IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 96-3013 & 96-3049

United States,

Appellee,

vs.

Bobby A. Holton,

Appellant,

&

United States,

Appellee,

vs.

Dennis Davis,

Appellant.

On Appeal from the
United States District Court
For the District of Columbia
91-Cr.-0677

Joint Petition for Rehearing & Suggestion for Rehearing *en Banc*

Lee H. Karlin
Counsel of Record
P.O. Box 6058
Washington, D.C. 20005
(202) 371-1688
Attorney for Appellant Davis
(Appointed by the Court)

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

Filed: August 11, 1997

CONCISE STATEMENT OF ISSUE FOR *EN BANC* REVIEW AND ITS IMPORTANCE

In *United States v. Holton*, No. 96-3013, slip op. at 10-11 (D.C. Cir. June 27, 1997),[1] a Panel of this Court announced a new, clear procedure for trial judges 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 Appellants' case could not have anticipated the new rule, it held that he failed to follow the standards 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. 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 concluded that the Trial Court's error was harmless.

Appellants respectfully submit that the Panel's decision that they were not prejudiced by the Judge's error conflicts with the holdings of the U.S. Supreme Court and prior decisions of this Court in two respects. First, because the Trial Court exposed unsupervised jurors in deliberations to transcripts that were not in evidence and which the Judge had never determined were accurate, the error implicated Appellants' Fifth Amendment Due Process rights. Although the Panel could properly apply the *Kotteakos* standard to analyze the error in permitting use of the transcripts at trial, where defense counsel were present to safeguard Appellants' rights, it was error to apply that standard to assess prejudice resulting from exposing unsupervised jurors to the transcripts in deliberations. In analyzing the risk of prejudice during deliberations, the Panel was required to apply the standard enunciated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *See United States v. Shelton*, 628 F.2d 54, 202 U.S. App. D.C. 54 (D.C. Cir. 1980)(*Kotteakos* standard applied in assessing prejudice from violation of Fed. R. Evid. 404(b)); *United States v. Sobamowo*, 892 F.2d 90, 96, 282 U.S. App. D.C. 74 (D.C. Cir. 1989)(error

[1] A copy of the opinion is attached to this Petition as an Addendum.

harmless beyond reasonable doubt where trial judge and at least one defense counsel present as jurors listened to tapes using transcripts as aids to understanding).

Second, in ruling that the Trial Court's abuse of discretion was harmless, the Panel erroneously imposed the burden of demonstrating prejudice on Appellants, even though both standards create a rebuttable presumption that the error was prejudicial. *Shelton, supra,* at 58 n 28, Under *Chapman* the Government must demonstrate harmlessness beyond a reasonable, and under *Kotteakos* it must demonstrate a substantial probability that the error was harmless. *O'Neal v. McAninich*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947, 954 (1995); *United States v. Olano*, 507 U.S. 725, 734-5, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

In reaching its conclusion, the Panel rejected the Government's argument that the error was harmless because there was overwhelming evidence of guilt, finding merely that the transcripts were relatively accurate and the prosecution put forth other evidence "through proper means." Slip op. at 13. But, the Panel refused to presume prejudice. *Id.* Calling concerns raised by Appellants about what occurred when jurors read the transcripts while listening to the tapes 'speculation,' and applying a presumption that jurors follow instructions given by judges, the Panel reversed the burden of proof on important aspects of the prejudice/harmlessness inquiry. It further found that the Trial Court's decision to permit jurors to use the transcripts in deliberations, after defense counsel made their closing arguments in reliance on his earlier statements to the contrary, was not prejudicial.

Finally, Appellants renew their request, initially made in a Suggestion for Hearing *en Banc* filed February 6, 1997, that the full Court declare the mandatory-minimum sentencing provisions of 21 U.S.C. § 841(b)(1) as they apply to defendants convicted of distributing crack cocaine violative of the Fifth Amendment Equal Protection Clause. They request that the Court review the previously-filed Suggestion and will limit argument here to relevant events that have occurred since it was filed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES[†]

CASES

CONSTITUTIONAL PROVISIONS

[†] Cases principally relied upon are in boldface type.

STATUTES

RULES & REGULATIONS

LEGISLATION

OTHER AUTHORITIES

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

UNITED STATES, **APPELLEE,** vs. **BOBBY A. HOLTON,** **APPELLANT** & **UNITED STATES,** **APPELLEE,** vs. **DENNIS DAVIS,** **APPELLANT.**	No. 96-3013 (91-Cr.-677-2) No. 96-3049 (91-Cr.-677-1)

JOINT PETITION FOR REHEARING & SUGGESTION FOR REHEARING *EN BANC*

STATEMENT OF THE CASE

Appellants Bobby A. Holton and Dennis Davis were arrested October 30, 1991 on warrants. They were indicted November 26, 1991 on conspiracy to distribute and possess with intent to distribute cocaine base in violation of 21 U.S.C. § 846, multiple counts of distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii), multiple counts of distributing cocaine base within 1,000 feet of a playground or school in violation of 21 U.S.C. § 860(a), and using a communication facility to distribute cocaine base in violation of 21 U.S.C. § 843. Vincent Jones and Dennis Davis' brother Brian were indicted by grand jury originals.

Appellants and Vincent Jones were convicted in May 1992 of all charges against them, but this Court overturned those verdicts and ordered a new trial. The second trial began October 3, 1995 and concluded November 9, when the jury convicted Holton and Davis on all counts and acquitted Jones. Both defendants were sentenced to incarceration for periods in excess of 30 years and supervised probation for 10 years thereafter. Both filed timely Notices of Appeal.

On appeal, Appellants challenged their conviction, arguing *inter alia* that the Trial Court had violated their Fifth Amendment right to due process and the Federal Rules of Evidence in its handling of Government-prepared transcripts of audiotape evidence by permitting jurors to read them at trial and in deliberations. Appellants also challenged their sentences under 21 U.S.C. § 841(b)(1)(B)(iii) on grounds that the statute violates the Equal Protection Clause of the Fifth Amendment because it imposes mandatory-minimum penalties for distribution of crack cocaine that are 100 times more severe than penalties for distribution of powder cocaine. The so-called crack penalty has a grossly disparate impact on racial minorities, particularly African Americans. Holton and Davis filed a timely Joint Suggestion for Hearing *en Banc* on that issue, but the Court rejected it.

In an opinion issued June 27, 1997 the Panel agreed with Appellants that the Trial Judge abused his discretion to permit jurors to use Government-prepared transcripts as aids to understanding the tape recorded evidence at trial and in deliberations. But it concluded that the error was harmless because it was reasonable to assume Appellants were not prejudiced by the error. The Panel ruled, based on prior decisions in this Circuit, that Congress had a rational basis for imposing different sentences for distribution of the two forms of cocaine and, therefore, the crack penalty does not violate the Fifth Amendment.

STATEMENT OF FACTS

According to the Government's evidence, police learned from a drug dealer who had been arrested earlier in 1991 that Dennis Davis was selling narcotics in Barry Farms. The Narcotics and Special Investigations Division devised a plan under which the informant would introduce Det. Michael Quander, masquerading as a drug dealer, to Dennis Davis, and Quander would attempt to buy PCP from Davis. The broad objective of the investigation was to identify individuals in Barry Farms involved in drug sales and the apartments used for the operation, Sgt. John Brennan said. Another objective was to enhance the sentences imposed on individuals charged in the case by making multiple purchases that would bring the total amount of drugs involved above limits established in 21 U.S.C. § 841(b), Brennan admitted.

Investigators made six purchases on five days in October 1991, obtaining about 275 grams of crack cocaine for $11,000. At the conclusion of the last transaction, October 30, arrest and search teams

moved in to arrest both Appellants and to search two dwellings in the 1300 block of Stevens Road, S.E.[2]

ARGUMENT

THE PANEL REPEATEDLY AND ERRONEOUSLY PLACED THE BURDEN ON APPELLANTS TO PROVE THE ABSENCE OF PREJUDICE

In its opinion the Panel 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 [*United States v.*] *Slade*[, 627 F.2d 293 (D.C. Cir. 1980)] 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

Slip op. at 11. 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 Appellants. Furthermore, although the Panel did not make a specific finding on this point, it is clear that the Trial Judge abused his discretion again in the final hours of the five-week-long trial, after counsel for both Appellants made their final arguments, by permitting jurors during deliberations to read the transcripts while replaying the tapes.

The 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 principle 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 state-

[2] More detailed statements of the case and the facts can be found in Appellants' main briefs.

> ments. . . . 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 6 (citations omitted).

Because the Trial Court's mishandling of the transcripts at trial and during deliberations "affected" "substantial rights," the Panel correctly held that it was required to determine whether the abuse of discretion prejudiced Appellants.[3] Trial counsel repeatedly objected to use of the transcripts and, therefore, the Panel at a minimum was required to apply harmless error analysis in making that determination.[4]

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.[5] Thus, an error resulting from violation of a statute, rule of proce-

---

[3] "Technical errors," which need not be analyzed in this manner, include the "mere etiquette of trials and [] the formalities and minutiae of procedure." *United States v. Olano*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947, 954 (1995)(quoting *Bruno v. United States*, 308 U.S. 287, 294, 60 S.Ct. 198, 84 L.Ed. 257 (1939)(Frankfurter, J.)).

[4] Appellants continues to believe, as stated in Holton's *Brief* at 12-13, that, under the circumstances of this case, the Trial Court decision to permit unsupervised jurors to read the tape transcripts during deliberations was structural error and, therefore, a new trial is required because the degree of prejudice cannot be quantified. *See, e.g. United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996).

[5] 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.

dure 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)).

It is often difficult, if not impossible to determine which harmless error test an appellate court has applied. *See, e.g., United States v. Strothers*, 77 F.3d 1389, 1392-3, 316 U.S. App. D.C. 210 (D.C. Cir. 1996)(admission of transcripts into evidence was harmless error);[6] *Dallago v. United States*, 427 F.2d 546, 556-7, 138 U.S. App. D.C. 276 (D.C. Cir. 1969)(new trial required where documents not in evidence sent to jury room in error, relying on *Ogden v. United States*, 112 F. 523 (3d Cir. 1902)). Very few cases discuss the proper standard to be applied when an abuse of discretion is found. *See, i.e., United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983)(tapes of very poor quality, new trial required because transcripts were unreliable hearsay). In cases where it is possible to discern which test was applied, this Court appears to have invoked the *Kotteakos* test when considering whether erroneous admission of evidence resulted in prejudicial error. *See, e.g., United States v. Treadwell*, 760 F.2d 327, 245 U.S. App. D.C. 257 (D.C. Cir. 1985)(document not in evidence sent to jury room); *Shelton, supra* (evidence of character admitted in violation of Fed. R. Evid. 404(b)). In considering whether it was error to exclude defendants when audiotape evidence was replayed for jurors during deliberations, this Court applied the *Chapman* test. *Sobamowo, supra*, 892 F.2d at 96 (error harmless beyond reasonable doubt where trial judge and at least one defense counsel present as jurors listened to tapes using transcripts as aids to understanding).

Appellants' case raises elements of both erroneous admission of evidence and contamination of the jury's deliberations. Because the Trial Court's abuse of discretion in permitting unsupervised jurors in deliberations to read government-prepared transcripts, Appellants' rights under the Fifth Amendment Due

[6] Appellants believe the Panel misinterpreted the holding in *Strothers.* It stated, "we found error when government-prepared transcripts were admitted into evidence and could be read by the jurors without listening to the tapes, but we didn't rule out the admission of a transcript into evidence altogether." Slip op. at 8. The *Strothers* Court ruled that it was error to admit the transcripts, although harmless in that case. It is a stretch to read that opinion as condoning admission of tape transcripts in other cases, and it is hard to imagine how the Panel would regulate jurors' use of transcripts in deliberations once they are admitted into evidence.

Process Clause were substantially affected, and their convictions can stand only if the error was harmless beyond a reasonable doubt.

Under either the *Kotteakos* or the *Chapman* test the Government bears the burden of demonstrating that the error did not prejudice Holton and Davis. "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 Appellants the duty to demonstrate prejudice and, finding that they had not, reached 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*, slip op. at 13. The Panel's reasoning relied heavily on this Court's decision in *Treadwell, supra*, 760 F.2d at 245, which applied a very diluted 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).

Assuming for purposes of argument that the *Kotteakos* standard applies to both issues, admission of the transcripts as aides to understanding and the lack of supervision of jurors reading them in deliberations, the Panel should have taken the approach explained in *Shelton, supra*, 628 F.2d at 58 n28, requiring that the error be deemed prejudicial if it had a substantial influence or if the court is "left in grave doubt," which Judge Bazelon defined by reference to "*Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)('The question is whether there is a *reasonable possibility that the evidence complained of might have contributed to the conviction*.')." (emphasis added).

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." Slip op. at 13 (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.[7]

Second, the Panel stated it would not presume prejudice in Appellants 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." Slip op. at 13. 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 or Davis, and 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. It cited the Government's version of Davis' arrest after jumping out a window of 1361 Stevens Road, S.E. But, through the testimony of defense witnesses Davis challenged the Government's evidence concerning the circumstances of his arrest, leaving it to the jury to determine the credibility of police and civilian witnesses.

Appellants submit that the Panel's heavy reliance on *Treadwell* for the proposition that evidence erroneously sent to the jury room did not prejudice the Appellants 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 Court distinguished *Treadwell* from

[7] The Panel intimates that the *Slade* Court may have considered whether a trial judge had discretion to permit jurors to use transcripts while listening to tapes during deliberations. Slip op. at 7. But there is no evidence in the opinion supporting that belief, and the Court stated in *Strothers, supra*, 77 F.3d at 1392, that "[i]n *Slade* . . . the transcripts were used only as listening aids during trial."

two Second Circuit cases, ***United States v. Ware***, 247 F.2d 698 (2d Cir. 1957), and *United States v. Adams*, 385 F.2d 548 (2d Cir. 1967). In those cases trial judges admitted into evidence envelopes filled out by investigators and chemists who analyzed the drugs the envelopes had contained.

The transcripts in Appellants' case are like the evidence envelopes in *Ware* and *Adams*. The *Treadwell* Court 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 *Adams* 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. 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 United States v. Sawyer*, 303 F.2d 392, 395, 112 U.S. App. D.C. 381 (D.C. Cir. 1962). In cases like Appellants' 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 Appellants

The Panel's conclusion that defense counsel availed themselves of the opportunity to challenge the preparation and accuracy of the transcripts is only partially correct. Holton's counsel elicited testimony from Quander that he had prepared the transcripts and was the only person to assign attributions to the

statements. But when she attempted to show that they included only portions of the recorded conversations, the Trial Judge sustained a Government objection that the line of questioning would mislead the jury. Tr. 10/13/95, 128.[8] Prosecutors had previously admitted that they transcribed only the relatively-audible portions of the tapes they intended to use to augment Quander's testimony. *Davis' Brief* at 29. Counsel's use of the transcripts in cross examination was limited as well by concerns that if she went into too much detail the Government might seek admission of them — making them available to jurors in deliberations, or that they might be distributed to the jurors in the courtroom. Tr. 10/13/95 at 109-112. The judge repeatedly told counsel and jurors during the trial that the transcripts would not go to the jury room, and did not announce that he might permit jurors in deliberations to use them until November 7, the day after counsel for Davis and Holton made closing arguments. The Judge did not make his final decision until one of the unrecorded, in-chambers sessions following the jury's request to hear the tapes.

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. 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. 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. 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 that had been transcribed. Tr. 11/7/95, 44-47. *Davis Brief* at 17.

Errors in Evaluating Deliberations

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

[8] References to the trial transcript are in the form "Tr." followed by the date of the proceeding and the page number.

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. Slip op. at 14-15. 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 6, in *Olano* the Supreme Court applied plain error analysis, and that decision clearly does not stand for the proposition that, under harmless error analysis, this 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, the Supreme 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 the Supreme Court has generally applied *Kotteakos* harmless error analysis to issues arising under Rule 52(a), not the stricter *Chapman* standard. In the case before this Court, 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,

> it is clear that the jury did not use the transcripts as a substitute for listening to the tapes in deliberations. The 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.

Slip op. at 15. 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 6. 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 Appellants' 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 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.

Errors in Evaluating Fifth Amendment Due Process Issue

In *Sobamowo*, *supra*, this Court 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. 892 F.2d at 96. It analyzed the issue under the *Chapman* standard, finding harmlessness beyond a reasonable doubt, because the issue implicated due process concerns, *Id.* The Court totally 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.

Appellant Holton 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, as Sobamowo had.[9] *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.

[9] Contrary to the Government's assertion, *Brief* at 29-30, and the Panel opinion, Slip op. at 16-17, Holton conceded that this Court had previously rejected the Confrontation Clause/Rule43(a) argument in *Sobamowo*.

As the Court 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.

Slip op. at 16. Thus, it placed the burden on Appellants to demonstrate that prejudicial errors occurred, when the Government should have been required to prove beyond a reasonable doubt that no prejudice resulted. But 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. Such unsupported assertions, based mainly on presumptions, would not satisfy the requirements of *Kotteakos*. They clearly are insufficient to satisfy *Chapman*.[10]

THE MANDATORY-MINIMUM SENTENCING SCHEME APPLIED TO PERSONS CONVICTED OF DISTRIBUTING COCAINE BASE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT

Appellants filed a Joint Suggestion for Hearing *en Banc* prior to oral argument in this case, arguing that in light of evidence amassed by the U.S. Sentencing Commission and others it has become clear that the mandatory-minimum sentencing provisions of 21 U.S.C. § 841(b)(1) for crack cocaine violate the Fifth Amendment Equal Protection Clause. The Court denied the suggestion, perhaps because *en banc* review is such an extraordinary procedure, and it would have been unnecessary if Appellants' convictions had been reversed.

[10] 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.

Appellants renew their request for *en banc* review on this issue. Rather than present their entire argument again, they will limit argument here to issues that have arisen since early February 1997 and request that the Court review the previous filing.

Although the Sentencing Commission presented Congress strong evidence in 1995 that sentences imposed under § 841(b)(1)(A)(iii) and (B)(iii) have a grossly disparate impact on minority criminal defendants and that the 100:1 quantity ratio is constitutionally deficient,[11] several bills introduced in the 104th Congress to alter the ratio languished in committee until the term ended.

In late April, Congress received the second *Special Report to Congress: Cocaine and Federal Sentencing Policy*, U.S. Sentencing Commission (April 1997) (referred to below as 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 crack/powder ratio, perhaps 1:5 rather than 1:100, and that the trigger quantities for both 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

In his concurring opinion to the 1997 report, Sentencing Commission Vice Chairman Michael Gelacak responded to some of the arguments made by members of Congress in support of the 100:1 ratio. Noting the oft-repeated claim that crack is "cheap" and, therefore, affordable by the poor and young children, *1995 Cocaine Policy Report* at 85, he said that argument is "a little like punishing vehicular homicide while under the influence of alcohol more severely if the defendant had become intoxicated by ingesting cheap wine rather than scotch whiskey." *1997 Cocaine Policy Report, Concurring Op.* at 2. Ac-

[11] *Special Report to Congress: Cocaine and Federal Sentencing Policy*, U.S. Sentencing Commission (February 1995)(referred to below as the *1995 Cocaine Policy Report).*

cording to a recently-released study, "young inner city users are starting to disdain crack as a 'ghetto drug'; Miami sources describe crack use as 'unfashionable' among youth, particularly with African Americans in inner city areas, and often those who continue to use crack try to hide it from their peers." *Pulse Check: National Trends in Drug Abuse*, Office of National Drug Control Policy, Summer 1997, 7 (*referred to below as Pulse Check*).

Responding to the argument that the goal of the crack penalty was to help inner-city minority neighborhoods, Gelacak stated, "Black Americans know that the penalties for crack cocaine fall primarily upon the youth of their communities and they do not countenance the present penalty structure." *Id.* at 3 (emphasis in original).

Since the 105th Congress convened three bills have been introduced in the House and two in the Senate, but none has been reported out of committee, and none includes a retroactivity clause.[12] Therefore, the general saving statute, 1 U.S.C. § 109, would prevent defendants, like Appellants, sentenced before § 841(b) is amended, from receiving a sentence reduction, even though the Sentencing Commission likely would reduce sentences of individuals convicted of simple possession who received mandatory-minimum terms under U.S.S.G. 2D1.1. *See United States v. Anderson*, 82 F.3d 436, 441 D.C. Cir. 1996).

Furthermore, because the Commission did not propose an amendment to U.S.S.G. 2D1.1 in May 1997, 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).

This year's *Pulse Check* report counters the assumption that crack is unique in fostering violent crime. The report found little difference in the makeup of the distribution chain for heroin and both forms of cocaine. *Id.* at 4-6, 8.

In mid-July, Attorney General Reno and Gen. McCaffrey, director of the Office of National Drug

[12] S. 209, 105th Cong., 1st Sess., introduced Jan. 28, 1997, H.R. 332, 105th Cong., 1st Sess., introduced January 7, 1997, and H.R. 2229, 105th Cong., 1st Sess., introduced July 23, 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. 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.

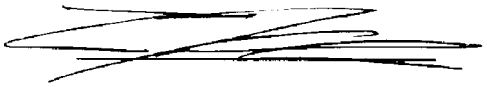
Control Policy, joined the chorus seeking amendment of § 841(b)(1). In a letter to the President they proposed that the ratio be reduced to 10:1 by raising the quantities of crack and lowering the quantities of powder that trigger mandatory-minimum sentences.[13] *See* Washington Post, July 21, 1997 at A2, *Officials Draft Plan to Reduce Cocaine Sentencing Disparities*.

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

For the reasons stated above, Appellants Bobby A. Holton and Dennis Davis respectfully request that the Court *en banc* review the Panel decision and find that the Trial Court's abuse of discretion in admitting the audiotape transcripts and permitting unsupervised jurors to read them during deliberations was prejudicial error requiring that they be granted a new trial. Alternatively, Appellants request that the court declare the mandatory-minimum sentences for distribution of cocaine base embodied in 21 U.S.C. § 841(b)(1) violative of the Equal Protection Clause of the Fifth Amendment, vacate their sentences and remand their cases to the District Court for resentencing under the applicable U.S. Sentencing Guidelines.

Respectfully submitted,



Lee H. Karlin
D.C. Bar No. 384721
P.O. Box 6058
Washington, D.C. 20005
(202) 371-1688
Attorney for Dennis Davis
(*Appointed by the Court*)

Respectfully submitted,

Robert S. Becker
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*)

[13] Neither the Department of Justice nor the ONDCP released the letter and neither has responded to Appellant Holton's request under the federal Freedom of Information Act, 5 U.S.C. § 552(a), for a copy of it.

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Bobby A. Holton, certify that on August 11, 1997 I served a true copy of the attached Petition for Rehearing & Suggestion for Rehearing *en Banc* by first-class mail on counsel listed below.

Robert S. Becker

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

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