NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Bobby A. Holton

Petitioner,

VS.

United States,

Respondent,

On Petition for Writ of Certiorari
To the U.S. Court of Appeals
For the District of Columbia Circuit

Petition for Writ of Certiorari

Robert S. Becker
Counsel of Record
5505 Connecticut Avenue, N.W.
No. 155
Washington, D.C. 20015
(202) 364-8013
Attorney for Petitioner
(Appointed by the Court)

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QUESTIONS PRESENTED

1. Whether the Trial Court, by permitting unsupervised jurors to read incomplete audiotape transcripts while listening to the tapes during deliberations, violated Petitioner's Fifth Amendment right to due process of law.
2. Whether, in violation of the holdings of this Court, the Court of Appeals improperly shifted the burden of proof to Petitioner to demonstrate that the Trial Court's error in admitting the transcripts was prejudicial to his defense, rather than placing the burden on the Government to demonstrate the harmlessness of the error beyond a reasonable doubt.
3. Whether, in light of evidence that 21 U.S.C. § 841(b)(1) has a grossly disparate impact on black defendants and there is no rational basis for the distinction it draws between powder and crack cocaine, Petitioner’s right to equal protection of the laws under the Fifth Amendment was violated by imposition of a mandatory-minimum sentence for distribution of more than 50 grams of crack cocaine, when, had he distributed the powder form of the same drug, he would have received the same sentence only after being convicted of distributing more than 5 kilograms of the drug?

LIST OF PARTIES

In addition to Petitioner and Respondent, codefendant Dennis Davis was involved in the trial and appeal to the U.S. Court of Appeals for the District of Columbia Circuit. Three others were indicted, Davis' brother Brian Davis, who was acquitted in the first trial of this case, Vincent Jones, who was acquitted in the second trial, and Brenda Smith, who died shortly after the indictments were returned in 1991.

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OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at *United States v. Holton*, 116 F.3d 1536 (D.C. Cir. 1997), and is reproduced in the Appendix to this Petition (App. A-1 to A-13).[1]

JURISDICTION OF THE COURT

The judgment of the U.S. Court of Appeals was entered June 27, 1997. The Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion of Rehearing *en Banc* September 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] References to the Appendix to this petition are in the form "App." followed by the page number. References to the trial transcript are in the form "Tr." followed by the date of the proceeding and the page number.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is the Fifth Amendment to the U.S. Constitution, which states in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Pursuant to 21 U.S.C. § 841(a) in pertinent part, "it shall be unlawful for any person knowingly or intentionally — (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance…" Also at issue is 21 U.S.C. § 841(b), which states in pertinent part:

> § 841. Prohibited acts A
>
> . . .
>
> (b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420, 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;
>
> . . .
>
> 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 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.

STATEMENT OF THE CASE

INTRODUCTION

In *United States v. Holton*, 116 F.3d 1536, 1542-3 (D.C. Cir. 1997)(App. A-5 to A-7), the Court of Appeals announced a new, clear procedure for trial judges in the D.C. Circuit to follow to determine whether jurors may use transcripts of audiotape evidence as aids to understanding while listening to the tapes in deliberations. Although the Panel found that the Trial Judge in Petitioner's case could not have anticipated the new rule, it held that he failed even to follow the standards previously set out 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), for deciding to permit use of the transcripts at trial. Therefore, allowing juror use of the transcripts at trial and during deliberation, when no one was in the courtroom but the jurors and the Judge's law clerk, was an abuse of discretion. Stating that it was applying the standard of review set out in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), the Panel erroneously concluded that the Trial Court's error was harmless.

Petitioner continues to believe, as he argued in the Court of Appeals, that permitting unsupervised jurors under these circumstances to read the Government's audiotape transcripts while listening to tape recorded evidence in deliberations violated his right to due process under the Fifth Amendment. However, whether the error was of constitutional dimensions or a trial error reversible only for abuse of discretion, as the Court of Appeals held, the issue this Court must address is whether it prejudiced Petitioner's defense.

The Panel's decision that Petitioner was not prejudiced by the Judge's error conflicts with this Court's holdings in both *Kotteakos, supra*, and *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). It erroneously imposed the burden of demonstrating prejudice on Petitioner, even though both standards create a rebuttable presumption that the error was prejudicial. In so doing, the panel appears to have applied the plain error standard. *See United States v. Olano*, 507 U.S. 725, 734-5, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *O'Neal v. McAninich*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947, 954 (1995).

If this Court does not conclude that Petitioner is entitled to a new trial, due to the great significance nationally of the racial disparity in sentencing of defendants convicted of distributing crack cocaine, he requests that the Court determine, in light of the findings of the U.S. Sentencing Commission in 1995 and in early 1997, and recent actions in Congress, that 21 U.S.C. § 841(b)(1) violates the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution insofar as it imposes grossly disparate sentences on defendants convicted of distributing crack as opposed to powder cocaine.

Petitioner will argue that the legislative history of the so-called crack penalty warrants application of a more stringent standard than rational basis analysis. However, even if this Court were to conclude that the rational basis test is appropriate, it should be guided by the Sentencing Commission's determination, based on the legislative history and empirical data, and the findings of independent medical researchers that there is no rational basis for the crack penalty.

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, 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., five times from codefendant Dennis Davis and once from Holton.

According to Brennan, police learned from a drug dealer turned informant that Davis was selling narcotics in Barry Farms. NSID devised a plan under which the informant would introduce Quander, masquerading as a drug dealer named Darnell, to Davis, and Quander would attempt to buy PCP from him. Tr. 10/4/95, 123.

Quander testified that he and the informant drove to Barry Farms in the early evening of October 3, 1991 to locate Davis. Tr. 10/6/95, 114. While they were negotiating to purchase PCP, Brian Davis, Holton and Vincent Jones were making street sales of small quantities of crack to people who drove up to them, according to Quander. *Id.* at 119, 128. Davis said he no longer

dealt in PCP, but agreed to sell them crack cocaine instead. In two transactions that evening Quander and the informant bought an aggregate amount of 1 ounce of crack from Davis for $1,000. *Id.* at 141.

Quander testified that late the next day he and the informant 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. After a brief telephone conversation with Davis, Quander and the informant returned to Barry Farms to complete the deal. *Id.* at 77. According to Quander, he gave Davis the money and the latter told Holton to count it while he went to a house on the courtyard to get the drugs. When Davis returned with the drugs, Holton nodded to him that the money was correct, and Davis gave Quander a package containing crack, the undercover officer said. *Id.* at 79.

Quander and the informant returned October 16, 1991 and signaled to Davis that they wanted to buy two ounces of crack. *Id.* at 96. Holton made only a brief appearance while Quander and the informant were waiting for Davis to return with the drugs, for which they paid $2,000. Tr. 10/11/96, 98.

Quander said he called Davis' beeper number October 23, 1991, 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 the detective admitted that when he identified himself as "Darnell," Bee-Bee did not understand who he was until Quander said he was the person driving the white Nissan 280Z, the car he and the informant had used in the three previous trips to Barry Farms to buy drugs. *Id.* at 114. When 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, went to the 1300 block of Stevens Road. *Id.* at 119. Curtis stayed in the parked car as Quander met Holton on the street and a short time later entered the courtyard near 1361 Stevens Road, S.E.. *Id.* at 123. According to Quander, 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.

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. When Quander and Curtis arrived in the 1300 block of Stevens Road, 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 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 his car 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.

PROCEEDINGS BELOW

Petitioner was arrested October 30, 1991 on a warrant along with Dennis Davis and Brenda Smith. He 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).

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, but the Trial Court denied these motions in orders issued April 16, 1992. In a status hearing prior to trial the Government stated that it would play tape recordings of telephone conversations 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. At the conclusion of the 10-day trial, the jury May 6, 1992 convicted Dennis Davis, Holton and Jones on all charges and acquitted Brian Davis of all charges.

Holton was sentenced 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. 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(a), because they are lesser included offenses.

Finding that the Trial Court's reasonable doubt instruction did not comport with constitutional requirements, the D.C. Circuit vacated the convictions of Petitioner, Dennis Davis and Jones November 23, 1994 and remanded their cases for a new trial.

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, but later denied all of the pretrial motions.

The second trial began October 3, 1995. 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 Quander's attributions.[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

[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)."

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.

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. Counsel for Petitioner and Davis had already made their final arguments. Jurors sent a note to the Judge November 8 asking to hear the tapes, but making no mention of the transcripts. Following an off-the-record, *in camera* discussion with 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. Holton was resentenced January 16, 1996, and received the same sentence as had been imposed following the first trial. He filed a timely notice of Appeal January 25. The D.C. Circuit ruled June 27, 1997 that the Trial Court abused its discretion in permitting jurors during the trial and deliberations to read the audiotape transcripts while listening to tape recordings, but it concluded that the error was harmless and affirmed Petitioner's conviction. The Court of Appeals denied Holton's Petition for Rehearing and Suggestion of Rehearing *en Banc* September 17, 1997.

REASONS FOR GRANTING THE PETITION

In its opinion the D.C. Circuit established procedures for trial judges to follow in ruling on whether transcripts may be given to jurors as aids to understanding of tape recorded evidence. It then stated:

> Although we recognize that the district court could not have anticipated the rule we lay down today, we find that the trial court failed to meet the standards previously set forth in *Slade* for the use of a transcript during trial. A careful reading of the transcript reveals that the trial judge acknowledged that the tapes were sufficiently audible and intelligible to be played to the jury and that the transcripts would aid the jury in listening to the tapes, but that he never explicitly found that the transcripts accurately reflected statements recorded on the tapes or that the attributions in the transcripts were accurate

116 F.3d at 1543. In fact, the Panel found, "[t]here was no way . . . for the judge to know whether the attributions of certain voices to certain defendants was accurate" because Det. Quander had not yet testified, and the Judge did not "condition his accuracy 'finding' on subsequent proof that the attributions were correct or ever revisit the issue." *Id.* at 12. Thus, "the district judge did not follow any of the procedures described in *Slade* that *must precede the jurors being given the transcripts.*" *Id.* (emphasis added).

In short, the Panel ruled that the Trial Court abused its discretion in permitting jurors during trial to use the Government-prepared transcripts as aids to understanding body-wire recordings introduced as evidence against Petitioner. Furthermore, although the Panel did not make a specific finding on this point, it clearly held that the Trial Judge abused his discretion again in the final hours of the five-week-long trial, after counsel for Holton and Davis made their final arguments, by permitting jurors during deliberations to read the transcripts while replaying the tapes.

PERMITTING UNSUPERVISED JURORS TO READ TAPE TRANSCRIPTS DURING DELIBERATIONS DEPRIVED PETITIONER OF HIS FIFTH AMENDMENT DUE PROCESS RIGHT

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.

In Petitioner'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. She argued that the transcripts were not in evidence and, like other exhibits marked but not admitted, should not go to the jury. She noted that this was a "one witness case," and the transcripts are prior consistent statements of Quander, who recites in the transcripts what is on the tapes and assigns names to the voices.

As the D.C. Circuit stated in *United States v. Dallago*, 427 F.2d 546, 553, 138 U.S. App. D.C. 276 (D.C. Cir. 1969), "the jury room must be kept free of evidence not received during trial, and … 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).

The error in permitting jurors to use the transcripts in deliberations had even greater significance. The Judge's final instructions to the jury on use of the transcripts in deliberations stated: "Transcripts of … 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 the speakers*." *Holton, supra*, 116 F.3d 1545 n. 1 (emphasis added). In his note explaining the procedures for listening to the tapes and informing jurors that the transcripts would be made available, the Judge directed jurors to reread that instruction.

Thus, although the Trial Judge never attempted to verify the accuracy of attributions in the transcripts, as the Panel concluded, he advised jurors they could rely on those attributions in evaluating the tape recorded evidence. In effect, the Judge resolved for jurors a central factual

issue in the case, whether Petitioner was present and made the statements attributed to him by Quander, the only witness called to testify about the meetings and the person who assigned attributions in the transcripts.

The D.C. Circuit opinion discusses at length the risks to substantial rights posed by failure to follow proper procedures in determining whether to permit introduction of the audiotape transcripts.

> The principal risk of indiscriminately permitting the use of transcripts by jurors is that in the case of a poor quality or unintelligible recording, the jurors may substitute the contents of the more accessible, printed dialogue for the sounds they cannot readily hear or distinguish on the tapes and, in so doing, transform the transcript into independent evidence of the recorded statements. . . . A related risk arises when a transcript attributes incriminating statements to a defendant that the defendant does not admit making . . . Placing a transcript in the jury room during deliberations—after the completion of the supervised, adversarial portion of the trial—opens up the possibility that jurors will see the transcript as a neutral exhibit placed before them by the court and increases the chance that the document will be read without the tape recording playing alongside for the purpose of comparison.

Id. at 1540-41 (citations omitted).

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. It was as though Quander, who prepared the transcripts and assigned attributions to the recorded statements, had gone with them to the jury room. *See United States v. Ware*, 247 F.2d 698 (2d Cir. 1957), and *United States v. Adams*, 385 F.2d 548 (2d Cir. 1967).

The Trial Court's procedure for permitting jurors to rehear the tapes during deliberations in addition created the risk that jurors would place greater emphasis on the tape recorded evidence in its most intelligible form. *See 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). Furthermore, delegating to the Judge's law clerk responsibility for replaying the tapes amounted to an abdication of the Trial Court's responsibility to protect

Petitioner's constitutional rights. *See, e.g., United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996); *Riley v. Deeds*, 56 F.3d 1117, 1119-20 (9th Cir. 1995).

THE PANEL REPEATEDLY AND ERRONEOUSLY PLACED THE BURDEN ON PETITIONER TO PROVE THE ABSENCE OF PREJUDICE, IN EFFECT, APPLYING PLAIN ERROR ANALYSIS

Ruling that the Trial Court's mishandling of the transcripts at trial and during deliberations was an abuse of discretion that "affected" "substantial rights," the Panel held that it was required to determine whether the abuse of discretion prejudiced Petitioner. Because trial counsel repeatedly objected to use of the transcripts at trial and adamantly opposed the Judge's decision to send them to the jury room, the Panel was required to apply harmless error analysis in making that determination.

Thus, the Court of Appeals arrived at roughly the same point it would have if it had correctly concluded that Petitioner's Fifth Amendment right to due process had been violated. But, because it found only an abuse of discretion, the Panel incorrectly concluded that it could choose which harmless error standard to apply.

The Supreme Court has enunciated two tests for assessing whether an error was harmless: one for use when the error affected constitutional rights, *Chapman, supra*; and the other applicable in all other circumstances arising under 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a), *Kotteakos, supra*. The Court stated in *Chapman* that "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Supra*, 386 U.S. at 24. The less-strict test of *Kotteakos* states that "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected," *Supra*, 328 U.S. at 764. If the error "had substantial influence," or if the reviewing Court is "left in grave doubt" about whether it did, "the conviction cannot stand." *Id.*

The decision about which test is appropriate is not based on the specific violation, but on the effect of the violation on a defendant's rights.[3] Thus, an error resulting from violation of a statute, rule of procedure or rule of evidence, not in itself of constitutional proportions, may require analysis under *Chapman* because of its effect on interests protected by the Fourth, Fifth or Sixth amendment. *See, e.g. Arizona v. Fulminante*, 499 U.S. 279, 306-7; 113 L.Ed.2d. 302 (1991)(opinion of Rehnquist, C.J., for the Court)(collecting examples); *Bustamante v. Cardwell*, 497 F.2d 556 (9th Cir. 1974)(defendant not present when jurors reinstructed in violation of Fed. R. Crim. P. 43(a)).

Because the error seriously compromised Petitioner's due process right, the Court of Appeals was required to apply the *Chapman* test, even though it considered the Trial Court's action to be an abuse of discretion.

Under either the *Chapman* test or the *Kotteakos* test the Government bears the burden of demonstrating that the error did not prejudice Petitioner. "Both of those cases . . . plac[e] the risk of doubt on the state." *O'Neal, supra*, 130 L.Ed.2d at 954. *See, also, Olano, supra*, 507 U.S. at 734-5 (explaining difference between requirements of Fed. R. Crim. P. 52(a) and 52(b)).

But the Panel reversed the presumption, imposing on Petitioner the duty to demonstrate prejudice and, finding that he had not, reaching its conclusion that the error resulting from the Trial Court's abuse of discretion was harmless.

ERRORS IN EVALUATING TRIAL EVENTS

That the Panel shifted the burden is evident from its primary conclusion — that "the facts of this case do not suggest that the court should presume prejudice. . . ." *Holton, supra*, 116 F.3d at 1544. The Panel's reasoning relied heavily on the D.C. Circuit's decision in *United States v. Treadwell*, 760 F.2d 327, 245 U.S. App. D.C. 257 (D.C. Cir. 1985), which applied a very diluted

[3] For example, in *United States v. Lane*, 474 U.S. 438, 461, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) Justice Brennan noted in dissent that misjoinder in violation of Fed. R. Crim. P. 8 does not usually amount to constitutional error and, therefore, is usually evaluated under the *Kotteakos* test. However, he cited *Bruton v. United States*, 391 U.S. 125 (1968), and noted that misjoinder might be so egregious in a particular case as to violate due process and require analysis under the *Chapman* test. *Id.* at 462 n. 3.

version of the *Kotteakos* standard, and the Supreme Court's decision in *Olano, supra*, in which the Court applied plain error analysis appropriate under Fed. R. Crim. P. 52(b), not the harmless error standard applied under Rule 52(a).

The Panel had two bases for concluding it should not presume that exposing deliberating jurors to the Government's transcripts was prejudicial. First, it said, "[t]he record 'provides substantial support for the relative accuracy of the transcripts." *Holton, supra*, 116 F.3d at 1544 (citing *Slade, supra*, 627 F.2d at 303). But in *Slade*, the Court ruled that it was not an abuse of discretion to have permitted jurors, under the watchful eyes of the judge and counsel at trial, to use the transcripts as aids to understanding the tape recordings and, therefore, it never reached the issue of whether, under other circumstances, juror exposure to the transcripts might be considered prejudicial.

Second, the Panel stated it would not presume prejudice in Petitioner's case because "the information on the tapes was only a portion of a larger set of facts that the prosecution put before the jury through proper means." *Holton, supra*, 116 F.3d at 1544. The Panel noted that when Holton was arrested he was beside the "open driver's door of an Acura automobile in which a cellular telephone used in the drug transactions was found," and that he had $559 in his possession. Neither the Acura, which was parked near the site of the transactions on more than one occasion, nor the cellular phone belonged to Holton, and codefendant Jones was acquitted although he was seated in the Acura using the phone when police made the arrests. The Government offered no evidence that Holton was unemployed, and its witnesses testified that the money confiscated from him did not include any of the marked money paid by Quander for drugs during the month-long investigation. Furthermore, Det. Curtis did not corroborate Quander's testimony that either Holton or Jones had been involved in the October 30 transaction.

The Panel relied heavily on the Government's version of Davis' arrest after jumping out a window of 1361 Stevens Road, S.E., to support its holding that there was sufficient evidence to convict Holton. The Government had presented a much stronger case against Davis in terms of the quantity and quality of evidence. Members of the arrest team had testified that when they

entered 1361 Stevens Road, S.E. they saw Davis emerge from a second floor bathroom where they later found crack cocaine. They said he then ran down a hall with officers in pursuit and jumped out a window. Other officers immediately stopped Davis when he landed on the ground and found in his pocket the $3,000 in marked currency received from Quander. None of this evidence had any bearing on Holton's involvement in the transaction.

Petitioner submits that the Panel's heavy reliance on *Treadwell* for the proposition that evidence erroneously sent to the jury room did not prejudice him because the Government put on other evidence by proper means is misplaced. *Treadwell* was a complex fraud case in which the Government had admitted numerous documents as evidence of the crimes. A document not admitted into evidence, a summary used by a witness to illustrate a particular point, was included with exhibits sent to the jury room during deliberations. The Court ruled that the summary was cumulative of other evidence presented at trial and rejected defendants' claims that it was a summary of the government's "theories of liability" which gave the prosecution an advantage. In reaching this conclusion the *Treadwell* Court distinguished that case from two Second Circuit cases, *Ware*, *supra*, and *Adams*, *supra*. It stated,

> the documents here did not summarize the government's entire case against the defendants as it did in *Ware* and *Adams*, both of which involved the simple charge of possession and sale of narcotics and hinged almost entirely on the testimony, fully summarized on the envelopes, of undercover agents who had purchased the illegal drugs.

Treadwell, supra, 760 F.2d at 340.

In *Ware* and *Adams* trial judges admitted into evidence envelopes in which investigators had sent suspected narcotics to chemists for analysis. The envelopes included investigators' notes about the circumstances of the seizures. The transcripts in Petitioner's case are far more similar to the evidence envelopes in *Ware* and *Adams* because they reflect the government version of what occurred in four of the six alleged transactions, as set out by the only Government witness who could testify about the transactions, including who was present and what each person supposedly said. In *Ware* the Second Circuit said,

> the error in this case was compounded by the fact that the jury was permitted, over objection by the defendant, to have the exhibits in the jury room during its deliberations.

> The jury thus had before it a neat condensation of the government's whole case against the defendants. The government's witnesses in effect accompanied the jury into the jury room. In these circumstances we cannot say that the error did not influence the jury to the defendants' detriment, or had but very slight effect.

Id. 247 F.2d at 701.

Furthermore, only where an appellate court can state that the Government has produced overwhelming evidence of guilt can it conclude, arguably without putting the Government to the test, that jurors were not prejudiced in such circumstances. *See Sawyer, supra*, 303 F.2d at 395. In cases like Petitioner's, where the Panel rejected a Government claim that evidence of guilt was overwhelming, "it is not the appellate court's function to determine guilt or innocence. (citation omitted). . . . Those judgments are exclusively for the jury. . . ." *Kotteakos, supra*, 328 U.S. at 764. "The question . . . is not whether the legally admitted evidence was sufficient to support the [verdict], which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Satterwhite v. Texas*, 486 U.S. 249, 258-9, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988)(quoting *Chapman, supra*, 386 U.S. at 24).

The Sequence of Events Leading to the Judge's "About Face" Prejudiced Petitioner

Prosecutors had previously admitted that they transcribed only the relatively-audible portions of the tapes they intended to use to augment Quander's testimony. In final arguments counsel for Holton and Davis urged that jurors listen to the tapes in their entirety during deliberations, relying on the Trial Court's earlier assurances that jurors would not have the transcripts in deliberations.[4] The judge repeatedly told counsel and jurors during the trial that the transcripts would not go to the jury room. When Holton's counsel suggested that Quander inaccurately attributed statements on the tapes she urged jurors to compare the timbres of voices on two or more tapes to determine whether they matched, without any reference to the transcripts.

[4] Neither mentioned the transcripts in closing and when Holton's counsel attempted to quote from one of the tape transcripts the Court sustained a Government objection that the transcripts were not in evidence.

The Judge did not announce that he might permit jurors in deliberations to use them until November 7, after defense counsel made closing arguments. In rebuttal, the Government, then knowing jurors would have the transcripts, urged them to focus on portions of the tapes that had been played in court, the portions for which they would have transcripts in the jury room. Tr. 11/7/95, 44-47.

ERRORS IN EVALUATING DELIBERATIONS

In its assessment of the jury deliberations the Panel twice engaged in presumptions that improperly shifted the burden to Petitioner to prove prejudice: one regarding the jury's adherence to instructions; the other the possibility that the transcripts became substitute evidence.

Juror Adherence to Instructions

The Panel presumed jurors followed the judge's instructions, given verbally during the trial and in writing after the deliberating jury asked to listen to the tapes, that the tapes, not the transcripts, were evidence. *Holton, supra*, 116 F.3d at 1545. For this proposition it cited *United States v. Crowder*, 36 F.3d 691, 697 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1146 (1995), and *Olano*, 507 U.S. at 740-41. In *Crowder* the Court found no abuse of discretion, so it never reached the issue of whether juror exposure to the transcripts was prejudicial. Even if it had reached that issue it would have applied plain error analysis, because the appellant had not objected to the "legitimacy or accuracy" of the transcripts when they were published to the jury at trial. *Id.* As noted above at 16, in *Olano* the Supreme Court applied plain error analysis, and that decision clearly does not stand for the proposition that, under harmless error analysis, an appellate court may presume that jurors follow their instructions to the letter.

In *Olano* the appellants challenged their convictions on grounds that alternate jurors were permitted to sit in the jury room while the 12 regular jurors deliberated. The alternates had been instructed not to participate in any way in the discussion and there was no evidence that they had. Because appellants did not object to this procedure as a violation of Fed. R. Crim. P. 24(c) when the judge proposed it, this Court applied plain error analysis, concluding that an appellate court,

under Rule 52(b), was not authorized to correct the error. *Olano, supra*, 507 U.S. at 741. In his concurring opinion Justice Kennedy stated:

> If there were a case in which a specific objection had been made and overruled, the systemic costs resulting from a Rule 24(c) violation would likely be significant since it would seem to me most difficult for the Government to show the absence of prejudice, which would be required to avoid reversal of the conviction under Rule 52(a).

Id. at 742.

It should be noted that this Court has generally applied *Kotteakos* harmless error analysis to issues arising under Rule 52(a), not the stricter *Chapman* standard. In Petitioner's case, in which due process rights are implicated, the latter standard applies. In addition, Justice Kennedy apparently would not apply a presumption that jurors follow instructions, even under the less stringent standard.

The Transcripts as Substitute Evidence

The Panel compounded the error by concluding that the clear, typewritten transcripts were not substituted in the minds of jurors for the tape recorded evidence because "[t]he record indicates that the transcripts were made available only in conjunction with the relevant tape recordings and the record suggests that the jury did listen to the tapes being replayed during deliberations. 116 F.3d at 1545. This statement is correct as far as it goes, but it does not address the issue of whether juror use of the transcripts was prejudicial. As the Panel noted early in the opinion:

> The principal risk of indiscriminately permitting the use of transcripts by jurors is that in the case of a poor quality or unintelligible recording, the jurors may substitute the contents of the more accessible, printed dialogue for the sounds they cannot readily hear or distinguish on the tape and, in so doing, transform the transcript into independent evidence of the recorded statements.

Id. at 1540. The mere fact that the tape is playing in the background as jurors read the transcript does not automatically alleviate this risk during trial or deliberations. This is especially true in a case like Petitioner's, where large portions of the tapes were not transcribed because they were unintelligible or did not advance the Government’s case, and jurors could read and reread the transcribed portions, including attributions never determined to be accurate, in the interstices.

In this case a presumption that the transcript did not become substitute evidence because jurors listened to the tape while reading it fails to comport with the requirements of the harmless error rule. The Government provided no evidence on which the Court could conclude the error was harmless.

FAILURE TO RECOGNIZE THAT THE ERROR IMPLICATED CONSTITUTIONAL RIGHTS

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), the Court of Appeals ruled that replaying audiotape evidence during deliberations without the defendants present was harmless error because the Trial Judge and at least one defense lawyer were present in the courtroom at all times. It analyzed the issue under the *Chapman* standard, finding harmlessness beyond a reasonable doubt, because the issue implicated due process concerns. *Id.* The Court rejected Sobamowo's assertion that he had a right under the Sixth Amendment Confrontation Clause and Fed. R. Crim. P. 43(a) to be present as well as his lawyer.

Petitioner argued that he had a Fifth Amendment right to have his lawyer present while jurors listened to the tapes and read the Government-prepared transcripts in deliberations. *Holton's Brief* at 15-18. Holton noted several errors that could result from permitting unsupervised jurors to use the transcripts, which had not been placed in evidence. *See, supra* at 14**Error! Bookmark not defined.**. The Government's response to this argument was a series of conclusory statements not supported by any portion of the record: that there was no reason to believe jurors listened to the tapes more than once, or that the law clerk remained in the courtroom while jurors discussed what they heard on the tapes and can be presumed to know better than to do so; and that the judge did not instruct his law clerk about whether to honor jurors' requests to replay portions of the tape. *Government Brief* at 30-31.

As the D.C. Circuit did in *Sobamowo*, the Panel should have applied *Chapman* harmlessness beyond a reasonable doubt analysis in ruling on this contention. Instead, it stated:

> appellants speculate about problems that might have occurred during the replaying, which was conducted in the courtroom. . . . But, there is, in fact, no evidence suggesting that the law clerk either made independent decisions about whether or how to replay tapes or

> remained in the courtroom while the jury was deliberating, except for the actual playing of the tapes.

Holton, supra, 116 F.3d 1545-46. Thus, it placed the burden on Petitioner to demonstrate that prejudicial error occurred. The Government's unsupported assertions, based mainly on presumptions, would not satisfy the requirements of *Kotteakos*. They clearly are insufficient to satisfy *Chapman*.[5]

THE MANDATORY-MINIMUM SENTENCING SCHEME APPLIED TO PERSONS CONVICTED OF DISTRIBUTING COCAINE BASE VIOLATES 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 (1954), which is "a direction that all persons similarly situated should be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). In cases like Petitioner's, 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 invidious racial discrimination, that mandate of the Fifth Amendment is not being carried out.

Every federal circuit has upheld the mandatory-minimum sentencing provisions in 21 U.S.C. § 841(b)(1) for crack cocaine offenders against equal protection challenges on grounds that Congress had a rational basis for considering crack more dangerous than virtually every other illegal drug.[6] However, confronted with scientific evidence concerning the similarities between

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[5] In response to the Government's claim that Appellants waived any objection to the Trial Judge's procedure for replaying the tapes, the Panel noted the absence of a record of two in-chambers meetings among counsel and the judge. In light of the strenuous objection voiced to permitting jurors to read the transcripts in deliberations, defense counsel should not be presumed to have waived their objections to the judge's procedure.

[6] *See, e.g., United States v. James*, 78 F.3d 851 (3d Cir.), *cert. denied*, 117 S.Ct. 128, 136 L.Ed.2d 77 (1996); *United States v. Moore*, 54 F.3d 92 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 793, 133 L.Ed.2d 742 (1996); *United States v. Singleterry*, 29 F.3d 733 (1st Cir.), *cert. denied*, 115 S. Ct. 647, 130 L. Ed.2d 552 (1994); *United States v. Byse*, 28 F.3d 1165 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 767, 130 L.Ed.2d 663 (1995); *United States v. Coleman*, 24 F.3d 37 (9th Cir.), *cert. denied*, 115 S.Ct. 261, 130 L.Ed.2d 181 (1994); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S.Ct. 2754, 129 L.Ed.2d 871 (1994); *United States v. Thurmond*, 7 F.3d 947 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 1311, 127 L.Ed.2d 662 (1994); *United States v. Reece*, 994 F.2d 277 (6th Cir. 1993); *United States v. Lattimore*, 974 F.2d 971 (8th Cir. 1992), *cert.*
Continued on next page . . .

the two forms of cocaine, statistical data showing the starkly disparate impact of the 100:1 ratio[7] on blacks, and the U.S. Sentencing Commission's repudiation of that ratio in two reports to Congress,[8] and Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25075-76 (1995), some federal appellate courts are questioning the constitutionality of § 841(b)(1)(A)(iii) and (B)(iii).

In *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995), Judge Calabresi noted in his concurrence that evidence amassed by the Sentencing Commission

> might change the constitutional status of the current ratio. If Congress, for example, though it was made aware of both the dramatically disparate impact among minority groups of enhanced crack penalties and of the limited evidence supporting such enhanced penalties, were nevertheless to act affirmatively and negate the Commission's proposed amendments to the Sentencing Guidelines (or perhaps were even just to allow the 100-to-1 ratio to persist in mandatory minimum sentences), subsequent equal protection challenges based on claims of discriminatory purpose might well lie. And such challenges would not be precluded by prior holdings that Congress and the Sentencing Commission had not originally acted with discriminatory intent.

. . . Continued from previous page
denied, 113 S. Ct. 1819, 123 L. Ed.2d 449 (1993); *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1025, 122 L.Ed.2d 170 (1993); *United States v. Galloway*, 951 F.2d 64 (5th Cir. 1992).

[7] 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. 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. Individuals who have more than two previous drug convictions must be sentenced to life without parole. Under the statute, a person convicted of distributing only 5 grams of crack (10 to 50 doses), who is a first offender, must receive a five-year minimum sentence, while it takes distribution of 500 grams of powder cocaine (2,500 to 5,000 doses) to reach that threshold. A heroin distributor would receive a five-year minimum sentence for 100 grams. Individuals in this category who have one or more prior drug convictions must serve at least 10 years; there is no mandatory life sentence for multiple offenders. 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.

[8] *Special Report to Congress: Cocaine and Federal Sentencing Policy*, U.S. Sentencing Commission (February 1995)(the *1995 Cocaine Policy Report*), and *Special Report to Congress: Cocaine and Federal Sentencing Policy*, U.S. Sentencing Commission (April 1997)(the *1997 Cocaine Policy Report).*

He noted that this Court has held that facially neutral statutes violate equal protection where the legislature "selected or *reaffirmed* a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed.2d 870 (1979)(emphasis added)).

Similarly, after enumerating the Sentencing Commission's findings, Judge Nathaniel R. Jones, concurring in *United States v. Smith (Lewis J.)*, 73 F.3d 1414, 1419 (6th Cir. 1996) stated:

> with the benefit of this further examination, I regard the premises which drive our constitutional analysis of the 100:1 ratio with great suspicion. Each of these premises is subject to challenge, and we must not ignore this fact. I urge my colleagues to don a more realistic set of lenses. Otherwise, we risk substantial harm to the integrity of our constitutional jurisprudence. Continued use of the law to perpetuate a result at variance with rationality and common sense — even in a war on drugs — is indefensible.

Arguing that district judges in the D.C. Circuit should be permitted to grant downward departures to defendants under U.S.S.G. 5K2.0 because the mandatory-minimum sentences imposed by U.S.S.G. 2D1.1 on individuals convicted of possessing crack cocaine violate the requirements of 18 U.S.C. § 3553(a), Judge Wald stated, referring to the *1995 Cocaine Policy Report*:

> The agency itself admitted that the rule was arbitrary, capricious, unfair, and violative of a federal statute, and then documented that admission with credible evidence…. It seems to me the ultimate triumph of form over substance to base prison sentences on guidelines which have now been repudiated as irrational by the authors of those guidelines themselves.

United States v. Anderson, 82 F.3d 436, 450 (D.C. Cir. 1996)(Wald, J., dissenting).

Other courts have found ways to avoid imposition of the harsh mandatory-minimum sentences under U.S.S.G. 2D1.1 by narrowly reading the guideline definition of cocaine base as applying only to crack, and not other base forms of the drug. *See, e.g., James, supra*, 78 F.3d at 857-8 (Government failed to prove by preponderance of evidence cocaine base James sold was crack); *United States v. Muñoz-Realpe*, 21 F.3d 375 (11th Cir. 1994).

This Court must intervene because even though there is not now a split among the circuits, the winds have changed. The Sentencing Commission has recommended abolition of the

100:1 ratio, but Congress blocked implementation of the guideline amendments. Numerous bills introduced in Congress to abolish or reduce the ratio have languished in committee, never reaching the floor. Recently the Department of Justice and the Office of National Drug Control Policy proposed a sharp reduction in the disparity, recommending in a letter to the President that the ratio be reduced to 10:1.

The federal courts of appeals are sending out signals they recognize that § 841(b)(1)'s mandatory-minimum sentences for distributing crack may now have to be subjected to more stringent scrutiny, and they may no longer survive even rational-basis analysis.

But because those courts are not writing on a clean slate, it could take years for them to effectuate necessary changes. As the Sixth Circuit noted in *Smith (Lewis J.), supra,* 73 F.3d at 1418, custom and court rules prohibit a panel from overruling a prior circuit decision holding that the 100:1 ratio has a rational basis, or even that the ratio should be subjected to more stringent scrutiny. Every federal circuit, having applied rational-basis analysis and ruled that the ratio does not violate equal protection, is in the same situation and would have to review its prior holdings on this subject *en banc* if and when appropriate cases present themselves. If this Court does not settle the matter once and for all, it is likely that a split among the circuits will develop and defendants convicted of distributing relatively small amounts of crack cocaine will be subjected to vastly differing sentences depending on where they are tried.

THE APPROPRIATE LEVEL OF JUDICIAL REVIEW

The Court's initial task when confronted with a claim that a statute, such as § 841 (b)(1), violates the Equal Protection Clause is to determine the appropriate standard of review — strict scrutiny, an intermediate level of scrutiny, or rational-basis analysis.

Strict scrutiny will be applied "when the governmental act classifies people in terms of their ability to exercise a fundamental right" or "distinguishes between persons, in terms of any right, upon some 'suspect' basis." Ronald D. Rotunda & John O. Nowak, *Treatise on Constitutional Law*, ¶ 18.3, at 15 (3d Ed. 1992). When strict scrutiny is appropriate, courts "independently determine the degree of relationship which the classification bears to a

constitutionally compelling end. . . .” and “will require the government to show a close relationship between the classification and promotion of a compelling or overriding interest.” *Id.*

The intermediate level of review is used when laws do not involve facially invidious classifications, but “nonetheless give rise to recurring constitutional difficulties.” *Plyler, supra*, 457 U.S. at 217. In those cases, the Court must determine whether the classification in the law can “fairly be viewed as furthering a substantial interest of the state.” *Id.*, at 217-18. The burden is on the government to show that the disparate treatment, in this case the 100:1 ratio of powder to crack cocaine for purposes of imposing mandatory-minimum sentences, reasonably relates to accomplishment of the law’s purpose. *Id.*, at 224.

The lowest level of review, the rational-basis test, is applicable when a law does not restrict exercise of a fundamental right or “use a criterion for classification which itself violates a fundamental constitutional value.” *Treatise on Constitutional Law, supra,* at 13. Under this standard, a court need only ask “whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution.” *Id.*, at 14.

THE CRACK PENALTY SHOULD BE SUBJECT TO STRICT SCRUTINY

Petitioner believes the appropriate standard of review is strict scrutiny or, alternatively, intermediate scrutiny. But, even if the Court were to apply the rational-basis test, the U.S. Sentencing Commission’s repeated repudiations of the 100:1 ratio, the floor debate leading to Congress’ refusal to abolish it, and the letter from Attorney General Janet Reno and Gen. Barry McCaffrey, director of the Office of National Drug Control Policy, to the President provide strong evidence that the mandatory-minimum sentences imposed for distribution of relatively small amounts of crack cocaine are not rationally related to the Government’s interest in combating distribution of that drug. Furthermore, these events demonstrate that the harsh disparity in sentencing of crack offenders is racially motivated. Therefore, imposition pursuant to § 841(b)(1)(A)(iii) of Petitioner’s 363-month sentence is a denial of equal protection of the laws under the Fifth Amendment.

Strict scrutiny is required for two reasons: there is clear evidence that Congress created this fundamentally different sentencing scheme for crack offenders knowing its impact would fall mainly on inner-city blacks; and, even if Congress had a rational basis in 1986 for adopting more stringent penalties for distributing crack, in October 1995 it reaffirmed that penalty scheme, while ignoring substantial empirical evidence and a decade of statistical data demonstrating this scheme has a grossly disparate racial impact, which does not further its compelling interest in combating drug trafficking.

When it adopted the Anti-Drug Abuse Act of 1986, Publ. L. No. 99-570, 100 Stat. 3207 (1986), Congress established thresholds for imposition of mandatory-minimum sentences for distribution of a wide variety of illegal drugs. Under it, "drug kingpins," individuals who trafficked in large quantities of a narcotic, would receive 10-year minimum sentences and "middle level dealers" would receive sentences of at least five years. In the case of cocaine powder, a person convicted of distributing five kilograms was considered a drug kingpin, and a person who distributed 500 grams was considered a middle-level dealer. "Neither Congress nor the Sentencing Commission has ever suggested that a defendant caught with fifty grams of crack is likely to be a "kingpin" or a "major trafficker," or that someone with five grams of crack is probably a "middle-level dealer." Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan. L. Rev. 1283, 1288 (1995). In fact, it recognized that powder cocaine is most often converted to crack by street-level dealers. *Id.* Nonetheless, Congress set the thresholds for imposition of mandatory-minimum sentences for distribution of crack at 50 and 5 grams.

Furthermore, the association between crack cocaine and blacks played a major role in passage of the 1986 law, and in passage of H.R. 2259, 104th Cong., 2d Sess. (1995), and S. 1254, 104th Cong., 2d Sess. (1995), blocking implementation of Sentencing Commission guideline amendments that would have abolished the 100:1 powder-crack ratio embodied in U.S.S.G. 2D1.1. In 1986, H.R. 5484, a precursor to the Anti-Drug Abuse Act, 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. *1995 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 black NCAA and University of Maryland basketball star Len Bias in June 1986.[9] *Id.*, at 121.

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. In floor debate over H.R. 2259 in October 1995, Rep. Shaw of Florida stated:

> We … 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), at H10260. But, in hearings before the Sentencing Commission in March 1993, Eric Sterling, who was counsel to the House Judiciary Subcommittee on Crime in 1986, testified that the 50:1 ratio in H.R. 5484 "was arbitrarily doubled simply to symbolize redoubled congressional seriousness," and that the 100:1 ratio "reflects no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an illegal drug." Sklansky, *supra*, 47 Stan. L. Rev. at 1297, n 69. Regardless of whether the motive of Congress was to help inner-city neighborhoods or to make it appear that members were tough on crime, it was eminently foreseeable that its primary impact would be on members of racial minority groups.

Experience with the application of § 841(b)(1) since the mandatory-minimum provisions were added by the Anti-Drug Abuse Act of 1986 demonstrates that the statute has had a grossly disparate impact on racial minorities. More than 95 percent of individuals convicted in 1993 in federal court of distributing crack were members of minority groups: 88.3 percent were black and 7.1 percent were Hispanic. *1995 Cocaine Policy Report*, *supra*, at 156. In the same year 10.3

[9] Although Bias died of cocaine intoxication caused by snorting powder cocaine, *1995 Cocaine Policy Report*, at 123, supporters of the legislation used his death to further the higher sentences for crack.

percent of defendants charged in federal court with possession of crack were white, 84.2 percent were black and 5.2 percent were Hispanic. *Id.* The disproportionate impact is made more problematic when considering that, of individuals reporting crack use in 1991, 52 percent were white, 38 percent were black and 10 percent were Hispanic. *Id.*, at 38-39.

By contrast, among defendants convicted in federal courts in 1993 of distributing powder cocaine, 32 percent were white, 27.4 percent were black and 39.3 percent were Hispanic. In cases where defendants were convicted of possession, 58 percent were white, 26.7 percent were black and 15 percent were Hispanic. *Id.*, at 156. In a 1991 survey of drug use, 75 percent of whites reporting cocaine use, 15 percent of blacks and 10 percent of Hispanics reported using powder cocaine at least once during the year. *Id.*, at 38. These statistics prompted the Sentencing Commission to conclude that "The 100-to-1 powder to crack cocaine quantity ratios is a primary cause of the growing disparity between sentences for Black and White federal defendants." *Id.*, at 163.

This Court has accepted statistical proof of disparate racial impact as demonstrating intent to discriminate in several contexts. *McCleskey v. Kemp*, 481 U.S. 279, 283 (1986)(citing *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed.2d 110 (1960), *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)). The disparate impact of the mandatory-minimum sentence structure is particularly significant in a case like this one, where Petitioner challenges its constitutionality as applied, because the denial of equal protection may occur as a result of the legislative process, selective enforcement or both.

CONGRESS' REFUSAL TO ELIMINATE THE CRACK PENALTY SHOULD BE VIEWED AS EVIDENCE OF ITS INTENT TO DISCRIMINATE

Even if, in the face of the mass of evidence set forth in the *1995 Cocaine Policy Report*, the Court believes that statistical proof of disparate impact is insufficient to demonstrate racial motivation in applying § 841(b)(1), the Sentencing Commission's discussion of the legislative history provides further proof of discriminatory intent. *1995 Cocaine Policy Report*, at 111-26.

As the D.C. Circuit noted in *United States v. Johnson*, 40 F.3d 436, 439-40 (D.C. Cir. 1994),

> When determining whether such invidious discriminatory purpose exists, courts may look to "the totality of the relevant facts," including the disparate impact. . . . Circumstantial evidence of racially discriminatory legislative purpose may also include the historical background of the legislative scheme, the specific sequence of events leading up to the enactment, a departure from the normal *procedural* sequence, a *substantive* departure from a routine decision or rule, contemporary legislators' statements, and the "inevitability or foreseeability of the consequence of the law."

40 F.3d at 439-40 (citing *United States v. Clary*, 34 F.3d 709, 711 (8th Cir. 1994)(emphasis in original, internal citations omitted).

Despite the large amount of scientific evidence to the contrary, the same myths about the scourge of crack cocaine that drove the debate and legislative action more than a decade ago fueled the successful effort in 1995 to block the sentencing guidelines amendments. Although minority members of Congress did not mount opposition to mandatory-minimum sentences for crack defendants in 1986, they strongly opposed H.R. 2259 in October 1995. In the two hours or more of debate on the House floor, Rep. Conyers of Michigan, senior minority member of the Subcommittee on Crime, and others argued that the crack penalty is racially discriminatory, and 83 members voted against it. 141 Cong. Rec., *supra*, at H10283.

Yet, despite the Sentencing Commission's report in February 1995 presenting strong evidence that § 841(b)(1) has a grossly disparate impact on minority criminal defendants and that the 100:1 quantity ratio is constitutionally unsupportable,[10] Congress has demonstrated no inclination to seriously reconsider the mandatory-minimum sentencing structure in § 841(b)(1). Several bills introduced in the 104th Congress to alter the ratio languished in committee until the term ended.

In late April, Congress received the *1997 Cocaine Policy Report* voicing the Commission's unanimous suggestion that U.S.S.G. 2D1.1 be amended to establish a much smaller powder/crack ratio, perhaps 5:1 rather than 100:1, and that the trigger quantities for both

[10] The Commission exhaustively analyzed data on the methods of use and pharmacology of crack and powder cocaine, patterns of distribution and criminal activity associated with the two forms of the drug, and community impact, and came to the conclusion that there is little difference. Its findings were borne out by medical researchers. See, 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.

forms of cocaine be adjusted. It suggested that the trigger amount of crack be increased from 5 grams to between 25 and 75 grams for a five-year mandatory-minimum sentence, and that the trigger amount of powder be reduced from 500 grams to between 125 and 375 grams. *Id.* at 2. However, mindful of its experience in 1995, in which Congress overrode a guideline amendment recommendation for the first time, the Commission did not propose an amendment to implement its recommendation. Instead, because the ratio embodied in the Sentencing Guidelines is based on the ratio established by § 841(b), *Id.* at 3, it stated, "After Congress has evaluated our recommendations and expressed its views, the Commission will amend the guidelines to reflect congressional intent." *Id.* at 9

Because the Commission did not propose an amendment to U.S.S.G. 2D1.1 in May 1997, as it did in 1995, Congress is under no deadline for taking action on this issue. Amendments to the Sentencing Guidelines for United States Courts, 62 Fed. Reg. 26616 (1997) (proposed May 1, 1997). Since the 105th Congress opened in January, seven bills have been introduced to abolish the differential or to alter the powder/crack ratio,[11] but none has been reported out of committee.

In mid-July, Attorney General Reno and Gen. McCaffrey joined the chorus seeking amendment of § 841(b)(1). In a letter to the President they proposed that the ratio be reduced to 10:1 by raising the quantities of crack and lowering the quantities of powder that trigger mandatory-minimum sentences.[12] *See* Washington Post, July 21, 1997 at A2, *Officials Draft Plan to Reduce Cocaine Sentencing Disparities*.

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[11] S. 209, 105th Cong., 1st Sess., introduced Jan. 28, 1997, H.R. 332, 105th Cong., 1st Sess., introduced Jan. 7, 1997, H.R. 2229, 105th Cong., 1st Sess., introduced July 23, 1997, and S. 1162, 105th Cong., 1st Sess., introduced Sept. 11, 1997, would set the trigger levels for cocaine powder at five grams for a five-year mandatory-minimum sentence and 50 grams for a 10-year mandatory-minimum sentence. S. 3, 105th Cong., 1st Sess. (Omnibus Crime Control Act of 1997), introduced Jan. 21, 1997, and S. 260, 105th Cong., 1st Sess., introduced Feb. 4, 1997, would reduce the trigger levels for cocaine powder to 100 grams for a five-year mandatory-minimum sentence and 1 kilogram for a 10-year mandatory-minimum sentence. H.R. 2031, 105th Cong., 1st Sess., introduced June 24, 1997, would repeal 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii), making the trigger levels for crack cocaine the same as the current levels for powder cocaine.

[12] Neither the Department of Justice nor the ONDCP released the letter and both have denied Petitioner's request under the federal Freedom of Information Act, 5 U.S.C. § 552(a), for a copy of it, citing the deliberative process exemption (Exemption 5) as the basis for denial. § 552(b)(5).

The anecdotal information on which Congress acted in 1986 and 1988 has been replaced by a decade's accumulation of empirical data that largely negate the assumptions on which the 100:1 ratio was based, as Judge Wald noted in her dissent in *Anderson, supra*. 82 F.3d at 449 n. 6. In light of the failure of political entities to take corrective action to protect minority populations from the discriminatory effects of § 841(b)(1), the courts must re-examine the constitutionality of the crack penalty.

CONCLUSION

Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari, vacate his conviction and remand this case for a new trial. Alternatively, if the Court concludes that the Court of Appeals correctly determined that errors in use of audiotape transcripts at trial were harmless, Petitioner requests that the Court declare unconstitutional the differential treatment of crack and powder cocaine in 18 U.S.C. § 841(b)(1) and remand his case for resentencing pursuant to the provisions of U.S.S.G. 2D1.1 related to powder cocaine.

Respectfully submitted,

Robert S. Becker, Esq.
5505 Connecticut Avenue, N.W.
No. 155
Washington, D.C. 20015
(202) 364-8013
Attorney for Bobby A. Holton
(*Appointed by the Court*)