UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-5022

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES RENE ZENON,
KEVIN RIGGS, and DONITA R. NELSON,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

(92-20022-02)

(June 30, 1994)

Before WISDOM, DAVIS, and DUHÉ, Circuit Judges.

WISDOM, Circuit Judge:[*]

We affirm the convictions and sentences of three defendants on various drug trafficking and firearms charges.

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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Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

We begin by laying out the pertinent facts. Defendant/appellant Charles Rene Zenon was the alleged leader of a conspiracy to transport cocaine base, "crack" cocaine, from Houston, Texas to southern Louisiana. Zenon was tried jointly with five of his alleged co-conspirators. Some of the incidents proved at the trial, however, relate only to Zenon himself, so we will discuss these separately before turning to the facts relevant to the other defendants/appellants.

A. The Lake Charles Traffic Stop

On December 12, 1990, Lavonso Wade was driving a rented car eastbound on Interstate 10 through Lake Charles, Louisiana. Zenon was a passenger in the car.

The police stopped Wade's car for speeding and improper lane usage. Wade left the interstate and pulled into a parking lot. Zenon then leaped out of the car and fled on foot. When Zenon reached a fence adjoining the parking lot, he dropped two packages later found to contain about 41 grams of crack cocaine, and jumped over the fence. The police pursued and apprehended Zenon on foot. Wade was arrested. The police then searched the car Wade had been driving. In a red bag in the trunk of the car, they found a gun and some ammunition. Wade denied knowing anything about the gun. After one of the officers read to Zenon the *Miranda* warnings, he signed a written waiver of those rights. Zenon then candidly

admitted that he was transporting the crack cocaine from Houston to Lafayette.

B. The "Four Corners" Photographs

In January 1991, the police were conducting a surveillance operation near Gussie's Cafe and Bar, an establishment in the "Four Corners" region of St. Mary Parish, Louisiana.[1] There was testimony at the trial to the effect that Gussie's is reputed to be a site of narcotics trafficking.

The police photographed three men, suspected of being involved in drug dealing, emerging from a wooded area near Gussie's.[2] Charles Zenon emerged from the same wooded area some twenty yards away from the three men. The police took two photographs of Zenon, who was known to the police at that time only by the alias "T".[3] The police then searched the area of the woods from which the three men had emerged and found two containers of crack cocaine. At Zenon's trial, the prosecution was allowed to introduce the photographs of Zenon taken near Gussie's. The district court

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[1] "Four Corners" is a rural area located near the intersection of U.S. Highway 90 and Louisiana Highway 318, 30-40 miles southeast of Lafayette, Louisiana.

[2] These men were Freddy Lawston, Freddy Narcisse, and James Dorsey, none of whom are involved in this case.

[3] Zenon's brief on this appeal complains of the prejudicial effect of allowing the use of a photograph showing Zenon "with his hands over his face". Brief for Appellant Zenon at 31. We have located no such photograph in the record. The two photographs marked as Government Exhibits 17d and 17e both show Zenon's face clearly. The only photograph showing a man with his hands over his face is Exhibit 17a, identified as a photograph of James Dorsey.

excluded the evidence of the cocaine found in the woods, however, as insufficiently connected with Zenon himself.

C. The Beaumont Traffic Stop

So far we have recited the facts chronologically. We depart from that approach briefly to describe an incident that occurred seven months *after* the events in New Iberia that are discussed in the next section. Because this incident involved only Zenon, it is more properly considered along with the other incidents already recited.

On September 19, 1991, Zenon and Andre Begleton were passengers in a rented car driven by Gilbert Celestine. Celestine was driving eastbound on Interstate 10 through Beaumont, Texas when the police stopped the car for following another vehicle too closely. The officers noticed that Begleton was nervous and had a suspicious bulge in his trousers. When asked about the bulge, Begleton told the police he was carrying "dope". The police seized the drugs from Begleton, who was later charged with possession. The police then searched the car and recovered a loaded pistol. At the trial, the prosecution was allowed to introduce evidence that Zenon had been a passenger in a vehicle stopped in Beaumont on September 19, 1991, and that another passenger in that vehicle possessed cocaine.

D. The Surveillance and Arrests in New Iberia

On February 21, 1991, the sheriff's office in New Iberia, Louisiana,[4] received a tip from the management of the Inn of Iberia, a local motel, that a marijuana cigarette butt had been found in one of the motel rooms. They were also advised that the room's telephone log showed several telephone calls to and from Houston, New Orleans, and St. Mary Parish. The sheriff's office placed the motel room under surveillance that same day.

Around 4:00 a.m. on February 23, 1991, a van pulled up in front of the motel room.[5] Two men and three women got out of the van: Charles Zenon, his co-appellants Kevin Riggs and Donita Nelson, and Patrina and Shuntel Woolridge, two sisters.[6] The five entered the motel room. John Jackson was already inside the motel room.[7]

Around 4:30 a.m., Zenon and Jackson left the motel room. They got in the van, but did not drive anywhere. They returned to the motel room carrying some luggage they had retrieved from the van.

Around 5:30 a.m., Zenon, Nelson, and the Woolridge sisters left the motel room and got in the van. Jackson and Riggs remained

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[4] New Iberia, Louisiana is located roughly 20 miles south-east of Lafayette and roughly 15 miles northwest of the "Four Corners" area. Their geographic proximity weakens Zenon's argument that the incidents in New Iberia and the "Four Corners" area are completely unrelated.

[5] The van had been rented by Patrina Woolridge and defendant/appellant Donita Nelson, using a driver's license provided by Woolridge's stepmother.

[6] The Woolridge sisters were co-defendants in the trial of this case but were acquitted of all charges.

[7] Jackson was not tried together with the other conspirators, and he is not involved in this appeal.

in the motel room. Zenon drove the van to a gas station. When he left the gas station, the police stopped the van for having a burned-out headlight.

Zenon had no driver's license. He identified himself to the police as "Leonard Cologne". The police read the *Miranda* rights to all the occupants of the van. The police then arrested Zenon and took him to the New Iberia Police Department. The police asked Nelson and the Woolridge sisters to come to the police department as well. The police informed the women that they were not under arrest, but the trial court ruled that the circumstances indicated that the women were in fact taken into custody.[8] The women

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[8] In denying the defendants' motion to suppress, the district judge stated:

> As to the issue of whether or not the defendants, Woolridge and Nelson, were in custody under the facts as I have heard them testified to today, would indicate to the Court that while there may not have been any formal statement you are under arrest, that what occurred would certainly lead someone who is not familiar with law enforcement procedures to think that they were, in fact under arrest, whether she rode in the car with an officer or whether she rode in the van. There was testimony that there was police vehicles in front and a police vehicle behind. They were taken in, photographed, fingerprinted, and no testimony that anybody said, okay, take off now if you want to. It is just difficult for this Court to believe that if these people did not feel they were under arrest, they would have remained around a police station for some twelve or thirteen hours. These facts had all the indicia of arrest.

5 Rec. 128-29. The district court overruled Nelson's motion to suppress, finding that although Nelson was in custody, her statements to the police were given voluntarily after a proper *Miranda* warning.

accompanied the police and Zenon to the police department, where all the alleged conspirators were questioned and gave statements.

When questioned by the police, Patrina Woolridge said she had seen some crack cocaine in the van. Donita Nelson told the police that she also had seen some crack cocaine, but had hidden it in the "gas tank area" of the van.

Zenon told the police that he was involved in supplying the St. Mary Parish area with crack cocaine. He told the police he used "three black females" to transport the drugs.[9] He said he wanted to cooperate with the police, but they were too late because the drugs had already left the motel room.

The police immediately obtained a warrant to search the motel room. They had the motel manager summon Riggs and Jackson to the front desk on the pretext that there was a problem with the room's telephone bill. Around 11:20 a.m., Riggs and Jackson left the motel room. Riggs got in a red Ford Topaz.[10] Jackson took something out of the crotch of his trousers and dropped it into the car's trunk. Riggs drove the car to the motel's office with Jackson walking alongside. Police officers then approached the vehicle. As they approached, they saw Riggs lean toward the front passenger seat and reach down.

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[9] This statement was introduced in redacted form at the trial and is the subject of both Riggs's and Nelson's appeal. The statement introduced at trial noted that Zenon told the police "that he, in fact, had been supplying the St. Mary Parish area with crack cocaine and that he had employed several individuals to distribute it for him".

[10] Zenon admitted that had rented this vehicle in exchange for a rock of crack cocaine.

Riggs was arrested. He first gave the false name "Lavonso Wade" to the police, then later identified himself as "Kevin Thomas". The police eventually identified him as Kevin Riggs. The police searched the vehicle and found a gun under the front passenger's side floor mat. In the trunk of the Topaz, they found a package containing 70.49 grams of crack cocaine. The police searched the motel room and recovered a marijuana cigarette.

The police searched the rented van but found no narcotics. A narcotics dog, however, "alerted" to two locations on the van, including the area around the gas tank fill cap. The dog's handler testified that the dog was trained to alert to residual traces of narcotics even after drugs had been removed from an area.

E. Proceedings in the District Court

Zenon, Riggs, Nelson, and the Woolridge sisters were indicted on June 17, 1992. The five-count indictment charged Zenon with (I) conspiring to distribute about 70 grams of crack cocaine from around December 1, 1990 to around September 19, 1991; (II) possessing about 41 grams of crack cocaine on December 12, 1990; (III) using or carrying a firearm during and in relation to a drug trafficking crime on December 12, 1990; (IV) possessing with intent to distribute about 70 grams of crack cocaine on February 23, 1991; and (V) using or carrying a firearm during and in relation to a drug trafficking crime on February 23, 1991. Zenon's four co-defendants were indicted on counts I, IV, and V of the indictment.

The jury convicted Zenon on all five counts. Riggs and Nelson were found guilty on the three counts with which they had been charged. The Woolridge sisters were acquitted of all charges.

The three appellants moved for judgment of acquittal. Zenon's motion was denied. Riggs's motion was granted as to the conspiracy charge (count I), and the jury verdict of guilty was set aside. Nelson's motion was granted as to the conspiracy and firearms charges (counts I and V), and the jury verdicts of guilty were set aside.

Zenon was sentenced to 235 months on Count I, 235 months on Count II, and 235 months on Count IV, to run concurrently. He was further sentenced to 60 months on Count III, to run consecutively with the other sentences, and 235 months on Count V, also to run consecutively, for a total sentence of 530 months. Riggs was sentenced to 121 months on Count IV and 60 months on Count V, to run consecutively, for a total sentence of 181 months. Nelson was sentenced to 121 months on Count IV. Zenon, Riggs, and Nelson appealed to this Court.

II.

We first consider Zenon's challenges to his conviction and sentence.

A. Evidentiary Hearing on Zenon's Motion to Suppress

Zenon moved to suppress evidence of the traffic stops in Lake Charles (on December 12, 1990) and New Iberia (on February 23,

1991) and the evidence taken therefrom. The district court denied his motion without holding an evidentiary hearing on the pertinent parts of his challenge. We review for abuse of discretion the district court's decision not to hold an evidentiary hearing.[11]

> [A]n evidentiary hearing is required on a motion to suppress only when necessary to receive evidence on an issue of fact. . . . Evidentiary hearings are not granted as a matter of course, but are held only when the defendant alleges sufficient facts which, if proven, would justify relief.[12]

We have considered carefully the entire record and facts identified in Zenon's brief as pertinent, and we conclude that they would not justify relief if proved. Accordingly, we find no abuse of the district court's discretion in refusing to hold an evidentiary hearing on Zenon's motion to suppress.

B. Zenon's 20-Year Sentence for a "Second or Subsequent" Firearms Conviction

18 U.S.C. § 924(c) imposes a mandatory penalty on those who use or carry firearms during and relation to a violent or drug-related crime. Section 924(c)(1) provides, in pertinent part, that "[i]n the case of [a defendant's] second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . ." Zenon challenges the district court's imposition of the 20-year sentence under this

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[11] *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983).

[12] *Id.*

section, arguing that because he was convicted of Counts III and V simultaneously, neither was a "second or subsequent conviction" under § 924(c)(1). The Supreme Court recently upheld this Court's rejection of Zenon's argument in *Deal v. United States*.[13] A defendant may receive a 20-year sentence under § 924(c)(1) even though the "second or subsequent conviction" was imposed in the same trial as the first. We reject this challenge to Zenon's sentence.

C. Two-Level Sentencing Enhancement for Obstructing Justice

Zenon challenges the district court's two-point sentencing enhancement for obstructing justice under U.S.S.G. § 3C1.1, based on the fact that he dropped two packets of crack cocaine while fleeing the arresting officers in Lake Charles on December 12, 1990. Zenon contends that Application Note 3(d) to that section prohibits an obstruction enhancement for destroying or concealing evidence "if such conduct occurred contemporaneously with arrest". Note 3(d) provides that destroying or concealing evidence justifies a two-point obstruction enhancement, but continues:

> however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, *standing alone*, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or sentencing of the offender[.] (emphasis added).

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[13] 508 U.S. ---, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993), *aff'g* 954 F.2d 262 (5th Cir. 1992).

The words "standing alone" distinguish Zenon's conduct from the application note. When a defendant, like Zenon, attempts to flee the arresting officers, we have held a two-point upward adjustment for obstruction proper.[14] Zenon's attempt to discard the packets of crack cocaine during his flight also supports the obstruction enhancement.[15] In addition, Zenon gave a false name to the arresting officers in New Iberia on February 23, 1991, which would support the district court's enhancement for obstruction.[16]

D. "Crack" Sentencing--Equal Protection and the Eighth Amendment

The Sentencing Guidelines provide higher offense levels for cases involving "crack" than for cases involving powder cocaine. Specifically, the drug quantity and drug equivalency tables provide that 1 gram of "crack" is treated the same as 100 grams of powder cocaine.[17] Zenon lodges two challenges against this portion of the Sentencing Guidelines, and is joined in his challenges by Riggs.

Zenon first contends that the 100-to-1 sentencing ratio denies him, as an African-American, equal protection of the laws because

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[14] *United States v. Ainsworth*, 932 F.2d 358, 362 & n.3 (5th Cir.), *cert. denied*, --- U.S. ---, 112 S. Ct. 327, 116 L. Ed. 2d 267, --- U.S. ---, 112 S. Ct. 346, 116 L. Ed. 2d 286 (1991).

[15] *United States v. Galvan-Garcia*, 872 F.2d 638, 641 (5th Cir.), *cert. denied*, 493 U.S. 857 (1989).

[16] *See* U.S.S.G. § 3C1.1 app. note 3(g); *United States v. Montano-Silva*, 15 F.3d 52, 53-54 (5th Cir. 1994) (per curiam).

[17] *See* U.S.S.G. § 2D1.1(c)(1)-(16); app. note 10--drug equivalency tables, providing "1 gm of Cocaine = 200 gm of marihuana", but "1 gm of Cocaine Base (`Crack') = 20 kg of marihuana".

"crack" cocaine is viewed as a drug of choice among minority groups, while whites prefer powder cocaine. We have repeatedly rejected an equal protection challenge to the Sentencing Guidelines' 100-to-1 crack ratio and need not reopen the issue here.[18]

Zenon next argues that the 100-to-1 ratio constitutes cruel and unusual punishment in violation of the Eighth Amendment. So far, Zenon's argument has been squarely rejected in every circuit to consider an Eighth Amendment challenge to this part of the Guidelines.[19] We recently added our own voice to the chorus upholding the 100-to-1 crack ratio against an Eighth Amendment attack. In *United States v. Fisher*,[20] we held that "the penalties for cocaine base transactions, while harsher than those for cocaine transactions, are not grossly disproportionate to the severity of the offense . . .".[21] We follow *Fisher* and the unanimous view of our sister circuits in holding that the disproportionately harsh sentences for crack cocaine do not violate the Eighth Amendment.

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[18] *See United States v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992) (per curiam), and cases cited therein.

[19] *See United States v. Angulo-Lopez*, 7 F.3d 1506, 1509-10 (10th Cir. 1993), *cert. denied*, --- U.S. ---, 114 S. Ct. 1563, 128 L. Ed. 2d 209 (1994); *United States v. Frazier*, 981 F.2d 92, 95-96 (3d Cir. 1992), *cert. denied*, --- U.S. ---, 113 S. Ct. 1661, 123 L. Ed. 2d 279, --- U.S. ---, 113 S. Ct. 1662, 123 L. Ed. 2d 281 (1993); *United States v. Avant*, 907 F.2d 623, 625-27 (6th Cir. 1990); *United States v. Winfrey*, 900 F.2d 1225, 1227 (8th Cir. 1990); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989).

[20] --- F.3d ---, slip op. 4651, 1994 WL 228359 (5th Cir. May 27, 1994).

[21] *Id*. at ---, slip op. at 4657-58.

We have considered carefully all of Zenon's challenges to his conviction and sentence, even those not discussed above, and we find them to be without merit.

III.

Next we turn to the appeal of defendant Kevin Riggs. We disposed of Riggs's challenges to the Sentencing Guidelines in part II.D above. We will discuss only Riggs's *Bruton* challenge.

At the time of his arrest, Zenon told the police that he employed "three black females" to transport drugs between Houston and Louisiana. The reference to "three black females" was redacted and the arresting officer testified at trial that Zenon had said he employed "several other people" to transport the drugs for him.[22] Zenon did not testify. Riggs challenges the redaction, contending that the original reference to "three black females" would have exculpated him, and thus by redacting the statement the prosecution denied him the opportunity to present exculpatory evidence.

Bruton v. United States[23] forbids the prosecution from introducing a non-testifying co-defendant's statement implicating another co-defendant. The Supreme Court in *Richardson v. Marsh* loosened the *Bruton* rule by holding that a *Bruton* violation does not occur when the statement is redacted "to eliminate not only the defendant's name but any reference to his or her existence" and

[22] *See supra* note 9.

[23] 391 U.S. 123 (1968).

"proper limiting instructions" are given.[24] "*Bruton* is not violated unless the co-defendant's statement *directly* alludes to the appellant, even if the evidence makes it apparent that the defendant was implicated by some *indirect* references".[25] Because the reference to "several other people" does not directly allude to Riggs, the district court did not abuse its discretion in admitting the statement.[26]

We have considered carefully all of Riggs's challenges to his conviction and sentence, even those not discussed above, and we find them to be without merit.

IV.

Finally, we address the appeal of Donita R. Nelson.

A. Sufficiency of the Evidence

Nelson challenges the sufficiency of the evidence to support her conviction of possession with intent to distribute, Count IV of the indictment. On review of a sufficiency challenge, we ask whether, viewing the evidence in the light most favorable to the verdict, a reasonable jury could have found that Nelson

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[24] *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

[25] *United States v. Restrepo*, 994 F.2d 173, 186 (5th Cir. 1993) (emphasis in original; internal quotations omitted).

[26] Riggs's brief suggests that the proper remedy would have been for the prosecution to sever his case and try him separately from Zenon. As his counsel conceded at oral argument, however, Riggs never moved for a severance during the trial.

(1) knowingly (2) possessed drugs (3) with the intent to distribute.[27]

At trial, one of the arresting officers who questioned Nelson was allowed to introduce her own inculpatory statement against her. The officer testified that:

> Donita stated that she had seen crack cocaine in the past, and she saw it, the crack cocaine, she placed it in the gas tank area to conceal it. And that she did that out of fear. And nobody forced her to do so.

Nelson's statement to the police admitted that she "had seen crack cocaine in the past" and that she concealed some crack cocaine in the "gas tank area". The jury reasonably could have inferred that she meant the gas tank area *of the van* rented by Nelson and driven by Zenon, where a narcotics dog "alerted" during the police search of the van. Her attorney argues on appeal that Nelson might have been talking about some other "gas tank area", perhaps of a different vehicle, but the evidence supports an inference that Nelson knowingly hid crack cocaine near the gas tank of Zenon's van. Hiding or concealing drugs has been held to be a sufficient exercise of dominion or control to support a conviction for possession.[28] Nelson's intent to distribute can be inferred

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[27] *United States v. Ayala*, 887 F.2d 62, 68 (5th Cir. 1989).

[28] *See, e.g.*, *United States v. Deisch*, 20 F.3d 139, 153 (5th Cir. 1994); *United States v. Molina-Iguado*, 894 F.2d 1452, 1456-57 (5th Cir.), *cert. denied*, 498 U.S. 831 (1990); *United States v. Gardea Carrasco*, 830 F.2d 41, 45 (5th Cir. 1987); *United States v. Williams-Hendricks*, 805 F.2d 496, 500-01 (5th Cir.), *reh'g en banc denied*, 808 F.2d 56 (5th Cir. 1986).

from the large quantity of crack cocaine involved.[29] Accordingly, we conclude that there is sufficient evidence from which a reasonable jury could have found Nelson guilty beyond a reasonable doubt of possessing crack cocaine with intent to distribute.

B. The Bruton Issue

Nelson, like Riggs, lodges a *Bruton* objection against the introduction at trial of a redacted statement made by Zenon. The basis of Nelson's complaint is somewhat different from Riggs's. Zenon's original reference to "three black females" was redacted, and the statement as introduced at trial stated only that Zenon employed "several other people" in his narcotics distribution operation. Nelson complains that the redacted statement implicates her just as much as the original would have, and was therefore improperly admitted against her.

The reference to "several other people" does not "directly allude" to Nelson.[30] A listener hearing the statement would not necessarily conclude that Zenon was referring to Nelson or, for that matter, any of the co-defendants with whom Zenon was tried. Nelson's argument that the redacted statement implicated her is

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[29] *Ayala*, 887 F.2d at 68; *United States v. Grayson*, 625 F.2d 66, 66-67 (5th Cir. 1980). 70.49 grams of crack was found in the red Topaz. At the trial, the prosecution's narcotics trafficking expert, Ronnie Dale Francis Trahan, Sr., testified that the customary size of a single dose of crack cocaine is 0.10-0.20 gram. The defendants, therefore, were transporting enough crack cocaine for 352-704 individual doses.

[30] *Restrepo*, 994 F.2d at 186.

incorrect, and therefore we reject her assertion of a *Bruton* violation.

C. Length of Nelson's Sentence

Nelson raises two arguments against the district court's imposition of a mandatory ten-year sentence under 21 U.S.C. § 841(b)(1)(A)(iii). She first contends that the jury could not have found her guilty of possessing more than 50 grams of cocaine base, the necessary predicate for a mandatory ten-year sentence under § 841(b)(1)(A)(iii). We take this as merely another challenge to the sufficiency of the evidence to support her conviction, and we reject it for the reasons stated in part IV.A of this opinion.

Second, Nelson contends that the ten-year minimum violates her Eighth Amendment right to freedom for cruel and unusual punishment. She cites no pertinent authority for this argument. We do not consider this punishment "grossly disproportionate"[31] to the offense of trafficking in a quantity of cocaine base sufficient to provide hundreds of individual doses to the trafficker's victims. In rejecting a similar argument in *United States v. Fisher*, we stated that "[t]he impact of crack cocaine is devastating; Congress's decision to punish more severely those who traffic in it is well warranted".[32] Accordingly, we conclude that the Eighth Amendment

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[31] *See McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir.), *cert. denied*, --- U.S. ---, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992).

[32] --- F.3d at ---, slip op. at 4658, 1994 WL 228359.

does not forbid the mandatory ten-year prison term imposed on Nelson under 21 U.S.C. § 841(b)(1)(A)(iii).[33]

We have considered carefully all of Nelson's challenges to her conviction and sentence, even those not discussed above, and we find them to be without merit.

V.

We AFFIRM the convictions and sentences of each of the three appellants.

[33] *Accord United States v. Holmes*, 838 F.2d 1175, 1178-79 (11th Cir.), *cert. denied*, 486 U.S. 1058 (1988).