed to be so unusual; or to put it another way, the remarks justifying the disparity in sentencing between crack cocaine and powder cocaine and the fact that blacks seem to be almost exclusively prosecuted for crack cocaine, you know, it was a remarkable conclusion that Judge Walton reached. And that is to the effect it was justified because black crack use is associated with violence whereas, presumably, whites are staying home and using crack or using it in their offices.

But Judge Walton's comments were extraordinary; and we have the problem, you know, of following up. We have a local judge who presumably is entitled to greater—that is, his opinion carries greater weight than virtually anybody else's. He's somebody who's had intimate experience and, of course, we also know that he worked for the drug czar Bennett.

. . .

Ms. D'Antuono: I also would note that Judge Walton was introduced as not only a sitting judge in the Superior Court of the District of Columbia but said himself that he was Bill Bennett's deputy and that in serving Bill Bennett, he had been all over the United States and found it to be true that the crack trade in the hands of black defendants was almost invariably associated with violence and murder.

And Johnny St. Valentine Brown [the Government's drug expert in this case] announced as one of his credentials that he, too, was on Bill Bennett's staff; so we have that second link here.

Id. at 7-15.

Standard of Review

Failure of the Trial Court to ensure that potentially prejudicial publicity does not impair a defendant's right to a fair trial by an impartial jury is constitutional error because it impacts on the fundamental fairness of the trial process. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6

[6] Counsel wrote to the producer of *Nightline* and called John Zucker, assistant general counsel at ABC, in an attempt to determine whether ABC aired a teaser earlier in the evening and, if so, what it said. Zucker stated that ABC would release such information only in response to a subpoena. Counsel explained that in the context of this appeal he had no authority to subpoena ABC, and the network did not provide the requested information.

L.Ed.2d 751 (1961). This is so whether prejudicial information reaches jurors before the trial begins or mid-trial. *Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

If a trial court takes steps to determine whether prejudicial publicity has reached jurors and to alleviate any threat to the defendant's Sixth Amendment rights, its rulings will be reversed only for abuse of discretion. *See, e.g., United States v. Williams-Davis*, 90 F.3d 490, 501-2 (D.C. Cir. 1996); *United States v. Gaggi*, 811 F.2d 47, 51 (2d Cir. 1987); *Marshall, supra*. As the Fifth Circuit noted, however, in the wake of highly prejudicial media coverage like that broadcast by ABC's *Nightline*,

> [t]he inferences which would naturally flow from the appearance of [news coverage], coupled with a sound regard for the sanctity of the jury system, lead us to presume that some prejudice of impermissible dimension did in fact exist in the jury room when the verdict in this case was decided. We think this presumption is required in light of the district court's refusal to inquire into the matter when the defense requested that course of action; as a result of that refusal, there is nothing on the record before us to indicate that the defendant's guilt was not impermissibly prejudged.

United States v. Herring, 568 F.2d 1099, 1103-4 (5th Cir. 1978). Thus, denial of a motion like that made by Holton's counsel can never be considered harmless error.

Because the Trial Court Took No Steps To Protect Appellant's Sixth Amendment Rights This Court Must Presume They Were Prejudiced

The problem of mid-trial prejudice caused by news coverage was of such great concern that the U.S. Supreme Court exercised its supervisory power over federal courts to order a new trial in *Marshall, supra*, 360 U.S. at 313. In that case, after two newspaper accounts were published, the Trial Court questioned each juror individually and determined that several jurors had seen at least one of the articles, but all stated that they could set aside what they had learned from the articles and decide the case on the evidence. After stating that trial judges have great discretion to rule on whether mid-trial news coverage caused sufficient prejudice to warrant a mistrial, the Supreme Court stated:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the

> defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence . . . . It may indeed be greater for it is then not tempered by protective procedures.

Id. at 312-3 (citations omitted).

A week after the Supreme Court decide *Marshall*, this Court reversed a conviction in a case in which the Trial Judge asked jurors *en masse* whether any of them had read a news account of the case and, after four jurors raised their hands, instructed the jury that they were required to disregard the published information and reach a verdict on the evidence presented in court. *Coppedge v. United States*, 272 F.2d 504, 106 U.S. App. D.C. 275 (1959). It stated that "[t]he court knew which of the regular jurors had read the newspaper articles. No individual inquiry was addressed to these persons as to the possible influence of the articles upon each of them." *Id.* at 508. The panel noted that the news articles

> contained facts which should not have come to the knowledge of the jury. Had they been offered as evidence in court they would not have been admissible. Had they been told to the jurors verbally by outside parties, the admonition which the court gave the jury would have been violated, the jurors would have been punishable if they had not reported the incident, and, had they reported it, a mistrial would have been in order.

Id.

In Holton's case, a juror who saw the *Nightline* program on the first day of the defense case, would have learned that the defendants faced lengthy mandatory sentences, information not admissible at trial. Jurors are routinely told, as the Trial Court did in this case, that they are not to take into account sentencing in rendering a verdict. Tr. 11/6/95, 96. *See Criminal Jury Instructions for the District of Columbia*, 4th Ed. (1993), Instruction 2.74. However, jurors in Holton's case knew the defendants were charged with distributing 277 grams of crack and learned from the *Nightline* program that, if convicted, they would be in prison for at least 10 years.

In addition, over repeated defense objections that none of the defendants was charged with firearms offenses, the Government took every opportunity to introduce testimony that defendants Dennis Davis and Jones had displayed handguns at various times, that Jones and Brian Davis had made statements October 3, 1991 they intended Quander to hear about violence against

police informants, and to introduce ammunition seized October 30, 1991 from the dwellings that were searched. *See, e.g.* Tr. 10/27/95, 32. The purpose of this evidence, prosecutors stated, was to demonstrate to the jury that guns, violence and drugs are invariably linked. Defense counsel argued repeatedly to no avail that such evidence should have been excluded under Fed. R. Evid. 403 because it was not probative of guilt and was highly prejudicial. For a juror exposed to the 30-minute broadcast on the well-respected *Nightline* program, which focused national attention on crack distribution in Washington, D.C., that prejudicial evidence undoubtedly would have been magnified greatly in importance.

Exposure to such damning, prejudicial information was particularly harmful to Holton. The Government had presented evidence that Quander believed Jones had a gun on one occasion and that he had engaged in intimidating conduct toward the undercover officer and Wright October 3, 1991. Quander testified that Davis was armed October 30, and Davis' lawyer had elicited testimony from Government witnesses about allegations that he had engaged in violent acts in the past. No evidence was presented that Holton used firearms or ever engaged in violent conduct, yet he was linked to an alleged conspiracy involving these other violent individuals.

"[J]ury deliberations do not take place in a vacuum, [and] the danger is always present that a jury facing a defendant prone to violence [or selling a drug alleged by a prominent local judge to be responsible for a large number of murders] will base its verdict on a perceived need to protect society." *United States v. McCracken*, 488 F.2d 406, 427 (5th Cir. 1974). Thus, any juror who saw the *Nightline* program would have been exposed to highly prejudicial, inadmissible information about violence related to crack cocaine dealing, and inadmissible information about sentencing. Taken together, the unmistakable message is that jurors concerned about protecting the community should convict, as this Court noted in *Coppedge, supra*, and the Fifth Circuit concluded in *McCracken.*

In Holton's case the trial judge never read to jurors the portion of Jury Instruction 1.03 which admonishes jurors not to read newspaper accounts or listen to broadcast accounts of his case, or Instruction 1.16. Although almost daily the Judge warned jurors before they left court not

to discuss the case with anyone, he never told them to avoid news accounts. *See App. I for a list of the admonitions given.*

The Government undoubtedly will argue that in most cases in which prejudice caused by news accounts becomes an issue, including *Marshall* and *Coppedge*, the stories were about the defendants on trial. But in *United States v. Coast of Maine Lobster Co., Inc.*, 538 F.2d 899 (1st Cir. 1976), the court, exercising its supervisory powers, overturned convictions because jurors had seen news accounts very similar in nature to the *Nightline* program at issue here. In that case, before deliberations began, the U.S. Attorney for Maine, appearing on a local television station, stated that white collar criminals did not receive jail sentences often enough, and the next morning the *Portland Herald* reported on the comments under the headline "Mills: White Collar Criminals Get Off Easy." *Id.* at 900. The U.S. Attorney was not trying the case against Coast of Maine Lobster, and his comments were not directed at that company or its criminal case. But in response to defense counsel's mistrial motion the trial court asked jurors *en masse* whether any had seen the broadcast or the headline. Several admitted having seen the headline and one said he read the article, but all said they could disregard what they had seen and decide the case on the evidence. When considering the prejudicial impact of news coverage,

> The prominence of the publicity is important because it, more than anything else, affects the likelihood of prejudice to the criminal defendant. . . . [T]he nexus between the views as published and the issues in the pending trial must be close enough so that a reasonable person might see an obvious connection.

Id. at 901.[7] *See, also, Hanscomb v. Meachum*, 435 F.Supp. 1162 (D.Mass 1977)(news reports of chief judge's tirade against jury verdict in unrelated case could have prejudicial impact, requiring trial court to prevent prejudice to defendant).

[7] In *Coast of Maine Lobster* the First Circuit overturned the conviction because the statements were made by the U.S. attorney, whose views conflicted with those of the judge presiding over the case, and the prosecutor could have prevented the prejudice by avoiding comment while the case was pending. For purposes of Holton's case the critical point is that courts have a duty to inquire when there is a possibility that jurors were exposed to prejudicial information outside the courtroom.

In *Gaggi, supra,* the Court was confronted with a situation in which one of 10 defendants in an organized crime trial was murdered during the trial. The panel affirmed the Trial Court's finding that none of the publicity arising from the murder was about any of the remaining defendants, and that the death of one defendant was a collateral matter. *Id.* at 52. Noting that

> the district court here took prompt and effective corrective action. Once it saw "a potential for unfair prejudice," it held not one but two, *voir dires* of each juror outside the presence of other jurors, to determine the extent of the juror's exposure to the reports and its effect on his or her attitude toward the remaining defendants.

Id. It added that the judge had repeatedly given the jury cautionary instructions about avoiding news coverage of the case. *Id.* at 53.

In *Herring, supra,* the Fifth Circuit cited with approval *United States v. Titsworth,* 422 F.Supp. 587 (D.Neb. 1976), in which the District Court ordered a new trial after ascertaining that some jurors had seen a broadcast news story stating that a material government witness had appeared apprehensive before the trial and disappeared during the trial, but went on to say investigators did not suspect the disappearance was the result of foul play. 568 F.2d at 1105-6. The Fifth Circuit stated: "All that this means is that the publicity involved in *Titsworth* was potentially less prejudicial than the publicity here in question. Thus, our approval of the district court's action in *Titsworth a fortiori* calls for the reversal of Herring's case," where the judge, like the one in Holton's case, refused to inquire whether any jurors had been exposed to the news coverage. *Herring, supra,* at 1106, n. 17.

As defense counsel argued, a 30-minute television program in which several members of Congress and a well known local judge assert that crack is a unique scourge on society generally and the District of Columbia specifically, and is closely associated with violence and murder, has far greater impact than newspaper stories or editorials about the sentencing disparity. *Id.* Furthermore, empirical evidence contradicts much of what Rep. McCollum and Sens. Feinstein and Hatch said about crack. *See below at 32 - 34.* Even those who opposed the sentencing disparity on the program made no effort to argue that crack does not have a devastating effect on society.

As the Fifth Circuit noted in *Herring, supra*, 568 F.2d 1104, no full blown due process inquiry was required by the Trial Judge in Holton's case because the publicity occurred on one occasion and was not pervasive in the community. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1057, 16 L.Ed. 2d 600 (1966); *Irvin, supra*, *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed 2d 543 (1965); and *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). But the Trial Court was not free to ignore the *Nightline* broadcast and proceed with the trial merely because jurors at the outset had been found to be impartial and untainted. The appropriate procedure for such circumstances, the one the Fifth Circuit adopted, was the ABA Standards Relating to Fair Trial and Free Press § 3.5(f)(1968). It involves a two-step inquiry. The first step "should focus on the nature of the material," and "The critical question here is whether that material 'goes beyond the record . . . and raises serious questions of possible prejudice' to the litigants." *Id.* at 1104. If the judge concludes that the news coverage "raise[s] serious questions of possible prejudice," the second step is to "determine the likelihood that the damaging material has in fact reached the jury." *Id.* at 1104-5.

This is the procedure suggested by Holton's counsel and endorsed by this court in *Williams-Davis, supra*, 90 F.3d at 501-2. But the Judge rejected it out of hand despite his comment that he had expected one of the lawyers to raise the issue of media coverage of the sentencing issue earlier, which demonstrates that the judge viewed the issue as a potential problem, even before the broadcast. Furthermore, in response to counsel's request for a *voir dire* the Judge did not conclude that no prejudice could possibly result from exposure of one or more jurors to the broadcast.

Under such circumstances the Trial Judge was required to ask if any jurors saw the *Nightline* program. Doing so would have taken very little time and presented no risk of prejudice to the defendants or the Government. Only if one or more of the jurors answered "yes" to that question would the judge have been bound to inquire further. Furthermore, at that point in the proceedings two alternate jurors were available in case a juror who saw the program had to be dismissed.

THE MANDATORY MINIMUM SENTENCES FOR DISTRIBUTION OF CRACK COCAINE IN 18 U.S.C. § 841(b)(1) VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT

The Fifth Amendment guarantees that "no person shall be . . . deprived of . . . life, [or] liberty . . . without due process of law." This provision includes the right to equal protection of the law, *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed.2d 884 (1954), which is "a direction that all persons similarly situated should be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). In cases like the one at bar, where a law has a grossly disproportionate impact on one racial group, and where there are strong indications that the disparity is the result of an irrational statutory distinction and discriminatory enforcement, that mandate of the Fifth Amendment is not being carried out.

The U.S. Sentencing Commission has recommended to Congress significant changes in sentences for crack cocaine possession and distribution, mainly based on its conclusion that there is no rational basis for the severity of sentences imposed on defendants in crack cases relative to sentences imposed on defendants who committed similar crimes involving powder cocaine. The Commission's conclusions are borne out by a review of scientific data, Hatsukami and Fischman, *Crack Cocaine and Cocaine Hydrochloride: are the Differences Myth or Reality?*, J.A.M.A., Vol. 276, No. 19, Nov. 20, 1996, 1580 (referred to below as "JAMA").

Congress acted in October 1995 to block implementation of proposed Sentencing Guideline amendments designed to make sentences for simple possession of crack the same as sentences for possession of comparable amounts of powder cocaine. Furthermore, despite strong warnings from the Sentencing Commission in 1991 and again in February 1995 that the mandatory minimum sentences imposed for distribution of crack have had a grossly disparate impact on racial minorities, Congress has failed to take any action to ameliorate the discriminatory impact of the sentencing structure imposed by 21 U.S.C. § 841(b)(1).

That statute is among a very small number of federal laws under which defendants receive

mandatory-minimum sentences with regularity.[8] The sentencing provisions were added in 1986 to target "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities" of narcotics, so-called drug kingpins, for mandatory sentences ranging from 10 years to life in prison without possibility of parole. *Cocaine and Federal Sentencing Policy,* U.S. Sentencing Commission, February 1995, at 118 (referred to below as the "*Cocaine Policy Report*"). "[M]anagers of the retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities," were considered "serious traffickers" subject to mandatory minimum sentences ranging from five to 10 years. *Id.* The primary factor that triggers the mandatory minimum sentence is the quantity of drugs involved, and Congress established different minimum quantities for each type of drug, purportedly based on an assessment of the relative danger each drug posed.

So, for example, distribution of only 50 grams of crack cocaine, (100 to 500 doses) would subject a first-time drug offender to the 10-year minimum sentence, while distribution of 5 kilograms (25,000 to 50,000 doses) of powder cocaine would be required to subject a first-time offender to the same penalty. A person would have to distribute at least one kilogram of heroin to receive a 10-year mandatory sentence. Thus, the penalties for distribution of crack cocaine are 100 times as severe as those for distribution of powder cocaine, and 20 times as severe as those for distribution of heroin.

Standard of Review

This Court has ruled that the mandatory-minimum sentencing provision of 21 U.S.C. § 841(b)(1) does not restrict exercise of a fundamental right or "use a criterion for classification which itself violates a fundamental constitutional value." *Thompson v. United States,* 27 F.3d 671, 307 U.S. App. D.C. 221 (D.C. Cir. 1994). Therefore, it concluded that it need only ask

[8] Four statutes, § 841, 21 U.S.C. § 844 dealing with possession of controlled substances, 21 U.S.C. § 960 dealing with importation and exportation of controlled substances, and 18 U.S.C. § 924(c) providing enhanced penalties for using or carrying firearms in connection with drug trafficking or violent crimes, accounted for 94 percent of cases in which mandatory minimum sentences were imposed by federal courts from 1984-90. *Mandatory Minimum Penalties in the Federal Criminal Justice System,* U.S. Sentencing Commission, August 1991, at 10 (referred to below as the "Mandatory Minimum Report").

"whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution." Ronald D. Rotunda & John O. Nowak, *Treatise on Constitutional Law*, ¶ 18.3, at 14 (3d Ed. 1992).

Congress Lacked a Rational Basis for the Sentencing Disparity Between the Two Forms of Cocaine

The Sentencing Commission's discussion of the legislative history of § 841(b) provides proof that Congress lacked a rational basis for the 100:1 ratio. *Cocaine Policy Report*, at 111-26.

Historical Background of the 100:1 Ratio

The Commission found that the first media mentions of crack cocaine occurred in 1984, and that by 1986 large amounts of media coverage were devoted to it. One report dubbed crack "America's drug of choice," at a time when statistical evidence indicated that 95 percent of cocaine users preferred to snort powder cocaine. *Cocaine Policy Report, supra*, at 122.
The Anti-Drug Abuse Act of 1986 established the mandatory minimum penalties applicable to federal drug trafficking crimes and the 100:1 quantity ratio between powder and crack cocaine. The original house bill, H.R. 5484, would have established a 50:1 ratio, and a bill introduced on behalf of the Reagan Administration, S. 2849, would have set the ratio at 20:1. *Cocaine Policy Report, supra*, at 116-7. The Commission reported that there was little debate over the 1986 act, no legislative committee prepared a report analyzing its key provisions, and it was expedited through Congress, largely due to public opinion and media coverage of the death of basketball star Len Bias in June 1986, *Id.*, and football player Don Rogers of the Cleveland Browns. *Id.* at 121. In fact, Bias died of cocaine intoxication caused by snorting powder cocaine. *Id.* The legislative history includes no discussion of the 100:1 ratio, *Id.* at 117, although Florida Sen. Lawton Chiles, a leader in the fight for stringent crack penalties, said the 100:1 ratio was needed "because of the especially lethal characteristics of this form of cocaine." *Id.* at 120..

The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), extended the mandatory minimum penalties in § 841(b)(1) to conspiracies and attempts, and amended 21 U.S.C. § 844 to include mandatory minimum sentences for simple possession of crack, but no

other narcotics. *Id.* at 123. A first-time offender convicted of possessing five grams of crack would receive a minimum five-year sentence. The original versions of the 1988 act did not include mandatory minimums for possession of crack; they were added through amendments from the floor in both houses despite Justice Department opposition. Proponents of the new crack possession penalty "argued that the supply of [crack] 'cocaine' was greater than ever. Second, it was argued that crack cocaine 'causes greater physical, emotional, and psychological damage than any other commonly abused drug.' Finally, . . . it was argued that 'crack [cocaine] has been linked to violent crime.' " *Id.* at 125 (footnotes omitted).

In floor debate over H.R. 2259, 104th Cong., 2d Sess. (1995), in October 1995, Rep. Shaw of Florida stated:

> [W]e found the instant addictive nature of this substance was absolutely debilitating. We also found that where it was being used most, and where it was creating its worst problems were in minority areas because of the cheapness of it. . . . We set quantities we felt that would qualify people as dealers; not users but dealers, people who were going in and exploiting the poor people and stealing their lives and their future by selling them crack cocaine.

141 Cong. Rec. (daily ed., Oct. 18, 1995) H 10260. Regardless of the beneficent purpose of the crack penalty, it was eminently foreseeable that its primary impact would be on members of minority groups.

Thus, it is clear that, in enacting the crack penalty in 1986 and extending it in 1988, Congress acted without due deliberation. It hurried bills to the floor with limited committee review and no reports analyzing their impact and effectiveness, and it appears to have established the 100:1 ratio arbitrarily. Then, in applying that arbitrary quantity ratio to prosecutions for possession of crack, it disregarded the advice of the federal agency most directly involved in law enforcement, and the foreseeable disparate impact §§ 841 and 844 would have on members of minority groups.

The same myths that drove the debate and legislative action a decade ago fueled the successful effort to block implementation in 1995 of the proposed Sentencing Guidelines that would have eliminated the 100:1 ratio for defendants convicted of possessing small amounts of

crack. Although the Sentencing Commission in February presented Congress strong evidence that § 841(b)(1) has a grossly disparate impact on minority criminal defendants and that the 100:1 quantity ratio is constitutionally insuperable, Congress has demonstrated no inclination to seriously reconsider the mandatory minimum sentencing structure in § 841.

Justifications Given for the 100:1 Ratio

In October 1995, Rep. McCollum, chairman of the Subcommittee on Crime, led floor debate against the guideline amendments, stated: "The fact of the matter is we have minimum mandatory sentences for the crack crystal form of cocaine, which is the most deadly, most addictive, most dangerous, most widely used, and the one we want to get at the most." 141 Cong. Rec., *supra,* H 10259.

Rep. Bryant of Tennessee added that "Crack cocaine accounts for many more emergency room visits than powder cocaine, and importantly crack is cheap. It is popular among teenagers, and it is most likely to be associated with violent crimes, burglaries, carjackings, drive-by shootings, whatever." *Id.* at H 10266. Other concerns voiced by Rep. Pryce of Ohio were that "crack dealers have more extensive criminal records than other drug dealers and they tend to use young people to distribute the drug at a greater rate." *Id.* at H 10256.

Thus, Congressional opponents of reducing the 100:1 ratio expressed the view that crack is unique because: 1) it is more addictive than powder cocaine and, seemingly, heroin; 2) it poses a greater health hazard to users; 3) marketing it in single-dose amounts makes it more accessible, particularly to inner-city youth; 4) it leads to more violent crime; and 5) dealers use youths as distributors.

Empirical Evidence Contradicts Most Justifications for the 100:1 Ratio

Crack and Addiction

Powder cocaine is ingested, snorted or injected, and crack cocaine is only administered by inhalation (smoking). Among individuals reporting cocaine use at least once in 1991, 76 percent said they snorted powder cocaine, about 28 percent reported smoking crack, 10.5 percent injected powder and 10.8 percent ingested powder. *Cocaine Policy Report, supra,* at 36. According to the

report, injecting powder cocaine and smoking crack have comparable psychotropic impact and are the methods of use most likely to lead to addiction. *Id.* at 28. The Sentencing Commission stated that the relatively greater chance of addiction due to crack use "is not a reliable basis for establishing longer penalties for crack cocaine, because powder cocaine may be injected and injection is even more likely to lead to addiction than is smoking." Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,077. *See, also, JAMA, supra,* at 1582-3

Emergency Room Treatment and Deaths

In 1991, 38.2 percent of cocaine-related emergency room admissions involved smoking crack, 17.5 percent involved injected powder cocaine and 11.3 percent involved snorting cocaine, making it appear that crack is the most likely form of cocaine to cause injury requiring medical treatment. *Cocaine Policy Report, supra*, at 184. But, because nearly three times as many people use crack as inject powder, a larger percentage of those who are intravenous cocaine users seek hospital treatment. Furthermore, intravenous use of powder caused 12.7 percent of cocaine-related deaths, and smoking crack caused only 4.3 percent. As the death of basketball star Bias indicates, snorting powder cocaine can be fatal as well. *Id. See, also, JAMA, supra,* at 1584-5

Availability in Single Doses Encourages Use by Inner-City Youth

Members of Congress repeatedly stated that crack is "cheap" and, therefore, affordable by the poor and young children because crack can be bought in single doses for $5 to $20, but powder cocaine is usually sold in units of one gram at street prices of $65 to $150. *Id.* at 85. Data provided by the Sentencing Commission indicates that a gram of crack, two to five doses, costs about the same amount as a gram of powder cocaine, which is also two to five doses, making the former no less expensive.

But the critical fact never mentioned in debate is that use of cocaine in both forms has been declining steadily among adults and young people. *Id.* at 35.

Crack and Crime

The Sentencing Commission data indicates that use of crack cocaine does not produce more psychotic or compulsive crime than use of powder cocaine, and that use of alcohol often results in more violent crime and use of heroin results in more economic crime. *Id.* at 98-102. Violent crime associated with crack cocaine is predominantly systemic, "violence associated with the black market and distribution." *Cocaine Policy Report* at 95. It is related to economic regulation and control of the marketplace. But because many crack dealers also sell powder cocaine it is difficult, if not impossible, to determine the level of violence associated with crack specifically. *Id.* Based on expert testimony, the Commission stated that "Whatever conclusions are drawn about current levels of systemic violence in the crack cocaine market relative to levels for the current powder cocaine market, researchers have tended to agree that, from a historical perspective, crack cocaine is not unique." *Id.* at 108. *See, also, JAMA, supra*, at 1585-6

Youths in the Distribution Chain

According to the Commission, researchers in New York City found great similarity between retail sellers of crack and powder cocaine: that they were primarily poor, minority youths under 18 years old. *Id.* at 68. Although many sell both forms of cocaine, more sell crack. *Id.* at 83. But, the report noted, "Recent research suggests that the use of teenagers to sell crack cocaine may have plateaued, particularly as retail profits decrease and as social norms develop against 'crack heads' and those who sell to them." *Id.*

After evaluating all of these factors, the Sentencing Commission concluded that "sufficient policy bases for the current penalty differential do not exist." 60 Fed. Reg., *supra*, at 25,076. The anecdotal information on which Congress acted in 1986 and 1988 has been replaced by nearly a decade's accumulation of empirical data that does not support the assumptions on which the 100:1 ratio is based. The authors of the JAMA article stated that the method of use of cocaine, rather than its form, is the most critical factor in assessing the relative danger of crack and powder cocaine. *JAMA, supra*, at 1581. They concluded that the data might support a ration of 2:1 or 3:1, *Id.* at 1588, but "the current federal sentencing guideline that markedly

differentiates the penalties for crack cocaine and cocaine hydrochloride is not warranted." *Id.* at 1586.

CONCLUSION

For the reasons stated above and any others that might appear to the Court after oral argument, Appellant respectfully requests that his conviction be vacated and that the case be remanded for a new trial. If the Court concludes that his conviction should stand, Appellant requests that the Court rule that the mandatory-minimum sentence imposed pursuant to § 841(b)(1) is unconstitutional and remand his case for resentencing to a non-mandatory sentence under the U.S. Sentencing Guidelines.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28(D)

I hereby certify that the foregoing Brief is in compliance with the word count established by D.C. Circuit Rule 28(d) for parties' main briefs.

_____
Robert Becker

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Bobby A. Holton, certify that on December 19, 1996 I served two true copies of the attached Brief of Appellant by first-class mail on counsel listed below.

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A D D E N D U M

TITLE 21. FOOD AND DRUGS
CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL
OFFENSES AND PENALTIES

21 USCS § 841 (1996)

§ 841. Prohibited acts A

. . .

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(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);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram 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 or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of

such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(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);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 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 and not more than 40 years and if death or serious bodily injury results from the use of

such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has

become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 100,000 if the defendant is an individual or $ 250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 200,000 if the defendant is an individual or $ 500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [21 USCS § 844] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;

(C) $ 500,000 if the defendant is an individual; or

(D) $ 1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.