IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3653
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS HOLLOWAY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-93-185-I-5)

(April 13, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Louis Holloway appeals the sentence imposed by the district court following a guilty plea conviction for conspiracy to distribute cocaine base in violation of 21 U.S.C.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

§§ 841(a)(1) and 846. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

After Holloway pleaded guilty to conspiracy to distribute cocaine base ("crack cocaine"), he was sentenced to a 63-month term of imprisonment, a three-year term of supervised release, and a $50 special assessment.

The PSR provided that:

> [Holloway] initially provided six ounces of cocaine hydrochloride, knowing that a portion of this would be converted to cocaine base. In the defendant's presence, 24.412 grams of cocaine base was formulated and given to the confidential informant. As cocaine base has a 100 to one ratio with cocaine in the conversion tables in U.S.S.G. § 2D1.1, a total of slightly more than 2.5 kilograms was reached. This establishes a base offense level of 28 where there is at least two but less than 3.5 kilograms of cocaine.

After adjusting for acceptance of responsibility, Holloway's offense level was determined to be 25, yielding a sentencing range of 63 to 78 months imprisonment. Represented by counsel at sentencing, Holloway did not object to the base offense level calculation in the PSR. He did object to "the constitutionality of the conversion factor of one hundred to one for crack cocaine, powder cocaine . . ." arguing that the conversion ratio resulted in a "constitutional excessiveness under the Eighth Amendment and a lack of equal protection under the Fifth Amendment and a lack of due process." The district court overruled his objection, and imposed sentence. Holloway timely appealed.

II

ANALYSIS

Holloway contends that the disparate sentencing provisions for crack cocaine and cocaine powder contained in the sentencing guidelines "are so irrational, arbitrary and discriminatory as to violate the due process and equal protection provisions, as well as the Eighth Amendment prohibition against excessive punishment, of the United States Constitution." He provides us with much anecdotal evidence, and some non-binding judicial authority, in support of his contention that § 2D1.1's distinction between crack cocaine and cocaine powder has a disparate impact on blacks because statistically most crack cocaine users are black.

Holloway requests reconsideration of our prior decisions upholding the constitutionality of the sentencing provisions against due process and equal protection challenges. But only an "overriding Supreme Court decision," a change in statutory law, or this court sitting en banc may overrule a prior panel decision. <u>United States v. Zuniga-Salinas</u>, 952 F.2d 876, 877 (5th Cir. 1992) (en banc).

We have held that the disparate sentencing provisions for crack cocaine and cocaine powder contained in the sentencing guidelines do not offend constitutional due process guarantees. <u>United States v. Watson</u>, 953 F.2d 895, 897 (5th Cir.), <u>cert. denied</u>, 112 S.Ct. 1989 (1992).

"Even if a neutral law has a disproportionate adverse effect upon a racial minority, it is unconstitutional under the Equal

Protection Clause only if that impact can be traced to a discriminatory purpose." United States v. Galloway, 951 F.2d 64, 65 (5th Cir. 1992) (internal quotation and citation omitted). As § 2D1.1's classification cannot be traced to any discriminatory purpose, it "will survive an equal protection analysis if it bears a rational relationship to a legitimate end." Id. at 66. "[T]he fact that crack cocaine is more addictive, more dangerous, and can therefore be sold in smaller quantities is reason enough for providing harsher penalties for its possession." Watson, 953 F.2d at 898.

Nevertheless, Holloway argues, the 100:1 ratio violates the Eighth Amendment's prohibition against excessive punishment. We disagree. "[T]he Eight Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are `grossly disproportionate' to the crime." Harmelin v. Michigan, _____ U.S. _____, 111 S.Ct. 2680, 2705, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring) (quoting Solem v. Helm, 463 U.S. 277, 288, 303, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)).

In a recent unpublished opinion, we rejected an Eighth Amendment attack on § 2D1.1, reasoning that "[g]iven Congress' recognition that the use and distribution of crack cocaine is a problem of national concern, we cannot conclude that [the defendant's] sentence of fifty-seven months imprisonment under the guidelines was grossly disproportionate to his offense." United States v. Hordge, No. 93-4923, p. 4 (5th Cir. Dec. 27, 1993)

(citations omitted) (opinion attached). In this circuit, unpublished opinions are binding precedent. See Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991); Fifth Cir. Loc. R. 47.5.3. In view of our case law, Holloway's sentence of 63 months imprisonment is not grossly disproportionate to his crime.

For the foregoing reasons, Holloway's sentence is AFFIRMED.