Oral Argument Has Not Yet Been Scheduled

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-3053

United States,

Appellee,

vs.

Marlon Marshall,

Appellant.

On Appeal from
The U.S. District Court
For the District of Columbia
95-Cr.-0201

Brief of Appellant

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI.

Appellant Marlon Marshall and Appellee the United States of America, appeared in the United States District Court for the District of Columbia. They are the only parties to appear before this Court.

B. RULINGS UNDER REVIEW

At issue before this Court is Marshall's conviction January 25, 1996 by a jury and the sentence handed down by Judge Friedman April 10, 1996. The Judgment of Conviction is reproduced in the Appendix at C.

C. RELATED CASES

This case has not previously been before this Court and no other cases are related to it.

STATUTES & RULES

Pursuant to Fed. R. App. P. 28(f) and D.C. Cir. R. 28(a)(5), relevant statutes and rules are set forth in the Addendum to this brief.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of conviction and imposition of a sentence of 135 months in prison by the U.S. District Court for the District of Columbia, which had jurisdiction pursuant to 18 U.S.C. § 3231. A Notice of Appeal was filed within 10 days of judgment in compliance with FED. R. APP. P. 4(b) and this Court has jurisdiction pursuant to 18 U.S.C. § 1291. The Notice of Appeal is reproduced in Appellant's Appendix at D.

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QUESTIONS PRESENTED

1. Whether the Trial Court abused its discretion by permitting the Government, in its case-in-chief, to introduce evidence it had failed to disclose to Defense Counsel in violation of Fed. R. Crim. P. 16, and only made available to the defense mid-trial, after Counsel had committed himself to a litigation strategy the undisclosed documents were intended to defeat.
2. Whether the mandatory-minimum sentencing structure embodied in 21 U.S.C. § 841(b)(1) violates the Equal Protection Clause of the Fifth Amendment because Congress lacked a rational basis for imposing sentences on individuals convicted of selling crack cocaine that are 100 times as severe as sentences imposed on those convicted of selling powder cocaine, in the absence of evidence demonstrating that the former is a more dangerous form of the same drug?

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

UNITED STATES, **APPELLEE,** vs. **MARLON MARSHALL,** **APPELLANT.**	No. 96-3053 (95-Cr.-0201)

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Although the narcotics transaction for which appellant was convicted allegedly occurred May 16, 1994, and investigators ceased efforts to initiate further transactions with him the following month, Marshall was not indicted until August 10, 1995. At the time he was under preventive detention by order of D.C. Superior Court in an unrelated homicide case. About two weeks later the U.S. Attorney was forced to dismiss that case because prosecutors were not ready for trial.

The indictment charged Marshall with one count of unlawful distribution of more tha five grams of cocaine base or "crack" cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B(iii). R. 3.[1] App. B.

Marshall was arrested at the D.C. Jail and arraigned August 16, 1995. At a hearing August 25, 1995, Trial Counsel did not oppose the Government's request that he be detained. Counsel noted that the murder trial was scheduled to begin the following Monday and reserved the right to litigate the issue if that trial ended in acquittal. Tr. 8/25/95, 2. At Trial Counsel's suggestion the

[1] References to transcripts of proceedings in the trial court will be in the form "Tr." followed by the date of the proceeding and the page number. References to the record will be in the form "R." followed by a page number. References to Appellant's appendix will be in the form "App." followed by a tab letter and, where appropriate, a page number.

detention hearing was continued, and at a status hearing September 8, 1995, Counsel moved for reconsideration of bond because the homicide case had been dismissed for want of prosecution. R. 4. At the conclusion of the hearing the Court took the motion under advisement. The Judge ordered detention at a hearing September 29, 1995. *Id.*

Defense Counsel filed motions to suppress in-court and out-of-court identifications of appellant by investigators and physical evidence — audio- and videotape recordings of telephone conversations and meetings. R. 4. The Court considered both motions at a hearing January 16, 1996, immediately before the trial. *Id.* After the midday recess Counsel informed the Court that the Government had permitted him to listen to new, intelligible copies of two tapes that were the subject of his motion to suppress because the copies provided previously had been unintelligible. He said the Government produced a third tape he had never heard before, Tr. 1/16/95, 84-89, and asked for a recess so he could listen to the tapes with Appellant to consider their impact on the case and to prepare for further argument concerning the motion to suppress identifications.

The next day Trial Counsel withdrew the motion to suppress the tapes on grounds that they were unintelligible, but reserved the right to challenge on evidentiary grounds Government use of portions of them. Tr. 1/17/95, 103. The Government filed its notice pursuant to Fed. R. Evid. 404(b) that day, indicating that the only other crimes evidence it intended to introduce related to an aborted transaction May 25, 1994 among Appellant, the undercover DEA agent and the confidential informant who had precipitated the investigation. R. 5.

Before the trial began January 18, Trial Counsel filed a motion *in limine* asking that Government witnesses be barred from referring to a pager called repeatedly by the informant in this case as belonging to Marshall because the Government could produce no evidence linking the pager to him. The Prosecutor responded that he would not introduce such evidence in his case-in-chief. Tr. 1/18/96, 7. After hearing oral argument on the motion to suppress identifications and admissibility of the Government's 404(b) evidence, the Trial Judge refused to suppress either category of evidence. R. 5, Tr. 1/18/96, 33.

After the Prosecutor gave his opening statement, Defense Counsel gave an opening in which he told jurors none of the investigators in the case knew Marshall prior to May 1994 and they relied on the word of a criminal working for the DEA in the hope of obtaining leniency in his own case. Counsel went on to say the Government would produce no evidence linking Marshall to the pager, the cars he allegedly drove to the two meetings, or the telephones from which calls were made to set up meetings May 16 and 25, 1994. Tr. 1/18/96, 52-60.[2]

The trial followed and was interrupted for a hearing to determine the fate of a photograph of Appellant. The Government had introduced a copy of the photo, Exhibit 14, and its witness, DEA Agent Frank Suarez, testified the original had been lost. Defense Counsel argued that he was entitled under Fed. R. Crim. P. 16 (a)(1)(C) to a copy of the original, which may have had notations on the back, but which were absent from the copy. The Trial Court admitted the photo but agreed to hear further argument concerning suppression of identifications resulting from its ue and sanctions for violation of Rule 16. Tr. 1/18/95, 117-20.

Through cross-examination of Suarez, Trial Counsel determined that the Government had not provided him additional evidence he argued it was required to disclose under Rule 16, a Report of Investigation prepared May 27, 1994, that identified investigators whose names had not previously been disclosed and the license plate number of the vehicle Marshall allegedly drove to the aborted May 25 meeting. *Id.* at 157-58. The Trial Court dismissed the jury early and, after hearing argument from both sides, concluded that the report contained information material to preparation of the defense, ordered the Government to review its file for other material it failed to disclose in discovery, and recessed so Trial Counsel could review the documents he had received. *Id.* at 164. App. G.

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[2] These assertions were based on documents provided to Appellant in discovery under Rule 16 and statements provided in advance of trial under the Jencks Act pursuant to the U.S. Attorney's general practice in District Court cases. An August 15, 1995 letter to Defense Counsel from Assistant U.S. Attorney Cynthia G. Wright stated:

> The following information and enclosed documents are intended to satisfy the Government's obligations under Rule 16 of the Federal Rules of Criminal Procedure (unless otherwise noted herein):
> …
> Documents: The following police reports are enclosed: (1) DEA-7, (3) Reports of Investigation by Special Agent Valentine; Special Agent Arthur Miller; Special Agent Frank Suarez; Receipt for Items.

When the trial resumed January 19, 1996, Trial Counsel informed the Court he learned for the first time from Suarez' report that the Government had a much stronger identification case than he had previously believed and would discuss a plea with Marshall. Tr. 1/19/96, 4. Appellant rejected the plea offer and the trial resumed. When examination of Suarez concluded, the Prosecutor, for the first time, informed the Court and Defense Counsel he wanted to call a D.C. Department of Corrections officer as his next witness to introduce records showing who visited Appellant at the jail.[3] Tr. 1/19/96, 66. App. H. In response to Counsel's objection that such testimony would be highly prejudicial, the Judge ordered the Prosecutor to turn over copies of the records to Appellant and delay calling the corrections officer until after a hearing.[4] *Id.* at 68. After the jury was dismissed the Court held a hearing on evidentiary issues, including sanctions that might be imposed for losing the original photograph of Appellant and whether the corrections officer could testify. *Id.* at 127. App. I.

The Government filed a motion *in Limine* requesting permission to introduce the evidence it had failed to disclose — including the jail visitor records and documents linking Appellant to the pager and the vehicle he allegedly drove May 25, 1994, App. E, and Defense Counsel filed a motion *in limine* to suppresss evidence disclosed late, App. F. Following a hearing the Court ruled that all of these documents were material to preparation of the defense and, therefore, subject to the disclosure requirements of Fed. R. Crim. P. 16(a)(1)(C). It concluded that the Government could introduce the jail records and documents linking Marshall to the car; but it suppressed the pager and barred the Government from using in its case-in-chief records showing it belonged to Marshall. Tr. 1/24/96 a.m., 81-88. App. J. Subsequently, in response to Defense Counsel's argument that disclosing to jurors the fact that Marshall had been incarcerated was more prejudicial than probative, the Court strongly urged the Government to enter into a

[3] The Government contended that a woman who visited Marshall while he was incarcerated pretrial, Sabrina Shorter, owned the phone used to return some pages made by the informant.

[4] The Judge ordered the Government to go forward with other witnesses but, after calling one witness who testified briefly, the Prosecutor again attempted to call the corrections officer, prompting a bench conference in which the Judge upbraided the prosecution for failing to make timely disclosures to Defense Counsel and for causing trial delays. Tr. 1/19/96, 81. App. H, 4.

stipulation proposed by Defense Counsel that Marshall knew Shorter, rather than calling the corrections officer as a witness. Tr. 1/24/96 p.m., 45-47. App. K.

After the Government rested, Defense Counsel announced that he would not call any witnesses. Following final arguments and instructions January 25, 1996, the Jury returned a guilty verdict on the one-count indictment. R. 6. The Trial Court sentenced Marshall April 10, 1996 to 135 months in prison and four years of supervised probation following his release. R, 7. He filed a timely Notice of Appeal April 15, 1996. *Id.*

STATEMENT OF FACTS

The facts underlying this case are relatively straightforward. Based on information provided by an informant, Drug Enforcement Administration agents initiated an investigation in which the informant made a series of phone calls to a pager number from the DEA Washington Field Office beginning May 10, 1994. The calls were returned and the informant, under the supervision of Agent Frank Suarez, negotiated to purchase 62 grams of crack cocaine May 16, 1994. Before the transaction took place the dealer told the informant he could deliver only 42 grams of crack. In the transaction outside a McDonald's at Minnesota Avenue and Dix Street, S.E., the informant and undercover DEA Agent Arthur Miller received 35.46 grams of crack in exchange for $1,350.

In another round of phone calls beginning May 24, 1994 the informant arranged to make a second purchase of 62 grams the next day. The informant and Miller met the dealer at Pennsylvania and Branch avenues, S.E., but the dealer told the informant he would not complete the transaction because it was too "hot" in the area, meaning police were present. The dealer rejected Miller's attempts to move the transaction to a nearby restaurant, and the operation ended for the day.

Investigators made several attempts into June 1994 to initiate another transaction with the dealer, but calls to the pager number were never again returned.

THE GOVERNMENT'S EVIDENCE

The Government presented its case through the testimony of four DEA agents: Suarez, who coordinated the investigation, Miller, Carlton M. Perry and Robert Valentine, surveillance officers; Metropolitan Police Sgt. Brian Hubbard, also involved in surveillance; and Prince George's County Police Cpl. Brian Rumsey.

Suarez' Testimony

Based on a tip from the informant[5] that Marlon Marshall was a drug dealer, Suarez arranged May 10, 1994 for the informant to initiate a transaction by calling a pager number the informant supplied. Tr. 1/18/96, 74. The informant received a call in response to the page and arranged to purchase 1/8 kilogram (125 grams) of crack cocaine for $3,200. Suarez' attempt to record the call failed, and he acknowledged that he heard only the informant's side of the conversation. *Id.* at 75-6. On cross-examination Suarez admitted that his only basis for claiming that Marshall had returned the call was hearsay, the word of the informant. *Id.* at 137.

Early in the investigation Suarez acquired a photograph of Marshall from the Metropolitan Police Department. *Id*. at 74.

The informant called the pager number again May 11, 1994 and received a call back from a person he told investigators was not Marshall, *Id*. at 77-8, and, according to Suarez, the DEA never identified the caller. During that conversation, which was recorded,[6] the caller asked to reduce the amount of crack to 62 grams. The informant initiated a third contact May 16, 1994 by calling the pager and receiving a return phone call at the DEA office. In the conversation, which was not recorded, the informant discussed the amount of drugs and a price. *Id.* at 89. The informant called the pager number again later that day and received a call back. In the recorded conversation a person Suarez identified as Marshall, again based on hearsay, said he could only provide 42 grams of crack for $1,350. *Id.* at 91.

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[5] Although the Government did not call the informant as a witness it arranged to make him available to Defense Counsel in the courthouse January 19, 1996 for an interview, and Counsel, with Marshall's approval, agreed to a secrecy order barring disclosure of the informant's identity.

[6] The Trial Court admitted the recording over a defense objection that it was hearsay, which was not admissible under the exception for coconspirator statements because the government neither alleged a conspiracy nor established an agency relationship between Marshall and the caller. Tr. 1/18/96, 78. The Court ruled that the Government established the existence of a conspiracy by a preponderance of evidence and the tape was admissible under *Bourjailly v. United States*, 483 U.S. 171 (1987), and Fed. R. Evid. 801(d)(2)(3). *Id.* at 81.

According to Suarez, the informant and Miller drove to the McDonald's on Minnesota Avenue, S.E., at about 5:45 p.m. *Id.* at 94. At least twice before the meeting, earlier that day and at an earlier, unspecified time, Suarez showed a photo of Marshall to Miller.[7] Tr. 1/18/96, 96.

The informant called the pager number again May 24, 1994 and received a return phone call from someone who said Marshall would call later, Suarez testified. *Id.* at 123. He said that when Marshall called, the informant told him the last purchase had been short — about 35 grams, not the promised 42 grams — and that they wanted to buy 62 grams of crack. *Id.* at 123-6. In a call that was recorded May 25, 1994, the informant and the person he identified as Marshall agreed to meet at Pennsylvania and Branch avenues, S.E., Suarez stated. *Id.* at 131. He said Miller and the informant met Marshall that afternoon but no transaction occurred. Suarez said he was in a van across Pennsylvania Avenue videotaping the meeting at the time and Hubbard, acting as a surveillance officer in plain clothes, was pretending to use a telephone near where Marshall was standing before the meeting. *Id.* at 131-4. After viewing the videotape (Gov't Exh. 10) during cross-examination, Suarez testified he believed the person shown near Hubbard was Marshall, but he was not sure. Tr. 1/19/96, 18-19.

Suarez testified on cross-examination that he traced the registrations on the two vehicles Marshall was seen in May 16 and 25, and neither car was registered to Appellant. Tr. 1/19/96, 8. Ne never attempted to interview the owners of the cars to determine if they knew Appellant. *Id.* at 10. On redirect examination Suarez added that he checked the license plate numbers with Prince George's County police as well as with the D.C. Motor Vehicles Bureau. *Id.* at 58.

[7] When the Government attempted to introduce a photo of Marshall, actually a polaroid print of a photograph, Gov't Exh. 14, Defense Counsel objected. He noted that Suarez said Miller had been shown the original photo, which, Counsel argued, may have had handwritten notations on it and which should have been provided to the defense in discovery. Tr. 1/18/96, 107. He noted as well that the name "Marshall" had been written on the top of the original before it was copied and that Suarez could not say whether the name had been there when Miller was shown the photo. *Id.* at 113-4. Counsel argued that the photo should be excluded as a sanction for loss of the original, and asked the Judge to reconsider his ruling on the motion to suppress identifications because it appeared the photo shown to Miller was even more suggestive than previously thought. *Id.* at 117. The Judge agreed, but ruled that the identification was reliable nonetheless. Tr. 1/18/96, 119.

Efforts to link Marshall to the pager failed as well, and no fingerprints were found on packaging in which the informant and Miller received the drugs May 16. *Id.* at 10-12. Investigators determined who owned the telephones used to make return calls to the informant, but they never interviewed those individuals, and a visit to a motel where one of the calls was made turned up no link to Marshall. *Id.* at 14-15.

Miller's Testimony

Agent Miller, the undercover officer, testified that he and the informant met Marshall May 16, 1994 at about 5:45 p.m. in the parking lot of the McDonald's at Minnesota Avenue and Dix Street, S.E. Tr. 1/19/96, 91. They drove to the meeting in the informant's truck and when they arrived the informant stated that Marshall was the passenger in a car nearby on Clay Street. In response to a signal from Marshall that the informant should follow to another location, Miller instructed the informant to refuse to leave the parking lot. *Id.* at 92. The vehicle in which Marshall was riding then parked next to the informant's and Marshall approached the driver's side, according to Miller. He said Marshall stated "Have a french fry" to the informant and handed him a McDonald's box containing crack cocaine. The informant handed Miller the box and he reached over and paid Marshall for the drugs, Miller stated. *Id.* at 93-96.

Miller testified that he drove the informant's truck to the May 25, 1996 meeting in a convenience store parking lot, and a large, green car pulled into the lot behind them as they parked. *Id.* at 115. He said the informant identified Marshall as the driver of the car, and both men walked back to it. The informant got into the car on the passenger side and Miller stood by the door. Although Miller testified that the dark tinted windows of the car were open, *Id.* at 116, on cross-examination he acknowledged they appeared on the videotape of the meeting to be closed, making it impossible to see into the car. He conceded that he appeared to be looking in through a small crack when the door was open. Tr. 1/24/96, 20-28.

Miller said he walked away from the car because Marshall indicated he wanted to talk to the informant only. When the conversation ended the informant walked to where Miller was standing and stated that Marshall did not want to complete the transaction because he believed

police were present in the area. *Id.* at 118-19. Miller said he instructed the informant to tell Marshall they were going to a restaurant and he should meet them there a short time later to complete the deal. He added that Marshall proposed they go immediately to a pancake restaurant in Temple Hills, Md. *Id.* at 120. But they could not reach agreement and no transaction occurred.

Rumsey's Testimony

Cpl. Rumsey from Prince George's County testified that he stopped a dark Buick with the same license plate number as the car Marshall allegedly drove to the May 24 meeting. The stop occurred October 21, 1994 at about 7 p.m., and Marshall was driving the car, he said. Tr. 1/24/96, 24-25.

Hubbard's Testimony

Sgt. Hubbard said he was part of the surveillance team May 25, 1994 and he stood outside the convenience store pretending to use a pay phone. *Id.* at 29. He said Marshall was standing outside the store as well, and another man approached. According to Hubbard, Marshall instructed the unidentified man to "put the shit back in the car" because it was "too hot," meaning there were police in the area. *Id.* at 30. In cross-examination Hubbard confirmed that the windows of the Buick Marshall allegedly drove were tinted so he could not see what was going on inside. *Id.* at 37.

SUMMARY OF THE ARGUMENT

The purpose of Fed. R. Crim. P. 16 is to ensure the fair administration of justice, to permit a criminal defendant to make an informed decision about whether to take a plea and to formulate litigation strategy, to minimize the undesirable effects of surprise at trial, and to promote accurate fact-finding. When a party violates the rule by failing to make required disclosures timely, the Trial Court may impose sanctions to alleviate prejudice resulting from noncompliance with the rule.

The Trial Judge in this case correctly concluded that jail records indicating a link between Sabrina Shorter and Appellant, a pager and records linking it to Appellant, and a Prince George's County police report linking a car allegedly driven to an aborted drug transaction to Appellant were material to Marshall's defense and were covered by Rule 16(a)(1)(C). None of these records was disclosed to Appellant until the middle of his trial, after Defense Counsel told jurors in his opening statement that the Government would not be able to produce evidence establishing the links. Counsel made the assertions in the belief that on the Government having fully complied with Rule 16.

The Judge erroneously concluded that the Government did not act in bad faith in failing to produce the jail records pretrial and that it had produced the pager and police records as soon as it obtained them, although it should have investigated earlier and obtained those records before trial. Because the focus of the rule is on protecting the defendant's rights, not punishing the Government, even negligent or inadvertent failure to make timely disclosures is a violation of the rule.

Treating the undisclosed items as posing a series of evidentiary problems, rather than as attacking the foundation of the defense case, the Trial Court failed to properly assess the very significant degree of prejudice to Appellant caused by the discovery violations. This led the Court to conclude that brief mid-trial continuances were sufficient to permit Counsel to restructure the defense case.

The Judge's failure to rule that the Government could not introduce any of the late-disclosed evidence in its case-in-chief or, to grant a mistrial, was an abuse of discretion. Therefore, this Court should remand Appellant's case for a new trial.

Upon conviction Marshall received a mandatory-minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(B)(iii) for distribution of more than 5 grams of crack cocaine. The U.S. Sentencing Commission has concluded that there is no rational basis for the statute's 100:1 disparity in sentencing between crack and powder cocaine, but Congress has refused to amend the statute and blocked amendment of the Sentencing Guidelines to eliminate the disparity imposed on individuals convicted of simple possession. Furthermore, analysis of scientific data about crack and powder cocaine by independent researchers supports the Sentencing Commission's conclusion. As such, the 100:1 disparity violates the Equal Protection Clause of the Fifth Amendment, and this Court should remand Marshall's case for resentencing under the guidelines applicable to those convicted of distributing less than 500 grams of powder cocaine.

ARGUMENT

THE GOVERNMENT'S MULTIPLE VIOLATIONS OF FED. R. CRIM. P. 16 PREVENTED APPELLANT FROM FORMULATING AN EFFECTIVE TRIAL STRATEGY OR MAKING EFFECTIVE USE OF MATERIAL OBTAINED BELATEDLY IN DISCOVERY

The Government violated Fed. R. Crim. P. 16(a)(1)(C) by failing to disclose before trial information about the telephone pager the informant called repeatedly during the investigation, although it knew the pager had been confiscated from Marshall by Prince George's County Police in October 1994 and was in their custody prior to the trial. The Government, in addition, withheld a Prince George's County police report written in October 1994 linking Marshall to the 1967 Buick allegedly driven to the meeting May 25, 1994.

It further violated Rule 16(a)(1)(C) by withholding jail records documenting a link between Marshall and the owner of a telephone used to arrange one of the drug transactions. It did not disclose them until ordered to do so by the Trial Court on the second day of trial, although the Prosecutor knew no later than when Defense Counsel made his opening statement that the records were material to the defense.

The Government violated Rule 16(a)(1)(A) and 16(a)(1)(C) by failing until the eve of trial to even reveal to Defense Counsel the existence of the KEL tape recording of the May 25, 1994 meeting among Marshall, the informant and Agent Miller, and withholding until then an intelligible copy of the KEL tape recording of the May 16, 1994 meeting.[8]

The Trial Court never ruled on whether failure to produce a copy of the original photograph of Appellant, which may have had notations on the back, violated Rule 16.

[8] In late September or early October 1995 in discovery, the Government provided Defense Counsel copies of tapes containing telephone conversations May 11, 16, 24 and 25, the KEL recording of the May 16 meeting, a tape that was totally unintelligible, aod one of a telephone conversation that was unintelligible because it had been recorded at the wrong speed. During a recess in the suppression hearing January 16, 1996 the Prosecutor produced a KEL recording of the May 25 meeting still in a sealed evidence bag, the intelligible copy of the KEL recording of the May 16 meeting, and a copy of a telephone conversation, recorded at the correct speed, between the informant and someone other than Marshall. The Prosecutor played the three new tapes for Defense Counsel and Appellant during a recess in the suppression hearing, but never turned over copies of them. Defense Counsel acknowledged that the telephone conversation with the unidentified person, the tape recorded at the wrong speed, was inconsequential. Tr. 1/16/96, 84.

Standard of Review

This Court reviews a claim that the Trial Judge failed to impose an adequate sanction for violation of Fed. R. Evid. 16(a)(1)(C) for abuse of discretion. *United States v. Lanoue*, 71 F.3d 966, 973 (1st Cir. 1995), *United States v. Rodriguez*, 799 F.2d 649, 652 (11th Cir. 1986). Appellant is entitled to a new trial if the discovery violation caused prejudice to substantial rights. *United States v. Brodie*, 871 F.2d 125, 130 (D.C. Cir. 1989).

The Government Withheld Material Information in Its Possession Pretrial Until After the Trial Began

The discovery problems in Marshall's case were evident from the outset. Conclusion of the suppression hearing had to be postponed because of the Government's failure to turn over one of the KEL tapes and intelligible copies of two other tapes. The Trial Judge was so concerned at the end of jury selection that he admonished

> I recognized we postponed things from yesterday because of the tapes being discovered and this confidential informant issue, but once we get started…if the Government hasn't done everything it's supposed to do to put on its case it will have to suffer the consequences. And if it hasn't done everything it's supposed to do to provide what [Defense Counsel] is entitled to, it will have to suffer the consequences…. If [the defense is] not ready for its witnesses unless it's the Government's fault, then the defense will have to suffer the consequences.

Tr. 1/17/96, 113-4.

Trial Counsel obviously was concerned as well, asking before the jury was sworn that the Court bar Government witnesses who testified about the pager from referring to it as "Marlon Marshall's pager," because he had been provided no pager company records establishing that the pager was registered to Appellant. Tr. 1/18/96, 6-7. The Prosecutor replied, "we don't plan to offer that kind of evidence in our case in chief." *Id.*

In reliance on his reasonable belief that the Government had fully complied with Rule 16, Counsel's opening statement informed jurors the Prosecutor would provide no evidence linking Marshall to the pager, the telephones allegedly used to arrange the transactions, or the car.

> The evidence is going to show nothing to corroborate that Mr. Marshall is engaged in the business which he has been accused of engaging on May 16th of 1994. No cars, money, all this stuff they say a drug dealer is supposed to have.
>
> The evidence is going to show that though phone calls are placed repeatedly to a

> pager number, that there are no records or anything from the United States to say that that was Mr. Marshall's pager.
>
> The evidence is going to show that those phone calls were made back in response to those pages and they got phone numbers from the places where those calls came from…. The evidence is going to show that those phone calls came in from places not associated with Mr. Marshall, from homes where the people don't know Mr. Marshall, because Mr. Marshall is not the person who made those phone calls.

Tr. 1/18/96, 59-60.

Then, in cross-examination the next day, Agent Suarez corroborated Defense Counsel's understanding of the Government's evidence, testifying that investigators had failed to connect Marshall to the pager or the cars. *See, supra at 9.* Although Counsel mentioned all of the places from which the return phone calls had come, including the home of Sabrina Shorter, the only clue that investigators had established a link was Suarez' cryptic comment, "I now believe that some of those addreses were certainly —, at least one address is in fact connected with Mr. Marshall." Tr. 1/19/96, 14.

On redirect examination Suarez stated that he found information linking Marshall to Shorter but, when confronted with a hearsay objection, the Prosecutor did not pursue the issue to elicit the source of that information. *Id.* at 51. At the conclusion of Suarez' testimony, the Prosecutor notified the Court he wanted to call as a witness a Corrections Department employee who would produce records showing that Shorter had visited Marshall at the D.C. Jail in November and December 1995. The Government had not yet turned over to Defense Counsel copies of the jail records obtained before trial. Tr. 1/24/96 a.m., 69.

At the end of the trial day January 19, the Prosecutor stated that investigators were trying to establish connections between Marshall, the car and the pager, and before the trial resumed January 24, he filed a motion seeking permission to introduce the pager, pager records and Prince George's County police records showing that Marshall was arrested in the 1967 Buick and had the pager in his possession. The Government wanted to introduce the jail records, the pager and testimony concerning the arrest[9] in its case-in-chief, and to used pager company records in

[9] The Prosecutor said he would sanitize the Prince George's County evidence to eliminate the 404(b) issue.

rebuttal. Defense Counsel argued that all of the evidence should be suppressed. He said the defense strategy would have been very different had he been aware of this evidence pretrial, and he would have objected to some of Suarez' hearsay testimony concerning the telephone calls.

Rule 16(a)(1)(C) requires that:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

There is no question that documents and objects establishing a link between Marshall and the May 16, 1994 narcotics transaction are material to his misidentification defense, as the Trial Court found.

> Basically let me say was it material, is all of this stuff material? Yes. It doesn't have to be exculpatory to be material, that's not what Rule 16 says.
>
> Rule 16 says that anything material to preparation of the defendant's defense, which means I think relevant, probative, helpful, whether it's exculpatory or not, because the preparation of the defense also includes the decision to abandon certain potential defenses as well as the decision to pursue certain potential defenses, what the rule says is that such material evidence should be turned over during discovery upon request, or if prior to or during trial the party discovers additional evidence that is material then they should promptly notify the court.

Tr. 1/24/96 a.m., 80-81.

Thus, the pager and records showing it was registered to Marshall, the Prince George's County incident report showing that Marshall had been arrested in the car involved in the May 25, 1994 meeting with Miller and the informant, and jail visitor records establishing Marshall's acquaintance with Sabrina Shorter were subject to pretrial disclosure under Rule 16 if they were "within the possession, custody or control of the government."[10]

[10] Even absent a showing of materiality, the pager would have to be disclosed because it was confiscated from Marshall when he was arrested in Prince George's County.

The Trial Court Abused Its Discretion in Refusing To Declare a Mistrial

Under Rule 16(d)(2),

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

A necessary predicate for issuing any sanction under the rule is a finding that the discovery violation prejudiced the party deprived of discovery. The decision about what remedy is most appropriate depends on an assessment of the "seriousness of the violation and the amount of prejudice to the defendant." *Lanoue, supra*, 71 F.3d 978.

In Marshall's case the Trial Judge noted that granting a continuance is the "preferred sanction for a discovery delay" and a judge considering whether to impose sanctions for violation of Rule 16(a) should "impose the least severe, but effective, sanction." *United States v. Douglas,*[11] 862 F.Supp. 521, 525-6 (D.D.C. 1994)(citing *United States v. Euceda-Hernandez,*[12] 768 F.2d 1307, 1311-12 (11th Cir. 1985). In *Euceda-Hernandez* the Court enunciated a three-step procedure under which a trial judge considering imposition of sanctions should assess the reasons for the Government's delay in providing required discovery, the degree of prejudice to the defendant, and the feasibility of curing the violation by ordering a continuance.[13] *Id.*

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[11] In *Douglas, supra*, the Government violated Rule 16 by failing to disclose to Defense Counsel until several days before trial copies of tape recorded conversations between his client and police, and Counsel stated that a continuance would not help him prepare to meet the force of that evidence. 862 F.Supp. at 526. It does not purport to address whether granting a continuance is an appropriate sanction when the Government fails to disclose Rule 16 evidence mid-trial.

[12] *Euceda-Hernandez*, in which the Court of Appeals ruled that the Government could use appellants' statements to investigators even thought the Prosecutor had not disclosed them pursuant to Rule 16(a)(1)(C) to Counsel before trial, is factually very different from the case at bar. Defense Counsel knew three days before trial that their clients had met with investigators and the "gist" of the conversations. 768 F.2d at 1312-3. In such cases "where the evidence is disclosed before the jury is sworn and the trial begins, a brief continuance, to allow counsel to confer with his client or restructrure his trial strategy, will eliminate any prejudice the belated discovery may have worked." *Id.*

[13] The Trial Judge cited several other cases, none of which supports his conclusion that the discovery violations did not prejudice Appellant sufficiently to warrant a new trial. In *United States v. Stevens*, 985 F.2d 1175, 1181 (2d Cir. 1993), the Court of Appeals ruled that failure to disclose a tape recorded conversation involving defendant until after he testified did not result in sufficient prejudice to warrant a new trial because he had otherwise failed to provide sufficient evidence to support his coercion defense and the taped conversation was relatively innocuous. In *United*

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There Is No Valid Justification for the Rule 16(a) Violations in This Case

The Court ruled that the Government should have turned over the jail records pretrial, but its failure to do so was not an act of bad faith. The Government's failure to discover Marshall's connection to the car, the Judge said, was "sloppy police work, insufficient investigation…. One would have thought that the investigators would have done everything that they could as to the title of the car, the pager, and that wasn't done." *Id.* at 84. But he concluded that the Prosecutor turned over the information as soon as he discovered it, "[s]o, the reason for the delay is not bad faith but either a failure to investigate the case more fully or a recognition that the government may have to bolster its case after it heard the opening statement and the cross examination." *Id.* His analysis of the failure to disclose the pager and pager records was similar.

The first flaw in the Court's ruling is that it is irrelevant that the Government did not exhibit bad faith. "[A] principal purpose of discovery is to advise defense counsel what the defendant faces in standing trial; it permits a more accurate evaluation of the factors to be weighed in considering a disposition of the charges without trial." *United States v. Lewis*, 511 F.2d 798, 802 (D.C. Cir. 1975). *See, also, Lanoue, supra*¸ 71 F.3d at 976 (Rule 16 contributes to fair administration of justice, providing basis for informed plea decision and litigation strategy, minimizing undesirable effects of surprise at trial, promoting accurate factfinding). Because the focus is on protecting the defendant's rights, not punishing the Government, it is irrelevant whether a violation of Rule 16 was intentional. *United States v. Rodriguez*, 799 F.2d 649, 654

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States v. Edmondson, 962 F.2d 1535, 1545-6 (10th Cir. 1992) the appeals court rejected Appellant's argument that he was entitled to a mistrial because the Government was permitted to introduce a report stating that his fingerprint was on the packaging containing drugs. The Government disclosed the report a month into the trial, but there was no evidence on which to conclude that it had failed to make the disclosure as soon as it got the report. The Court noted that although the trial court rejected a request for a 45-day continuance, it had barred the Government from introducing the report for seven days to give the defense time to have the packaging analyzed by its own expert. The Trial Judge in Marshall's case also cited *United States v. Rodriguez*, 716 F.2d 1546, but appellate counsel could find no such case. In *United States v. Rodriguez*, 799 F.2d 649 (11th Cir. 1986), *infra*, at 14, the Court of Appeals ordered a new trial because the Government failed to disclose a wallet pursuant to Rule 16(a)(1)(C) and then cross-examined him about its contents.

(11th Cir. 1986). In addition, "prosecutorial good faith could have no mitigating effect on the prejudice flowing from the violation." *Lanoue, supra*, at 975.

Similarly, the plain language of the rule belies the Prosecutor's apparent belief that he was obligated to turn over the pager records and jail visitor records only if he intended to use them in his case-in-chief. Tr. 1/18/96, 7 (pager records), Tr. 1/19/96, 116 (visitor records). The rule is disjunctive, requiring the Government to disclose objects if they are material to the defense or were obtained from or belong to the defendant, regardless of whether the Government intends to use them in its case-in-chief.

Nor does the rule excuse nondisclosure if the defense could have obtained the discoverable material by other means, as the Government argued when confronted with its failure to disclose the jail records. Tr. 1/19/96, 141-2. Such logic is "inconsistent with the mandatory language of Rule 16,… and incompatible with common sense and fundamental fairness." *United States v. Alvarez*, 987 F.2d 77, 85 (1st Cir. 1993).

In a hearing on whether to permit the Government to introduce the evidence, the Trial Court pressed for an explanation for the failure to comply with Rule 16 until the middle of trial.[14]

[14] The following colloquy occurred:

PROSECUTOR: …
The second item is testimony by the custodian of records of the pager that —

THE COURT: The company that leases it?

PROSECUTOR: Yes, the pager company, that they had leased to Marlon Marshall a pager.

THE COURT: When did you get that?
…
PROSECUTOR: I got it over the weekend.

THE COURT: Why didn't you get it before? That's typically done in every case that I've had.

PROSECUTOR: What happened actually, and you may recall the direct examination of Agent Suarez when asked whether he was able to get the pager information, unfortunately the pager company was not able, or for some reason didn't want to, produce that information to Agent Suarez when he had only the number. Once we had the serial number of the pager, that is once the pager itself was obtained, he called the guy, he supplied that serial number, and the person was able to pull it up on a computer screen.

THE COURT: When did you get the serial number?

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The Prosecutor responded that bad weather in the two weeks immediately before trial prevented him from gathering evidence, and that the relevance of some of the evidence did not become apparent until Defense Counsel made his opening statement.

He did not explain why the Government failed to locate the pager or the October 1994 Prince George's County police incident report between January 1995, when Agent Suarez' interest in Marshall's case was renewed, and January 1996, when it went to trial, although he admitted Suarez had information with which to acquire both. Nor did the Prosecutor have an

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> PROSECUTOR: I think that was obtained this weekend.
>
> THE COURT: Why wasn't that obtained before?
>
> PROSECUTOR: I didn't know—the government didn't know where it ws. It happens that Friday after Agent Suarez testified I asked him to do some additional looking into the pager information.
>
> As a part of doing that he looked in more detail at some of the defendant's prior arrests in Prince George's County, among those he found out that he was stopped in the same vehicle and that he had the same pager, and the agent himself then contacted the Prince George's County officer who ws involved in that stop. He ascertained that it was in fact the same defendant. The police records have a different defendant's name on it, you know, that may explain something about why it hadn't jumped out at Agent Suarez before as something that was relevant.
>
> The fact of the matter is the pager itself was taken out of evidence itself for the first time this morning. I met with the Prince George's County officer who made the arrest of Marlon Marshall this morning for the first time.
>
> THE COURT: When did you know what [Defense Counsel's] defense was going to be?
>
> PROSECUTOR: On the first day of trial.
>
> THE COURT: Not before?
>
> PROSECUTOR: No.
>
> THE COURT: What did you think that it was going to be?
>
> PROSECUTOR: He and I discussed a number of things, coercion, duress, missed ID were I think the three words that came out of [Defense Counsel's] mouth.
>
> But I think what is important for the Court to understand and for the record to reflect because it does not do that yet is that [Defense Counsel] and I met on another case in early January. We talked about this case and how it was going to go to trial. In the interim there were a number of furlough days and a number of show days. My witnesses didn't appear until Monday of last week, which was a federal holiday, Martin Luther King, Jr. Day. There was a lot of snow on the ground and one of my agents as the court knew flew in from Houston.
>
> So, in terms of the record being complete on when it was that government counsel was able to send agents currying around to do some of these things that was all very recent.

Tr. 1/24/96, 67-70.

explanation for failing to move more quickly to locate the pager and the police report after Trial Counsel's motion immediately before trial to bar Government witnesses from identifying the pager as belonging to Marshall.

The Prosecutor's claim that he was not aware of Appellant's misidentification defense strategy is disingenuous. He admitted having a discussion with Defense Counsel several weeks before trial and being told "missed ID" might be the defense. A quick review of Appellant's prior criminal record would have made clear to him that a coercion/duress defense he claims Trial Counsel suggested was not a viable alternative. Furthermore, implicit in the Trial Court findings is the conclusion that the Government knew the jail records were material before the trial began.

There was no explanation why the Government failed to make available intelligible copies of the KEL tapes before trial, in light of Defense Counsel's motion to suppress, filed October 13, 1995, which stated that two of the tapes turned over in discovery were unintelligible, and its failure to turn over the May 25 KEL tape at all.

Another flaw in the Trial Court's ruling is its finding that the Government turned over information about the pager and Prince George's County police report as soon as they came "within the possession, custody or control of the government," approximately January 22, 1996. Implicit in that finding is one that the evidence in the custody of Prince George's County police was not subject to disclosure in this case under Rule 16 until Agent Suarez obtained physical custody of it.

This Court should reject that finding for two reasons.

First, establishing a link between Marshall and the pager was an important element of the government's case, not merely a matter for rebuttal. The Prosecutor acknowledged this when he stated that investigators had tried to obtain records from the pager company and, for some reason not clearly explained, failed to get them,[15] and Suarez testified on redirect examination that during the investigation he had checked the license plates of vehicles used May 16 and 25 with

[15] See note 14.

Prince George's County Police, as well as with the D.C. Motor Vehicles Department. If this Court were to condone the Government's tactics in this case "it would mean that the government could avoid compliance with Rule 16(a)(1)(C) by the simple expedient of not deciding until trial what evidence to use in its case in chief. This would defeat the obvious purpose of Rule 16." *United States v. Sawyer*, 831 F.Supp. 755, 756 (D.Neb. 1993).

Second, as the Ninth Circuit concluded in *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989), this Court should hold that the pager and police report were subject to disclosure in this case under Rule 16 even though they were physically in the custody of Prince George's County Police. It ruled that

> "in the possession of the government" under Rule 16(a)(1)(C) may sometimes include out-of-district documents of which the prosecutor has knowledge of and access to. Nothing in the text of [the rule] suggests that the government's obligation to allow a defendant "to inspect and copy or photograph" documents within its possession which are "material"…is satisfied by turning over only those documents physically located within the district in which the defendant is tried.

Id. at 1036 (citing with approval *United States v. Robertson*, 634 F.Supp. 1020 (E.D.Cal. 1986), *aff'd*, 815 F.2d 714 (9th Cir.), *cert. denied*, 848 U.S. 912, 108 S.Ct. 258, 98 L.Ed.2d 215 (1987)("limiting 'government' to the prosecution alone unfairly allows the prosecution access to documents without making them available to the defense.")). The speed and ease with which Agent Suarez ultimately produced the pager and the police report on the October 1994 arrest strongly suggest he knew where they were all along.[16]

Appellant Suffered Very Significant Prejudice as a Result of the Discovery Violations

In Marshall's case the Trial Court erroneously minimized the prejudicial effects of the Government's violations of Rule 16 and, in doing so, abused its discretion. It ruled that no prejudice resulted from the Government's failure to disclose the jail records pretrial because Defense Counsel knew the names of people whose telephones were used to set up the drug

[16] In fact, the Assistant U.S. Attorney who had been assigned the case until late November 1995 may have known the whereabouts of this evidence, even if the Assistant who tried the case did not. She wrote the August 15, 1995 discovery letter stating that the Government had turned over the investigation reports and was responsible for making copies of the tapes turned over to the defense in September 1995.

transaction and had discussed the misidentification defense with Marshall. Any prejudice that would result from testimony that Marshall knew Shorter would be "largely self-inflicted," the Court stated. [17] *Id.* at 83.

As this Court recognized in *Lewis, supra*, 511 F.2d at 802, "Even where a defendant's memory is crystal clear, it is not every defendant who chooses to tell his own attorney all that he remembers." Similary, the First Circuit noted in *Alvarez, supra*, 987 F.2d at 85, such reasoning defies common sense.

Regarding the link to the Buick, the judge said

> there was no substantial prejudice that could have been corrected by anything that the defense could have done had it known about it in advance of trial…. [T]o the extent that there was any [prejudice] the continuance sufficiently deals with it. The ability to cross examine both Valentine and the records custodian, or the police officer from Prince George's, was sufficient to deal with it.

Tr. 1/24/96 a.m., 86.

The Trial Court made an erroneous factual finding, stating

> The tag registration didn't come out as I recall until Agent Suarez was on the stand. Since one of the Jenks (sic) statements had been provided in advance and wasn't emphasized except when Agent Suarez testified and Agent Valentine testified, and Agent Valentine testified after [Defense Counsel] was aware of the fact that there would be an attempt to tie the Buick to the defendant through the Prince George's County stop.

Id. Valentine, a surveillance officer, did not file a report on the May 25 meeting and at the time of this hearing Defense Counsel had not yet cross-examined him. Valentine testified that he broadcast a lookout for the buick, which included the license plate number, but there apparently is no physical evidence of that. If it was on the May 25 KEL tape, which seems unlikely, the Government failed to alert Counsel that the tape existed until immediately before trial in violation of Rule 16.

[17] Although the Judge criticized the Government for attempting to call the Corrections Department official to testify about the records without alerting him to the potential problem that would have resulted from jurors being told that Marshall was incarcerated, he concluded that no harm was done because Defense Counsel was alert and immediately requested a bench conference. *Id.* at 81-82.

The Government's failure to turn over the Prince George's County police report was compounded by its failure to turn over Suarez' May 27, 1994 Report of Investigation, the only DEA report listing the license plate on the Buick.[18] Without the license plate number Defense Counsel could not determine who owned that car. Marshall never informed him of the Prince George's County arrest in which he apparently used the alias Lavon Wayne McCaskill.

As any experienced trial lawyer can attest, it is extremely damaging to have promised jurors something in an opening statement and then fail to deliver on that promise. If Defense Counsel had been aware of the connection to the car he would not have promised jurors in his opening statement that the Government would be unable to make the connection.

The Judge noted that the Government wanted to introduce the pager in its case-in-chief, but would use the pager company records in rebuttal only. He stated that the pager, by itself, was only marginally probative and potentially prejudicial, so he would bar its admission into evidence pursuant to Fed. R. Evid. 403. *Id.* at 86. He added that Defense Counsel, aware that the Government had the pager company records, could limit his questioning of defense witnesses to preclude Government use of that evidence in rebuttal. *Id.* at 87. Therefore, no prejudice would result from failure to disclose the pager records.

A Continuance Could Neither Make It Possible To Reformulate Defense Strategy Nor Blot from Jurors' Memories Defense Counsel's Opening Statement

Even if this Court concluded the Trial Court was correct in focusing on Appellant's ability to recover mid-trial, it should rule that the Judge abused his discretion in denying the motion for a mistrial.

Defense Counsel told jurors the Government would not be able to produce evidence linking Appellant to Sabrina Shorter or the 1967 Buick. In response to the ruling that the Government could present the Corrections Department evidence, Counsel was forced to propose a

[18] Defense Counsel conceded the report was covered by the Jencks Act, not Rule 16, and, therefore, he was not, entitled to it until Agent Suarez' completed his direct testimony. But he argued that the Government produced all other Jencks material before trial and he reasonably believed he had received all of the Reports of Investigation.

stipulation that Marshall knew Shorter to prevent the jury from learning that he had been incarcerated, information the trial judge acknowledged was highly prejudicial. The Judge defined the term "stipulation" for jurors as an agreement among the parties as to the truthfulness of a particular fact. Thus, in jurors' eyes, Defense Counsel told them something at the beginning of the trial and then admitting he lied. The appearance that Counsel had tried to mislead the jury was compounded when Cpl. Rumsey testified Marshall was stopped in October 1994 driving the 1967 Buick. A continuance, no matter how lengthy, could not change this impression nor enable Defense Counsel to marshal evidence to alleviate the damage resulting from the discovery violations.

The Trial Court might have alleviated the problem if it had barred the Government from introducing any of the late-disclosed evidence in its case-in-chief. Neither Defense Counsel's opening statement nor his cross-examination of Suarez opened the door for the Government to introduce the jail records or the police report. *Brodie, supra,* 871 F.2d at 129. Marshall had not yet put on his misidentification defense and the Trial Court's ruling permitting the Government to use late-disclosed evidence "potentially made more difficult [Marshall's] presentation of the defense later on." *Id.* Had the Court delayed introduction of the evidence until rebuttal, Counsel would not have been compelled to propose the stipulation regarding Marshall's acquaintance with Shorter and his decision not to put on any witnesses would have alleviated the prejudicial effects of the discovery violations.

This Court should take a broader view, however, considering in addition the Government's failure to disclose the pager and pager records — even though the Judge suppressed the pager, the KEL tapes and Suarez' May 27, 1994 investigation report. Taken together, the discovery violations gave Appellant a grossly distorted view of the strength of the Government's case and prevented Defense Counsel from developing strategies for confronting the evidence against Marshall.

Had Marshall not relied on the holes in the Government's case in making the decision to go to trial, and had he not staked his entire defense on the Government's inability to establish

links between him, the telephones, the pager or the cars, the Trial Court's rulings would have fallen well within its discretion. But, as the Judge recognized, agreeing with Trial Counsel's oft-voiced argument,

> I have to ask myself … whether or not if [Defense Counsel] had had all of this material in advance of trial and more opportunity to talk with Mr. Marshall and with his mother and others perhaps in advance of trial, whether we might not have had a plea in advance of the trial.
>
> Whereas, once the trial has already begun and Mr. Marshall is required to make a very important and difficult decision about whether or not to plea in an abbreviated period of time the decision was made not to plea, which is a perfectly legitimate decision and absolutely understandable. But we might have been in a very different posture. We might not have been in a a trial at all. Or alternatively the defense might have explored other avenues in terms of its investigation that it didn't have the opportunity to explore.

Tr. 1/19/96, 136-7. The Judge alluded to the fact that early January 19, Defense Counsel had stated that the Government's identification evidence was much stronger than previously believed. *Id.* at 3.That statement was based on his review of Suarez' May 27, 1994 Report of Investigation received at the end of the previous day, which the Government had withheld in violation of the Jencks Act, 18 U.S.C. § 3500. Counsel indicated he and Marshall were discussing a plea to the distribution charge, in which the Government would not seek consideration of the aborted May 25, 1994 transaction as relevant conduct. Had Marshall been able to fully consider the plea offer and had he accepted it his offense level would have been lower and his sentence probably would have been substantially shorter.

For the reasons the Trial Court enunciated in the January 19th hearing, the only adequate remedy, once it decided to permit the Government to introduce evidence of the link to Shorter and to the Buick, would have been to declare a mistrial. But, in ruling on the admissibility of the undisclosed evidence January 24th, the Trial Court gave no consideration to these factors.

Because one of the primary purposes of Rule 16 is to protect the defendant's right to a fair trial, the Trial Court should have evaluated the severity of prejudice resulting from the discovery violations based on the degree to which the violations impaired Marshall's ability to present a defense. *Lanoue, supra*, 71 F.3d at 977, *Alvarez, supra*, 987 F.2d 85 (Rule 16 violation deprived appellant of opportunity to design intelligent litigation, plea strategy responsive to undisclosed

evidence); *United States v. Noe*, 821 F.2d 604, 607 (11th Cir. 1987)("government introduced evidence that attacked the very foundation of the defense strategy."); *United States v. Padrone*, 406 F.2d 560, 561 (2d Cir. 1969)(where defense strategy determined by failure to produce discovery new trial required).

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

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

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

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

The Commission, in April, unanimously reiterated its 1995 finding that "although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a

100-to-1 quantity ratio cannot be justified." ***Cocaine and Federal Sentencing Policy***, U.S. Sentencing Commission, April 1997, 2 (referred to below as the "*1997 Cocaine Policy Report*"). It proposed that the 500 gram trigger for the five-year mandatory-minimum sentence imposed for possession of powder cocaine be reduced to between 125 and 375 grams, and that the five gram trigger for the five-year mandatory-minimum sentence for possessing crack cocaine be increased to between 25 and 75 grams. The net result of this proposal would be a 5:1 quantity ratio.

The current five gram trigger for crack cocaine is snaring street-level dealers, not the mid-level dealers Congress intended to target when it passed the amendments to § 841, according to the Commission. *Id.* at 5.

Mindful of the reaction to its last proposal, the Commission has not proposed amendments to the U.S. Sentencing Guidelines to implement its recommendation as part of the amendment package sent to Congress in mid-May. Such an amendment to U.S.S.G. 2D1.1 would affect only defendants sentenced for simple possession of crack and powder cocaine, and not Marshall. The Commission stated:

> We urge Congress to adopt a ratio within the quantity ranges we have recommended to address the problem as soon as possible, as hundreds of people will continue to be sentenced each month under the current law. After Congress has evaluated our recommendations and expressed its views, the Commission will amend the guidelines to reflect congressional intent..

Id. at 9.

The statute under which Marshall was sentenced, § 841, is among a very small number of federal laws under which defendants receive mandatory-minimum sentences with regularity.[19] The sentencing provisions were added in 1986 to target "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities" of narcotics,

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

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

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

Standard of Review

This Court has ruled that the mandatory-minimum sentencing provision of 21 U.S.C. § 841(b)(1) does not restrict exercise of a fundamental right or "use a criterion for classification which itself violates a fundamental constitutional value." *Thompson v. United States*, 27 F.3d 671, 307 U.S. App. D.C. 221 (D.C. Cir. 1994). Therefore, it concluded that it need only ask "whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution." Ronald D. Rotunda & John O. Nowak, *Treatise on Constitutional Law*, ¶ 18.3, at 14 (3d Ed. 1992).

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

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

Historical Background of the 100:1 Ratio

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

The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), extended the mandatory-minimum penalties in § 841(b)(1) to conspiracies and attempts, and amended 21 U.S.C. § 844 to include mandatory-minimum sentences for simple possession of crack, but no other narcotics. *Id.* at 123. A first-time offender convicted of possessing five grams of crack would receive a minimum five-year sentence. The original versions of the 1988 act did not include mandatory-minimums for possession of crack; they were added through amendments from the floor in both houses despite Justice Department opposition. Proponents of the new crack possession penalty "argued that the supply of [crack] 'cocaine' was greater than ever. Second, it was argued that crack cocaine 'causes greater physical, emotional, and psychological damage than any other commonly abused drug.' Finally, . . . it was argued that 'crack [cocaine] has been linked to violent crime.' " *Id.* at 125 (footnotes omitted).

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

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

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

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

The same myths that drove the debate and legislative action a decade ago fueled the successful effort to block implementation in 1995 of the proposed Sentencing Guidelines that would have eliminated the 100:1 ratio for defendants convicted of possessing small amounts of crack. Although the Sentencing Commission in February 1995 presented Congress strong evidence that § 841(b)(1) has a grossly disparate impact on minority criminal defendants and that the 100:1 quantity ratio is constitutionally insuperable, Congress has demonstrated no inclination to seriously reconsider the mandatory-minimum sentencing structure in § 841.

Justifications Given for the 100:1 Ratio

In October 1995, Rep. McCollum, chairman of the Subcommittee on Crime, led floor debate against the guideline amendments, stating: “The fact of the matter is we have minimum mandatory sentences for the crack crystal form of cocaine, which is the most deadly, most

addictive, most dangerous, most widely used, and the one we want to get at the most." 141 Cong. Rec., *supra*, H 10259.

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

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

Empirical Evidence Contradicts Most Justifications for the 100:1 Ratio

Crack and Addiction

Powder cocaine is ingested, snorted or injected, and crack cocaine is only administered by inhalation (smoking). Among individuals reporting cocaine use at least once in 1991, 76 percent said they snorted powder cocaine, about 28 percent reported smoking crack, 10.5 percent injected powder and 10.8 percent ingested powder. *Cocaine Policy Report, supra*, at 36. According to the report, injecting powder cocaine and smoking crack have comparable psychotropic impact and are the methods of use most likely to lead to addiction. *Id.* at 28. The Sentencing Commission stated that the relatively greater chance of addiction due to crack use "is not a reliable basis for establishing longer penalties for crack cocaine, because powder cocaine may be injected and injection is even more likely to lead to addiction than is smoking." Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,077. *See, also, JAMA, supra*, at 1582-3

Emergency Room Treatment and Deaths

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

Availability in Single Doses Encourages Use by Inner-City Youth

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

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

Crack and Crime

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

for the current powder cocaine market, researchers have tended to agree that, from a historical perspective, crack cocaine is not unique." *Id.* at 108. *See, also, JAMA, supra*, at 1585-6

Youths in the Distribution Chain

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

After evaluating all of these factors, the Sentencing Commission concluded that "sufficient policy bases for the current penalty differential do not exist." 60 Fed. Reg., *supra*, at 25,076. The anecdotal information on which Congress acted in 1986 and 1988 has been replaced by nearly a decade's accumulation of empirical data that does not support the assumptions on which the 100:1 ratio is based. The authors of the JAMA article stated that the method of use of cocaine, rather than its form, is the most critical factor in assessing the relative danger of crack and powder cocaine. *JAMA, supra*, at 1581. They concluded that the data might support a ratio of 2:1 or 3:1, *Id.* at 1588, but "the current federal sentencing guideline that markedly differentiates the penalties for crack cocaine and cocaine hydrochloride is not warranted." *Id.* at 1586.

CONCLUSION

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

Respectfully submitted,

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ADDENDUM

RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL

Rule 16. Discovery and Inspection

(a) Governmental disclosure of evidence.

(1) Information subject to disclosure.

(A) Statement of defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's prior record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and tangible objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of examinations and tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications. (2) Information not subject to disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other

internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in *18 U.S.C. § 3500*.

(2) Information not subject to disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in *18 USC § 3500*.

(3) Grand jury transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

…

(c) Continuing duty to disclose.If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) Regulation of discovery.

(1) Protective and modifying orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to comply with a request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

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

§ 841. Prohibited acts A

. . .

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

(1)

…

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

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

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

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

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

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

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

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

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

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or

$ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28(D)

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

Robert Becker

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Marlon Marshall, certify that on June 10, 1997 I served a true copy of the attached Brief of Appellant by first-class mail on counsel listed below.

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