Oral Argument Scheduled May 8, 1997

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
United States District Court
For the District of Columbia
91-Cr.-677

Reply Brief of Appellant

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

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UNITED STATES, **APPELLEE,** vs. **BOBBY A. HOLTON,** **APPELLANT.**	No. 96-3013 (91-Cr.-677-2)

REPLY BRIEF OF APPELLANT

THE GOVERNMENT MISCHARACTERIZED THE EVIDENCE AND APPELLANT'S ARGUMENTS

In its brief the Government relies heavily on facts not in evidence to overstate the weight of the evidence against Appellant and mischaracterizes Appellant's defense to minimize the harmful effects on his case of the Trial Court's errors. Appellant will endeavor to point out these flaws in the Government's assertions without going into great detail, in the hope that the Court will examine the issues and the voluminous record more carefully.

The Government argued that the Trial Court committed only harmless errors in its handling of audiotape evidence and tape transcripts of disputed accuracy while the deliberating jury listened to the recordings, and in refusing to inquire whether jurors had seen an ABC News *Nightline* program about the dangers of crack cocaine and sentencing of individuals convicted of distributing crack. Government's Brief at 31, 47. It argued that the evidence against Appellant was "overwhelming," and his defense was weak.

THE GOVERNMENT OVERSTATED THE STRENGTH OF ITS CASE

The Government noted in the portion of its brief headed "The Government's Case" that Det. Gary Curtis testified:

> on October 23, 1991, he observed Holton speak to Detective Quander for several minutes, enter the alley behind 1361 Stevens Road, return, knock on the door of 1361, receive an

> object from a woman who stuck her head out of the window, and hand the object to Detective Quander (10/19/95 Tr. 12, 15-16, 22-27).

Government's Brief at 8-9. The Government was citing Curtis' testimony in the first trial, which is not the subject of this appeal. Tr. 4/27/92, 239-40, 243-44. Then, on cross-examination Curtis admitted that he had not seen much of what he had testified about, *Id.* at 247-49. Curtis stated that he knew the transaction had taken place at 1361 Stevens Road only because Quander had told him that, *Id.* at 261, and that he saw a hand reach out of the window, but only knew the hand belonged to a woman because Quander told him that as well. *Id.* at 265.

Before Curtis testified in the second trial, Trial Counsel asked that he be instructed to limit his testimony to what he had seen, and the Government assured the Court that he would do so. Tr. 10/19/95 p.m., 3. On direct examination Curtis said he saw Holton go up to a house, and saw a hand reach out and give him something which he then gave to Quander in exchange for money. *Id.* at 25-27. Under cross-examination by Davis' counsel he admitted that he never got out of the car October 23, Tr. 10/19/95 p.m., 42, and that it was dark when he and Quander arrived at Stevens Road that night. *Id.* at 44. He further admitted that his testimony, that Quander received the drugs in a plastic bag, conflicted with his testimony in the first trial, where he said the drugs had been packaged in a brown paper bag. *Id.* at 69. After establishing where Curtis parked the car, by having him place a label on Government Exhibit 1B, an aerial photo of the 1300 block of Stevens Road, *Id.* at 60, and referring to the exhibit as she questioned him, Holton's Trial Counsel established that Curtis did not have a clear line of site to where the alleged transaction occurred.[1] Quander had previously testified that it was about 130 feet from where the car was parked to where the transaction took place.

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[1] Trial Counsel engaged Curtis in the following colloquy:

> Q. And you weren't — you saw something occur, you now say, at the doorway of 1361?
> A. Yes, ma'am.
> Q. And you weren't able to see who was in 1361, were you?
> A. No, ma'am.
> Q. And you weren't able to see what was happening at 1361, correct?
> . .
> A. Yes.
> Q. What did you see?

Continued on next page . . .

Considering Curtis' actual testimony in the second trial and the effective impeachment by counsel for Holton and Davis concerning the October 23, 1991 transaction, his corroboration of Quander's version is far less than overwhelming evidence of guilt.

The Government also argued that Appellants "overlook the wealth of physical evidence linking them to the crime." Government's Brief at 31. But the recitation that follows mainly deals with Davis' arrest and evidence found in 1361 Stevens Road, where the arrest team encountered

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. . . Continued from previous page

A. I seen a hand hand Bobby Holton the plastic back (sic) and Quander then — Bobby Holton went and gave it to Quander.
. . .
Q. And you're in the car watching all this from the driver's seat, right?
A. Yes, ma'am.
Q. And it's dark outside and your car is parked right about here; am I correct?
A. Correct.
Q. So, you have to see past this part of the row of buildings that juts out, correct?
A. Correct.
Q. And that was somewhat in your way, was it not?
A. No, ma'am.
Q. And the person you say is Bobby Holton was all the way up here, right?
A. Correct.
Q. In the dark, right?
A. Correct.
Q. And walking in the dark someplace over here, right —
A. Correct.
Q. — to make that putative exchange? And when you first arrived on the scene, you never got out of the Pathfinder to speak to the person you now say is Bobby Holton, did you?
A. No, ma'am.
Q. You were never face-to-face with the person you say is Bobby Holton, were you?
A. I wasn't close to him, no, ma'am.
Q. And you were never, ever face-to-face with him, were you?
A. No, ma'am.
. . .
Q. In fact, the closest you ever got was a number of car lengths, right?
A. Correct.
Q. And you never in your report of this incident that was written the same night it happened said anything about the person you claim is Bobby Holton going up in a back alley, in alley one, do you?
. . .
A. No, ma'am.
Q. And you never in your report written right after this incident happened to say anything about seeing a hand coming out of 1361, do you?
A. No, ma'am.

Tr. 10/19/95 p.m. at 70-72.

him. *Id.* at 31-32. The Government offered no evidence at trial that Holton ever was inside 1361 Stevens Road.

Eventually the Government states that "recovered from the Acura beside which Holton was arrested was the cellular telephone Davis had used to call Detective Quander on October 30 in order to prearrange the final three-ounce purchase." *Id.* at 32. But, despite testimony of Government witnesses that codefendant Vincent Jones assisted in the October 30 transaction and was sitting in the Acura, using the cellular phone when the arrests were made and police stopped him to obtain identification information, Jones was acquitted. If the Government's evidence of Jones' location when police made the arrests was insufficient to win a conviction, the jury likely gave little or no weight to Holton's proximity to the phone, which he did not own, that was in a car he did not own.

Despite the Government's assertions to the contrary, its case against Holton was very much a one-witness case in which Quander's testimony was corroborated with tape recordings he transcribed. In those transcripts Quander is the only person who assigned names of speakers to statements in the transcripts, and defense counsel repeatedly challenged those attributions. It was for the jury to decide whether Holton and Davis made statements attributed to them. By giving jurors during deliberations the transcripts, including the Government's assertions about who made specific statements, the Trial Court obviated the need for the jury to make that finding. Such an error can never be harmless.

THE GOVERNMENT MISCHARACTERIZED APPELLANT'S ARGUMENT

The Government correctly states that Holton's defense was that Quander "misidentified him as the individual named 'Bee' who was part of the drug-dealing operation on Stevens Road." Government Brief at 13. But Holton did not assert, as the Government now claims, that Quander omitted physical descriptions of "Bee" from his reports so he could "identify whoever had been arrested along with Davis as 'Bee.' " *Id.* Rather, through defense witnesses Trial Counsel attempted to show that Holton was not called "Bee." In her final argument Counsel noted the length of time between the alleged incidents and the trial, and argued that Quander's failure to

describe “Bee” in any of the PD 854s he filled out contemporaneously with the drug purchases rendered the reports useless as a means for him to refresh his recollections prior to testifying and as evidence corroborating or impeaching his testimony. Tr. 11/6/95, 154-56. In fact, Holton’s defense was remarkably similar to the Government’s description of Jones’ successful defense. Government Brief at 14.

In mischaracterizing Holton’s defense, the Government disregarded the numerous occasions on which Trial Counsel objected or moved for severance and a mistrial when Davis’ lawyer attempted to build his police-conspiracy defense. She opposed cross examination of government witnesses that would place before the jury Davis’ prior crimes and the 1988 murder investigation. She repeatedly argued that such evidence would, in a conspiracy case, spill over on Holton and induce the jury to find him guilty, in much the same way the Government now hopes its argument blurring the distinctions between appellants will spill over and convince this Court that the Trial Court’s errors were harmless as to Holton. *See, e.g.*, Government Brief at 32 (“Against this wealth of evidence, appellants presented a weak defense; a massive police conspiracy to frame them.”), *Id.* at 47 (“We have already shown that the evidence against appellants was strong, if not overwhelming, and that their police-conspiracy defense was weak.”),

ARGUMENT

THE GOVERNMENT'S ARGUMENT DISREGARDS THE LAW OF THIS CIRCUIT AND FAILS TO EXPLAIN WHY TAPE TRANSCRIPTS SHOULD BE TREATED DIFFERENTLY THAN OTHER EXHIBITS NOT IN EVIDENCE

The Government's heavy reliance on *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), and cases from other jurisdictions[2] for the proposition that the Trial Court did not commit reversible error by permitting deliberating jurors to read the Government's tape transcripts while listening to tape-recorded evidence is misplaced. As the Government acknowledged, the *Slade* Court addressed only the issue of use of government-prepared tape transcripts during the evidentiary phase of the trial. Government's Brief at 22. It goes on to say that in other circuits jurors routinely are permitted to read transcripts while reviewing tape recorded evidence during deliberations, and this Court should adopt that view as well.

But it does not attempt to explain how its position can be squared with this Court's holding in *United States v. Strothers*, 77 F.3d 1389, 316 U.S. App. D.C. 210 (D.C. Cir.), *cert. denied*, 117 S.Ct. 374, 136 L.Ed.2d 236 (1996), that tape transcripts in cases like Holton's are not to be admitted into evidence, and in *United States v. Dallago*, 427 F.2d 546, 138 U.S. App. D.C. 276 (D.C. Cir. 1969) and *United States v. Sawyer*, 303 F.2d 392, 112 U.S. App. D.C. 381 (D.C. Cir. 1962), that exhibits not admitted into evidence are not to be placed in the hands of deliberating jurors.

The Government appears to be advocating a change in the law of this Circuit without attempting to explain why such transcripts should be treated differently than any other exhibit that has not been received in evidence. In doing so it argues that the tape transcripts are like the indictment, which jurors routinely receive during deliberations and are free to read as closely as they please, subject to the Court's instruction that it is not evidence. Government's Brief at 24. But it ignores the fact that the indictment represents the findings of an impartial, multi-member

[2] Government Brief at 23 n. 4.

grand jury, not the work of government agents bent on conviction and, like the final jury instructions, it is more a road map to the case than purported evidence of guilt. In addition, as a court document, not an exhibit, the indictment is not an inadmissible proffer from one party in the case.

The Government further argued that once the Trial Judge determined, pursuant to this Court's dictates in *Slade*, that the transcripts were accurate, the risk of prejudice was alleviated. The Trial Judge may have concluded that the Government's transcripts accurately reflected statements made by speakers on the tape. But, throughout the case, defense counsel contended that the attributions made by police to specific speakers were inaccurate, and the Trial Court did not attempt to determine whether the voices he heard on the tapes belonged to the individuals whose names appeared beside those statements in the transcripts.

For Holton, juror use of the transcripts during deliberations was particularly prejudicial. Even if one accepts the Government's claim that "Bee" is Holton, "Bee's" role in several of the transactions, as reflected on the tapes, is a series of innocuous statements made while entering or exiting the scene. At one point his presence is marked by a notation that he made a spitting sound, not by a statement which could be compared to a voice on the tape. In all of the handwritten transcripts turned over to appellate counsel by the Government, and all but one of the typewritten transcripts jurors read, the person Quander claimed was Holton is identified as "Bee." However, one of the most incriminating typewritten transcripts, the one of the October 23, 1991 telephone conversation between Quander and a person who identified himself as "BeeBee," the attribution is to Holton, not to "Bee." Whether the difference in identification was inadvertent or deliberate, that transcript does not merely assist jurors in understanding the recording, it reinforces Quander's assertion that Holton is "Bee."

This Case Is Different From the Government's Cited Authorities

Even if the Court is inclined to consider the Government's reasoning as a general principle, the cases it cited are distinguishable from the case at bar, and the Court should find

that it was reversible error for the Trial Judge to permit jurors in Holton's case to read the transcripts while listening to the tapes during deliberations.

In *United States v. Delpit*, 94 F.3d 1134, 1147-8 (8th Cir. 1996), jurors were given transcripts provided by the Government and defense counsel to read while listening to the tapes. Thus, jurors were clearly on notice that there was a dispute over the accuracy of the Government's version of what was on the tapes and could compare the opposing versions. In addition, the appeals court held that defense counsel did not identify any particular portions of the transcripts that were inaccurate, and that the judge "diligently and repeatedly" instructed jurors that the transcripts were not evidence. In *United States v. Riascos*, 944 F.2d 442, 444 (8th Cir. 1991), the Court held that the trial judge's error in permitting jurors to use the transcripts was harmless in a case where the jurors' request for them stated, "May we use the written transcripts . . . to find information to listen to on the tapes." The Court said Appellant had never pointed to specific inaccuracies in the transcripts, so it would assume they were accurate. It noted that the jurors' stated purpose for requesting the transcripts "belies the claim that the transcripts rather than the tapes moved them to a verdict," and added that the trial judge's "admonition must have been hanging in their minds; they requested the transcripts as maps to the tapes, not as independent sources of information." *Id.*

The Sixth Circuit stated in *United States v. Scarborough*, 43 F.3d 1021, 1025 (6th Cir. 1994) that "Use of transcripts not in evidence is permissible where the tape is in evidence, the defendant has not questioned the accuracy of the transcript, and the defendant has shown no prejudice." It noted that, in addition to the general instruction that the tape, not the transcript was evidence, the judge instructed the jury that the transcript represented the Government's version of what was on the tape. *Id.*

In *United States v. Larson*, 722 F.2d 139, 145 (5th Cir. 1981), *cert. denied*, 466 U.S. 907, 104 S.Ct. 1688 (1984), the Court stated, "In view of the court's charge to the jury and the fact that the jurors had already read the transcript during trial, we decline to find that the failure to formally introduce what the trial judge referred to as 'quasi-admitted' evidence was anything

other than harmless error." In that case, the limiting instruction was far more emphatic than that given in Holton's case. More importantly, in the Fifth Circuit, it apparently would have been permissible for the Government to move the transcripts into evidence, which is contrary to this Court's holding in *Strothers, supra*. Furthermore, repeatedly during Holton's trial, defense counsel objected to attempts by the Government to authenticate the transcripts and refrained from reading them during cross examination to keep them from being admitted and, as a result, available to jurors during deliberations.

The more appropriate course of action for the Trial Court in Holton's case was that taken by the judge in another Fifth Circuit case, *Fountain v. United States*, 384 F.2d 624, 632 n. 9 (5th Cir. 1967), *cert. denied sub nom., Marshall v. United States*, 390 U.S. 1005, 88 S.Ct. 1246, 20 L.Ed.2d 105 (1968). The Judge had ruled that the Government could distribute accurate transcripts to jurors to facilitate identifying recorded voices, where the defense objection to the transcripts was that they, when coupled with playing the tapes, placed undue emphasis on the recorded conversations. *Id.* When jurors asked during deliberations to use the transcripts the Judge denied the request, stating "if we had not had the [transcripts] * * * it would have been necessary to stop at the end of every sentence to identify who the next speaker was * * *. It is your recollection of the evidence that counts. It is going to be up to you to use your best powers of recollection with respect to the evidence." *Id.*

In *United States v. Dorn*, 561 F.2d 1252 (7th Cir. 1977), appellants challenged the Trial Court's decision to permit the deliberating jurors to read transcripts while listening to the tapes. In that case one of the alleged coconspirators testified in a hearing out of the jury's presence that the voices on the tape were his and Dorn's. *Id.* at 1257. The panel concluded that "the discrepancies complained of were so minimal that they could not have substantially affected the meaning of the conversations," and that the judge had meticulously instructed the jury on the limited function served by the transcripts. *Id.*

The opinion in *United States v. Collazo*, 732 F.2d 1200, 1204 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105, 105 S.Ct. 777 (1985), that "[t]he jury did not use the transcripts as 'substitute

evidence' in deliberations" is opaque. The Court of Appeals did not explain the basis for this holding, although it provided a detailed explanation for holding that the trial judge's decision to permit use of the transcripts during trial as an aid to understanding the tapes was not an abuse of discretion. *Id.* at 1203-4.

Similarly, the Second Circuit, in *United States v. Lam Lek Chong*, 544 F.2d 58 (2d Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977), did not elaborate on its reason for concluding that juror use of tape transcripts during deliberations was not error. But in *United States v. Carson*, 464 F.2d 424, 437 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972), the Second Circuit had ruled that it was permissible for trial judges to admit tape transcripts into evidence when both parties agreed they were accurate and, therefore, permitting jurors to use the transcripts during deliberations was not error. *See, also, United States v. Koska*, 443 F.2d 1167 (2d Cir.), *cert. denied*, 404 U.S. 852 (1971) ("No good reason appears for denying the transcript to a jury which has requested it" where both parties stipulated to the accuracy of the transcript.). Thus, the Second Circuit's precedents, like those in the Fifth Circuit, conflict with this Court's holding in *Strothers, supra*.

Regardless of what the law is in other circuits, the law here is that judges should not permit deliberating jurors to read tape transcripts of disputed accuracy while listening to tape recorded evidence. Furthermore, the mere fact that this Court determined that it was harmless error for jurors in *Strothers, supra,* to have been exposed during deliberations to exhibits not in evidence does not mean it would be harmless error in all cases and, we submit, it clearly was not harmless in this case.

THE GOVERNMENT SEEKS A *POST HOC* DETERMINATION BY THIS COURT THAT THE *NIGHTLINE* BROADCAST WAS NOT PREJUDICIAL TO APPELLANT

At the outset the Court should note that when Holton's trial counsel requested a *voir dire* to determine whether jurors saw the *Nightline* program *Crack and Powder Cocaine: Unequal Justice,* the Government did not oppose the motion. When asked by the Trial Judge for comment on the request, Government Counsel stated:

The Government's position is just to leave it to the discretion of the Court.

> Our only request is if the Court deems it appropriate to ask the question—I don't know how the Court would handle it; we'd be satisfied with the Court sort of sticking its head in the jury room, if that's what the Court chooses to do, to just ask did anybody see "Nightline" last night.
>
> If we get no responses, that's the end of the matter.
>
> But, you know, we have selected a jury that by everybody's estimation, ours and the defense, they all said they could be fair and would base their decisions solely on the evidence presented in court.
>
> I really don't see it as an issue. It was "Nightline"; it was very late at night, but if the Court deems it appropriate to ask them, I would just ask that it be done in such a way as to minimize any disruption to proceeding with the trial.

Tr. 11/1/95, 9 (See Appellee's App., Vol. II, 11/1/95 Tr.). The Government did not argue that the *Nightline* program was not prejudicial to Appellant, and the Trial Court made no such factual finding before ruling that it would not inquire whether any jurors saw the program.

The Government does not take issue with Appellant's assertion that such a finding is a necessary predicate to refusing to make at least a preliminary inquiry concerning juror exposure to the program. *See*, Holton's Brief at 27 (citing *United States v. Herring*, 568 F.2d 1099, 1104 (5th Cir. 1978). In fact, several of the cases the Government cites clearly agree. *See United States v. DiSalvo*, 34 F.3d 1204, 1221-2 (3d Cir. 1994)("First, a court determines whether the news coverage is prejudicial. Second, if it is, the court determines whether any jurors were exposed to the coverage. . . ."); *Morris v. United States*, 564 A.2d 746, 748 (D.C. 1989)("First, the trial court must decide whether the information was potentially prejudicial. . . ."); *United States v. Abscal*, 564 F.2d 821, 833 (9th Cir. 1977)(affirming judge's refusal to question jurors because he first found that articles were not prejudicial); *United States v. Jones*, 542 F.2d 186, 194 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976) ("[W]henever a claim of in-trial prejudicial publicity arises, the threshold question, . . . for the trial court is whether the publicity rises to the level of substantial prejudicial material.").

Instead, the Government asks this Court to make a *post hoc* factual finding that no prejudice could possibly have resulted to Appellant, even if one or more of the jurors had seen the program. It is not the role of the Court of Appeals to make such a finding, which is the province

of the "trier — who is on the front lines, sensitive to the nuances of the case before him. . . ." *United States v. Nazzaro*, 889 F.2d 1158, 1167 (1st Cir. 1989). Nor should the Court read a finding that the program was not potentially prejudicial into the Trial Judge's statements that the lawyers picked an impartial jury when the trial began and that final jury instructions would eliminate the problem.

If the Court is inclined to accede to the Government's request, it should, nonetheless, conclude that the *Nightline* program was potentially highly prejudicial to Appellant and, therefore, the Trial Court's failure to conduct a *voir dire* cannot be considered harmless error.

The Government argues that the *Nightline* program was too general to prejudice Appellant, that the disparity in sentencing was common knowledge before the trial, that the program presented information cumulative of evidence presented at trial, and that it was harmless in light of the overwhelming evidence of guilt. Government Brief at 42. Appellant went into great detail in his Brief, at 19-27, to demonstrate that statements made during the program by Judge Walton and members of Congress were potentially prejudicial. Therefore, he will not respond to the Government's contention that the program was too general. Trial Counsel in Appellant's case, unlike counsel in *Nazzaro, supra*, 889 F.2d at 1167, met her burden of demonstrating a sufficient nexus between the program and her client's situation to warrant inquiry into whether jurors had seen or heard about the program.[3]

The Government next argued that it is common knowledge that violence is associated with crack distribution and that there had been wide discussion of the sentencing disparity among defendants convicted of distributing crack as opposed to powder cocaine. But the Government points to no evidence on which this Court can conclude that jurors had any knowledge about

[3] The Government reliance on *United States v. Williams*, 604 F.2d 1102, 1114-15 (8th Cir. 1979), is misplaced, because in that case the trial judge determined that articles about an informant in a totally unrelated case did not constitute prejudicial publicity in Williams' case and, therefore, it was not necessary to question jurors. *Id.* See Government's Brief at 44-45 n. 9. Nor is its position helped by *Morris, supra*, 564 A.2d at 748, in which the D.C. Court of Appeals concluded that "When jurors have been exposed to media discussion of issues they are considering a two-part determination is required." In that case the judge waited until after verdicts were returned to question jurors. He determined that, although some jurors had seen television news stories about "date rape" which were not specifically related to the case on trial, the verdicts had not been affected by their exposure to media accounts.

crack cocaine or how it is treated under federal law. Although it cites numerous articles in local newspapers over 10 years concerning crack and violence, there is no evidence in the record that any members of Appellant's jury subscribed to or regularly read those newspapers. Government's Brief at 46.

What is known is that every potential juror who stated during the initial *voir dire* that he or she was acquainted with Barry Farms or drug dealing there, or who stated that a member of his or her family used drugs or had been arrested for a narcotics offense, was excused from service on the jury. Furthermore, the Judge refused a request from Appellant's Trial Counsel to ask potential jurors whether they lived in areas in which there were drug problems and whether those individuals believed exposure to such problems would impair their ability to render fair verdicts. Tr. 10/3/95, 148-9. Because every potential juror who indicated having direct knowledge of narcotics was excused, it is pure speculation whether any seated jurors had direct knowledge before the *Nightline* program aired about crack, drug related violence or drug sentencing .

The Government next argues that because its expert witness testified that crack dealers carry guns to protect their turf, juror exposure to the *Nightline* program was merely cumulative of evidence in the case. It hastens to note that defense counsel did not object to this testimony. Government's Brief at 46-47. But counsel for all three defendants repeatedly objected to testimony about use of firearms and about ammunition seized from one of the apartments searched October 30, 1991, arguing that because none of their clients had been charged with firearms offenses such testimony was not probative of guilt but was highly prejudicial. *See*, *e.g.*, Tr. 8/11/95, 27, Tr. 10/6/95, 6, Tr. 10/12/95, 36, Tr. 10/17/95, 4, Tr. 10/23/95, 29, Tr. 10/27/95, 33, 34.

More importantly, as the *Nightline* transcript reproduced at Appellant's App. I demonstrates, statements made by participants in the program are far more inflammatory and addressed issues more far-reaching than the relatively benign testimony of Det. Johnny St. Valentine Brown. Therefore, the Government's reliance on *United States v. Williams-Davis*, 90 F.3d 490, 500 (D.C. Cir. 1996), is misplaced. In that case the Court found a far greater correlation

between the trial testimony and news stories. Furthermore, the trial judge twice conducted mid-trial *voir dires* of jurors concerning published accounts and determined they had not prejudiced the trial. The appeal was not from those rulings, but from the Trial Court's refusal to order a new trial after two jurors, post trial, recanted their testimony at the *voir dire* proceedings.

Neither *United States v. Carrodeguas,* 747 F.2d 1390 (11th Cir. 1984), *cert. denied,* 474 U.S. 816, 106 S.Ct. 60 (1985), nor *United States v. Greschner,* 802 F.2d 373 (10th Cir. 1986), *cert. denied,* 480 U.S. 908, 107 S.Ct. 1353 (1987), is of help to the Government either. In the former, the Court of Appeals concluded that "Most of the information contained in the article did not go beyond the record as developed at trial. Other information was unrelated to the charges for which appellants were being tried." 747 F.2d at 1395. The Court went on to note that, in light of the trial judge's specific instructions to jurors not to read or listen to media coverage of the case, it would presume jurors followed the instructions. *Id.* In *Greschner,* the appeals court concluded that allegedly prejudicial media references to extraordinary security measures during the trial were factual and did not address issues in the case, and that the defendants' criminal records had been revealed to jurors during cross examination. 802 F.2d at 380-81. The trial court's repeated admonitions not to read news accounts were a factor in that case as well. *Id.* at 381.

Finally, as discussed above, the Government's evidence against Bobby Holton was far from overwhelming. Therefore, any prejudice resulting from juror exposure to the *Nightline* broadcast cannot be considered merely harmless error.

THE GOVERNMENT'S ENTIRE ARGUMENT CONCERNING MANDATORY-MINIMUM SENTENCES IMPOSED IN THIS CASE PURSUANT TO 21 U.S.C. § 841(b)(1) IS BASED ON ERRONEOUS PREMISES

The Government's primary ground for attacking Appellant's argument is that he did not raise this issue in the Trial Court. Government's Brief at 48. It states that "An unobjected-to interpretation of a statute may not be overturned on appeal unless it was 'error under settled law of the Supreme Court or this circuit.' " *Id.* (citing *United States v. Glenn,* 64 F.3d 706, 711, 314 U.S. App. D.C. 202 (D.C. Cir. 1995)).

Holton's Trial Counsel filed Memoranda in Aid of Sentencing January 9 and January 16, 1996, which specifically addressed the crack penalty, the findings of the U.S. Sentencing Commission and Congress' rejection of proposed guideline amendments.[4] In them counsel requested a downward departure under U.S.S.G. 5K2.0. At the sentencing January 16, 1996, the Court acknowledged receipt of the memoranda, counsel argued verbally for a downward departure, Tr. 1/16/96, 6-10, 15-16, and the Government responded to that argument. *Id.* at 13-14. The Judge stated that he was operating under "the limitations that are encroached (sic) on me by the law, which includes both the statutes and the Sentencing Commission's pronouncements. I would say that I have never agreed with the hundred-to-one ratio, but that's a judgment for Congress to make. I have also never agreed with the mandatory minimum sentencings. . . ." *Id.* at 21.

What the Trial Judge did not say is that he is bound by decisions of this Court which predate *Cocaine and Federal Sentencing Policy*, U.S. Sentencing Commission, February 1995, *e.g., United States v. Thompson*, 27 F.3d 671 (D.C. Cir.), *cert. denied*, 115 S.Ct. 650, 130 L.Ed.2d 554 (1994); *United States v. Johnson*, 40 F.3d 436 (D.C. Cir. 1994), *cert. denied*, 131 L.Ed.2d 297 (1995), holding that the sentencing disparity in § 841(b)(1) has a rational basis and, therefore, does not violate the Fifth Amendment's Equal Protection Clause.

The Government goes on to posit, without citing authority, that "rational basis challenges to legislation must be based on evidence of irrationality — evidence that the trial court finds credible and persuasive — not merely citation to the conclusion of others." Government Brief at 49.

There are two fallacies in this pronouncement. First, even if rational basis analysis is appropriate, which Appellant disputes in the Joint Suggestion for Hearing *en Banc* filed February 6 on behalf of Holton and Davis, the 100:1 disparity in sentencing can stand only if it is rationally related to furthering a legitimate governmental interest. *See, e.g., Romer v. Evans*, 1996 U.S.

[4] If the Court wishes counsel will provide copies of these memoranda.

Lexis 3245, 20, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Appellant's burden is to demonstrate the tenuousness of the nexus between Congress' legitimate interest in combating drug trafficking and the sentencing disparity, not to prove that the sentencing scheme is irrational.

Second, if the 240-page Sentencing Commission report, which analyzed medical, penological, legislative and legal data from more than 275 government and private sources, and the recent review published in the *Journal of the American Medical Association*, Hatsukami and Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, J.A.M.A., November 20, 1996, analyzing data from 85 sources, are not credible and persuasive evidence of the lack of a nexus, then it is hard to imagine what evidence this Court would find credible and persuasive.

CONCLUSION

For the reasons stated in Appellant's main brief and in this reply brief, and any others that may appear to the Court, Appellant respectfully requests that his conviction be vacated and that the Court order a new trial. Alternatively, if the Court finds no error in his trial justifying reversal, Appellant asks that the Court declare the sentencing disparity embodied in 21 U.S.C. § 841(b)(1) unconstitutional and remand his case for resentencing pursuant to U.S.S.G. 2D1.1 as though he had been convicted of selling powder cocaine.

Respectfully submitted,

Robert S. Becker, Esq.
D.C. Bar No. 370482
5505 Connecticut Avenue, N.W.
No. 155
Washington, D.C. 20015
(202) 364-8013
Attorney for Bobby A. Holton
(*Appointed by the Court*)

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' reply briefs.

Robert Becker

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Bobby A. Holton, certify that on February 26, 1997 I served a true copy of the attached Brief of Appellant by first-class mail on counsel listed below.

Robert S. Becker

William Weinreb
Assistant U.S. Attorney
555 Fourth Street, N.W.
Washington, D.C. 20001

Lee H. Karlin
P.O. Box 6058
Washington, D.C. 20005
Counsel for Dennis Davis